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Response to Terrorism: Legal Aspects of the Use of Military Force

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Summary

The terrorist attack of September 11, 2001, has precipitated widespread calls for the use of military force in response. Under U.S. and international law a variety of legal considerations attach to such use. This report briefly summarizes several salient aspects.

Legal considerations concerning the use of force under U.S. and international law include the following:

(1) Acts of war. War has been defined as “a condition of armed hostility between States”¹ or, in Grotius’ terms, as the “state or condition of governments contending by force.”² An act of war, thus, involves the threat or use of force of some kind by one state against another. But whether a particular threat or use of force constitutes an act of war depends heavily on how the parties choose to characterize it. For the United States acts of foreign governments that have been deemed to constitute acts of war have ranged from the impressment of U.S. seamen into service in the British navy to failure to honor U.S. neutrality in conflicts between other states to Japan’s attack on Pearl Harbor.

(2) Declaration of war. Article I, § 8, of the Constitution confers on Congress the power to “declare War.” That power comprehends not only the enactment of formal declarations of war but also the authorization of uses of military force which are not intended to rise to the level of a war. Congress has enacted eleven formal declarations of war relating to five different conflicts – the War of 1812, the Mexican-American War in 1846, the Spanish-American War in 1898, World War I, and World War II. It has also enacted numerous authorizations for the use of military force that have **not** constituted declarations of war, such as the Tonkin Gulf Resolution of 1964³ and the 1991

¹ Hyde, Charles Cheney, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. 3 (1945), at 1686.

² *Id.* n. 1. Grotius was one of the original theorists of international law.

³ P.L. 88-408 (August 10, 1964).

“Authorization for Use of Military Force Against Iraq Resolution.”⁴ One domestic effect of a declaration of war is that it brings into effect a number of statutes that confer discretionary authority on the President.

(3) President’s authority to use military force. Article II, § 1, of the Constitution vests the “executive Power” of the government in the President. Article II, § 2, states that the President “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” These clauses clearly empower the President to direct the conduct of a war or other military engagement authorized by Congress. But it has often been argued that these clauses, as well as the inherent authority that accrues to the President by virtue of the existence of the United States as a sovereign nation, empower the President to initiate the use of force even absent Congressional authorization. Others contend otherwise. But however that debate is resolved in a given situation, virtually all commentators concur that the President has the constitutional authority to defend the United States from sudden attack even absent Congressional authorization. Whether that authority is wholly defensive or can also involve the use of offensive force in a given situation, however, has been the subject of dispute between Congress and the President.

(4) War Powers Resolution. To protect its constitutional role regarding the use of military force, Congress in 1973 enacted the “War Powers Resolution” (WPR)⁵ over President Nixon’s veto. That enactment specifically recognizes the President’s authority to use military force in “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” But it requires the President to “consult with Congress ... in every possible instance” prior to employing force and to submit a report to Congress on any such instance. Most critically, it requires the President to terminate U.S. involvement in hostilities within 60-90 days unless Congress has enacted a declaration of war or a specific authorization for such involvement, has extended the 60-day period by statute, or is unable to meet because of an armed attack on the United States. Every President since Nixon has regarded the WPR as an unconstitutional intrusion on his prerogatives regarding the use of force.

(5) United Nations Charter. The UN Charter was adopted in part “to save succeeding generations from the scourge of war” (Preamble). As a consequence, it requires its Members to “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations” (Article 2(4)); and it provides for collective action under the auspices of the Security Council to maintain or restore international peace and security (Chapter VII). However, the Charter also recognizes a right of self-defense. Article 51 provides that “[n]othing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security”

⁴ P.L. 102-1 (Jan. 14, 1991).

⁵ P.L. 93-148 (Nov. 7, 1973); 50 U.S.C. 1541 *et seq.*