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FEB 27 2018

The Honorable Mitchell "Mitch" McConnell
Majority Leader
United States Senate
Washington, DC 20510

Dear Mr. Majority Leader:

On February 22, 2018, the Department of Defense (DoD) briefed your staff concerning DoD support to the Kingdom of Saudi Arabia's (KSA) operations in Yemen. Subsequently, you requested an unclassified letter reflecting DoD's views on a draft joint resolution that would "direct[] the President to remove United States Armed Forces from hostilities in or affecting the Republic of Yemen, except United States Armed Forces engaged in operations directed at al Qaeda in the Arabian Peninsula or associated forces... ." DoD opposes this Joint Resolution. Even if enacted into law, the Joint Resolution would not achieve its apparent purpose of restricting U.S. support to the KSA-led coalition, because, as described below, that support does not constitute "hostilities." In addition to the potential constitutional concerns raised by such a proposal, the draft resolution's restrictions on U.S. military support to our partners could undermine our ability to foster long-term relationships, increase interoperability, promote burden sharing, and build strong security architectures throughout the world. The KSA is a key U.S. partner in the Middle East and we rely on our strong military partnership to promote regional security.

DoD opposes the resolution because the resolution's fundamental premise is flawed. Specifically, the draft resolution incorrectly asserts that U.S. forces have been "introduced into hostilities between the [KSA-led] coalition and the Houthis .... ." The limited military and intelligence support that the United States is providing to the KSA-led coalition does not involve any introduction of U.S. forces into hostilities for purposes of the War Powers Resolution or of section 1013 of the Department of State Authorization Act, Fiscal Years 1984 and 1985 (50 USC 1546a).

Since 2015, the United States has provided limited support to KSA-led coalition military operations against Houthi and Saleh-aligned forces in Yemen. With the exception of a defensive strike in October 2016, U.S. forces are not taking direct military action in this Saudi-led effort in Yemen. Instead, the United States provides the KSA-led coalition defense articles and services, including air-to-air refueling; certain intelligence support; and military advice, including advice regarding compliance with the law of armed conflict and best practices for reducing the risk of civilian casualties.

The draft resolution incorrectly describes United States support to the KSA-led coalition as an operation that introduces U.S. forces into hostilities or imminent involvement in hostilities for purposes of the War Powers Resolution. It has been the longstanding view of the Executive Branch that "hostilities" refers to "a situation in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces."[1] U.S. personnel providing support to the KSA-led coalition are not engaged in any such exchanges of fire. Further, the limited U.S. support to the KSA-led coalition does not implicate the activities identified in section 8(c) of the War Powers Resolution. Section 8(c) defines the term "introduction of United States Armed Forces" but does not address the term "hostilities." "[W]hen applying section 8(c), the relevant question remains whether U.S. forces—not the foreign forces they are accompanying—are introduced into hostilities or situations involving the imminent threat thereof."[2] With respect to U.S. support to the KSA-led coalition, U.S. forces do not currently command, coordinate, accompany, or participate in the movement of coalition forces in counter-Houthi operations. Thus, no U.S. forces are accompanying the KSA-led coalition when its military forces are engaged, or an imminent threat exists that they will become engaged, in hostilities. Accordingly, U.S. forces supporting the KSA-led coalition have not been introduced into hostilities or situations where hostilities are imminent.

Although the resolution's requirement to remove U.S. forces from hostilities would not implicate U.S. support to the KSA-led coalition, this requirement could call into question the statutory authority for ongoing U.S. counterterrorism operations in Yemen. Pursuant to the 2001 Authorization to Use Military Force (AUMF) (Public Law 107-40), U.S. armed forces are currently engaged in hostilities against both al Qa'ida in the Arabian Peninsula (AQAP) and the Islamic State of Iraq and Syria (ISIS) in Yemen. Hostilities against AQAP and associated forces are explicitly exempted from the resolution's termination requirement, but hostilities against ISIS are not similarly exempted.

The resolution also asserts incorrectly that there is no authorization for U.S. participation in a Joint Combined Planning Cell with the KSA and mid-air refueling of KSA-led coalition aircraft. President Obama directed such military and intelligence support pursuant to his authority under Article II of the Constitution as Commander in Chief and Chief Executive and his authority to conduct U.S. foreign relations. *See Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (explaining that the President "is authorized to direct the movements of the naval and military forces placed by law at his command"); *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941) ("[T]he President's authority has long been recognized as extending to the dispatch of armed forces outside the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests.").[3] Because, as discussed above, this limited support to the KSA does not

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[1] Letter to Rep. Clement J. Zablocki from Monroe Leigh, Legal Adviser, Dept. of State, and Martin R. Hoffinan, General Counsel, Dept. of Defense (June 3, 1975).

[2] Letter to Sen. Carl Levin from Robert Taylor, Acting General Counsel, Dept. of Defense (May 6, 2013). Mr. Taylor's letter described U.S. military non-combat support to French operations in Mali. That support included intelligence collection, in-flight refueling, and logistics. *See also* Memorandum of June 16, 1978, reproduced in the report of the hearing before the Subcommittee on International Security and Scientific Affairs of the Committee on International Relations, House of Representatives, August 10, 1978, at pp. 32-33.

[3] Because the President has directed U.S. troops to support the KSA operations pursuant to his authority under Article II, and because the limited operation does not implicated Congress's constitutional authority to Declare War,

involve the introduction of U.S. forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated, it does not implicate section 4(a)(l) of the War Powers Resolution. *See* 50 U.S.C. § 1543(a)(l). The Obama Administration published its summary of that limited support to the KSA-led coalition as part of the December 2016 "Report of the Legal and Policy Framework Guiding the United States Use of Military Force and Related National Security Operations." As discussed further below, DoD and the Department of State have implemented the President's direction through statutory authorities available to the respective Secretaries.

Article II of the Constitution likewise supplied the legal authority for the October 2016 strikes against radar facilities in Houthi-controlled territory in defense of U.S. Navy ships in international waters. The President has authority pursuant to Article II to take military action that furthers sufficiently important national interests. The limited October 2016 strikes were taken to protect U.S. vessels and personnel. Consistent with the War Powers Resolution, President Obama notified Congress of these strikes on October 14, 2016. The Obama Administration also published a summary of its legal analysis for the strike in its December 2016 report.

In late July 2017, President Trump completed a review of the Obama Administration's policy of limited support to the Saudi-led coalition. President Trump decided to continue that support, adjusting the priorities in light of the recommendations of Secretary of Defense James Mattis and intervening developments in Yemen. President Trump's policy guidance for support to the KSA-led coalition's operations in Yemen is to focus on ending the war and avoiding a regional conflict, mitigating the humanitarian crisis, and defending Saudi Arabia's territorial integrity and commerce in the Red Sea. Authorized types of support continue to include intelligence, logistics, and advisory support to the KSA-led coalition.

DoD and the Department of State have implemented the President's policy guidance to provide limited support to the Saudi-led coalition pursuant to legal authorities available to the respective Secretaries. The most prominent forms of support to the KSA and the United Arab Emirates (UAE), as well as the corresponding legal authorities, are detailed below.

Arms and Other Defense Articles: The Arms Export Control Act (AECA) is the underlying authority through which the United States provides or licenses defense articles and defense services to the KSA, UAE, and other members of the KSA-led coalition; many of these defense articles and defense services have been used in the conflict in Yemen. The AECA and associated delegations of authority provide the Secretary of State with the authority to approve the transfer of arms and other defense articles and defense services, primarily through the Foreign Military Sales program (which is overseen by the State Department and implemented through DoD) and through the State Department's licensing of Direct Commercial Sales to foreign partners. The authority to approve such transfers or licenses is not contingent upon whether the foreign recipient is engaged in an ongoing armed conflict, although the existence of

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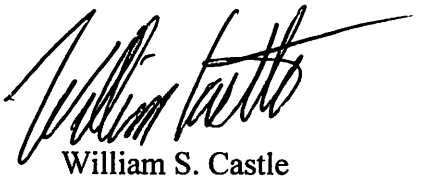
the draft resolution would raise serious constitutional concerns to the extent it seeks to override the President's determination as Commander in Chief.

such a conflict clearly increases demand and can be a policy factor in approval decisions. Transfers and licenses made pursuant to the AECA are subject to various requirements (such as notifications to Congress when transfers are above certain monetary thresholds) as well as restrictions on end-use (including no further transfer by the end-user without U.S. consent and that proposed uses must be consistent with the law of armed conflict).

Logistics: Pursuant to licenses issued by the State Department under the AECA, U.S. contractors provide defense services in the form of essential maintenance and sustainment for KSA and UAE combat aircraft engaged in hostilities in Yemen. The in-flight refueling of KSA and UAE aircraft, including combat aircraft, and certain other support, may also be provided pursuant to 10 U.S.C. §§ 2341 *et seq.*, which authorizes DoD to provide logistic support, supplies, and services to the military forces of a country with which DoD has an Acquisition and Cross-Servicing Agreement (ACSA) in force. DoD must first obtain State Department approval to conclude an ACSA; DoD has ACSAs with the Ministry of Defense of the KSA (applied provisionally pending its formal entry into force) and with the Armed Forces General Headquarters of the UAE.

I trust that this response will be helpful to your understanding of U.S. support to the KSA's operations in Yemen, and the reason for the DoD's opposition to this proposed Joint Resolution. Thank you for your continued support of the Department of Defense.

Sincerely



William S. Castle
Acting

cc:
The Honorable Charles E. "Chuck" Schumer
Minority Leader
United States Senate