

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

Trump Administration's Iran Policies Raise Questions About the Executive's Authority to Use Force Against Iran

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In the face of rising tensions between Iran and the United States, some members of Congress have urged the Trump administration to clarify whether it believes it has congressional authorization to use force against Iran.¹ In June of 2019, the U.S. State Department issued a letter stating that it had not “to date” interpreted either the 2001 or the 2002 Authorization for Use of Military Force (2001 AUMF and 2002 AUMF, respectively) “as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces engaged in counterterrorism operations or operations to establish a stable, democratic Iraq.”²

In May of 2019, the Trump administration sent an air carrier strike force and a bomber strike force to the Middle East “to send a clear and unmistakable message to the Iranian regime that any attack on United States interests or on those of our allies will be met with unrelenting force.”³ On June 17, Acting Secretary of Defense Patrick Shanahan authorized the deployment of 1,000 additional troops to the Middle East in response to “the reliable, credible intelligence we have received on hostile behavior by Iranian forces and their proxy groups . . .”⁴ After the troop deployment, a bipartisan group of six senators sent a letter to President Trump inquiring about the relationship of the deployed troops’ mission to Iran:

¹ See Letter from Eliot Engel, Chairman, H. Comm. on Foreign Aff. and Ted Deutch, Chairman, H. Subcomm. on the Middle East, North Africa, and Int’l Terrorism, to Marik String, Acting Legal Adviser, U.S. Dep’t of State (June 25, 2019), available at https://foreignaffairs.house.gov/_cache/files/6/f/6f43caff-89cd-4a7f-bfe7-841db9f5d305/3D06F9947687C18E9BB46C8A50603AEB.ele-deutch-letter-to-string-aumf-iran.pdf [https://perma.cc/MWH7-M9XB] [hereinafter House Letter]; Letter from Michael S. Lee, Senator, et. al., to Donald J. Trump, President (June 18, 2019), available at <https://www.scribd.com/document/413785563/Kaine-Lee-Call-on-President-Trump-to-Explain-New-Deployments-to-the-Middle-East-Warn-Against-War-With-Iran>, [https://perma.cc/67R9-97N3] [hereinafter Senate Letter].

² Letter from Mary Elizabeth Taylor, Assistant Sec’y, Bureau of Legis. Aff., to Eliot L. Engel, Chairman, H. Comm. on Foreign Aff. (June 28, 2019), available at https://foreignaffairs.house.gov/_cache/files/8/4/84c1fa85-94cf-43c8-84a1-472972ec9c11/CCDEB9BD152E93A97B89332218E2A89C.aumf.pdf [https://perma.cc/9YLU-59FL] [hereinafter State Department Letter]; see also Tess Bridgeman & Ryan Goodman, *Unpacking the State Dept Acknowledgement that 2001 and 2002 AUMFs Don’t Authorize War Against Iran*, JUST SECURITY (July 3, 2019), at <https://www.justsecurity.org/64807/unpacking-the-state-dept-acknowledgment-that-2001-and-2002-aumfs-dont-authorize-war-against-iran>. The 2001 AUMF authorizes the president to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001). The 2002 AUMF authorizes the president to use force 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.” Pub. L. No. 107-243, 116 Stat. 1498 (2002).

³ See White House Press Release, Statement from the National Security Advisor Ambassador John Bolton (May 5, 2019), at <https://www.whitehouse.gov/briefings-statements/statement-national-security-advisor-ambassador-john-bolton-2> [https://perma.cc/N3GP-E7XW].

⁴ U.S. Dep’t of Defense Press Release, Statement from Acting Secretary of Defense Patrick Shanahan on Additional Forces to U.S. Central Command (June 17, 2019), at <https://www.defense.gov/Newsroom/Releases/Release/Article/1879076/statement-from-acting-secretary-of-defense-patrick-shanahan-on-additional-force> [https://perma.cc/S5SQ-NNYQ].

Given that growing risk, we want to reiterate that, as of this date, Congress has not authorized war with Iran and no current statutory authority allows the U.S. to conduct hostilities against the Government of Iran. To that end, we expect the administration to seek authorization prior to any deployment of forces into hostilities or areas where hostilities with Iran are imminent Article One, Section 8 of the United States Constitution provides Congress the exclusive power to declare war. It is critical that Congress fully retain and enforce this authority.⁵

Even before this additional deployment, the administration had faced questioning regarding a potential war with Iran. After the designation of the Iranian Islamic Revolutionary Guards Corps as a foreign terrorist organization,⁶ Senator Rand Paul asked Secretary of State Mike Pompeo during testimony at the Senate Foreign Relations Committee if he believed that the 2001 AUMF applied to Iran.⁷ Pompeo replied, “I’d prefer to just leave that to lawyers.”⁸ After Paul pressed him for a direct response, Pompeo stated:

The legal question I will leave to counsel. The factual question with respect to Iran’s connections to Al Qaeda is very real. They have hosted Al Qaeda. They have permitted Al Qaeda to transit their country. There’s no doubt there is a connection between the Islamic Republic of Iran and Al Qaeda. Period, full stop.⁹

In response, Paul stated, “I can tell you explicitly you have not been given power or authority by Congress to have war with Iran,” to which Pompeo did not reply.¹⁰

At a House Foreign Relations Committee hearing on June 19, Chair Ted Deutch asked the State Department’s Special Representative for Iran Brian Hook if the administration believed that Al Qaeda operatives transiting through or living in Iran were sufficient grounds for the use of force in Iran under the 2001 AUMF.¹¹ Hook reiterated that it was not the policy goal of the administration to seek a military engagement with Iran but stated, “If the use of military force is necessary to defend U.S. national security interests, we will do everything that we are required to do with respect to Congressional war powers and we will comply with the law.”¹² When pushed on the point, Hook referred Deutch to the State Department’s Office of the Legal Adviser.¹³

⁵ Senate Letter, *supra* note 1.

⁶ For more about this designation, see Jean Galbraith, *Contemporary Practice of the United States*, 113 AJIL 609 (2019).

⁷ Review of the FY 2020 State Department Budget Request: Before the S. Comm. on Foreign Relations, 116th Cong., at 1:20:30 (Apr. 10, 2019) (testimony of Secretary of State Mike Pompeo), *available at* <https://www.foreign.senate.gov/hearings/review-of-the-fy-2020-state-department-budget-request-041019>. Paul did not ask Pompeo about authorization under the 2002 AUMF. *See id.*

⁸ *Id.* at 1:21:54.

⁹ *Id.* at 1:22:46.

¹⁰ *Id.* at 1:23:08.

¹¹ Oversight of the Trump Administration’s Iran Policy: Before the H. Comm. on Foreign Affairs, 116th Cong., at 32:54 (June 19, 2019) (statement of Special Representative for Iran Brian Hook), *available at* https://www.youtube.com/watch?v=FKK_fABJl4.

¹² *Id.* at 34:15, 34:34.

¹³ *Id.* at 34:55.

The day after Hook's testimony, Iran downed an unmanned U.S. drone.¹⁴ Iran subsequently submitted a letter to the Security Council of the United Nations reporting the downing of the U.S. drone and claiming that its actions were justified under Article 51 of the Charter of the United Nations because the drone "engaged in a clear spying operation."¹⁵ Iran asserted that the drone "entered into the Iranian airspace where the Islamic Republic of Iran . . . targeted the intruding aircraft . . ."¹⁶ A U.S. press release announcing the incident stated that the drone was operating over international waters thirty-four kilometers from the Iranian coast and that "Iranian reports that this aircraft was shot down over Iran are categorically false."¹⁷

On the following day, June 21, Trump announced that he had ordered and then cancelled retaliatory strikes against Iran because the strikes would not have been "proportionate to shooting down an unmanned drone."¹⁸ The White House and the Pentagon did not further discuss these potential strikes on the record.¹⁹ While Trump cancelled physical strikes, media reports indicated that he did authorize certain cyberattacks against Iran.²⁰

On June 25, Deutch, as well as House Foreign Affairs Committee Chairman Eliot Engel, submitted a letter to the Acting Legal Adviser for the State Department Marik String requesting "[a]ny and all legal analysis, whether contained in electronic documents, emails, or hard copy, concerning, relating, or referring in any way to whether the 2001 or 2002 AUMFs are applicable to any actions that could be undertaken by the Executive Branch in or against the Islamic Republic of Iran."²¹

The response from the State Department on June 28 came not from the Acting Legal Adviser, but rather from Mary Elizabeth Taylor, the assistant secretary of state for legislative affairs. She did not produce any documents in response to the request from Deutch and Engel, but rather stated in her letter:

¹⁴ U.S. Cent. Command Statement, U.S. Air Forces Central Command Statement on the Shoot Down of a U.S. RQ-4, at <https://www.centcom.mil/MEDIA/STATEMENTS/Statements-View/Article/1882519/us-air-forces-central-command-statement-on-the-shoot-down-of-a-us-rq-4> [<https://perma.cc/X6FE-NJSV>] [hereinafter Cent. Com. Statement].

¹⁵ Letter from Majid Takht Ravanchi, Ambassador of Iran to the UN, to António Guterres, Secretary-Gen. of the UN (June 20, 2019), available at https://www.justsecurity.org/wp-content/uploads/2019/07/Iran-UNSC-Letter-S_2019_512_E.pdf [<https://perma.cc/9FWY-AZHF>] [hereinafter Iran Article 51 Letter]. Under Article 51 of the UN Charter "[m]easures taken by Members in the exercise of . . . self-defence shall be immediately reported to the Security Council . . ." UN Charter, Art. 51.

¹⁶ Iran Article 51 Letter, *supra* note 15.

¹⁷ Cent. Com. Statement, *supra* note 14. For discussion of the disagreement between the United States and Iran with respect both to the location of the drone and to the law of the sea as it relates to control over the Strait of Hormuz, see Mark Nevitt, *The Missing Piece in US-Iran Drone Dispute: Navigational Freedoms and the Strait of Hormuz*, JUST SECURITY (June 28, 2019), at <https://www.justsecurity.org/64725/the-missing-piece-in-us-iran-drone-dispute-navigational-freedoms-and-the-strait-of-hormuz>.

¹⁸ Donald J. Trump (@realDonaldTrump), TWITTER (June 21, 2019, 7:03 AM), at <https://twitter.com/realDonaldTrump/status/1142055392488374272> [<https://perma.cc/42JZ-5LEK>].

¹⁹ See Michael Shear, Eric Schmitt, Michael Crowley & Maggie Haberman, *Strikes on Iran Approved by Trump, Then Abruptly Pulled Back*, N.Y. TIMES (June 20, 2019), at <https://www.nytimes.com/2019/06/20/world/middleeast/iran-us-drone.html>.

²⁰ Ellen Nakashima, *Trump Approved Cyber-Strikes Against Iranian Computer Database Used to Plan Attacks on Oil Tankers*, WASH. POST (June 22, 2019), at https://www.washingtonpost.com/world/national-security/with-trumps-approval-pentagon-launched-cyber-strikes-against-iran/2019/06/22/250d3740-950d-11e9-b570-6416efdc0803_story.html; Julian E. Barnes, *U.S. Cyberattack Hurt Iran's Ability to Target Oil Tankers, Officials Say*, N.Y. TIMES (Aug. 28, 2019), at <https://www.nytimes.com/2019/08/28/us/politics/us-iran-cyber-attack.html>.

²¹ House Letter, *supra* note 1.

The Department of State has great respect for Congress's role in authorizing the use of military force. As Secretary Pompeo has noted, the Administration's goal is to find a diplomatic solution to Iran's activities, not to engage in conflict with Iran. Moreover, the Administration has not, to date, interpreted either AUMF as authorizing military force against Iran, except as may be necessary to defend U.S. or partner forces engaged in counterterrorism operations or operations to establish a stable, democratic Iraq.

President Trump has expressed the U.S. willingness to negotiate with Iran. No one should be uncertain about the United States' desire for peace or a readiness to normalize relations in the event the United States and Iran reach a comprehensive deal. As Special Representative for Iran and Senior Policy Advisor to the Secretary of State Brian Hook testified to your Committee on June 19, 2019, the Administration has implemented an unprecedented maximum pressure campaign focused on Iran with two primary objectives: first, to deprive the Iranian regime of the money it needs to support its destabilizing activities, and second, to bring Iran back to the negotiating table to conclude a comprehensive and enduring deal as outlined by Secretary Pompeo in May 2018.²²

Neither her letter nor the inquiry to which she was responding discussed the conditions under which the president would have the independent constitutional authority to use force against Iran if neither the 2001 AUMF nor the 2002 AUMF were applicable.²³

On July 18, approximately a month after the downing of the U.S. drone, Trump announced that the American military had destroyed an Iranian drone located over international waters in the Strait of Hormuz.²⁴ Trump described the act as one of self-defense, asserting that the drone had approached an American vessel and ignored repeated warnings.²⁵ Unlike Iran, the United States does not appear to have submitted an Article 51 letter to the Security Council describing its action. Iran denied that it had lost any of its drones.²⁶

In addition to the tensions described above, relations between the United States and Iran worsened on other fronts during the summer of 2019. The Trump administration built upon the vast set of sanctions it had already imposed on Iran by implementing sanctions designed to target Iran's metals industry,²⁷ and by adding sanctions directed at the Office of the Supreme Leader of Iran.²⁸ In early July, meanwhile, Iran exceeded the uranium enrichment limits set

²² State Department Letter, *supra* note 2.

²³ For a recent, formalized articulation of the position of the Department of Justice's Office of Legal Counsel relevant to this issue, see April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1 (May 31, 2018) (slip op.) (concluding that the president could order air strikes against Syria under his independent constitutional authority in response to Syria's use of chemical weapons against its own citizens); see also Jean Galbraith, Contemporary Practice of the United States, 112 AJIL 522 (2018).

²⁴ Donald J. Trump (@realDonaldTrump), TWITTER (July 18, 2019, 1:13 PM), at <https://twitter.com/realdonaldtrump/status/1151948135868051457> [<https://perma.cc/3YGD-X3E3>].

²⁵ *Id.*

²⁶ Seyed Abbas Araghchi (@araghchi), TWITTER (July 18, 2019, 10:03 PM), at <https://twitter.com/araghchi/status/1152081448704196611> [<https://perma.cc/6ME4-UYP4>].

²⁷ U.S. Dep't of State Press Release, First Anniversary of President Trump's New Iran Strategy (May 8, 2019), at <https://www.state.gov/first-anniversary-of-president-trumps-new-iran-strategy> [<https://perma.cc/6ZAY-H6BG>].

²⁸ U.S. Dep't of State Press Release, Executive Order to Impose Sanctions on the Office of the Supreme Leader of Iran (June 24, 2019), at <https://www.state.gov/executive-order-to-impose-sanctions-on-the-office-of-the-supreme-leader-of-iran> [<https://perma.cc/AJ8S-HJA7>].

out in the 2015 Joint Comprehensive Plan of Action, justifying this action by pointing to the earlier decision of the United States to withdraw from this commitment and reimpose sanctions.²⁹ Iran has also warned that it could stop all energy exports through the Strait of Hormuz if sanctions relief is not forthcoming.³⁰ In September of 2019, a drone attack inflicted major damage on Saudi oil production facilities. Iran denied carrying out the strike, but Pompeo, among others, deemed Iran responsible and warned of consequences.³¹

INTERNATIONAL LAW AND NONSTATE ACTORS

U.S. Supreme Court Denies Certiorari in Habeas Case Brought by Guantánamo Bay Detainee Challenging His Continuing Detention

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On June 10, 2019, the Supreme Court denied certiorari in a case in which the D.C. Circuit held that the United States could continue to detain an individual at Guantánamo Bay until the cessation of the hostilities that justified his initial detention, notwithstanding the extraordinary length of the hostilities to date.¹ The case, *Al-Alwi v. Trump*, arises from petitioner Moath Hamza Ahmed Al-Alwi's petition for a writ of habeas corpus challenging the legality of his continued detention at the United States Naval Base at Guantánamo Bay.² The Supreme Court's denial of certiorari was accompanied by a statement by Justice Breyer observing that "it is past time to confront the difficult question" of how long a detention grounded in the U.S. response to the September 11 attacks can be justified.³

²⁹ *Iran to Restore Arak Reactor to Original Design from July 7*, MEHR NEWS AGENCY (July 3, 2019), at <https://en.mehrnews.com/news/147161/Iran-to-restore-Arak-reactor-to-original-design-from-July-7>. In response, the United States called for a special session of the International Atomic Energy Agency. U.S. Mission to Int'l Orgs. in Vienna Media Note, United States Requests Special Meeting of IAEA Board of Governors (July 5, 2019), at <https://vienna.usmission.gov/media-note-united-states-requests-special-meeting-of-iaea-board-of-governors> [<https://perma.cc/5CR4-UM8R>]; see also U.S. Mission to Int'l Orgs. in Vienna Media Note, Statement by the U.S. Mission Spokesperson on the Special IAEA Board of Governors Meeting Agenda Item 1 (July 10, 2019), at <https://vienna.usmission.gov/media-note-statement-by-the-u-s-mission-spokesperson-on-special-iaea-board-of-governors-meeting-on-iran> [<https://perma.cc/67AX-GP73>] (stating that during this special session "Board Members expressed their concern that Iran is expanding its proliferation-sensitive nuclear activities").

³⁰ Babak Dehghanpisheh, *Iran Says It Will Further Breach Nuclear Deal in One Month Unless Europeans Act*, REUTERS (Aug. 5, 2019), at <https://www.reuters.com/article/us-mideast-iran/iran-says-it-will-further-breach-nuclear-deal-in-one-month-unless-europeans-act-idUSKCN1UV1TV>.

³¹ Zack Budryk, *Pompeo Doubles Down on Blaming Iran for Oil Attacks: "This Was a State-on-State Act of War,"* THE HILL (Sept. 22, 2019), at <https://thehill.com/homenews/sunday-talk-shows/462488-pompeo-doubles-down-on-blaming-iran-for-oil-attack-this-was-a> (noting additional sanctions and deployments ordered by the Trump administration in the wake of this incident and describing Pompeo as saying that "he and President Trump are 'looking for a diplomatic resolution' but 'we're prepared to do the things we need to do'").

¹ *Al-Alwi v. Trump*, 139 S. Ct. 1893 (2019).

² *Al-Alwi v. Trump*, 236 F. Supp. 3d 417, 418 (D.D.C. 2017), *aff'd*, 901 F.3d 294, 295 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1893 (2019).

³ 139 S. Ct., *supra* note 2, at 1894 (Breyer, J., statement respecting denial of certiorari).