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AND PENSIONS

United States Senate

WASHINGTON, DC 20510-4607

October 2, 2018

The Honorable James Mattis
Secretary of Defense
U.S. Department of Defense
100 Defense Pentagon
Washington DC, 20301

Dear Secretary Mattis:

Thank you for the detailed response to my May 23, 2018 letter that followed a Department of Defense briefing on the Niger attack and requested clarification on a series of issues regarding train, advise, assist, and accompany missions. I would like additional information on one point in the Department's reply that most struck me given my longstanding focus on the appropriate division of war powers between the President and Congress. This is a concern only heightened by recent reports that the CIA is expanding its drone operations in Africa as the Department of Defense's footprint recedes.

In my letter, I asked for a description of the legal and policy differences between self-defense and collective self-defense. Specifically, whether collective self-defense could be invoked to support foreign partner forces engaged in hostilities against enemies that are not covered by a congressional authorization for use of military force (AUMF).

The Department's reply stated that "collective self-defense in this context means extension of U.S. unit self-defense to foreign or irregular partner forces or persons." Further that, "The collective self-defense supplemental rule of engagement, when approved, permits U.S. forces to defend partner forces from attack or an imminent threat of attack with necessary and appropriate force, and typically the authority applies irrespective of the group or individual committing the hostile act, or demonstrating hostile intent...Self-defense is not a deliberate, offensive use of force. Rather it is a reaction to an attack or imminent threat of attack. **As such, collective self-defense is not typically limited to particular groups or individuals committing the hostile act or demonstrating hostile intent, including not being limited to groups covered by the 2001 AUMF or other congressional authorizations for the use of force.** For example, U.S. forces responded in collective self-defense when Syrian pro-regime forces attacked a Syrian Democratic Forces base in Syria on February 7, 2018. **In other tactical scenarios (as was the case in Niger on October 4, 2017), U.S. and partner forces on the ground are not obligated to identify whether the attackers are part of a particular group."**

I am alarmed that the Department of Defense believes that, by merely designating a group as a partner force, it can respond with military action to protect that partner force and its property if threatened by any group - even one that poses no direct threat to the United States, its Armed Forces or persons, nor is covered by an AUMF.

This broad and troubling interpretation of the President's Article II powers completely circumvents Congress's Article I responsibilities to authorize the use of force and the constitutional requirement that two thirds of the Senate ratify a treaty, especially one that would commit U.S. forces to protect other nations from hostilities. The unintended consequences of this policy could be grave, and it raises the possibility of inadvertently becoming entangled in other countries' conflicts, especially as U.S. forces are deployed to over 170 countries around the world. I view the use of collective self-defense as yet another unilateral expansion of the President's Article II authority in a now 17-year counterterrorism campaign that seemingly knows no limits or end. I am also troubled that it appears the Department has not appropriately notified Congress, as required by law, of instances in which U.S. forces have acted "in self-defense or in defense of foreign partners" outside a declared theater of active armed conflict.

I request a response to the following questions and a briefing with senior Defense policy and legal experts on this issue as soon as can be arranged:

- 1) Please describe the process for designating a partner force as eligible for the provision of collective self-defense, to include the level of approval and any interagency review.
- 2) What criteria, if any, must a partner force meet to be eligible for the provision of collective self-defense? Are such partner forces vetted to ensure they observe international law, including the Geneva Conventions and Laws of Armed Conflict, for example?
- 3) Please provide an accounting of each partner force designated as eligible for the provision of collective self-defense by the President, the Secretary of Defense, or any other delegated authority. Is Congress notified once a partner force is so designated?
- 4) The Department's letter notes that, "some of these mission-specific supplemental measures, including collective self-defense of partner forces require the approval of the Secretary of Defense or the President." In which cases is the Secretary of Defense's approval necessary? In which cases is the President's approval necessary?
- 5) What is the Administration's domestic and international legal rationale for use of U.S. military force for collective self-defense against combatants who pose no direct threat to the U.S., its territorial possessions, embassies, consulates, Armed Forces or persons, nor are covered by the 2001 or 2002 AUMFs? Is there a blanket justification or is it determined on a case-by-case basis?
- 6) Please describe the legal and operational differences between a defense treaty, requiring ratification by the Senate, and collective self-defense of partner forces designated by the President.
- 7) Please describe the limiting principles on the use of collective self-defense from a legal and policy standpoint
- 8) Aside from the War Powers Resolution and the 2001 and 2002 AUMFs, are there any other congressional acts from which the Department of Defense derives statutory authority for the use of military force?

- 9) The Department's letter says that the standing rules of engagement (SROE) were last approved by the Secretary of Defense in 2005. When will be the SROE be updated, to reflect the lessons learned from U.S. military operations since that time?

I greatly appreciate your continued cooperation and candor with me on this and other issues and I look forward to the Department's response and briefing.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tim Kaine". The signature is stylized with a large initial "T" and a long horizontal stroke at the end.

Tim Kaine