

# By, With, And Through: Section 1202 and the Future of Unconventional Warfare

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## INTRODUCTION

Just weeks after al-Qaeda terrorists flew passenger aircraft into the World Trade Center and the Pentagon, a small force of Central Intelligence Agency (CIA) paramilitary officers infiltrated Afghanistan to establish a strategic partnership with the Northern Alliance, an Afghan resistance movement fighting against the Taliban. The CIA officers were soon joined by several detachments of Army Special Forces, commonly known as Green Berets. This combined force of approximately 450 Americans and 15,000 Afghans executed a classic unconventional warfare campaign that precipitated the fall of the Taliban government by early December 2001.<sup>1</sup> Yet during these operations, and for several years thereafter, the Green Berets were hampered in their ability to effectively work with their Afghan partners. Despite the fact that one of the primary missions of Special Forces is to operate by, with, and through (BWT) indigenous personnel, they had no fiscal authority to provide training or equipment to the Afghans. As a result, the Green Berets were wholly dependent on the CIA to use covert authorities in order to train, equip, and arm their foreign allies.<sup>2</sup>

Since World War II, U.S. Special Operations Forces (SOF) have been tasked to provide support to foreign personnel in a variety of circumstances from Vietnam to El Salvador to Syria.<sup>3</sup> Indeed, when Congress created U.S. Special Operations Command (USSOCOM) in 1986, it specifically designated assistance to indigenous forces as part of the organization’s statutory mission.<sup>4</sup> Although SOF are sometimes permitted to execute combined operations with their partners, as they were in Afghanistan, support more often includes the provision of training and equipment. The surprising limitations that were placed on the Green Berets during their initial

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1. DOUG STANTON, *HORSE SOLDIERS: THE EXTRAORDINARY STORY OF A BAND OF US SOLDIERS WHO RODE TO VICTORY IN AFGHANISTAN* 347 (2009). For other descriptions of CIA and Special Forces operations in Afghanistan immediately after the September 11 attacks, see LINDA ROBINSON, *MASTERS OF CHAOS: THE SECRET HISTORY OF THE SPECIAL FORCES* 153-190 (2004). See generally GARY SCHROEN, *FIRST IN: AN INSIDER’S ACCOUNT OF HOW THE CIA SPEARHEADED THE WAR ON TERROR IN AFGHANISTAN* (2006) and STEVE COLL, *DIRECTORATE S: THE C.I.A. AND AMERICA’S SECRET WARS IN AFGHANISTAN AND PAKISTAN* (2019) for their detailed accounts of the CIA’s involvement in the development of unconventional warfare campaigns during the infancy of the War on Terror.

2. See generally Matthew R. Grant & Todd C. Huntley, *Legal Issues in Special Operations*, in *U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE*, 553–601, 565–66 (Geoffrey S. Corn, Rachel E. Van Landingham & Shane R. Reeves, eds. 2015); RICHARD A. BEST, JR. & ANDREW FEICKERT, *CONG. RSCH. SERV., RS22017, SPECIAL OPERATIONS FORCES (SOF) AND CIA PARAMILITARY OPERATIONS: ISSUES FOR CONGRESS* 4 (2009).

3. See discussion *infra* Section I.

4. 10 U.S.C. § 167(k).

missions with the Northern Alliance were the result of a protracted struggle between Congress and the Executive Branch for control of foreign assistance in the aftermath of the Vietnam War. By the mid-1980s, this contest had left the U.S. military unable to use its own appropriated funds to train or equip foreign personnel without explicit legislative authorization.<sup>5</sup> Unfortunately, this policy severely limited the ability of SOF to effectively respond to unforeseen contingencies. When Green Berets began combat operations in the fall of 2001, there was simply no existing statute authorizing them to provide arms, equipment, or training to their Afghan partners.

This state of affairs was clearly unsustainable in the midst of a global campaign against Al-Qaeda and its affiliates that required SOF to execute multiple operations BWT indigenous forces. Indeed, in 2004, the 9/11 Commission Report recommended that lead responsibility for all U.S. paramilitary activities should be transferred from the CIA to SOF, including “legal authorities” to train foreign personnel.<sup>6</sup> Although this did not occur,<sup>7</sup> Congress ultimately saw the need to drastically expand foreign assistance authorities within the Department of Defense (DoD), and for SOF in particular. Between 2005 and 2017, Congress enacted a number of statutes which enabled SOF to provide training and other forms of assistance to foreign personnel who facilitate counterterrorism (CT) operations.<sup>8</sup> This sustained response has unmistakably signaled Congressional support for an expansive BWT strategy to combat violent extremist organizations (VEOs) in unstable areas throughout the world.

Legislative support for SOF-led BWT missions has continued even as DoD shifts its focus away from CT to long-term competition with other nation states such as Iran, North Korea, Russia, and China.<sup>9</sup> To that end, Congress enacted Section 1202 of the FY 2018 National Defense Authorization Act (Sec. 1202).<sup>10</sup> Sec. 1202 evolved from a legislative proposal originally drafted by Special Operations Command Europe (SOCEUR).<sup>11</sup> It permits the Secretary of Defense to obligate up to \$10 million annually<sup>12</sup> in order to “provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing and authorized irregular warfare operations by United States Special Operations Forces.”<sup>13</sup> On the surface, this appears to be an almost limitless

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5. See discussion *infra* Sections II.A., II.B.

6. THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, at 415–16 (2004).

7. BEST & FEICKERT, *supra* note 2.

8. See discussion *infra* Section II.C.

9. By 2015, then Chairman of the Joint Chiefs of Staff General Martin E. Dempsey declared that in addition to continued threats from “sub-state and non-state actors,” the Russian annexation of Crimea had demonstrated “a legitimate risk emanating from state actors.” Jim Garomone, *Dempsey: U.S. Forces Must Adapt to Deal With Near-Peer Competitors*, DOD NEWS (Aug. 17, 2015), <https://perma.cc/U95A-C9B3>.

10. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202 (2017).

11. See discussion *infra* Section III.A.

12. The FY2021 NDAA increases this annual amount to \$15 million. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1207, 134 Stat. 3388 (2021).

13. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(a), 131 Stat. 1283 (2017).

authority, but Congress significantly narrowed the scope of Sec. 1202 by defining irregular warfare as a situation that involves “competition between state and non-state actors short of traditional armed conflict.”<sup>14</sup> This phrase is not defined in the statute. However, based on the law’s legislative history, this terminology apparently refers to the so-called “gray zone,” an inherently ambiguous condition between war and peace.<sup>15</sup> The opacity of Congress’ language leaves significant questions as to the applicability of Sec. 1202. It is not entirely clear, for example, where “competition” ends and “traditional armed conflict” begins. Still, it is evident that Sec. 1202 provides authority for SOF to pay for a broad range of BWT activities that do not amount to direct hostilities, including training and equipping foreign surrogates.

As it is currently written, however, Sec. 1202 could not be invoked during actual hostilities between the United States and a state adversary, such as China or Russia—including if the United States were to suddenly become embroiled in the ongoing conflict between Russia and Ukraine. In fact, there is currently no overt statutory authority which permits SOF to train and equip an irregular force that supports U.S. objectives during a conventional armed conflict.<sup>16</sup> In other words, if the United States responded to a hypothetical Russian invasion of the Baltics or the real-world invasion of Ukraine, SOF would be prohibited from providing arms and training to partisans who resist the occupation in collaboration with U.S. forces. More than two decades after 9/11, SOF therefore remain needlessly restricted in their ability to operate by, with, and through foreign partners.

This article will argue that Sec. 1202 is an important step forward in allowing SOF to counter aggressive nation-states and their surrogates BWT foreign personnel. It will describe the genesis of the law and its provisions, and further argue that the statute’s restrictions leave a troubling gap in authorities to support irregular surrogate forces. Despite the consistent use of unconventional warfare as part of larger conventional campaigns over the last 60 years, there is currently no specific authority which would allow SOF to train and equip an irregular force during a “traditional armed conflict” against another nation-state. In the event of such a conflict, this gap may be temporarily filled through existing emergency funds, or through covert funds, as in Afghanistan. If history serves as a guide, Congress may also create overt authorities after such a conflict begins. Nevertheless, this article will argue that there is significant value in enacting such authorities prior to an emergency, and that such authorities can easily be tailored in order to forestall abuse.

Section I of the article will provide a brief history of SOF BWT activities beginning with the Second World War. Section II will review the fiscal authorizations framework which undergirds these activities, and how it has evolved over time. Section III will describe the enactment of Section 1202, its provisions, and its shortcomings. Finally, Section IV will argue that a specific statutory authority

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14. *Id.*

15. See discussion *infra* Section III.C.

16. See discussion *infra* Section III.D.

should be created which would allow SOF to train and equip irregular forces during a traditional armed conflict.

### I. A BRIEF HISTORY OF SOF BY, WITH, AND THROUGH ACTIVITIES

Although the BWT methodology has become a popular topic in contemporary national security discussions, it does not have an agreed upon definition. General Joseph L. Votel, former commander of USSOCOM, has recently defined BWT as an approach in which “operations are led *by* our partners, state or nonstate, *with* enabling support from the United States or U.S.-led coalitions, and *through* U.S. authorities and partner agreements.”<sup>17</sup> Votel’s characterization of BWT greatly expands upon the original meaning of the term, which indicated operations in which small numbers of U.S. personnel (typically SOF) are embedded with foreign forces in order to provide advice and support.<sup>18</sup> Indeed, BWT has evolved from a concept that was largely associated with low-intensity warfare to include large-scale conventional campaigns such as the war against ISIS in Iraq and Syria.<sup>19</sup>

For the purposes of SOF doctrine, however, many recent BWT operations can be placed into two broad categories: foreign internal defense (FID) and unconventional warfare (UW).<sup>20</sup> FID involves providing assistance to the armed forces of a nation-state in order to counter insurgents, terrorists, and other non-state actors.<sup>21</sup> An example of BWT in this form is the campaign against VEOs in Niger. In October 2017, four U.S. service members were killed by ISIS fighters near the village of Tongo Tongo during one of these operations.<sup>22</sup> On the other hand, UW involves the use of resistance forces, often irregular, to destabilize and overthrow hostile governments or an occupying force.<sup>23</sup> Recent examples include operations with the Northern Alliance against the Taliban in 2001,<sup>24</sup> operations with the Peshmerga in northern Iraq in 2003,<sup>25</sup> and operations with Syrian Democratic Forces against ISIS starting in 2016.<sup>26</sup>

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17. Joseph L. Votel & Eero R. Keravuori, *The By-With-Through Operational Approach*, JOINT FORCE Q., 2nd Quarter 2018, at 40. Lieutenant General Michael X. Garrett, former commander of U.S. Army Central (ARCENT), similarly describes BWT as “conducting military campaigns primarily *by* employing partner maneuver forces *with* the support of U.S.-enabling forces *through* a coordinated legal and diplomatic framework.” Michael X. Garrett, William H. Dunbar, Bryan C. Hilferty, & Robert R. Rodock, *The By-With-Through Approach: An Army Component Perspective*, JOINT FORCE Q., 2nd Quarter 2018, at 48, 49 (emphasis in original).

18. Diana I. Dalphonse, Chris Townsend, & Matthew W. Weaver, *Shifting Landscape: The Evolution of By, With, and Through*, STRATEGY BRIDGE (Aug. 1, 2018), <https://perma.cc/853A-N8TD>.

19. Garrett et al., *supra* note 17, at 50–51.

20. 10 U.S.C. § 167(g).

21. JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-05, SPECIAL OPERATIONS, at Ch. II 10–11 (July 16, 2014) [hereinafter JOINT PUB. 3-05].

22. Alice Hunt Friend, *The Accompany They Keep: What Niger Tells Us about Accompany Missions, Combat, and Operations Other than War*, WAR ON THE ROCKS (May 11, 2018), <https://perma.cc/94Z4-Y9DF>.

23. JOINT PUB. 3-05, *supra* note 21, at Ch. II 8–10.

24. STANTON, *supra* note 1, at 347.

25. See generally ROBINSON, *supra* note 1, at 296–341.

26. Tara Copp, *Large Portion of Additional 250 US Troops Going to Syria May Be Green Berets*, STARS AND STRIPES (Apr. 25, 2016), <https://perma.cc/4EG2-T2XS>.

FID and UW may employ a number of different operational approaches depending upon the strategic and legal context. In some circumstances, SOF may be authorized to conduct direct combat operations with the aid of a regular or irregular partner force, as in Afghanistan and Iraq. In others, SOF may be permitted to advise, assist, and accompany (A/A/A) indigenous personnel during combat operations, but not to take part in combat themselves, as in Niger.<sup>27</sup> Yet, a third option is for SOF to train and equip a partner force in order to increase its overall combat effectiveness. SOF may undertake this final course of action as its sole course of action or in concert with the other two.<sup>28</sup>

Ideally, BWT activities permit the United States to accomplish its strategic objectives while maintaining a small footprint on the ground and providing legitimacy to local partners.<sup>29</sup> Nevertheless, BWT has been criticized for degrading transparency and accountability for the harm suffered by civilians,<sup>30</sup> failing to deliver long-term stability in troubled regions,<sup>31</sup> and even failing to produce competent surrogates.<sup>32</sup> Regardless of whether these claims are true or not, the United States has largely adopted a SOF-led BWT strategy to support its post-9/11 counterterrorism policy. To that end, SOF has been extraordinarily successful in “their primary responsibility of protecting the United States and the lives of her citizens.”<sup>33</sup> Yet BWT is not exclusively a CT tool; BWT operations notably supported the conventional Allied campaign during World War II, while more recently proving to be a “strategic force multiplier” during early phases of the Iraq War.<sup>34</sup> BWT activities can also be a vital tool in so-called gray-zone conflicts between nation-states in the shadowy area between war and peace.<sup>35</sup>

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27. Friend, *supra* note 22.

28. Melissa Dalton and co-authors propose the following typology for BWT operations: 1. Support Operations, 2. Advise, Assist, and Accompany Missions, 3. Regional Platforms and Configurations, 4. Partnered Operations, 5. Partnered Operations with Nonstate Actors. MELISSA DALTON, DANIEL MAHANTY, JENNY MCAVOY, HIJAB SHAH, JULIE SNYDER, & KELSEY HAMPTON, CTR. FOR STRATEGIC AND INTL. STUDIES, CIVILIANS AND “BY, WITH, AND THROUGH”: KEY ISSUES AND QUESTIONS RELATED TO CIVILIAN HARM AND SECURITY PARTNERSHIP 4–6 (2018).

29. Morgan Kaplan, *Thinking Critically About “By, With, Through” in Syria, Iraq, and Beyond*, LAWFARE (Jan. 20, 2019), <https://perma.cc/SX4A-UHQU>.

30. DALTON, ET. AL, *supra* note 28, at 2.

31. Tommy Ross, Nathaniel Allen, & Phil McDaniel, *Beyond ‘By, With and Through: Reforming America’s Security Partnerships*, THE HILL (Mar. 29, 2019), <https://perma.cc/NS4K-8H6S>.

32. Michael D. Shear, Helene Cooper, & Eric Schmitt, *Obama Administration Ends Efforts to Train Syrians to Combat ISIS*, N.Y. TIMES (Oct. 9, 2015), <https://perma.cc/Z283-TC59>.

33. Daniel Byman & Ian A. Merritt, *The New American Way of War: Special Operations Forces in the War on Terror*, WASH. Q., Summer 2018, at 79, 84.

34. TIMOTHY D. BROWN, UNCONVENTIONAL WARFARE AS A STRATEGIC FORCE MULTIPLIER: TASK FORCE VIKING IN NORTHERN IRAQ, 2003 (2017).

35. Joseph L. Votel, Charles T. Cleveland, Charles T. Connett, & Will Irwin, *Unconventional Warfare in the Gray Zone*, JOINT FORCE Q., 1st Quarter 2016, at 101.



*A. World War II*

Modern BWT operations trace their origins to the activities of the Office of Strategic Services (OSS) during the Second World War.<sup>36</sup> The OSS was the brain-child of William J. Donovan, a World War I battalion commander and later a corporate attorney. Organized in June 1942 from portions of Donovan's pre-war intelligence office, the Coordinator of Information (COI), OSS ultimately employed some 13,000 military and civilian personnel.<sup>37</sup> The organization had two main divisions: Intelligence Services and Strategic Services Operations. The first of these divisions was largely concerned with what would today be called foreign intelligence and counterintelligence. The latter housed direct-action and UW capabilities organized into several branches.<sup>38</sup>

Over the course of the war, the OSS developed an in-depth methodology to organize, train, equip, and fight with resistance networks and guerilla forces.<sup>39</sup> OSS field manuals advised operatives who initiated contact with a resistance network to immediately assess that network's capabilities and supply needs. The operative would then develop requirements for the network including arms, ammunition, demolitions, food, hard currency, and medical supplies and deliver those requirements to OSS Field Service Headquarters or an OSS field base for fulfillment.<sup>40</sup> OSS "Jedburgh Teams" often parachuted into occupied territory laden with gear and local currency for resistance forces. The commander of these teams then had substantial discretion to distribute limited arms and supplies to various groups.<sup>41</sup> Donovan proudly recalled that during the war, OSS groups were "behind enemy lines living and working with resistance people, speaking

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36. The OSS was one of two organizations that form a dual-lineage for contemporary Army Special Forces. The second was the lesser known First Special Service Force, often referred to as "The Devil's Brigade." The First Special Service Force was a joint American-Canadian military unit originally intended to master winter and mountain-based commando operations. Although the unit engaged in some partnered operations with European resistance forces, it was essentially an elite direct-action unit. The U.S. Army Ranger battalions also made significant contributions to the current Special Forces structure. There are examples of Ranger battalions working with indigenous forces to execute Prisoner of War rescues and gather of intelligence, but the Rangers were primarily a raid force. For an expansive look at the historical development of Army Special Forces, and specifically First Special Service Force, see ROBERT H. ADELMAN & GEORGE H. WALTON, *THE DEVIL'S BRIGADE* (2013). See also DARREN SAPP, AARON BANK AND THE EARLY DAYS OF THE US ARMY SPECIAL FORCES 1-19 (2016); ROBERT D. BURHANS, *THE FIRST SPECIAL SERVICE FORCE: A CANADIAN/AMERICAN WARTIME ALLIANCE: THE DEVIL'S BRIGADE 16-32* (1947); U.S. Army Special Operations Command, *The OSS Primer*, <https://perma.cc/S975-MJTS>; William Donovan, Former Director, Office of Strategic Servs., Lecture on Partisan Warfare at U.S. Army War College (Jan. 11, 1951), <https://perma.cc/6KRS-RX9P>; JOHN J. TIERNEY, JR., *CHASING GHOSTS: UNCONVENTIONAL WARFARE IN AMERICAN HISTORY 208-216* (2006); Michael Krivdo, *Rescue at Cabanatuan*, VERITAS, vol. 14, no. 2, 2018, at 1-3.

37. CENT. INTEL. AGENCY, *THE OFFICE OF STRATEGIC SERVICES: AMERICA'S FIRST INTELLIGENCE AGENCY*, CIA LIBR.-CTR. FOR STUDY OF INTEL. (2000), <https://perma.cc/5FPW-T52M>.

38. OFFICE OF STRATEGIC SERVS. SCHOOLS & TRAINING BRANCH, *OFFICE OF STRATEGIC SERVICES (OSS) ORGANIZATION AND FUNCTIONS* (1945).

39. OFFICE OF STRATEGIC SERVS., *OPERATIONAL GROUPS FIELD MANUAL NO. 6—STRATEGIC SERVICES (PROVISIONAL) 14-16, 18* (1945).

40. *Id.* at 11-17.

41. SAPP, *supra* note 36, at 45-50.

their language, instructing leaders, furnishing supplies and ammunition and food, [and] helping in the training of recruits.”<sup>42</sup>

Conventional military officers ultimately recognized the significant value of these UW activities to the overall war effort. For example, General Dwight Eisenhower acknowledged that “organized resistance [forces] helped the main operations of the Allied Expeditionary Force . . . by sapping the enemy’s confidence[,] . . . by diverting enemy troops to internal security duties[,] . . . by causing delay to the movement of enemy troops[,] . . . by enabling allied formations to advance with greater speed[,] . . . [and] by furnishing military intelligence.”<sup>43</sup> Even so, obtaining resources for UW was a constant problem.<sup>44</sup> Colonel Aaron Bank, who worked hand-in-hand with the French resistance as a Jedburgh commander, later argued that he would have been significantly more effective had resources been more readily available for arming and training partisans.<sup>45</sup> At one point, Bank reported that his team had access to some 3,000 resistance members, but they were in need of arms and other supplies before they could be effectively utilized. In addition to posing operational difficulties, these shortfalls greatly undermined the trust that Bank’s team attempted to establish with its partners.<sup>46</sup> The lessons learned by Bank and other OSS alumni would later be incorporated into a model for a permanent unconventional warfare force within the U.S. Army.<sup>47</sup>

### *B. Korea and Vietnam*

As World War II came to an end, the OSS was disbanded. However, the organization was reestablished as the CIA in 1947 and retained significant paramilitary and UW capabilities. Five years later, the Army activated the first modern Special Forces unit, known as the 10th Special Forces Group (10SFG), whose primary mission was conducting UW operations in Europe in case of a Soviet attack.<sup>48</sup> In the interim, the Korean War broke out. As in the recent World War, the United States mainly relied upon UW activities with Korean resistance forces to supplement large-scale, conventional operations. At the beginning of the war, the anti-communist guerillas, most of whom were refugees from the North, were “poorly-trained and equipped.”<sup>49</sup> But in early 1951, American advisors established a reasonably well-functioning indigenous guerilla network that trained and operated across the Korean theater. These partisan units were used to gather

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42. Donovan, *supra* note 36, at 19.

43. Donovan, *supra* note 36, at 18–19. General Mark W. Clark likewise reported the importance of OSS activities in the Italian theater. *Id.* at 20–23.

44. DAVID W. HOGAN, JR., U.S. ARMY SPECIAL OPERATIONS IN WORLD WAR II 48–55 (1992).

45. SAPP, *supra* note 36, at 45–50 (discussing the immense value of FTP, FFI, BCRA, and other organized French resistance or “Maquis” groups).

46. SAPP, *supra* note 36, at 45–50.

47. SAPP, *supra* note 36, at 60–65.

48. U.S. Army Special Operations Command, *10th SFG(A) History*, <https://perma.cc/F3T4-726G>.

49. Kenneth Finlayson, *Guerillas in Their Midst: An Introduction to Veritas*, 8 VERITAS, no. 2, 2012, at 1, 2.



intelligence, conduct raids, and engage in sabotage operations as far north as the Chinese border.<sup>50</sup> At the same time, the CIA was actively involved in Korean paramilitary operations, providing training and logistical support to guerilla forces including food, arms, ammunition, and transportation.<sup>51</sup> Between 1951 and 1952, it is estimated that the number of guerilla forces working with American advisors grew from around 6,000 to approximately 20,000 personnel, while the number of combat actions involving guerillas doubled.<sup>52</sup> In 1953, members of the newly activated 10SFG were deployed to Korea in order to train and advise these partisan forces, continuing that mission even after an armistice went into effect.<sup>53</sup>

In contrast, when the United States became embroiled in Vietnam, UW activities became central to the American counter-insurgency (COIN) strategy against the Viet Cong. By 1961, President Kennedy was convinced that SOF should take the lead in a global BWT campaign against communist insurgents, including in South Vietnam.<sup>54</sup> In May of that year, the President told Congress that “[t]he main burden of local defense against local attack, subversion, insurrection or guerrilla warfare must of necessity rest with local forces. Where these forces have the necessary will and capacity to cope with such threats, our intervention is rarely necessary or helpful.”<sup>55</sup> Nevertheless, he asked Congress for over \$1.8 billion in military assistance funds, and directed the Secretary of Defense “to expand rapidly and substantially, in cooperation with our Allies, the orientation of existing forces for the conduct of non-nuclear war, paramilitary operations and sub-limited or unconventional wars.”<sup>56</sup>

In the late fall of 1961, representatives from the U.S. Embassy, the CIA, and Special Forces recruited approximately 400 Rhade people in the village of Buon Eno to provide local security against the Viet Cong. The Rhade were part of a collection of minority tribal groups known as the Montagnards who were alternately harassed or ignored by the South Vietnamese government even as they were intimidated by the insurgents. Consequently, the Rhade welcomed American support and soon built protective fences around their village, dug trenches inside, created their own intelligence networks to monitor Viet Cong activity, and began training with U.S. forces. In less than a year, the project expanded to include some 200 villages, and participants were organized into “Citizens Irregular Defense Groups” (CIDGs).<sup>57</sup>

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50. Kenneth Finlayson, *A Combat First, Army SF Soldiers in Korea, 1953-1955*, 9 VERITAS, no. 1, 2013, at 58.

51. Charles Briscoe, *CIA Paramilitary Operations, Korea 1950-1951*, 9 VERITAS, no. 1, 2013, at 69.

52. Michael Krivdo, *The Army's Guerilla Command in Korea, Part II: The Rest of the Story*, 9 VERITAS, no. 1, 2013, at 3, 11.

53. Finlayson, *supra* note 50, at 65.

54. WILLIAM COLBY & JAMES MCCARGAR, *LOST VICTORY: A FIRSTHAND ACCOUNT OF AMERICA'S SIXTEEN-YEAR INVOLVEMENT IN VIETNAM 86-88* (1989).

55. President John F. Kennedy, *Special Message to the Congress on Urgent National Needs* (May 25, 1961), <https://perma.cc/8KWZ-32CV>.

56. *Id.*

57. COLBY & MCCARGAR, *supra* note 54, at 88-103; COL. FRANCIS J. KELLY, *DEP'T OF ARMY, VIETNAM STUDIES: U.S. ARMY SPECIAL FORCES 1961-1971 19-32* (2004); *STUDIES IN INTELLIGENCE, THE CIA AND THE WARS IN SOUTHEAST ASIA 1947-1975 5-6* (2016).

The ultimate purpose of the CIDGs was to build areas of security against Viet Cong influence while simultaneously creating support for the South Vietnamese government in a classic “ink spot” strategy.<sup>58</sup> To this end, the CIDGs provided the local population with access to medical care and economic assistance in addition to military training and equipment. Over the next several years, Rhade irregulars continued to receive support from both U.S. and Vietnamese Special Forces who instructed them on the use of weapons, patrolling techniques, ambush, counter-ambush, village defense, and strike force operations.<sup>59</sup>

In 1962-1963, operational control of the CIDG program was transitioned from the CIA to the DoD’s Military Assistance Command-Vietnam Special Operations Group (MACVSOG, MACSOG, or SOG).<sup>60</sup> Thereafter, the CIDGs were renamed “Civilian Irregular Defense Groups,” and a new emphasis was placed on offensive operations.<sup>61</sup> At the same time, the program quickly grew in scale.<sup>62</sup> Within four years, American Special Forces were training, equipping, and operating with hundreds of thousands of irregular forces including the Montagnards.<sup>63</sup> After 1965, conventional military leaders began to assert increased control over the CIDG program which caused operational difficulties. Nevertheless, the program was judged to be extremely valuable through the beginning of “Vietnamization” in 1970, after which the CIDGs were largely deactivated.<sup>64</sup>

### C. The Cold War

In the aftermath of Vietnam, COIN and UW activities were largely eschewed by the military establishment which reoriented itself towards large-scale

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58. COLBY & MCCARGAR, *supra* note 54, at 91–92, 165–66.

59. COLBY & MCCARGAR, *supra* note 54, at 91–92, 165–66; KELLY, *supra* note 57, at 22–26, 135–137; STUDIES IN INTELLIGENCE, *supra* note 57, at 5–7. *See also* Hearings Before the Subcommittee of the Committee on Appropriations—United States Senate, Eighty-Eighth Congress, First Session on H.R. 7179: *Making Appropriations for the Department of Defense for the Fiscal Year Ending June 30, 1964, and for other purposes*.

60. STUDIES IN INTELLIGENCE, *supra* note 57, at 5–7; *see generally* ROBERT M. GILLESPIE, *BLACK OPS VIETNAM: AN OPERATIONAL HISTORY OF MACVSOG 11–63* (2011) (providing a detailed look at MACVSOG’s operations).

61. COLBY & MCCARGAR, *supra* note 54, at 166.

62. STUDIES IN INTELLIGENCE, *supra* note 57, at 6–7; KELLY, *supra* note 57, at 32.

63. KELLY, *supra* note 57, at 39–50. Some estimates place the number of irregulars mobilized by Army Special Forces over at over 500,000. Notably, many of these BWT activities involved U.S. advisors assuming command of indigenous forces in difficult situations. According to Colonel Kelly, Vietnamese Special Forces viewed this project as a U.S.-led effort and were less interested in accommodating the regional, tribal forces including the Rhade and the Montagnards. Sometimes by necessity, U.S. Special Forces advisors would engage in a more direct combat role to ensure operational success.

64. KELLY, *supra* note 57, at 79–85. Despite the deactivation of the CIDG program, Mr. Carol Dixon, formerly assigned to 5SFG(A) in Vietnam from 1970 to 1971, stated that training of and operations with indigenous forces were still very active during this time period, with many guerilla force members attending a Vietnam-based airborne school. Telephone Interview with Carol Dixon, former 5SFG(A) Soldier (June 5, 2019). Robert Seals, *MACV-SOG History*, in *USASOC History*, <https://perma.cc/G2LX-CTTW> (providing an overview of MACV-SOG).

conventional conflict with the Soviet Union.<sup>65</sup> Although the SOF community likewise reoriented itself toward potential UW missions in Europe, their budget was slashed while they faced significant recruitment and manning issues.<sup>66</sup> Despite these challenges, SOF participated in a series of BWT campaigns against communist forces during the 1980s.<sup>67</sup> These activities, and particularly those in Central America, had an enormous impact on the current fiscal framework for UW and FID.<sup>68</sup>

Beginning in 1979, the Sandinista government of Nicaragua (with significant aid from Cuba and the Soviet Union) began to covertly support communist insurgencies in El Salvador and other neighboring countries in what has been called a campaign of “secret warfare.”<sup>69</sup> The United States responded to Nicaraguan aggression by covertly training and arming the Contras, a Nicaraguan insurgent movement fighting against the Sandinistas.<sup>70</sup> Congress attempted to halt these activities through the Boland Amendments, a series of fiscal measures that prohibited the expenditure of government funds on behalf of the Contras. The Reagan Administration’s efforts to work around these restrictions ultimately resulted in the infamous Iran-Contra scandal.<sup>71</sup>

At the same time, Army Green Berets and other military advisors conducted an overt FID mission in El Salvador from 1979 to 1992. The mission was officially capped at 55 full-time advisors who were permitted to train and equip Salvadoran forces but not to accompany them on combat operations.<sup>72</sup> Nevertheless, during that period, up to 150 American military personnel might be in El Salvador at any given time, and large numbers of Salvadoran troops were trained in Honduras, Panama, and the United States.<sup>73</sup> These BWT operations saved the Salvadoran

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65. See generally SUSAN MARQUIS, *UNCONVENTIONAL WARFARE: REBUILDING U.S. SPECIAL OPERATIONS FORCES* 68–257 (1997) (discussing the post-Vietnam decline in focus on SOF and its rebuild from the budgetary and Congressional perspective, and an operational perspective via SOCOM’s establishment); Charles H. Briscoe, *Training on a Shoestring: Cheap, Practical SF Training in the post-Vietnam Turmoil*, 14 VERITAS, no. 1, 2018, at 25, 26.

66. MARQUIS, *supra* note 65, at 40–41, 207; Briscoe, *supra* note 65, at 26.

67. See STEVE COLL, *GHOST WARS: THE SECRET HISTORY OF THE CIA, AFGHANISTAN, AND BIN LADEN, FROM THE SOVIET INVASION TO SEPTEMBER 10, 2001* 53–169 (2004) (providing a description of BWT activities in Afghanistan and Pakistan during the 1980s); ROBINSON, *supra* note 1, at 155.

68. See discussion *infra* Section II.B.

69. John Norton Moore, *Jus ad Bellum Before the International Court of Justice*, 52 VA. J. INT’L L. 903, 919–21 (2012); see generally, ROBERT KAGAN, *A TWILIGHT STRUGGLE: AMERICAN POWER AND NICARAGUA, 1977-1990* (1996).

70. Moore, *supra* note 69, at 923.

71. Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief’s Spending Power*, 81 IOWA L. REV. 79, 92–97 (1995). For greater understanding of the political climate and tensions during and following the Iran-Contra Affair, see KAGAN, *supra* note 69; Baker, *infra* note 74.

72. These restrictions were sometimes ignored by advisors on the ground who believed that it limited their “ability to influence counterparts.” Advisors joked to their Salvadoran partners that if they were to be killed on a patrol, the Salvadorans were to “call the Embassy and report a terrible training accident.” Cecil E. Bailey, *OPATT: The U.S. Army SF Advisers in El Salvador*, 2 VERITAS, no. 4, 2004, at 18, 24.

73. Maj. Paul P. Cale, *The United States Military Advisory Group in El Salvador, 1979-1992*, SMALL WARS JOURNAL, 1996, at 15 (1996).

government from collapse, helped to professionalize the Salvadoran army, and cut insurgent forces by approximately half.<sup>74</sup> Although the conflict entered into a protracted stalemate in the mid to late-1980s, a peace treaty was finally signed between the Salvadoran government and the insurgents after the fall of the Soviet Union and the end of Sandinista rule in Nicaragua.<sup>75</sup>

As these events were taking place, Congress initiated a fundamental reorganization of the DoD. The Goldwater-Nichols Department of Defense Reorganization Act of 1986 attempted to create efficiencies in war-fighting through several methods, including removing the military services from the operational chain-of-command and placing the command of joint forces into the hands of Combatant Commanders who answered directly to the Secretary of Defense.<sup>76</sup> Concurrently, there was growing support in Congress and the Executive Branch to renew focus on the languishing Special Operations Forces.<sup>77</sup> One participant remembered that,

We started looking at all the operational failures and deficiencies of the U.S. Military and one of the things that we noticed immediately was this very excessive focus on conventional warfare . . . But the world [was] turning more toward unconventional warfare, some form of low-intensity conflict . . . We became concerned that the [DoD] was really neglecting a growing mission area . . . and also neglecting special operations forces which we thought were of increasing utility.<sup>78</sup>

A number of proposals were put forward to better organize SOF. For instance, Congressman Dan Daniels of the House Armed Services Committee argued that based on SOF's unique mission set, it should be consolidated into an entity wholly distinct from the conventional DoD with a separate budget and acquisition authorities.<sup>79</sup> Others, particularly Senators Nunn and Cohen of the Senate Armed Services Committee, believed that SOF should instead be integrated into the new framework recently created by the Goldwater-Nichols Act. Finally, the 1986 Nunn-Cohen Amendment formally established the US Special Operations Command (USSOCOM) as a Combatant Command, created a separate budget for SOF (MFP-11 funds), and codified a statutory mission for SOF that included UW and FID.<sup>80</sup>

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74. *Id. passim*; Bailey, *supra* note 72, *passim*. For a critical evaluation of the mission, see Ryan T. Baker, *El Salvador, 1979-92: Revisiting Success*, in PROXY WARS: SUPPRESSING VIOLENCE THROUGH LOCAL AGENTS 137–58 (Eli Berman & David A. Lake, eds., 2019).

75. Charles H. Briscoe, *El Paraiso and The War in El Salvador*, 3 VERITAS, no. 1, 2007, at 1-2.

76. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433 (1986); KATHLEEN J. McINNIS, CONG. RSCH. SERV., RS44474, GOLDWATER-NICHOLS AT 30: DEFENSE REFORM AND ISSUES FOR CONGRESS 2–10 (2016).

77. MARQUIS, *supra* note 65, at 285–291.

78. MARQUIS, *supra* note 65, at 136.

79. MARQUIS, *supra* note 65, at 122–125.

80. 10 U.S.C. § 167.

#### *D. The Global War on Terror*

After the creation of USSOCOM in the 1980s, SOF continued to train and operate with indigenous forces in a variety of circumstances including during the Persian Gulf War,<sup>81</sup> and as a part of counter-narcotics operations in Colombia.<sup>82</sup> However, the events of September 11, 2001 ushered in an unprecedented era in which SOF have been continuously involved in BWT activities with partners across the world, including Afghanistan, Iraq, and Syria. As described in the introduction, the early stages of the Afghanistan War were characterized by a classic UW campaign in which CIA paramilitaries and Special Forces surreptitiously infiltrated the country and partnered with Northern Alliance fighters against the Taliban. When combined with overwhelming American air power, these operations (sometimes involving Green Berets riding into battle on horseback) precipitated the collapse of the Taliban government within a matter of weeks.<sup>83</sup> After the fall of the Taliban, SOF continued to operate with the CIA and local Afghan militias in “Omega Teams” that hunted for Al-Qaeda adherents along the border of Afghanistan and Pakistan.<sup>84</sup> As an incipient Taliban insurgency began to coalesce over the subsequent years, SOF shifted to a FID mission; often working with local communities to recruit indigenous personnel for training and partnered operations.<sup>85</sup> Nearly two decades later, U.S. SOF were still fighting with their Afghan partners against the Taliban and other VEOs throughout the country until the U.S. withdrawal in 2021.<sup>86</sup>

In contrast to Afghanistan, the invasion of Iraq in 2003 was primarily a conventional effort with large armored formations maneuvering through the southern

81. MARQUIS, *supra* note 65, at 188–189, 200–201, 232–233; *see also* Kenneth Finlayson, *From the Yak and Yeti to Port-au-Prince: ODA 155 Trains the Gurkhas*, 5 VERITAS, no. 3, 2009, at 29 (discussing the role of 3SFG(A) as part of JTF-190’s mission in Haiti); Telephone Interview with Sheridan Elliott, U.S. Special Operations Command (July 15, 2019) (discussing SOF train and equip activities in CENTCOM during the 1990s).

82. Abigail Vaughn, *Colombia, 1990-2010: Cooperation in the War on Drugs*, in PROXY WARS: SUPPRESSING VIOLENCE THROUGH LOCAL AGENTS 80–109 (Eli Berman & David A. Lake, eds., 2019).

83. STANTON, *supra* note 1.

84. COLL, *supra* note 67, at 118–19, 160–61, 243–44, 390–91.

85. *See* Kenneth Finlayson, *A Collective Effort: Army Special Operations Forces in Deh Rawod, Afghanistan*, 5 VERITAS, no. 4, 2009, at 1-2; *see generally* KEVIN MAURER, *GENTLEMEN BASTARDS* 1-18 (2012).

86. Maj. Anthony Mayne, NATO Special Operations Component Command-Afghanistan, *Afghan and U.S. Special Operations Decimate IS-K in Northern Afghanistan* (Apr. 15, 2018), <https://perma.cc/76LZ-9WMH>; Phillip Walter Wellman, ‘Eagle Down’ examines the secretive role of US Special Forces in Afghanistan, STARS AND STRIPES (Jan. 23, 2021), <https://perma.cc/5NFV-BXFZ>. Special Operations Forces continued to fight alongside their Afghan partners until the drawdown of U.S. Forces in Afghanistan and continue to wage the War on Terror even after the withdrawal. *See* President Joseph R. Biden, Jr., Remarks on the Drawdown of U.S. Forces in Afghanistan (July 8, 2021), <https://perma.cc/BW46-BU96>; Mark Landler, *20 Years On, the War on Terror Grinds Along, With No End in Sight*, N.Y. TIMES (Sept. 12, 2021), <https://perma.cc/9T5Z-C5MN> (discussing the continued war on terror even after the United States’ withdrawal from Afghanistan, and the cost of such endeavors).

deserts towards Baghdad.<sup>87</sup> Nevertheless, SOF played an important role in the UW campaign against Iraqi forces in the north, as well as the Al-Qaeda-linked terrorist organization Ansar al-Islam.<sup>88</sup> The 10SFG had established relationships with the semi-autonomous Kurds over a decade before during the first Gulf War.<sup>89</sup> In addition to providing local government services, the Kurdistan Democratic Party (KPD) and the Patriotic Union of Kurdistan (PUK) also sponsored large and well-armed militias known as the Peshmerga.<sup>90</sup> After a risky insertion by air in late March 2003,<sup>91</sup> a combined force of Green Berets and Peshmerga backed by coalition air power destroyed the Ansar al-Islam training camps and then defeated four Iraqi Army corps in order to open the way into the strategic cities of Mosul and Kirkuk.<sup>92</sup> As another insurgency unfolded in Iraq, SOF once again transitioned to an FID mission to train, equip, and operate with Iraqi government forces until the United States withdrew from the country in 2011.<sup>93</sup>

The campaign against the so-called Islamic State (ISIS) that began in 2014 has been another high-profile demonstration of American air power coupled with SOF-led BWT operations on the ground. Over the course of approximately five years, these activities dislodged ISIS from its Mosul-based caliphate that at one time encompassed large areas of Syria and Iraq.<sup>94</sup> Nevertheless, the War on Terror has also been characterized by a number of less visible BWT operations.

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87. See generally WILLIAM MURRAY & MAJ. GEN. ROBERT H. SCALES, JR., *THE IRAQ WAR: A MILITARY HISTORY* (2003) (providing a detailed look at the largely conventional effort to seize the country of Iraq).

88. *Id.* at 185–95.

89. Interview with Tomas Sandoval, Comm. Sgt. Maj., 1st Special Forces Command (Airborne) at Fort Bragg, N.C. (May 30, 2019) [hereinafter Sandoval Interview]. CSM Sandoval outlined 10th Special Forces Group's work with the PDK and Peshmerga. Originally, 10th Special Forces Group was to return to Iraq as part of Operation Imminent Hammer immediately after returning from the Gulf War—this was in response to Saddam Hussein's bombing campaigns in both Northern and Southern Iraq against the Kurds and Shi'a Muslims, respectively. 10th SFG(A) did return, but as part of Operation Provide Comfort. *Id.*

90. *Id.* Kurdish forces had access to such a massive supply of AK-47s that they would use the lower receivers of these weapons to stake down tents or to assist with cooking in the field. When they prepared to move, they would reassemble the weapons. *Id.*; see also MURRAY & SCALES, JR., *supra* note 87, at 188.

91. Sandoval Interview, *supra* note 89. This insertion is now known as “The Ugly Baby,” and is the longest infiltration mission since WWII and the longest MC-130 Combat Talon infiltration in history. According to CSM Sandoval, who was on the first MC-130 in the formation, their planes were significantly overloaded with equipment (approximately 20 tons overweight) due to the one-way nature of their insertion. They took very heavy anti-aircraft fire, with only three of the five planes actually landing in Northern Iraq. See also ROBINSON, *supra* note 1, at 296–341.

92. Kenneth Finlayson, *Operation Viking Hammer, 3/10SFG Against the Ansar Al-Islam*, 1 VERITAS, no. 1, 2005, at 15. See also Cheryl A. Walley & A. Dwayne Aaron, *ODA 542, Working with the Free Iraqi Fighters*, 1 VERITAS, no. 1, 2005, at 86 (explaining that other BWT activities during the invasion of Iraq include operations with Ahmed Chalabi's Free Iraqi Fighters).

93. See, e.g., U.S. ARMY, *THE U.S. ARMY IN THE IRAQ WAR VOL. II: SURGE AND WITHDRAWAL, 2007-2011* at 67–69, 287, 361–62, 415–17, 509, 545–46 (2019).

94. Liz Sly & Louisa Loveluck, *The 'Caliphate' is No More. But the Islamic State isn't Finished yet.*, WASH. POST (Mar. 23, 2019), <https://perma.cc/77FH-YPS8>.



For instance, SOF engaged in a highly successful FID mission against Al Qaeda-affiliated insurgents in the Philippines from 2001 to 2015. Although the mission initially began with over 1,300 U.S. personnel, it typically included just 500 to 600 troops on the ground who engaged in training, various forms of advice and assistance, information operations, and civil affairs. As in El Salvador a generation before, SOF were not permitted to engage in direct combat operations.<sup>95</sup> Since 2015, SOF have also trained and equipped government forces in Niger as well as executing A/A/A missions against a panoply of VEOs. Once again, direct combat operations have never been authorized in this theater. This does not mean the American troops are out of harm's way, however. In 2017, an American detachment of Green Berets was ambushed by a large contingent of ISIS fighters near the village of Tongo Tongo while accompanying Nigerien troops on an operation to capture an insurgent leader.<sup>96</sup>

### E. Great Power Competition

In recent years, the U.S. military has begun to transition away from a focus on CT operations to operations against a peer or near-peer threat.<sup>97</sup> During a similar transition in the aftermath of the Vietnam War, SOF capabilities were severely compromised. However, contemporary SOF have continued to play a prominent role in missions meant to deter and degrade state competitors and their proxies in the “gray zone.”<sup>98</sup> Some of the most visible contemporary BWT activities are a direct response to Russian aggression in Ukraine. In the years following Russia's 2014 annexation of Crimea, SOF partnered with Ukrainian special forces to provide training and develop a “Resistance Operating Concept” in the event of further Russian incursions.<sup>99</sup> Even before the 2022 Russian invasion, the United States transferred significant lethal aid to Ukraine including Javelin anti-tank missiles.<sup>100</sup> Moreover, as part of an overall deterrence strategy, SOF are currently training with partner forces

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95. Linda Robinson, *The SOF Experience in the Philippines and the Implications for Future Defense Strategy*, PRISM, 152, 153(2016).

96. Friend, *supra* note 22; Wesley Morgan, *Behind the Secret U.S. War in Africa*, POLITICO (July 2, 2018), <https://perma.cc/34YS-3LXU>.

97. CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS 1–2 (2021).

98. Jon Harper, *Special Operations Command to Rebalance for New Strategic Era*, NAT'L DEF. (May 18, 2018), <https://perma.cc/5Q2N-HAC2>; Votel et al., *supra* note 35.

99. Davis Winkie, *How the US and Europe Helped Ukraine Prep for Insurgency*, ARMY TIMES (Mar. 7, 2022) <https://perma.cc/EQ58-PYVC> (discussing Special Operations Command Europe's involvement in preparing Ukraine); Michael Lee, *The US Army's Green Berets Quietly Helped Tilt the Battlefield a Little Bit More Toward Ukraine*, FOX NEWS (Mar. 24, 2022), <https://perma.cc/CH82-JRAR>; Yaroslav Trofimov, *Ukraine's Special Forces Hold Off Russian Offensive on Kyiv's Front Lines*, WALL ST. J. (Mar. 4, 2022) <https://perma.cc/42QD-JH5N> (“Ukraine has deployed elite special-forces units, trained by the U.S. and allies over the past several years, to defend Kyiv.”).

100. Kyle Rempfer, *More Lethal Aid to Ukraine? US Trainers, Javelins Have Already Made Russians a Little More Nervous*, MIL. TIMES (Mar. 6, 2019), <https://perma.cc/F5U6-45SX>. After Russia's 2022 invasion of Ukraine, this effort has only increased. Dan Lamothe & Karoun Demirjian, *Pentagon Looks to Vastly Expand Weapons for Ukraine*, WASH. POST (Apr. 12, 2022), <https://perma.cc/SX72-EE3E> (discussing the more than \$1.7 billion in aid provided to Ukraine since the start of the 2022 Russian invasion).

in the Baltics for a protracted UW campaign in case of a comparable Russian invasion.<sup>101</sup> Similar activities regularly take place in other theaters, such as Korea, where UW operations will play an important part in any future hostilities.<sup>102</sup> In short, BWT activities, including train and equip missions, will remain central to the American defense strategy for the foreseeable future.

## II. BY, WITH, AND THROUGH ACTIVITIES AND FISCAL LAW

All military operations are dependent on a combination of operational and fiscal authorities which ultimately flow from the President and Congress.<sup>103</sup> The legal authority to conduct a military operation (herein designated as “operational authority”) generally flows from the President, through the Secretary of Defense, to a uniformed Combatant Commander by means of an Execute Order (EXORD).<sup>104</sup> In some circumstances, operational authority may be derived solely from the President’s powers under Article II of the Constitution. However, in other circumstances, particularly those that involve offensive combat, operational authority may require a further delegation of authority from Congress such as an Authorization for Use of Military Force (AUMF).<sup>105</sup> Since the end of the Vietnam War, Congress has also used the War Powers Resolution<sup>106</sup> and other statutory mechanisms<sup>107</sup> in order to establish a continuing oversight role in regard to combat operations and related activities.<sup>108</sup> Indeed, one of the central questions growing out of the 2017 Tongo Tongo ambush is whether Special Forces who advised and accompanied Nigerien troops were actually executing a combat mission without congressional knowledge or approval.<sup>109</sup>

The proper roles of the President and Congress in the exercise of military operations remain a matter of fierce debate that this article will not attempt to resolve.<sup>110</sup> But assuming that there is proper operational authority to conduct a

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101. Nolan Peterson, *If Russia Invades, US Special Operations Forces Have an Unconventional Plan to Liberate the Baltics*, DAILY SIGNAL (June 8, 2018), <https://perma.cc/MCS4-3PLS>.

102. Capt. Brian Hartigan & Capt. Ben Lee, *Preparing for ODA Level Initial Entry UW Operations in Korea*, SPECIAL WARFARE, Jan.-Mar. 2014, at 59.

103. NAT’L SEC. L. DEP’T, THE JUDGE ADVOCATE GENERAL’S L. CTR. AND SCH., U.S. ARMY, OPERATIONAL LAW HANDBOOK 7–8 (2021) [hereinafter OPERATIONAL LAW HANDBOOK 2021].

104. Maj. Anthony V. Lenze, *Are We Allowed to Be There?: Understanding Mission Authority in the Context of the Fatal Niger Ambush*, ARMY L. 2019), at 37–38.

105. For the last two decades, the authority to conduct unilateral and partnered combat operations in Afghanistan, Iraq, and Syria has largely been premised on two Authorizations for the Use of Military Force enacted by Congress. But during that same period, there have been a number of significant military operations that relied solely on the President’s Article II authority. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Auth. to Use Mil. Force in Libya, 35 Op. O.L.C. 20 (2011); Apr. 2018 Airstrikes Against Syrian Chem.-Weapons Facilities, 42 Op. O.L.C. 1 (May 31, 2018).

106. 50 U.S.C. §§ 1541–1548.

107. 50 U.S.C. § 1549.

108. Scott R. Anderson, *The Most Important Report of the Trump Administration (So Far) is Due on Monday*, LAWFARE (Mar. 8, 2018), <https://perma.cc/PZR4-EGKE>; Elliot Setzer, *White House Releases Report Justifying Soleimani Strike*, LAWFARE (Feb. 14, 2020), <https://perma.cc/N6TW-NCSS>.

109. Friend, *supra* note 22; Lenze, *supra* note 104, at 37–38.

110. The literature in regard to this subject is extensive. For a recent exploration of the President’s authority to conduct military operations in historical context, see Aaron Haviland, *Misreading the History of Presidential War Power, 1789-1860*, 24 TEX. REV. LAW & POL. 481 (2020).

particular military mission, that mission must be paid for. The legal authority to expend government funds for a specific purpose (herein designated as “fiscal authority”) is a necessary prerequisite for any military operation. For this reason, it is clear that Congress possesses a potent check on Executive war powers through the so-called “power of the purse.”<sup>111</sup>

Article I, Sections 8 and 9 of the Constitution grant Congress the power to raise revenue and appropriate public funds in order to pay for government activities.<sup>112</sup> With a few notable exceptions, employees of the federal government (including the military) may not obligate the Treasury of the United States to pay for goods or services without an existing appropriation.<sup>113</sup> Under the current fiscal framework, Congress typically passes authorization acts in order to describe a particular purpose or object for which the government may obligate appropriated funds. Nevertheless, an authorization to use funds without a corresponding appropriation is a “dead letter.”<sup>114</sup> Moreover, in compliance with the Purpose Statute, first enacted in 1809,<sup>115</sup> the expenditure of public funds must comply with the particular purpose for which those funds were originally appropriated.<sup>116</sup> That is, a valid government expense must either be specifically authorized by statute or be “necessary and incident” to the stated purpose of a more general appropriation. Furthermore, the expenditure must not be prohibited by law, and it must not be provided for by a more specific appropriation.<sup>117</sup>

Congressional dominance in the realm of appropriations is particularly relevant in the context of SOF efforts to train and equip foreign partners. The President may have the ability to order troops to support a particular government or insurgent group. But before military planners may obligate the first penny of tax-payer funds for the benefit of foreign personnel, they must first identify a specific grant of statutory authority to do so.

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111. Professor John Yoo has gone so far as to suggest that the spending power is the *only* legitimate legislative check on executive war making. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996). However, Congress does not have unlimited authority to use the spending power to restrict the President in the execution of valid national security activities. Raven-Hansen & Banks, *supra* note 71, at 114–32.

112. U.S. CONST. art. I, §§ 8–9.

113. 31 U.S.C. § 1341; OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 2021. The Feed and Forage Act, now codified at 41 U.S.C. § 6301(b), is an exception to this general rule. For an example of how the Feed and Forage Act has operated in practice, see Raven-Hansen & Banks, *supra* note 71, at 86–92.

114. See Anthony V. Lenze, *Traditional Combatant Commander Activities: Acknowledging and Analyzing Combatant Commanders’ Authority to Interact with Foreign Militaries*, 225 MIL. L. REV. 641, 657–58 (2017).

115. “[T]he sums appropriated by law for each branch of expenditure in the several departments shall be solely applied to the objects for which they are respectively appropriated, and to no other . . .” Act of May 3, 1809, Session II, ch. 28, § 1. The current purpose statute dates back to 1982. See Act of Sept. 13, 1982, Pub. L. 97-258, § 1, 96 Stat. 917 (1982) (codified at 31 U.S.C. § 1301(a) (2018)).

116. 31 U.S.C. § 1301(a) (2018); see also U.S. DEP’T OF DEF., DoD 7000.14-R, FIN. MGMT. REGUL., vol. 14, ch. 2, para. 020202.B. 1-6 (2020).

117. OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 348–49; Propriety of Funding Methods Used by the Dep’t of Def. in Combined Exercises in Honduras, 63 Comp. Gen. 422, at 24 (1986), <https://perma.cc/WW5M-244T> [hereinafter 1986 Alexander Opinion].

*A. Funding By, With and Through Operations Prior to 1983*

During World War II, the OSS was given broad discretion to pay for UW activities with indigenous resistance movements. When the organization was founded in the summer of 1942, it had no specific appropriation from Congress. Instead, it operated under the President's Emergency Fund. These general funds could be expended "without regard to the provisions of law regarding the expenditure of Government funds or the employment of persons in the Government Service."<sup>118</sup> Moreover, the Emergency Fund permitted OSS to obligate money "for objects of a confidential nature," without disclosing the nature of those expenditures to Congress.<sup>119</sup> Under the authority of the First War Powers Act, OSS could likewise "enter into contracts '... without regard to the provisions of law relating [thereto].'"<sup>120</sup>

By 1944, the National War Agencies Appropriation Act provided a \$35,000,000 operating budget for OSS. Nevertheless, this was still an extraordinarily broad grant of authority with few controls. Of the amount appropriated, \$23,000,000 could be expended without regard to the general requirements of fiscal law, while \$21,000,000 of the appropriation could be expended for secret activities that were payable upon the certificate of the OSS Director alone.<sup>121</sup> However, Congress's *carte blanche* to the President and the Director of OSS to pay for BWT activities would not continue into the future.

As the Cold War took shape in the late 1940s, foreign aid became a cornerstone of America's national security policy, beginning with economic and military assistance to Greece and Turkey under the Truman Doctrine.<sup>122</sup> As one scholar has put it, this was "the first time in the history of the American Republic, [that] the House of Representatives, where money bills originate, became a continuing major player in foreign policy."<sup>123</sup> Congress soon created a patchwork of foreign aid authorities administered by several government agencies, which President Kennedy would later describe as "bureaucratic, fragmented, awkward, and slow."<sup>124</sup>

At the President's urging, Congress created a new basis for foreign aid through the Foreign Assistance Act of 1961 (FAA). This placed the State Department firmly in charge of assistance to partner nations including military aid.<sup>125</sup> Over the next decade, Congress attempted to exercise a measure of control over foreign

118. OFFICE OF LEGIS. COUNCIL, LEGISLATIVE HISTORY OF THE CENTRAL INTELLIGENCE AGENCY NATIONAL SECURITY ACT OF 1947 8 (1967).

119. *Id.* at 8–9.

120. *Id.* at 8.

121. *Id.* at 10.

122. Lee Edwards, *Congress and the Origins of the Cold War: The Truman Doctrine*, 151 WORLD AFFS. 131, 131 (Winter 1988–1989).

123. *Id.* at 136.

124. DIANNE E. RENNACK & SUSAN G. CHESSER, CONG. RSCH. SERV., R40089, FOREIGN ASSISTANCE ACT OF 1961: AUTHORIZATIONS AND CORRESPONDING APPROPRIATIONS 1 (2011).

125. Foreign Assistance Act of 1961, 22 U.S.C. 2151 et seq. (2016); OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 358.

assistance with the threat of a legislative veto as well as various reporting requirements.<sup>126</sup> Nevertheless, the FAA provided the President with “practically untethered special funds” and the authority to waive many of the act’s restrictions.<sup>127</sup> Moreover, some \$50 million could be spent without specifying its exact use to Congress if the President found this to be “inadvisable.”<sup>128</sup> The act also gave the President the authority to draw down some \$300 million from the DoD’s budget for the purposes of foreign assistance.<sup>129</sup> Yet over the next 15 years, executive action during the Vietnam War forced Congress to reevaluate its approach to foreign assistance and to limit discretionary spending.

During the early 1960s, SOF working in Vietnam established a number of non-standard logistical techniques in order to provide food, clothing, military equipment, and even salaries to irregular partner forces using DoD funds.<sup>130</sup> As an example, when MACVSOG took over control of the CIDGs starting in late 1962, the Army “authorized local purchases from current operating funds at all U.S. Special Forces levels, allowed for informal justification for unusual items or quantities, dropped formal accountability for items on shipment to Vietnam, and devised what came to be known as ‘quick-reacting supply and procurement procedures.’”<sup>131</sup> As a result, from November 1962 through July 1963, “a monthly average of approximately 740 tons of equipment and supplies was airlifted from Saigon and Da Nang to Special Forces A detachments” working with the CIDGs.<sup>132</sup> Despite the lack of procedural accountability and safeguards, this reactive supply system has been credited with much of the success derived from the CIDG program.<sup>133</sup> Indeed, it was a hearkening back to the broad discretion OSS operatives had exercised to fund UW activities a generation before.

More troubling to Congress than these tactical-level innovations were efforts by U.S. Presidents to pay for a wider conflict in Southeast Asia through the FAA and other discretionary grants of fiscal authority. For instance, from 1962 to 1969, the United States funded a clandestine war in Laos largely by using the Executive transfer authority to move funds from the Agency for International Development (AID) to the CIA.<sup>134</sup> Furthermore, during the early 1970s, President Nixon used his authorities under the FAA to provide significant military aid to Cambodia while waiving Congressional restrictions.<sup>135</sup> In 1975, the Ford

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126. Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT’L L. 69, 73–76 (1988).

127. Raven-Hansen & Banks, *supra* note 71, at 104; Meyer, *supra* note 126, at 74.

128. Raven-Hansen & Banks, *supra* note 71, at 104 (citing Foreign Assistance Act of 1961, *supra* note 124, § 614(c) (current version at 22 U.S.C. § 2364(c)).

129. Raven-Hansen & Banks, *supra* note 71, at 104–05.

130. KELLY, *supra* note 57, at 35–37, 57–58.

131. *Id.* at 36.

132. *Id.* at 37.

133. *Id.* at 36.

134. Raven-Hansen & Banks, *supra* note 71, at 111–12.

135. Meyer, *supra* note 126, at 76 n.29.

Administration transferred some \$75 million to South Vietnam that had been congressionally-designated for other purposes.<sup>136</sup>

As a result of these activities, Congress took a number of steps to enhance oversight of discretionary spending for foreign assistance.<sup>137</sup> As early as 1971, Congress required that all Presidential findings permitting the government to waive funding restrictions must be reduced to writing, and further, the President must provide notice before exercising various discretionary authorities.<sup>138</sup> This was combined with more robust reporting requirements, and “fast-track” procedures for Congress to review Executive determinations.<sup>139</sup> Starting in the mid-1970s, Congress likewise tightened controls over arms sales to foreign nations and tied the provision of foreign assistance to human rights.<sup>140</sup> Finally, in 1974 Congress prohibited the discretionary transfer of DoD funds for a particular object if Congress had previously denied funding for that object.<sup>141</sup>

### *B. The Alexander Opinion: A Quantum Shift*

Although Congress exerted far greater control over foreign assistance funds in the aftermath of Vietnam, there were still significant questions concerning how various appropriations could be used to support foreign partners. During the early 1980s, BWT operations in Central America brought these questions to a head and thereby created the contemporary model for SOF train-and-equip activities.

As previously described, the United States provided covert support to the Contras, as well as overt military assistance to El Salvador and other Central American nations, in response to Sandinista aggression outside Nicaragua.<sup>142</sup> At the beginning of the Reagan Administration, the Contras were funded through a secret CIA contingency fund, and the expenditures were properly reported to the relevant congressional intelligence committees.<sup>143</sup> By 1982, however, Congress moved to limit funding for the Contras through the first Boland Amendment.<sup>144</sup> Over the next several years, the Administration played a fiscal game of cat and mouse with Congress as these restrictions became progressively more stringent.<sup>145</sup> By 1985, congressional controls were so tight that the Administration resorted to third-party solicitations to fund the Contras (sometimes expressly tied to *quid pro quo* arrangements), as well as profits gleaned from arms sales to Iran.<sup>146</sup>

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136. Raven-Hansen & Banks, *supra* note 71, at 112.

137. During the same period, Congress enacted the War Powers Resolution of 1973 in order to assert direct control over military operations. Act of Nov. 7, 1973, Pub. L. 93-148, § 2, 87 Stat. 555, (codified as 50 U.S.C. § 1541-1548 (2018)).

138. Meyer, *supra* note 126, at 76-77.

139. *Id.* at 78-79.

140. *Id.* at 79-82.

141. Raven-Hansen & Banks, *supra* note 71, at 112.

142. See discussion *supra* Section I.C.

143. Raven-Hansen & Banks, *supra* note 71, at 101.

144. *Id.* at 92.

145. *Id.* at 92-95, 105-06, 109, 113-14.

146. *Id.* at 95-97.



All the while, Congress sought to control overt assistance to El Salvador, limiting the amount of specific appropriations and tying the funds to improvements in human rights.<sup>147</sup> The President in turn unilaterally increased aid to El Salvador by tens of millions of dollars through discretionary funding mechanisms, such as emergency drawdowns and reprogramming.<sup>148</sup>

As Congress and the President continued to wrangle over control of U.S. policy in Central America, Rep. William Alexander asked the Comptroller General of the Government Accounting Office (GAO) to examine the use of DoD Operations and Maintenance (O&M) funds to pay for a major combined exercise in Honduras.<sup>149</sup> Congress appropriates O&M funds for “expenses, not otherwise provided for, necessary for the operation and maintenance of the [Army, Navy, or Air Force].”<sup>150</sup> They are the most common appropriation available to military commanders at all levels. Nevertheless, these funds are not intended for foreign assistance. In response to Rep. Alexander’s inquiry, the Comptroller General issued opinions in 1984 and 1986 that would provide the guiding principles for contemporary SOF activities with foreign partners.

The Ahuas Tara II exercise lasted from August 1983 until February 1984, and was officially meant to “discourage the leftist Sandinista government of Nicaragua from behaving aggressively in the region.”<sup>151</sup> Indeed, it was part of a series of combined maneuvers stretching back to 1981 in which 700 to 1,000 U.S. military personnel were in Honduras at any one time.<sup>152</sup> In effect, these maneuvers turned the nation into a forward base “for possible use against Nicaragua and perhaps El Salvador.”<sup>153</sup> Approximately 12,000 U.S. military personnel ultimately participated in the exercise including a significant contingent of SOF.<sup>154</sup> As part of the exercise, these troops engaged in several large-scale construction activities on Honduran bases, including the construction or expansion of several airstrips (some of which were apparently used to support the Contras),<sup>155</sup> the construction of approximately 300 wooden huts to use as barracks, dining facilities, and administrative offices, and the construction of two radar sites.<sup>156</sup> U.S. service members also executed humanitarian assistance missions in support of the exercise, including medical and veterinary services for Honduran civilians and the

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147. Kenneth E. Sharpe, *The Post-Vietnam Formula Under Siege: The Imperial Presidency and Central America*, 102 POL. SCI. Q. 549, 556–57 (Winter 1987–1988).

148. *Id.*

149. Propriety of Funding Methods Used by the Department of Defense in Combined Exercises in Honduras, 63 Comp. Gen. 422 (1984), <https://perma.cc/WW5M-244T> [hereinafter 1984 Alexander Opinion]; see generally Timothy Austin Furin, *Legally Funding Military Support to Stability, Security, Transition, and Reconstruction*, ARMY L., Oct. 2008, at 1 (discussing the Alexander Opinion).

150. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, Title II, 133 Stat. 1288 (2020).

151. Fred Hiatt, *U.S. Combat Troops to Be Sent to Honduras*, WASH. POST (July 26, 1983), <https://perma.cc/F94U-YXJA>.

152. Sharpe, *supra* note 147, at 559–60.

153. Sharpe, *supra* note 147, at 559.

154. 1984 Alexander Opinion, *supra* note 149, at 1–7.

155. Sharpe, *supra* note 147, at 561.

156. 1984 Alexander Opinion, *supra* note 149, at 1.

construction of a school.<sup>157</sup> Finally, U.S. troops conducted extensive training of their Honduran counterparts including artillery, infantry, and medical training.<sup>158</sup> Special Forces personnel provided “basic and/or advanced classroom and field training to four Honduran battalions on mortars, fire-direction, and counterinsurgency tactics [that were] similar to that provided by security assistance-funded military training teams at the Regional Military Training Camp.”<sup>159</sup> All of these activities were paid for with O&M funds.<sup>160</sup>

In the 1984 Alexander opinion, the Comptroller General acknowledged that O&M funds may be properly used for “a wide variety of activities in support of the operation of each military department,” and that these funds “are not subject to the same line-item scrutiny as are other types of appropriations.”<sup>161</sup> Nevertheless, the Comptroller General continued that DoD “clearly does not have unlimited discretion in determining which activities may be financed with O&M funds.”<sup>162</sup> Most pertinently for the purposes of this article, the Comptroller General reiterated that military training of foreign personnel is a security assistance activity “for which comprehensive legislative programs (and specific appropriation categories) have been established by the Congress.”<sup>163</sup> In short, the Comptroller General declared that the military cannot train or equip foreign partners using O&M funds without a specific statutory authorization from Congress. Indeed, training should normally be funded with money that has been specifically appropriated for foreign assistance purposes and is usually controlled by the State Department.<sup>164</sup> Otherwise, such training is in violation of the Purpose Statue, and may lead to an Anti-Deficiency Act violation.<sup>165</sup> According to the Comptroller General, the only exception to this rule involves informal training that is strictly for the purpose of promoting greater interoperability, safety, or familiarization between foreign forces and U.S. forces.<sup>166</sup> Within the military, this kind of interoperability training has come to be known as “Little T” training<sup>167</sup> in order to

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157. *Id.* at 1.

158. *Id.* at 1.

159. *Id.* at 19–20.

160. *Id.* at 1–2.

161. *Id.* at 3.

162. *Id.* at 3.

163. *Id.* at 20. It is interesting to note that prior to *Ahuas Tara II*, Army Judge Advocates and the DoD Office of General Counsel had both apparently argued that the level of training contemplated during the exercise could not be funded with O&M dollars. *Id.*

164. OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 358–67.

165. *Id.* at 349.

166. 1984 Alexander Opinion, *supra* note 149, at 20.

167. The term “Little T” training often leads to confusion. In the 1984 Alexander Opinion, the Comptroller General acknowledged that improving interoperability inevitably results in the “transfer of information and skills between the armed forces of the participating countries.” 1984 Alexander Opinion, *supra* note 148, at 20. Nevertheless, the primary beneficiary of this familiarization is the United States. There is no intent to train a partner force in a new ability, but merely to ensure that U.S. troops can safely and efficiently work with their foreign collaborators. It is for this reason that the expenditure of O&M funds is appropriate. *See* OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 367–68.

distinguish it from “Big T” training, or formal training that is equivalent to foreign assistance.<sup>168</sup>

Despite the restrictions imposed by the 1984 Alexander Opinion, Special Forces personnel continued to provide training to Honduran troops that apparently went beyond mere familiarization and that was funded using O&M dollars.<sup>169</sup> They argued to the Comptroller General that this was proper because “part of the role of the Special Forces is to train indigenous forces, and that such a role would be severely restricted if operational funds could not be used to that end.”<sup>170</sup> Moreover, they argued that the primary purpose of this training was not security assistance; instead, it was designed to train “Special Forces to fill their role as instructors of friendly indigenous forces.”<sup>171</sup> The training of Honduran troops was merely a “by-product” of these activities.<sup>172</sup> However, a further goal was “to create internal force support for specific U.S. operations.”<sup>173</sup>

In 1986, the Comptroller General issued a second Alexander opinion which agreed that there is a distinction between SOF personnel training a partner force for the purposes of security assistance versus training that is meant “to fulfill the Special Forces’ own training requirements,” or that consists of “minor training activities incidental to other U.S. operational requirements.”<sup>174</sup> Indeed, as a policy matter, the Comptroller General opined that,

Training of indigenous military units is a fundamental role of the Special Forces; such training is provided as a means of utilizing indigenous forces as resources to achieve specific U.S. operational goals. To require that the host country utilize scarce security assistance funds for the limited training thereby imparted would be both impractical and unfair.<sup>175</sup>

Even so, the Comptroller General emphasized that training which is equivalent to foreign assistance must be paid for with funds that are appropriated for that purpose.<sup>176</sup> Furthermore, the Comptroller General, apparently uncomfortable with the implications of his own analysis, urged Congress to clarify “the role of the Special Forces by specifically authorizing them to conduct (and use operational funds for) limited training of foreign forces during the course of field operations (actual or training exercises), for purposes of ensuring indigenous support of U.S. operations.”<sup>177</sup>

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168. OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 367–68.

169. 1986 Alexander Opinion, *supra* note 117, at 26.

170. *Id.* at 23.

171. *Id.* at 24.

172. 1986 Alexander Opinion, *supra* note 117, at 23.

173. *Id.* at 24.

174. *Id.* at 25–26.

175. *Id.* at 25.

176. *Id.* at 2, 29.

177. *Id.* at 26.

Congress created USSOCOM later that same year and endowed it with the statutory mission to conduct activities by, with, and through foreign partners including UW and FID.<sup>178</sup> Congress also provided MFP-11 funds for SOF-peculiar acquisitions and activities, although these funds were clearly not designed for foreign assistance.<sup>179</sup> That same year, Congress further authorized the Secretary of Defense to pay for the incremental expenses of a “developing country” that participated in bilateral or multilateral military exercises with the United States, such as Honduras during Ahuas Tara II.<sup>180</sup> But it was not until 1991 that Congress finally acted on the Comptroller General’s invitation to clarify SOF’s ability to train foreign partners. That year, Congress authorized the Joint/Combined Exchange Training Program (JCET). This program permits SOF units to pay for expenses associated with training foreign troops, and in some cases, to pay for the expenses of those foreign troops, insofar as the “primary purpose” of the activity is to train U.S. SOF.<sup>181</sup> Nevertheless, Congress did not directly address the Comptroller General’s assertion that SOF could use O&M funds in order to provide minor training to foreign partners if that training was incidental to a military operation.

The two Alexander opinions made it clear that despite the fact that SOF is designed to work by, with, and through foreign forces, it cannot utilize its own operating funds to train and equip those forces. Instead, these activities require independent fiscal authority from Congress. At most, SOF may engage in interoperability training with foreign partners, and they may engage in training exercises with foreign partners under the JCET program.<sup>182</sup> Despite the fact that Congress specifically designated UW and FID as statutory missions for SOF, minor training of foreign forces that takes place in connection with a U.S. military operation never developed into a stand-alone justification for the use of O&M funds.<sup>183</sup> However, to the extent that this form of training does not amount to security assistance, it could be argued that such activities have been subsumed within the concept of “Little T” training. In addition, SOF may occasionally rely on various emergency funds in order to pay for train-and-equip missions, just as OSS once did.<sup>184</sup> But the use of any of these authorizations

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178. 10 U.S.C. § 167 (2018).

179. ELVIRA N. LOREDO, JOHN E. PETERS, KARLYN D. STANLEY, MATTHEW E. BOYER, WILLIAM WELSER IV & THOMAS S. SZAYNA, INT’L SEC. AND DEF. POL’Y CTR. OF THE RAND NAT’L DEF. RSCH. INST., *AUTHORITIES AND OPTIONS FOR FUNDING USSOCOM OPERATIONS* 46–47 (2014).

180. National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 1321, 100 Stat. 3816 (1986).

181. 10 U.S.C. § 322(b).

182. Jason A. Quinn, *Other Security Forces Too: Traditional Combatant Commander Activities Between U.S. Special Operations Forces and Foreign Non-Military Forces*, 227 MIL. L. REV. 336, 349 n.75 (2019).

183. The U.S. Army JAG Corps’ OPLAW Handbook lists only two exceptions to the general rule that foreign assistance must be funded by the State Department: a statutory authorization or appropriation, or Little “T” interoperability training. OPERATIONAL LAW HANDBOOK 2021, *supra* note 103, at 367–68.

184. For example, Emergency and Extraordinary Expense (EEE) Funds are authorized under 10 U.S.C. § 127 (2018) to “provide for any emergency or extraordinary expense which cannot be anticipated or classified.” For a discussion of this authority, *see* LOREDO ET AL., *supra* note 179, at 49.

now involves significantly more legislative and executive oversight than could ever have been imagined during the dark days of the Second World War.

### C. *The Patchwork of Authorities*

In a post-*Alexander* world, DoD's authority to engage with foreign militaries was extremely limited. Under the FAA and related statutes, the State Department retained primary responsibility for foreign assistance. However, starting in the late 1980s, Congress began to create a patchwork of fiscal authorities, which authorized DoD to pay for discrete, narrowly tailored activities with foreign partners, such as JCETs.<sup>185</sup>

The events of September 11, 2001, and the subsequent War on Terror, unmistakably demonstrated the need for expanded foreign assistance authorities within DoD. Indeed, Congress ultimately recognized that it must close two fundamental "authority gaps" in order to effectively combat terrorism as part of a nascent BWT strategy. First, Congress needed to provide authorities for DoD to train and equip the regular military forces of foreign states to conduct CT operations; and second, it needed to provide authorities for DoD to train and equip irregular surrogate forces to conduct CT operations.<sup>186</sup> Generally speaking, the first category of authorities—what might be characterized as capacity-building authorities—was designed for use by any DoD component, while the second category—what might be characterized as surrogate development authorities—was limited to units under the purview of USSOCOM.<sup>187</sup>

Still, these authorities did not appear immediately. Unlike the OSS operatives who parachuted into France, or the Special Forces A-teams that provided training and logistical support to the Montagnards, the Green Berets who infiltrated Afghanistan in late 2001 had no authority to train and equip their Northern Alliance partners. Instead, they were limited to providing "Little T" training in conjunction with combat operations.<sup>188</sup> Any immediate financial or logistical support to the Afghans had to be provided by the CIA.<sup>189</sup> New authorizations slowly trickled out from Congress thereafter. Indeed, for more than fifteen years after the 9/11 attacks, Congress provided DoD with a series of *ad hoc* fiscal authorities that were haphazardly peppered throughout the U.S. code and various annual authorizations.<sup>190</sup>

185. See, e.g., National Defense Authorization Act for Fiscal Year 1992 and 1993, Pub. L. 102-190, § 1052(a)(1), 105 Stat. 1470 (1996).

186. See, e.g., 10 U.S.C. § 127d (2011); 10 U.S.C. § 153 (2011); 10 U.S.C. §§ 1050–1051(a) (2011); 10 U.S.C. §§ 2010–2011 (2011); 10 U.S.C. § 2282 (2015); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1204 & 1207, 127 Stat. 672 (2013) (as amended); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1081, 125 Stat. 1298 (2011) (as amended).

187. Compare 10 U.S.C. § 2282 (authorizing capacity-building), with National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811 (2004) (authorizing surrogate development).

188. Grant & Huntley, *supra* note 2, at 565–66.

189. Grant & Huntley, *supra* note 2, at 566; BEST & FEICKERT, *supra* note 2, at 4.

190. See generally DEF. INST. OF SEC. COOP. STUD., SECURITY COOPERATION PROGRAMS, Revision 16.3 (Nov. 15, 2016); LOREDO ET AL, *supra* note 179.

### 1. Rationalizing DoD Authorities

This patchwork of fiscal authorities created significant challenges for DoD as it attempted to prosecute a worldwide conflict over many years. When Congress enacted new authorizations for DoD, it often established limitations on their amount, as well as limitations on their temporal and geographical applicability. Accordingly, these statutes had to be constantly reauthorized and amended in order to keep up with the changing conditions of war, a state of affairs that greatly complicated operational planning and execution.<sup>191</sup>

In order to resolve these concerns, Congress finally systematized DoD's foreign assistance authorities as part of the 2017 National Defense Authorization Act (NDAA). This codified the majority of extant authorizations into a single statutory scheme contained in 10 U.S.C. §§ 311–352. In fact, the effort ultimately created several new authorities for DoD, although they were all based on preexisting statutes.<sup>192</sup> 10 U.S.C. § 333 provides an illustrative example of newly-updated, capacity-building authority that is available for any DoD component. Sec. 333 permits DoD to train and equip “the national security forces of one or more foreign countries for the purpose of building the capacity of such forces.”<sup>193</sup> Importantly, these activities can be paid for with DoD's own O&M dollars.<sup>194</sup> In creating this particular authorization, Congress aggregated and amended the provisions of at least four preexisting authorities.<sup>195</sup> Yet Sec. 333 still has several important restrictions. Like the majority of the 2017 authorizations, the support authorized under

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191. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, § 1207, 125 Stat. 1298 (2011) (as amended by National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113–291, § 1201, 128 Stat. 3292 (2014)); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115–91, § 1206, 131 Stat. 1283 (2017) (amending authorized dates); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114–92, § 1250, 129 Stat. 726 (2015) (as amended by National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114–328, § 1237, 130 Stat. 2000 (2016)); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115–91, § 1234, 131 Stat. 1283 (2017); John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115–232, § 1246, 132 Stat. 1636 (2018) (amending the amount of authorized support).

192. 10 U.S.C. §§ 311–352 (2018).

193. 10 U.S.C. § 333(a) (2018). As of 2017, the Department of Defense was operating § 333 programs in Cameroon, Chad, Ethiopia, Kenya, Niger, Uganda, Zambia, Indonesia, the Philippines, Georgia, the Republic of Serbia, Ukraine, Bahrain, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Tunisia, United Arab Emirates, Maldives, Pakistan, Tajikistan, Uzbekistan, Antigua and Barbuda, Bahamas, Barbados, Belize, Columbia, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Kitts and Nevis, St. Vincent and Grenadines, and Trinidad and Tobago. U.S. DEP'T OF DEF., FOREIGN MILITARY TRAINING REPORT, FISCAL YEARS 2017 AND 2018, JOINT REPORT TO CONGRESS VOL. I, at III-1 to VI-11 (2017), <https://perma.cc/W2YS-3NXW>.

194. 10 U.S.C. § 333(g)(1).

195. *See* 10 U.S.C. § 2282 (codifying National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109–163, § 1206, 119 Stat. 3136 (2006) (as amended)); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113–66, § 1204, 127 Stat. 672 (2013) (as amended); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112–81, § 1207, 125 Stat. 1298 (2011) (as amended); National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104–201, § 1082, 110 Stat. 2422 (1996) (as amended).



Sec. 333 is limited to Ministry of Defense (MoD) troops,<sup>196</sup> that is, regular military forces.<sup>197</sup> Additionally, while Sec. 333 is not limited by time, geography, or amount, it contains limitations on the types of operations DoD is permitted to support.<sup>198</sup>

## 2. USSOCOM-Specific Authorities

In contrast to the capacity-building mission that was provided to DoD as a whole, Congress entrusted the development of surrogate forces to SOF. Beginning with Sec. 1208 of the 2005 NDAA, Congress authorized the Secretary of Defense to expend funds to “provide support to foreign forces, irregular forces, groups, and individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism.”<sup>199</sup> Unlike capacity-building authorities, Sec. 1208 permitted SOF to train and equip irregular proxy forces in addition to MoD troops. This included the provision of arms, equipment, uniforms, food, and even the payment of salaries.<sup>200</sup> As a result, Sec. 1208 finally solved the problem that Special Forces had faced in Afghanistan since 2001 and provided a sound fiscal basis for UW activities. Nevertheless, this authority was also restricted in several ways. First, and perhaps most importantly, Sec. 1208 funds were tied to a very specific mission set: counterterrorism.<sup>201</sup> Second, Congress limited the authority by time: it originally applied only to “fiscal years 2005 through 2007.”<sup>202</sup> Without reauthorization, the

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196. A Ministry of Defense (or Defence) is the preferred term for a Department of Defense analog in a foreign country. *See, e.g.*, Ministry of Defence, UK.Gov, <https://perma.cc/AXY3-EEJ1> (United Kingdom Ministry of Defence); Home, MINISTRY OF DEFENSE OF UKRAINE, <https://perma.cc/TGF3-DPEN>; Home, FEDERAL MINISTRY OF DEFENCE, <https://perma.cc/GC3R-BLY6> (German Federal Ministry of Defence); Topics, MINISTRY OF DEFENSE, <https://www.mod.go.jp/en/> (Japanese Ministry of Defense); Topics, MINISTRY OF NATIONAL DEFENSE, <https://perma.cc/38JJ-QVP4> (Republic of Korea Ministry of National Defense).

197. Congress previously used the term “national military forces” to refer to MoD forces. *See, e.g.*, National Defense Authorization Act 2016, Pub. L. No. 114-92, § 1251, 129 Stat. 726 (2015). Over time, however, this term has fallen out of favor, and is replaced with the more inclusive term “national security forces.” *Compare* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1233, 130 Stat. 2000 (2016) (using the term “national military forces”), *with* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1205, 131 Stat. 1283 (2017) (using the term “national security forces”).

198. 10 U.S.C. § 333(a)(1–7) (2018) (authorizing capacity building in the following areas: (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) air domain awareness operations; (8) 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; (9) cyberspace security and defensive cyberspace operations).

199. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208, 118 Stat. 1811 (2004).

200. Daniel W. Hancock III, *Funding Surrogate Forces in the Fight Against Terrorism*, 228 MIL. L. REV. 22, 36–37 (2020).

201. National Defense Authorization Act for Fiscal Year 2005 § 1208(a).

202. *Id.* § 1208(h).

authority would lapse.<sup>203</sup> Third, Congress limited the authority by amount: DoD was authorized to expend a paltry \$25,000,000 per fiscal year in order to support its surrogates.<sup>204</sup> In addition to these limitations, Congress required DoD to report the use of this authorization within 48 hours,<sup>205</sup> and expenditures had to be approved by the Secretary of Defense himself.<sup>206</sup> These restrictions made it plain that Congress planned to keep DoD and SOF on a tight leash with regard to funding irregular forces and other surrogates.<sup>207</sup>

Despite Congress' initial reluctance concerning the 1208 program, it expanded significantly over the next decade. The 2009, 2010, 2011, 2012, and 2015 National Defense Authorization Acts progressively increased the amount of money authorized for expenditure from \$25,000,000 to \$75,000,000 per fiscal year while further clarifying the reporting requirements.<sup>208</sup> By 2017, the program was running so smoothly that Congress made the authorization permanent as 10 U.S.C. § 127e.<sup>209</sup> This codification not only removed the need for Congress to continually reauthorize the statute, it also increased the authorization to its largest amount yet: \$100,000,000 per fiscal year.<sup>210</sup>

Since § 127e was codified, it has been used to support counterterrorism operations by, with, and through surrogate forces in Somalia, Kenya, Tunisia, Niger, Cameroon, Mali, Mauritania, Libya, and Syria.<sup>211</sup> The slow development of the

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203. See, e.g., National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1535, 128 Stat. 3292 (2014) (exemplifying an authorization that lapsed due to a lack of reauthorization or permanent codification).

204. National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208(a), 118 Stat. 1811 (2004).

205. *Id.* § 1208(c).

206. *Id.* § 1208(d).

207. The Department of Defense—particularly those responsible for the implementation of this program—clearly understood this responsibility. See *Evolution, Transformation, and Sustainment: A Review and Assessment of the Fiscal Year 2019 Budget Request for U.S. Special Operations Forces and Command Before the Subcomm. on Emerging Threats & Capabilities, H. Armed Servs. Comm.*, 115th Cong. 17 (2018) (statement of General Raymond A. Thomas III, Commander, U.S. Special Operations Command), <https://perma.cc/H CJ2-9T J2>; *Hearing to Consider the Nominations of: Lieutenant General Thomas D. Waldhauser, USMC, to be General and Commander, United States Africa Command; and Lieutenant General Joseph L. Lengyel, ANG, to be General and Chief of the National Guard Bureau Before the S. Armed Servs. Comm.*, 114th Cong. 26–27 (2016) (advance policy questions for Lieutenant Gen. Thomas D. Waldhauser, U.S. Marine Corps Nominee for Commander, U.S. Afr. Command), <https://perma.cc/2PMV-E9U7>.

208. See National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 1208, 122 Stat. 4356 (2008); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1202, 123 Stat. 2190 (2009); National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1201, 124 Stat. 4137 (2011); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1203, 125 Stat. 1298 (2011); National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1208, 128 Stat. 3292 (2014).

209. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1203, 130 Stat. 2000 (2016) (codified as 10 U.S.C. § 127e (2018) and amended by National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1031, 131 Stat. 1283 (2017)). This codification occurred at the same time that Congress created 10 U.S.C. §§ 311–352 (2018), *supra* note 192.

210. 10 U.S.C. § 127e.

211. Hancock, *supra* note 200, at 23 n.1.

authority since 2005 allowed USSOCOM to demonstrate that it was not only capable of successfully conducting operations under this authorization, but that it was also capable of “answering the mail” from a skeptical Congress.<sup>212</sup> Moreover, the history of § 127e demonstrates the extent to which Congress has fully committed itself to a robust BWT strategy in order to combat terrorism.

### III. THE DEVELOPMENT AND IMPLEMENTATION OF IRREGULAR WARFARE AUTHORITY THROUGH SECTION 1202

The process that led to the codification of 10 U.S.C. § 127e also laid the groundwork for the next iteration of BWT authority, colloquially known as Sec. 1202. Like § 127e, this new authorization permits DoD to train and equip non-MoD forces that support SOF activities.<sup>213</sup> Yet Sec. 1202 is not tied to a counterterrorism mission set; instead, it is designed to facilitate irregular warfare operations against hostile state actors and their proxies within the competition environment.

#### A. *The Need for Sec. 1202*

By 2014, it had become clear to defense analysts that the United States was entering a new era of great power competition with foreign adversaries, such as Russia and China.<sup>214</sup> Although there is always a possibility of direct hostilities between the United States and its adversaries, it seemed likely that much of this competition would take place in the shadowy “gray zone” between war and peace.<sup>215</sup> Consequently, as early as November 2015, Congress instructed DoD to prepare a strategy to “counter unconventional warfare threats posed by adversarial state and non-state actors.”<sup>216</sup> Yet many of the foreign assistance authorities that Congress had provided to DoD after 2005 were either tied to specific geographical areas or to the counterterrorism mission set. As of 2016, there was no specific fiscal authority that would allow SOF to support irregular forces in operations against hostile state actors either in the gray zone, or in the event of a direct armed conflict.

In October of that year, Major General Mark Schwartz, commander of Special Operations Command—Europe (SOCEUR),<sup>217</sup> directed his staff to develop a new legislative proposal for Congress.<sup>218</sup> SOCEUR oversees all special operations throughout the United States European Command (USEUCOM), an area

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212. Interview with Maj. Anthony Heisler, U.S. Special Operations Command Legis. Affs. Officer, in Washington, D.C. (Dec. 20, 2019) [hereinafter Heisler Interview].

213. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(a), 131 Stat. 1283 (2017).

214. CONG. RSCH. SERV., *supra* note 97, at 1–3.

215. CONG. RSCH. SERV., *supra* note 97, *passim*.

216. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1097, 129 Stat. 726 (2015).

217. Maj. Gen. Schwartz was subsequently promoted to Lieutenant Gen. and is now assigned as the U.S. Security Coordinator for Israel and the Palestinian Authority, Jerusalem. *Lieutenant General Mark C. Schwartz Biography*, U.S. EMBASSY IN ISRAEL, <https://perma.cc WR5P-G29Z>.

218. Telephone Interview with Lieutenant Colonel Gabriel A. Szody, Exec. Officer to the Commanding Gen., U.S. Army John F. Kennedy Special Warfare Center & Sch., Special Operations Ctr. of Excellence, in Fort Bragg, N.C. (Mar. 4, 2020) [hereinafter Szody Interview].

that includes Russia, Ukraine, and the Baltics.<sup>219</sup> At the time, Russia was heavily involved in an irredentist conflict in eastern Ukraine and was providing support to irregular proxy forces, as well as deploying significant numbers of undeclared Russian military personnel.<sup>220</sup> In reviewing SOCEUR's objectives in the region, MG Schwartz's staff had recently identified a gap in fiscal authorities that precluded certain critical operations, particularly in partnership with non-MoD forces.<sup>221</sup> These included: (1) training and equipping irregular partners to conduct a UW campaign with U.S. SOF during any potential hostilities; and (2) the creation of information networks capable of providing indicators and warnings of hostile military action, as well as providing information from contested areas in the event of war.<sup>222</sup>

In searching for a method to fund these activities, personnel from the J-35 staff section<sup>223</sup> first reviewed the panoply of DoD's foreign assistance authorizations, including traditional commander's authorities to engage with foreign forces.<sup>224</sup> They then compared these authorities with the operational requirements outlined above.<sup>225</sup> Upon completion of their analysis, two major gaps were apparent. First, with the exception of counterterrorism authority provided by what was then Sec. 1208, SOCEUR was unable to provide support of any kind to irregular, non-MOD forces.<sup>226</sup> Second, the majority of then-existing authorities centered around joint exercises<sup>227</sup> or a few narrowly tailored train-and-equip missions.<sup>228</sup> None of these authorizations offered the necessary permissions to provide full-scope support to an irregular force.<sup>229</sup>

When the SOCEUR staff presented its findings to MG Schwartz, he immediately ordered Lieutenant Colonel (LTC) Gabe Szody, then the J-35 Chief, Counter Russia Division, to draft a legislative proposal to bridge the identified authority gaps.<sup>230</sup> The legislation that MG Schwartz envisioned was 1208-like in

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219. See SOCEUR, <https://perma.cc/93A7-GLWW>.

220. See Victoria Butenko, Laura Smith-Spark & Diana Magnay, *U.S. Official Says 1,000 Russian Troops Have Entered Ukraine*, CNN (Aug. 29, 2014), <https://perma.cc/5HYH-NNKJ>; Gabriela Baczyńska & Aleksandar Vasovic, *Pushing Locals Aside, Russians Take Top Rebel Posts in East Ukraine*, REUTERS (Jul. 27, 2014), <https://perma.cc/CD2S-R8PA>.

221. Szody Interview, *supra* note 218.

222. Szody Interview, *supra* note 218.

223. See DEPLOYABLE TRAINING DIVISION JOINT STAFF J7, JOINT HEADQUARTERS ORGANIZATION, STAFF INTEGRATION, AND BATTLE RHYTHM (3d ed. 2019), <https://perma.cc/28LW-WQWR>.

224. These authorities include traditional commander's activities, Joint Combined Exercise Training, Counter Narcotics Training, and several others. Szody Interview, *supra* note 218. For more of a discussion of traditional commander's activities, see generally Lenze, *supra* note 113; Quinn, *supra* note 181. Additionally, the staff looked to not only SOCEUR, but also to Special Operations Command—Africa, which faced the same problem. Szody Interview, *supra* note 218.

225. Szody Interview, *supra* note 218.

226. Szody Interview, *supra* note 218. As discussed above in section II.C., the patchwork of existing authority was not designed to cover every event, and this was one such situation.

227. See, e.g., 10 U.S.C. §§ 153, 321, 322.

228. See, e.g., 10 U.S.C. § 2282; National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1207, 125 Stat. 1298 (2011) (as amended).

229. Szody Interview, *supra* note 218.

230. *Id.*

that it authorized monetary support to irregular forces, groups, and individuals who supported SOF activities. However, MG Schwartz wished to decouple the authority from counterterrorism.<sup>231</sup> In addition to the legislative proposal, MG Schwartz directed LTC Szody to produce an illustrative concept to demonstrate how the new authority would be used in practice.<sup>232</sup>

LTC Szody began his efforts by using Sec. 1208 as a building block.<sup>233</sup> However, where Sec. 1208 described its purpose as providing support to foreign forces that facilitate U.S. counterterrorism operations, he instead substituted the term “irregular warfare operations.”<sup>234</sup> The Department of Defense Dictionary of Military and Associated Terms defines “irregular warfare” as a “violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s).”<sup>235</sup> LTC Szody believed that this term was sufficiently broad to encompass all of SOCEUR’s operational requirements.<sup>236</sup> In time, however, this would prove to be controversial. LTC Szody kept the language from 1208 authorizing support to “foreign forces, irregular forces, groups, and individuals.”<sup>237</sup> Finally, he also provided an illustrative example of how the authority would operate if approved.<sup>238</sup> SOCEUR presented LTC Szody’s proposal to USEUCOM Legislative Affairs personnel in November 2016, and by December 2016, a final draft was complete.<sup>239</sup> In the interim, the proposal had garnered the attention of General Raymond Thomas, then-commander of USSOCOM, and thereafter, both USSOCOM and USEUCOM moved the proposal on parallel tracks into the legislative process.<sup>240</sup>

Considering the growing awareness of great power competition post-2014, it is not surprising that a number of entities aside from the SOCEUR staff were also considering the need for a 1208-like authority that was not tethered to CT. At the same time that LTC Szody was drafting his proposal at SOCEUR, Special Operations Legislative Affairs officers and congressional staffers were likewise contemplating a solution for existing authority gaps.<sup>241</sup> As a result, when the SOCEUR proposal finally reached Congress, the appropriate legislative mechanisms were already moving to ensure swift passage of the authorization as part of the FY2018 NDAA.<sup>242</sup>

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231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. U.S. DEP’T OF DEF., DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS 111 (2021) [hereinafter DOD DICTIONARY], <https://perma.cc/8VPN-SCTG>.

236. Szody Interview, *supra* note 218.

237. Szody Interview, *supra* note 218.

238. *Id.*

239. Szody Interview, *supra* note 218 (describing how the proposal was initially shopped to the staff from the primary U.S. Army force-provider for SOCEUR—10<sup>th</sup> Special Forces Group (Airborne) during October and November of 2016, first referred to as “12XX” during initial drafting, and “12XY” by the time that it was presented to USSOCOM).

240. *Id.*

241. Heisler Interview, *supra* note 212.

242. *Id.*

In its report accompanying Sec. 1202, the Senate Armed Services Committee noted its concern that “adversarial nations are becoming more aggressive in challenging U.S. interests and partnerships and destabilizing regional order through the use of asymmetric means that often fall below the threshold of traditional armed conflict, often referred to as the ‘grey zone.’”<sup>243</sup> The committee further noted that the “ability of U.S. SOF to conduct low-visibility, irregular warfare operations in politically sensitive environments make them uniquely suited to counter the malign activities of our adversaries in this domain.”<sup>244</sup> It therefore concluded that enacting the authority contained in Sec. 1202 would “provide the Secretary [of Defense] with the necessary options and flexibility to achieve U.S. military objectives.”<sup>245</sup> Yet during the final drafting process, the proposed language of the statute was changed, including the addition of a critical subsection that defines the term “irregular warfare.”<sup>246</sup>

### B. Sec. 1202 Structure and Content

Based on the provenance of Section 1202, it is of little wonder that the law’s final structure is startlingly similar to Sections 1208 and 127e.<sup>247</sup> The primary difference is the purpose of the statute: to provide support to foreign forces that facilitate irregular warfare operations conducted by U.S. SOF against state and non-state actors.<sup>248</sup> Indeed, other than changes to the statute’s monetary and

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243. S. REP. NO. 115-125, at 257 (2017).

244. *Id.*

245. *Id.*

246. The House of Representative did not initially include the language of § 1202 in its National Defense Authorization Act resolution, while the Senate did include the language in its National Defense Authorization Act resolution. Compare H.R. Res. 2810, 115th Cong. (2017), with S. Res. 1519, 115th Cong., § 1201 (2017). The language from the Senate resolution was then added to the House resolution during conference. See H.R. Rep. No. 115-404, at 360–363 (2017) (Conf. Rep.). One additional change that Congress made during conference was the inclusion of the following language: “Funds may not be made available under paragraph (1) until 15 days after the submittal of the strategy required by section 1097 of the National Defense Authorization Act for Fiscal Year 2016 (Public Law 114-92; 129 Stat. 1020).” Compare S. Res. 1519, 115th Cong., § 1201 (2017), with H.R. Rep. No. 115-404, at 360 (2017) (Conf. Rep.). This requirement held USSOCOM’s feet to the fire, requiring them to submit a global unconventional warfare strategy ordered by Congress two years earlier. National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1097, 129 Stat. 1020 (2015).

247. Although Congress codified 10 U.S.C. § 127e during December of 2016, the drafting of what would become § 1202 of the FY2018 NDAA started before § 127e was codified. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 1203, 130 Stat. 2000 (2016) (codified as 10 U.S.C. § 127e (2018)).

248. Compare National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1208(a), 118 Stat. 1811 (2004), with National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(a), 131 Stat. 1283 (2017). Both the Department of Defense and USSOCOM share this opinion. See U.S. Dep’t of Def., Directive-type Memorandum (DTM)-18-005, *Authority for Support of Special Operations for Irregular Warfare (IW)* (Aug. 3, 2018). Compare USSOCOM DIRECTIVE NO. 525-19, 1208 AUTHORITY—SUPPORT OF SPECIAL OPERATIONS TO COMBAT TERRORISM (Oct. 13, 2016), with USSOCOM DIRECTIVE NO. 525-47, 1202 AUTHORITY—SUPPORT OF SPECIAL OPERATIONS FOR IRREGULAR WARFARE (Jul. 19, 2018) (both providing nearly identical implementation guidance for both authorities). The two directives listed above are classified, but set forth the policy and processes for implementing § 127e and § 1202, respectively.



temporal limitations,<sup>249</sup> the *only* difference between the substantive paragraphs of 10 U.S.C. § 127e and Sec. 1202 is the articulated purpose of the statute.<sup>250</sup> The drafters likewise reused language from § 127e concerning reporting requirements to Congress,<sup>251</sup> limits on the permissible delegation of authority,<sup>252</sup> and limits on the execution of covert activities.<sup>253</sup>

Despite these broad similarities between the statutes, Congress saw the need to include additional constraints and prerequisites in Sec. 1202. For instance, Sec. 1202 requires the Secretary of Defense to provide Congress with a written determination that support provided to foreign personnel in compliance with the statute does not constitute an independent authorization to introduce U.S. troops into hostilities as defined by the War Powers Resolution.<sup>254</sup> The Secretary must also determine that the provision of support under Sec. 1202 does not constitute authorization “for the provision of support to [foreign personnel] for the conduct of operations that United States Special Operations Forces are not otherwise legally authorized to conduct themselves.”<sup>255</sup> At its least restrictive, this condition might simply be interpreted to mean that Sec. 1202 funds cannot be used to finance an operation unless it complies with the general provisions of law that would be applicable if SOF were to execute it. However, a more likely interpretation is that Sec. 1202 funds cannot be used to support a particular mission unless SOF have been delegated the operational authority to conduct an analogous type of mission. In other words, SOF cannot use Sec. 1202 funds to provide direct support to surrogates in the execution of combat operations unless they themselves have the operational authority to engage in combat.<sup>256</sup> Both of these restrictions indicate a concern in Congress that executing irregular warfare activities might bring the United States perilously close to war with another nation-state. For this reason, it is important to reiterate that Section 1202 is a fiscal authority only. SOF still requires proper operational authority, flowing

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249. The original statute authorized the expenditure of a mere \$10,000,000 of O&M funds per annum in fiscal years (FY) 18–20. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(a), 131 Stat. 1283 (2017).

250. Compare 10 U.S.C. § 127e(a), with National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(a). The only other significant change was the inclusion of the language “and authorized” in the operative paragraph. Compare S. Res. 1519, 115th Cong., § 1201 (2017), with H.R. Rep. No. 115-404, at 360 (2017) (Conf. Rep.).

251. Compare 10 U.S.C. § 127e(d), with National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(d), 131 Stat. 1283 (2017); and compare 10 U.S.C. § 127e(h), with National Defense Authorization Act for Fiscal Year 2018 § 1202(h).

252. Compare 10 U.S.C. § 127e(e), with National Defense Authorization Act for Fiscal Year 2018 § 1202(e).

253. Compare § 127e(f), with National Defense Authorization Act for Fiscal Year 2018 § 1202(f).

254. National Defense Authorization Act for Fiscal Year 2018 § 1202(f)(2).

255. National Defense Authorization Act for Fiscal Year 2018 § 1202(f)(1).

256. During § 127e counter-VEO operations, SOF frequently have the operational authority to execute A/A/A missions with foreign partners even when they do not have the operational authority to engage in combat. See Friend, *supra* note 22; Morgan, *supra* note 96; Kyle Rempfer, *Army Advisers in Africa Following Spike in Combat*, ARMY TIMES (Mar. 24, 2020), <https://perma.cc/BBJ4-FYLW>.

from the President, in order to conduct any Section 1202-enabled missions.<sup>257</sup>

Even so, this same concern is evident in the definition of irregular warfare that Congress included in Sec. 1202.<sup>258</sup> This describes irregular warfare as “activities in support of predetermined United States policy and military objectives conducted by, with, and through regular forces, irregular forces, groups, and individuals participating in competition between state and non-state actors short of traditional armed conflict.”<sup>259</sup> This definition is not contained anywhere in DoD doctrine, and it presents a highly idiosyncratic conception of irregular warfare that is wholly unique to the statute.<sup>260</sup> Indeed, this definition was one of the primary areas of friction as the law developed.<sup>261</sup> Since the purpose of the statute is to authorize support to irregular warfare operations, the meaning of that term obviously provides the effective boundaries of the authority. From Congress’ perspective, then, the definition of “irregular warfare” needed to be sufficiently broad so as to allow SOF to operate effectively, while sufficiently narrow so as to limit the scope of permissible expenditures.<sup>262</sup>

As previously noted, the DoD Dictionary of Military and Associated Terms defines irregular warfare as a “violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s).”<sup>263</sup> This definition shares some common elements with the statute’s description of irregular warfare as “competition between state and non-state actors short of traditional armed conflict.”<sup>264</sup> But in this case, the phrase “competition . . . short of traditional armed conflict” does significant work. In fact, it encompasses the entire scope of permissible expenditures under Sec. 1202. Still, this phrase is not further explicated within the statute.

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257. See discussion *supra* Section II.

258. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(i), 131 Stat. 1283 (2017).

259. *Id.*

260. See generally U.S. DEP’T DEF. DIRECTIVE 3000.07, IRREGULAR WARFARE (Aug. 28, 2014) (C1 May 12, 2017); U.S. DEP’T DEF., IRREGULAR WARFARE: COUNTERING IRREGULAR THREATS JOINT OPERATING CONCEPT (May 17, 2010); DOD DICTIONARY, *supra* note 235, at 111. Notably, debate over the meaning of the term “armed conflict” is not confined to domestic law, and has spawned considerable discussion from international law practitioners in both academia and international courts. See INT’L LAW ASS’N, FINAL REP. ON THE MEANING OF ARMED CONFLICT IN INT’L LAW 1–3 (2010) (discussing *Prosecutor v. Tadić*, the International Criminal Tribunal’s decision that is “widely relied on as authoritative for the meaning of armed conflict in both international and non-international armed conflicts”). While there is admittedly a significant amount of international law surrounding this issue, this paper attempts to determine what, under domestic law, Congress intended when it used the words “armed conflict.” As such, while international sources provide an important groundwork for the national security law practitioners, sound principles of statutory construction dictate a focus on domestic sources, such as the Department of Defense’s doctrine.

261. Heisler Interview, *supra* note 212.

262. Heisler Interview, *supra* note 212.

263. DOD DICTIONARY, *supra* note 235, at 111.

264. Compare DOD DICTIONARY, *supra* note 235, at 111, with National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(h), 131 Stat. 1283 (2017).

DoD has frequently used the term “competition” to refer to a state of opposition or struggle between various state and non-state actors that does not amount to direct armed conflict. For instance, the 2018 National Defense Strategy repeatedly declares that the United States is currently involved in “long-term strategic competition” with states such as Russia and China that is “short of armed conflict.”<sup>265</sup> What’s more, DoD describes international relations as consisting of three concurrent phases along a “competition continuum”: cooperation, competition below armed conflict, and armed conflict.<sup>266</sup>

In its publication outlining the competition continuum, DoD provides definitions of armed conflict, as well as competition below armed conflict. Armed conflict is described as a situation in which “joint forces take actions against a strategic actor in pursuit of policy objectives in which law and policy permit the employment of military force in ways commonly employed in declared war or hostilities.”<sup>267</sup> In contrast, competition below armed conflict is “typically nonviolent and conducted under greater legal or policy constraints than in armed conflict.”<sup>268</sup> It may include “diplomatic and economic activities; political subversion; intelligence and counterintelligence activities; operations in cyberspace; and the information environment, military engagement activities . . . security cooperation activities, military information support activities, freedom of navigation exercises, and other nonviolent military engagement activities.”<sup>269</sup> Nevertheless, competition may also include “forms of indirect armed conflict (e.g., external support of an indigenous insurgency, counterinsurgency, or resistance movement) through proxies or surrogates that engage each other or the sponsor’s adversaries in direct armed conflict.”<sup>270</sup>

Assuming that this is what Congress meant by “competition,” it is apparent that Sec. 1202 authority may be used to provide support to both regular and irregular forces that facilitate a broad range of irregular warfare activities, as long as they fall below the threshold of “traditional armed conflict.” Certainly, Sec. 1202 permits SOF to train and equip irregular partner forces for a potential UW campaign as SOCEUR had originally proposed. SOF may also provide support to foreign forces that facilitate everything from preparation of the environment (PE)<sup>271</sup> to psychological operations (PSYOP).<sup>272</sup>

Even so, the statute’s employment of the modifier “traditional” to describe armed conflict imparts a degree of uncertainty as to the precise boundaries of competition. As previously mentioned, Sec. 1202 limits irregular warfare to a state of “competition” that is “short of traditional armed conflict.” But it is not

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265. Summary of the 2018 National Defense Strategy of the United States of America, at 2, <https://perma.cc/79DF-UQVS>.

266. U.S. DEP’T OF DEF., JOINT DOCTRINE NOTE 1-19, COMPETITION CONTINUUM, 2 (Jun. 3, 2019).

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. JOINT PUB. 3-05, *supra* note 21, IV-3-4.

272. *Id.* at II-14-16.

immediately obvious what “traditional armed conflict” means for the purposes of the statute.<sup>273</sup> Notably, it is not clear whether there is any substantive difference between competition that is “below armed conflict” as defined by DoD, and competition that is “short of *traditional* armed conflict” as written in the statute.

### C. *What is Traditional Armed Conflict?*

Congress used the phrase “traditional armed conflict” in Sec. 1202 in order to designate the boundaries of competition and the extent of authorized irregular warfare activities under the statute. Thus, depending on how “traditional armed conflict” is interpreted, it may significantly alter the applicability of Sec. 1202. This in turn would either limit or expand the circumstances under which SOF are authorized to train and equip foreign forces using this authority.

The fact is that “traditional armed conflict” has been left undefined both by Congress and DoD.<sup>274</sup> It is likewise difficult to learn anything about this term based on the surrounding language and syntax. Because the statute’s definition of irregular warfare discusses support to “foreign forces, irregular forces, groups, and individuals”—i.e., *anyone*—who participate in a competition between “state and non-state actors”—i.e., *any entity*—the phrasing adds virtually nothing of value when trying to determine what a traditional armed conflict might be.<sup>275</sup>

One might attempt to describe traditional armed conflict in a Westphalian sense, that is, nation-state versus nation-state, or, in modern legal terminology, international armed conflict.<sup>276</sup> Or one might attempt to describe traditional armed conflict from the perspective of tactics; for example, a conventional force-on-force engagement that involves massed infantry, armor, and artillery, as opposed to guerilla warfare. Traditional armed conflict might be read as an activity that amounts to war for constitutional purposes,<sup>277</sup> or hostilities for the

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273. In remarks to Congress in February 2018, Owen West, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, used the phrase “short of traditional armed conflict” in describing the competition environment without further elucidation. Statement of Hon. Owen West, Assistant Secretary of Defense Special Operations and Low-Intensity Conflict before the House Armed Services Committee Subcommittee on Emerging Threats and Capabilities, at 2 (Feb. 15, 2018), <https://perma.cc/EF93-79DN>. Even the recent amendments to § 1202 failed to provide additional light on this subject. See National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1203, 135 Stat. 1541 (2021); National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1207, 134 Stat. 3388 (2021).

274. See generally DOD DICTIONARY, *supra* note 235. The International Committee of the Red Cross similarly has no definition. See DICTIONARY OF THE INTERNATIONAL LAW OF ARMED CONFLICT, INT’L COMM. OF THE RED CROSS (1992).

275. It should be noted that Congress has used the term “traditional” in another vital statute related to DoD and SOF; the covert action statute. However, it seems unlikely that “traditional armed conflict” bears any relationship to “traditional military activities.” In fact, the latter concept includes many activities falling well below the accepted threshold of armed conflict. MICHAEL E. DEVINE, CONG. RSCH. SERV., COVERT ACTION AND CLANDESTINE ACTIVITIES OF THE INTELLIGENCE COMMUNITY: SELECTION DEFINITIONS IN BRIEF, R45196, 6–7 (2019).

276. See generally Ove Bring, *The Westphalian Peace Tradition in International Law: From Jus ad Bellum to Jus contra Bellum*, 75 INT’L L. STUD. 57 (2000).

277. U.S. CONST., art. I, § 8, cl. 11.

purposes of the War Powers Resolution.<sup>278</sup> Traditional armed conflict might even be read to exclude certain cyber or cyber-enabled operations that do not seem to have a “traditional,” that is, a historical analogue. It is simply not clear from a plain reading of the statute.

Nevertheless, an analogous term, “traditional warfare” does appear in certain DoD issuances. For instance, Joint Publication 1, *Doctrine for the Armed Forces of the United States*, states that traditional warfare is “characterized as a violent struggle for domination between nation-states or coalitions and alliances of nation-states.”<sup>279</sup> However, it may also include conflict with “non-state actors who adopt conventional military capabilities and methods.”<sup>280</sup> According to DoD, traditional warfare usually involves “force-on-force military operations in which adversaries employ a variety of conventional forces and special operations forces (SOF) against each other in all physical domains as well as the information environment (which includes cyberspace).”<sup>281</sup> The “typical mechanisms for victory in traditional warfare include the defeat of an adversary’s armed forces, the destruction of an adversary’s war-making capacity, and/or the seizure or retention of territory.”<sup>282</sup>

The publication goes on to contrast traditional warfare with irregular warfare, wherein a “less powerful adversary seeks to disrupt or negate the military capabilities and advantages of a more powerful military force . . . The less powerful adversaries, who can be state or non-state actors, often favor indirect and asymmetric approaches, though they may employ the full range of military and other capabilities in order to erode their opponent’s power, influence, and will.”<sup>283</sup> DoD Directive 3000.07, *Irregular Warfare*, adds that irregular warfare is “a deviation from the *traditional* form of warfare where actors may use non-traditional methods such as guerrilla warfare, terrorism, sabotage, subversion, criminal activities, and insurgency for control of relevant populations.”<sup>284</sup>

Under these definitions, traditional warfare does not depend on *who* is engaged in a conflict or *what* a conflict is labeled for legal purposes. Instead, it depends primarily on *how* a conflict is fought. If this is the measure of traditional armed conflict, then Sec. 1202 funds could conceivably be used to support a wide range of direct hostilities as long as they do not involve tank armies doing battle in the Suwalki Gap.

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278. 50 U.S.C. § 1541–1548.

279. U.S. DEP’T OF DEF., JOINT PUBLICATION 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, I-5 (Mar. 25, 2013, Incorporating Change 1, July 12, 2017).

280. *Id.* at I-6.

281. *Id.* at I-5.

282. *Id.*

283. *Id.* at I-6.

284. U.S. DEP’T OF DEF. DIRECTIVE 3000.07, *supra* note 260, at 14 (defining irregular warfare in a way that aligns with the definition of unconventional warfare in the National Defense Authorization Act for Fiscal Year 2016); *see also* National Defense Authorization Act, Fiscal Year 2016, Pub. L. No. 114-92, § 1097, 129 Stat. 726 (2015) (defining unconventional warfare as “[a]ctivities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, or guerrilla force in a denied area”).

To uncover Congress' intent, it is perhaps more useful to explore the concept of the gray zone. In its report accompanying Sec. 1202, the Senate Armed Services Committee specifically used the term "gray zone" as a synonym for "asymmetric operations that are below the threshold of traditional armed conflict."<sup>285</sup> In September 2015, a USSOCOM White Paper defined the gray zone as "competitive interactions among and within state and non-state actors that fall between the traditional war and peace duality . . . [and that are] characterized by ambiguity about the nature of the conflict, opacity of the parties involved, or uncertainty about the relevant policy and legal frameworks."<sup>286</sup> The next year, General Joseph L. Votel, then commander of USSOCOM, reiterated that the gray zone is "characterized by intense political, economic, informational, and military competition more fervent in nature than normal steady-state diplomacy, yet short of conventional war."<sup>287</sup> Others have defined gray zone conflict as an "activity that is coercive and aggressive in nature, but that is deliberately designed to remain below the threshold of conventional military conflict and open interstate warfare."<sup>288</sup> Such conflicts are "inherently ambiguous" and include "unconventional tactics, from cyberattacks, to propaganda and political warfare, to economic coercion and sabotage, to sponsorship of armed proxy fighters, to creeping military expansionism."<sup>289</sup> Widely accepted examples of gray zone activities include Russia's clandestine aggression predating its 2022 invasion of Ukraine,<sup>290</sup> China's expansionist policies in the South China Sea,<sup>291</sup> and Iran's long-term use of proxies throughout the Middle East.<sup>292</sup> The United States has also conducted its own operations widely considered to be in the gray zone, such as FID and UW campaigns in Afghanistan and Central America during the Cold War.<sup>293</sup>

In short, the "gray zone" seems to roughly mirror the idea of competition below armed conflict as characterized by DoD in the conflict continuum.<sup>294</sup> If this is correct, then Congress and DoD have used three terms to express the same basic set of circumstances: "gray zone," "competition below armed conflict," and "competition between state and non-state actors short of traditional armed conflict." All of these terms indicate a situation in which the United States is involved in a long-term, aggressive competition with a foreign adversary (state or non-

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285. S. REP. NO. 115-125, at 257 (2017).

286. U.S. SPECIAL OPERATIONS COMMAND, THE GRAY ZONE 1 (Sept. 2015).

287. Votel et al., *supra* note 35, at 102.

288. Hal Brands, *Paradoxes of the Gray Zone*, FOREIGN POL'Y RSCH. INST. (Feb. 5, 2016), <https://perma.cc/772C-R7YZ>.

289. *Id.*

290. Jen Judson, *Countering 'Little Green Men': Pentagon Special Ops Studies Russia 'Gray Zone' Conflict*, DEF. NEWS (May 15, 2017), <https://perma.cc/4VYJ-C9C2>.

291. Michael O'Hanlon, *China, The Gray Zone, and Contingency Planning at the Department of Defense and Beyond*, GLOBAL CHINA 3 (Sept. 30, 2019), <https://perma.cc/T5ZG-XG62>.

292. Michael Eisenstadt, *Operating in the Gray Zone: Countering Iran's Asymmetric Way of War*, WASH. INST. FOR NEAR EAST POL. 2 (Jan. 7, 2020), <https://perma.cc/WH6Q-BF7U>.

293. Votel et al., *supra* note 35, at 103-05; Eisenstadt, *supra* note 292, at 5.

294. *See supra* notes 269-270 and accompanying text.



state) but is not engaged in direct hostilities. Nevertheless, this struggle may encompass a variety of intrusive or even violent activities.

#### *D. Sec. 1202 in the Gray Zone*

Even assuming that “competition below armed conflict,” “competition between state and non-state actors short of traditional armed conflict,” and the “gray zone” are, in fact, synonymous terms, the fundamental ambiguities that exist within Sec. 1202 concerning the extent of authorized expenditures still are not resolved. More importantly, the moment aggressive competition transforms into a traditional armed conflict remains indistinct. As Elizabeth Kiessling has pointed out, gray zone activities “elude familiar categories of military action,” and are therefore difficult to plot on a traditional use-of-force spectrum under the Law of Armed Conflict (LOAC).<sup>295</sup> If this is true for the relatively well-defined categories within LOAC, it is even more so for the tenuous concept of “traditional armed conflict” under Sec. 1202. For instance, it is entirely possible that some activities that amount to armed conflict for the purposes of LOAC might still be considered part of the competition phase of international relations as envisioned by DoD and Congress. Consider a cyber-attack, such as the well-known Stuxnet attack against Iran. Although the kinetic effects associated with Stuxnet almost certainly rose to the level of an armed attack,<sup>296</sup> its covert nature and lack of conventional follow-up arguably kept this event within the gray zone. If this analysis is correct, then the United States could potentially engage a foreign adversary with a discrete cyber-attack without it rising to the level of “traditional armed conflict.” In this way, DoD could take direct action against a hostile state without affecting its ability to train and equip irregular partner forces that are participating in competition under the provisions of Sec. 1202.

The lack of clarity at the heart of Sec. 1202 will no doubt give military planners pause as they attempt to determine whether or not they can utilize the authority to train and equip foreign partners under questionable circumstances. But laying these conundrums aside, there are some situations that unmistakably meet the threshold of a “traditional armed conflict.” For example, imagine a conventional war between the United States and North Korea in which massed infantry and armor formations clash with each other near the DMZ.<sup>297</sup> Such a conflict would clearly move the United States out of the competition phase of international relations and into the armed conflict phase. Unless we resort to an extremely dubious reading of Sec. 1202, it seems clear that SOF would not have the authority to train and equip irregular forces to engage in an unconventional warfare campaign

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295. Elizabeth K. Kiessling, *Gray Zone Tactics and the Principle of Non-Intervention: Can “One of the Vaguest Branches of International Law” Solve the Gray Zone Problem?*, 12 HARV. NAT’L. SEC. J. 116, 119 (2021).

296. See generally Andrew C. Foltz, *Stuxnet, Schmitt Analysis, and the Cyber “Use-of-Force” Debate*, 67 JOINT FORCE Q. 40 (2012), <https://perma.cc/V3L7-E9K3>.

297. It was in contemplating such a scenario, in addition to efforts on real-world concepts, that the authors first considered the effective limits of § 1202.

under these conditions. A similar analysis would likely apply if the United States were to become engaged in the ongoing armed conflict between Ukraine and Russia.<sup>298</sup> It is peculiar that while Sec. 1202 permits SOF to train and equip foreign personnel during the hazy competition phase, it does not allow SOF to continue to train and equip those same personnel once the United States is unambiguously at war. In fact, there is currently no specific authority that would permit SOF to train and equip an irregular partner force in the event of an armed conflict with an adversary such as China, Russia, or Iran.<sup>299</sup> Consequently, U.S. SOF are still very much in the same position with regard to hostilities against a nation-state that they were in with regard to hostilities against terrorists in the fall of 2001.<sup>300</sup> If Russia were to invade the Baltics tomorrow and provoke a direct response from the United States,<sup>301</sup> SOF may engage in combat operations and “Little T” training with an irregular partner force, but they do not have the legal authority to provide more substantial forms of training or material assistance.<sup>302</sup> Similarly, if the United States were to suddenly enter into armed conflict with Russia pursuant to the current war in Ukraine, the same analysis would apply.

For this reason, it should be noted that Sec. 1202 did not actually fulfill SOCEUR’s original request. The drafters of the SOCEUR legislative proposal were certainly interested in obtaining fiscal authority to conduct UW activities prior to a potential incursion by enemy forces. To this end, Sec. 1202 is adequate to the purpose. Yet based on their contingency planning, the SOCEUR staff also requested an authority which could be utilized for UW in contested areas *after* an incursion had taken place.<sup>303</sup> By focusing solely on competition within the gray zone, Congress essentially ignored a vital need identified by SOF commanders.

Taken altogether, Sec. 1202 is a positive step in the evolution of BWT activities. It provides SOF with a flexible tool to engage in a broad range of irregular warfare missions by, with, and through foreign partners during gray zone competition. There are significant ambiguities in the statute that may cause problems as DoD engages in operational planning. Most crucially, the boundaries between “competition” and “traditional armed conflict” remain equivocal. Still, the substantial reporting requirements baked into Sec. 1202 ultimately make it unlikely that SOF will be able to use the authority in a manner that Congress does not

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298. Currently, the United States is likely not a co-belligerent in the ongoing international armed conflict between Ukraine and Russia. *See supra* note 260.

299. For example, 10 U.S.C. § 333 authorities could potentially be used to train and equip allied MOD forces during an armed conflict against another nation-state, but they are not available to support irregular forces.

300. *See* discussion *supra* Introduction.

301. A response from the United States to an invasion of the Baltics is far more likely as compared to the 2022 invasion of Ukraine due to the United States’ collective defense duties to the Baltic countries under Article 5 of the North Atlantic Treaty. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

302. *See* discussion *supra* Section II.B.

303. *See supra* notes 218–23 and accompanying text.

approve.<sup>304</sup> In fact, Congress has been so pleased with DoD's performance under Sec. 1202 that it recently reauthorized the statute out to FY 2023,<sup>305</sup> and increased the annual authorization to \$15 million.<sup>306</sup> Much like the codification of Sec. 127e in the context of counterterrorism, the process leading to the enactment of Sec. 1202 shows the extent to which Congress has embraced a BWT strategy in the face of great power competition. Nevertheless, even this broad authority did not wholly fulfill the needs of SOF commanders. Section 1202 leaves a significant gap in SOF's ability to effectively engage in UW operations during a conventional armed conflict.

#### IV. THE NEED FOR EXPANSION OF IRREGULAR WARFARE AUTHORITIES

As discussed above, the definition of irregular warfare that Congress provided in Sec. 1202 limits its applicability to the competition phase of international relations. Unfortunately, this means that outside of the CT mission set, there is no standing authority that would allow SOF to train and equip an irregular partner force in the event of unambiguous hostilities with a foreign adversary. Given the importance of unconventional warfare during virtually every large-scale military operation since WWII, this state of affairs places the United States at a significant disadvantage.<sup>307</sup> Although SOF may attempt to utilize certain emergency funds in order to provide assistance to an irregular force, or rely on covert support from the CIA as it did during the invasion of Afghanistan, the truth is that Congress has severely limited SOF in their statutory mission to perform BWT activities such as UW and FID. Indeed, SOF have been placed in a bizarre position in which they are permitted to train and equip a partner force in preparation for hostilities, yet they are unable to maintain support for that same partner force once hostilities actually begin. This section will therefore outline and evaluate three potential options for Congress to provide authorities to train and equip irregular forces during a "traditional armed conflict."

##### *A. Option 1: Enact Legislation in Response to Traditional Armed Conflict*

It is entirely possible that when Congress enacted Sec. 1202, it simply did not believe that the statute was the appropriate means to provide support to irregular forces during an armed conflict between the United States and another nation-state.<sup>308</sup> Indeed, Congress may be hesitant to create any kind of permanent wartime authority during the competition phase of international relations. If this is

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304. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 1202(h), 131 Stat. 1283 (2017).

305. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 1207, 133 Stat. 1198 (2019).

306. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 1207, 134 Stat. 3388 (2021).

307. This does not necessarily mean that SOF lacks the operational authority to engage in UW operations with an irregular partner force, but rather that SOF lacks the fiscal authority to train and equip that force. See *supra* notes 103–17 and accompanying text.

308. See *supra* notes 244–46 and accompanying text.

the case, then Congress may choose to keep Sec. 1202 limited to the competition environment. Congress could then establish a new fiscal authority to facilitate UW activities in the event that a traditional armed conflict occurs.

This option has several limitations, however. The most important is timeliness; geopolitical events rarely occur at a predictable pace as the recent conflict in Ukraine has underscored. If there is a gap in funding authorities between competition and armed conflict, it is entirely possible that enabled forces will be unable to obtain material support from DoD at the very moment that they need it most—when competition transforms into traditional armed conflict. It seems unlikely that Congress will be able to move quickly enough to rectify this kind of authority gap in the days or weeks that may be critical to defeating an adversary in the multi-domain battlespace.<sup>309</sup> Indeed, if the War on Terror is any precedent, it could take years to enact appropriate legislation after an attack.<sup>310</sup> In the case of Ukraine, President Biden authorized the drawdown of emergency funds under the FAA almost three weeks after the initial invasion while Congress passed a military aid package a few days later.<sup>311</sup>

Hopefully, SOF will continue to use existing Sec. 1202 authority to prepare surrogate forces for combat “left of boom,” as the saying goes. Indeed, these efforts have proved enormously important in Ukraine.<sup>312</sup> But this is no guarantee of success without continued access to American training and equipment once combat is joined. This is especially true in the case of resistance movements that spontaneously appear behind enemy lines without having had the prior benefit of Sec. 1202. To use a historical analogy, it would be as if the OSS had been ordered to operate with indigenous resistance movements in Europe and Asia without any authority to provide them with training or equipment. Under similar circumstances, SOF might be delegated the operational authority to conduct missions by, with, and through irregular partners, but without the appropriate fiscal authorities to provide them with material support, their effectiveness will be limited.

Moreover, this option may actually discourage irregular forces from cooperating with SOF during the competition phase. Surrogates that facilitate SOF activities must be willing to accept that if a traditional armed conflict occurs, the U.S. government will make every effort to continue to provide them with support. Put another way, enabled forces must trust that the U.S. government will fulfill its commitments to them and act in their best interest. But under the current

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309. See generally ANDREW FEICKERT, CONG. RSCH. SERV., IF11409, DEFENSE PRIMER: ARMY MULTI-DOMAIN OPERATIONS (MDO) (2020) for a discussion of the multi-domain battlespace. One of the lessons learned from Russia’s 2022 invasion of Ukraine was the importance of unconventional warfare to the multi-domain battlespace. Stravos Atlamazoglou, *Ukraine Special Operators May Soon be Putting Years of Secretive Training from the US to Use Against Russia*, BUS. INSIDER (Mar. 2, 2022), <https://perma.cc/XE8M-48MH> (discussing the unconventional nature of Ukrainian resistance).

310. See discussion *supra* Section II.C.

311. *Memorandum on the Delegation of Authority Under Section 506(a)(1) of the Foreign Assistance Act of 1961*, 87 Fed. Reg. 15,027, (Mar. 17, 2022); Katie Lobosco, *Here’s what’s in the \$13.6 billion Ukraine aid package*, CNN (Mar. 15, 2022), <https://perma.cc/Q969-NFJJ>.

312. See *supra* notes 99 & 100 and accompanying text.

legislative framework, there is no specific authority that would allow SOF to provide support to these forces once the tanks have crossed the frontier. It appears self-evident that an enabled force would be less likely to facilitate SOF activities during competition if it has no assurance that the United States will be able to provide some type of support when the situation becomes more threatening.<sup>313</sup>

Unfortunately, Congress has customarily taken a reactive approach to this set of circumstances.<sup>314</sup> As a result, Option 1 seems to be the most likely path for enacting authorities to train and equip irregular forces during a traditional armed conflict. Nevertheless, based on the issues outlined above, it is also the least preferable.

### B. Option 2: Amend Existing Statutes

If timeliness is the greatest limitation associated with Option 1, Congress could instead expand BWT authorities *now*, before a traditional armed conflict takes place. One option of doing so is to amend Sec. 1202 in such a way so as to permit the support of irregular forces during a traditional armed conflict. Alternatively, Congress could amend 10 U.S.C. § 127e in order to permit support to irregular forces outside the counterterrorism mission set. Both of these options would significantly reduce the risks that arise from waiting for a crisis to occur before authorizing these crucial activities.

Ultimately, Sec. 1202 authority is limited to the competition environment due to the idiosyncratic definition of irregular warfare that Congress included in the statute. If this definition were eliminated, it would permit SOF to provide support to irregular forces during competition *and* armed conflict. Leaving the term “irregular warfare” undefined is not without precedent. 10 U.S.C. § 127e, the closest analog of Sec. 1202, contains no definition of “terrorism” even though this one word designates the central purpose of the law. Still, Congress has experienced little difficulty in understanding how DoD interprets the term and, as a result, how DoD implements the authority.<sup>315</sup> Likewise, Congress could readily determine how DoD would interpret the term “irregular warfare.” As previously noted, DoD already has a doctrinal definition of the concept that applies to activities that take place during competition and armed conflict.<sup>316</sup> Congress could certainly allow DoD to conduct Sec. 1202-enabled operations under this broader

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313. For instance, in 2019, President Trump ordered the withdrawal of U.S. military forces from Syria and effectively abandoned the Kurdish Syrian Democratic Forces (SDF) who had been reliable partners against ISIS. This decision badly damaged American credibility with potential allies and forced the SDF to seek support from Russia. Jonathan Ruhe & Ari Cicurel, *Consequences of the US withdrawal from Syria*, DEF. POST (Oct. 26, 2019), <https://perma.cc/DUS9-5T5T>. Despite the President’s directive, the United States continues to support SDF forces. Sirwan Kajjo, *US-Backed Forces Stepping Up Campaign Against IS in Eastern Syria*, VOICE OF AM. (Feb. 8, 2021), <https://perma.cc/TS3D-H9CQ>.

314. See discussion *supra* Section II.C.

315. U.S. DEP’T OF DEF., JOINT PUBLICATION 3-26, COUNTERTERRORISM (Oct. 24, 2014); see DOD DICTIONARY, *supra* note 235, at 53.

316. DOD DICTIONARY, *supra* note 235, at 111.

definition while maintaining the significant approval and reporting requirements that are currently contained in the statute.

Removing the definition of irregular warfare in Sec. 1202 is a relatively quick fix to this particular authority gap. Congress makes amendments to existing DoD authorities annually through the NDAA. In fact, Congress amended Sec. 1202 just a year after initial authorization.<sup>317</sup> Moreover, altering the definition is necessary to effectuate the requirements that the law was actually meant to address. SOCEUR's original legislative proposal was designed to authorize support to irregular forces that relay indicators and warnings of a potential enemy incursion into friendly territory, as well as facilitate *post-incursion* reporting from *contested areas*.<sup>318</sup> In the latter instance, the current authority clearly falls short.

Alternatively, Congress could amend 10 U.S.C. § 127e in order to achieve a similar result. Specifically, Congress could remove the language in the statute that limits that authority to counterterrorism, and instead authorize expenditures “to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating authorized ongoing military operations by United States special operations forces.” This would create a one-size-fits-all authority that permits DoD to provide material and financial support to *anyone* that supports SOF operations for *any purpose*—including both counterterrorism and irregular warfare.<sup>319</sup>

Congress has traditionally been hesitant to provide SOF with the broad fiscal authorities afforded by these alternatives. While Sections 127e and 1202 each contain temporal and monetary limitations, the most important limitation to either authority has always been the authorized *activity*. From Congress' perspective, removing the operational restrictions on either statute might provide DoD with a “blank check” that diminishes Congress's ability to both assess and control the geopolitical risk of DoD activities.<sup>320</sup> Indeed, it may provoke institutional memories of the fistfights with the President over foreign assistance in Southeast Asia and Central America that occurred during previous administrations.

In its recent history, Congress has typically provided DoD with small, narrowly tailored authorities, followed by a metered expansion.<sup>321</sup> Congress first looks for proof of concept during the initial authority implementation to ensure its intended results.<sup>322</sup> Congress can then expand or contract the new authorization based on the effectiveness of DoD's implementation, the viability of DoD's future implementation plans, and the responsiveness of DoD's reporting.<sup>323</sup> Once Congress evaluates how the authority works in practice, and understands how DoD views

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317. See *supra* notes 304–5 and accompanying text.

318. See *supra* notes 215–23 and accompanying text.

319. Notably, this option was considered, but not presented, as an option during the drafting and approval process for § 1202. Heisler Interview, *supra* note 212.

320. See, e.g., National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1250, 129 Stat. 726 (2015) (exemplifying geopolitical concerns as contained in an authorization).

321. See, e.g., discussion *supra* Section II (discussing the development of § 1208 and § 127e).

322. See, e.g., discussion *supra* Section II (discussing the expansion of § 1208 and § 127e).

323. See, e.g., discussion *supra* Section II (discussing the expansion of § 1208 and § 127e).



future implementation, it then expands the statute, and removes monetary or temporal boundaries, akin to removing the training wheels.<sup>324</sup>

Expanding Sections 1202 or 127e as proposed herein could be viewed as an end-run around this process. The authority would be so broad that it would essentially skip the “training wheels” phase. Indeed, USSOCOM would be able to use the authority to support virtually *any* activity, limited only by its statutory mission, proper operational authority from the President, and any funding constraints imposed by Congress.<sup>325</sup> Furthermore, Congress may conclude that such a broad authority dramatically increases the risk of the United States becoming directly involved in armed conflict with a hostile state.<sup>326</sup> Given Congress’s concerns on this subject that are already expressed in the provisions of Sec. 1202,<sup>327</sup> Option 2 is likely to be a non-starter.<sup>328</sup>

### *C. Option 3: Draft a New Statutory Authority Applicable to “Traditional Armed Conflict”*

A third option that avoids the problems associated with timeliness as well as over-breadth is for Congress to immediately draft a new BWT authority that is specifically applicable to irregular forces during “traditional armed conflict.” This statute could take many forms and include checks to forestall abuse and ensure congressional control. For instance, it could be designed as a kind of emergency authority that would become operative upon a written determination by the President that the United States is no longer in the competition phase of international relations and has actually engaged in direct hostilities against a specific state or non-state actor. This would be similar to the discretionary provisions originally included in the FAA almost 60 years ago.<sup>329</sup> In drafting such an authority, Congress could expressly describe what circumstances constitute a traditional armed conflict. This would have the added benefit of further delineating the activities that can be supported under Sec. 1202. In addition, Congress could retain the onerous reporting requirements of Sec. 1202 and 10 U.S.C. § 127e while maintaining approval for operations at a relatively high level.

There is no reason to suppose that such a statute would significantly increase the risk of the United States becoming involved in hostilities. Once again, this is a fiscal authority, not an operational authority. U.S. SOF may only engage in offensive combat operations when they are delegated authority from the President

324. See, e.g., National Defense Authorization Act for Fiscal Year 2020, PUB. L. NO. 116-92, § 1207, 133 Stat. 1198 (2019).

325. 10 U.S.C. § 167(k) (defining special operations activities as: (1) direct action; (2) strategic reconnaissance; (3) unconventional warfare; (4) foreign internal defense; (5) civil affairs; (6) military information support operations; (7) counterterrorism; (8) humanitarian assistance; (9) theater search and rescue; (10) such other activities as may be specified by the President or the Secretary of Defense).

326. See discussion *supra* Section III.B.

327. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, §§ 1202(f)(3), 1202(i), 131 Stat. 1283 (2017).

328. Heisler Interview, *supra* note 212.

329. See *supra* note 125–29 and accompanying text.

flowing from the appropriate articles of the Constitution. This proposed statute merely ensures that if SOF actually received orders to engage in lethal UW operations with an irregular surrogate force, they would have the authority to expend funds to train those surrogates and support them in the field. Such activities have been a cornerstone of SOF operations since WWII. With appropriate controls, this option is therefore the most practical for providing SOF with the necessary authorities to defeat hostile nation states while ensuring proper congressional oversight.

#### CONCLUSION

When Congress enacted Sec. 1202, it was an important step toward facilitating BWT activities with irregular forces in the competition environment. It recognized the continued vitality of unconventional warfare and foreign internal defense that U.S. Special Operations Forces, particularly the Army Green Berets, have executed for nearly 80 years. These activities are essential to fulfilling U.S. foreign policy objectives, and are particularly useful in the gray zone between war and peace that will likely dominate the strategic environment for decades to come.

However, Sec. 1202 left a gaping hole in SOF authorities to conduct UW with irregular surrogate forces. In the aftermath of the Vietnam War, Congress limited the ability of the President and DoD to fund foreign assistance activities without specific approval. This ultimately left SOF unable to train and equip surrogate forces without independent statutory authority. While new authorities were slowly enacted after the 9/11 attacks, Congress has yet to grant SOF a specific authorization to train and equip irregular forces during a traditional armed conflict.

In a potential war against China, Russia, Iran, or North Korea, U.S. SOF should not be placed in the same position that they were in when they fought the Taliban in late 2001: unable to provide training or material support to their irregular partners. In other words, they were unable to perform basic activities associated with their statutory mission. Sec. 1202 represents an attempt to provide SOF with the authority to support friendly surrogate forces in the competition environment prior to direct armed conflict. Hopefully, these activities will be able to deter aggressors and make the need for U.S. intervention less likely. Regardless, DoD must have a way to continue to support these surrogates in the event of war, and it must exist prior to the start of a crisis. Consequently, Congress should enact new legislation that will authorize SOF to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating authorized military operations by U.S. SOF during a traditional armed conflict.