

KIMBERLY JACKSON

Authorities and Permissions to Conduct Army Special Operations Activities Abroad

The U.S. defense community has recently shifted its priorities from an emphasis on counterterrorism to long-term strategic competition with other major powers, including China and Russia. This competition can involve military operations, as well as efforts in the diplomatic, economic, and information domains and other activities short of war. This shift has raised questions about potential roles for special operations forces (SOF), including Army Special Operations Forces (ARSOF), the largest of the four services' SOF components, who are expert in many of the SOF community's key capabilities for competition.

U.S. military activities, including those conducted by ARSOF, are governed by a variety of statutes, laws, and legal decisions, which are broadly called *authorities*. Authorities detail what military forces can, and cannot, do under specific circumstances. They specify the types of missions that

may be conducted, locations where activities are allowed, types and identities of partners, reporting requirements, chain of command, restrictions on specific activities, and more.

These authorities, and the non-statutory permissions that support them, are often at the center of policy discussions about how to leverage ARSOF to support U.S. strategic objectives, particularly because the sheer number of authorities that might be utilized often muddles understanding of what the legal basis is for a deployment in a particular region. Understanding the distinc-

KEY FINDINGS

- U.S. military authorities to conduct activities short of war can be roughly divided into “steady-state” authorities and operational authorities.
- Steady-state authorities comprise congressional security cooperation authorities that enable executive branch agencies to expend funds on non-operational partnering activities and on certain exchange and training activities.
- Operational authorities encompass certain military activities that occupy the space beyond steady-state activities but fall short of war.
- Beyond authorities, military forces must have requisite permissions to conduct authorized operations. To conduct an activity, permissions might be required, for example, from chiefs of mission in a particular country, host-nation leadership, combatant commanders, the National Security Council, or the President.

tions between various types of authorities is important for understanding how ARSOF can be utilized. For example, the authorities that enable ARSOF and other military forces to conduct security force assistance are not necessarily the same authorities that allow military presence in a particular country, or that authorize such activities as preparation of the environment or advice and assistance of foreign forces.

This brief report provides an overview of the basic types of authorities that can be utilized by ARSOF to conduct activities short of war, as these authorities are most relevant to understanding ARSOF's role in strategic competition. Accordingly, this report does not discuss authorizations for war and other uses of military force,¹ nor does it discuss the defense budget cycle or defense appropriations process, or the authorities used to conduct operations domestically.²

Categories of Authorities

The authorities used to justify ARSOF deployments in support of operations short of conventional armed conflict span a wide range of activities, from security assistance programs, such as Section 333 of Title 10 of the U.S. Code (10 U.S.C. 333), to activities conducted under combatant commanders' authorities, which are derived from 10 U.S.C. 164. Authorities cover overt, clandestine, and covert military activities and can sanction narrow or broad activities. SOF are generally subject to the same types of authorities as conventional forces—with some exceptions—but ARSOF can be authorized to conduct certain activities that conventional forces cannot do, such as unconventional warfare.³ Further, an authority granted by Congress gives the executive branch the ability to expend funds to support the specified activity.

A staggering number of legal authorities and agreements, both domestic and international, underpin U.S. military deployments. For the purposes of this report, we attempt to describe only the general *types* of authorities that are related to the operational spectrum comprising ARSOF activities short of war.⁴

In general, U.S. military authorities to conduct activities short of war can be roughly divided into

Abbreviations

ARSOF	Army Special Operations Forces
DoD	U.S. Department of Defense
JCET	Joint Combined Exchange Training
SOF	special operations forces
U.S.C.	United States Code

two broad categories along the operational spectrum: “steady-state” authorities and operational authorities.⁵ These categories are not necessarily mutually exclusive in a given operating environment: For example, forces might be authorized to conduct security cooperation activities (steady-state) in a theater where other forces are conducting direct action operations (operational). Further, the categorization is intended to be illustrative, but not absolute: For example, from a legal perspective, the operational authorities afforded to the President and the Secretary of Defense in Title 10 of the U.S. Code that enable forces to participate in steady-state subject-matter-expert exchanges in one country are derived from the same authority as those that allow them to conduct operational activities to counter adversary aggression, but these authorities are governed by different executive branch policy decisions.

This “patchwork” of authorities governing the deployment of a military unit can sometimes create confusion about the legal basis for the unit's presence in a foreign country.⁶ For example, a train-and-equip program in one nation might be *funded* through congressional fiscal authorities, such as Section 333, while forces are *authorized to deploy* via executive branch authorities, described in more detail later, as grounded in Article II of the U.S. Constitution, which names the President as the Commander in Chief of the U.S. Armed Forces.

However, this patchwork also creates a natural balance of power in the government, distributing authority between the legislative and executive branches, and carefully defining which activities are authorized under which circumstances. While both the executive and legislative branches have significant roles in military authorities, certain presidential administrations have interpreted their ability to

authorize activities without congressional approval more broadly than others (Elsea, 2018).

Steady-State Authorities

On one end of the operational spectrum are steady-state authorities. Steady-state authorities comprise congressional security cooperation authorities that enable executive branch agencies (e.g., U.S. Department of Defense [DoD], State) to expend funds on non-operational partnering activities, and certain exchange and training activities that the President and/or Secretary of Defense are authorized to order under U.S. Code.

Security cooperation is intended to “encourage and enable international partners to work with the United States to achieve strategic objectives” (Defense Security Cooperation Agency, undated-b). These activities are informed by U.S. policy but are ultimately driven by what the partner nation wants and is willing to receive, administer, or host. In general, security cooperation authorities establish the means for Congress to authorize DoD (and other departments, as applicable) to conduct training, relationship building, and other developmental activities to bolster foreign defense capabilities, but not to conduct combat operations. These authorities sometimes include the provision of equipment (e.g., train-and-equip programs, such as Section 333), or might involve an exchange of subject-matter experts or sponsorship of foreign military officers to attend U.S. military education institutions, such as International Military Education and Training (IMET), which is a program executed by DoD but whose recipients are selected by the State Department (Defense Security Cooperation Agency, undated-a). An authority commonly utilized by ARSOF is the Joint Combined Exchange Training (JCET) program, which authorizes combatant commanders to pay for certain expenses related to training with foreign security forces where the primary benefit is accrued to U.S. ARSOF (10 U.S.C. 322).

Authorities derived from the President’s and the Secretary of Defense’s authorities enable a combatant commander to “employ forces within that command as he considers necessary to carry out missions assigned to the command” (10 U.S.C. 164[c]). These

Operational authorities encompass certain military activities that occupy the space beyond steady-state activities but fall short of war.

activities are exercised routinely throughout the geographic combatant commands under programs such as Traditional Commander’s Activity (TCA) or the Combatant Commander’s Initiative Fund (CCIF) (Moroney, Thaler, and Hogler, 2013).

For ARSOF, steady-state authorities can provide access to areas otherwise denied or difficult; improve ARSOF’s understanding of the environment; increase capacity of partner forces to counter adversaries’ action on their own soil or in an expeditionary status; augment ARSOF’s own skills and familiarity with partner tactics, techniques, and procedures; and develop trust and goodwill with foreign and irregular partners, groups, and individuals.

Operational Authorities

Operational authorities encompass certain military activities that occupy the space beyond steady-state activities but fall short of war.⁷ These are activities that U.S. forces can execute per either the President’s or Secretary of Defense’s direction under the U.S. Code, or that can be specifically authorized by Congress.

Operational authorities in the executive branch are sometimes referred to as a *combatant commander’s authorities*, a term taken from 10 U.S.C. 164, which authorizes a combatant commander to conduct certain activities within their jurisdiction. Under these authorities, the commander can also

delegate approvals for certain activities to appropriate levels of command.

Operations conducted under a combatant commander's authorities are generally defined in directives called *execute orders* that initiate certain military activities and define their limits. While execute orders also provide direction for a broader range of operations, including steady-state activities and use of force, they are especially important in the operational authority category because they define operations that do not have specific congressional authorization language, and generally do not require notification to Congress. However, execute orders and most of the operations authorized to support them still can undergo high levels of scrutiny, such as through the National Security Council, and often require permissions (described below).

Congress also authorizes spending for certain operational authorities short of war. Primary examples of this type of authority are 10 U.S.C. 127e (Support of Special Operations to Combat Terrorism), which enables the Secretary of Defense to "expend up to \$100,000,000 during any fiscal year to provide support to foreign forces, irregular forces, groups, or individuals engaged in supporting or facilitating ongoing military operations by United States special operations forces to combat terrorism" and Section 1202 of the National Defense Authorization Act for Fiscal Year 2018 (Support of Special Operations for Irregular Warfare), which is a similar program but authorizes the expenditure of \$10 million in any given year for support of ARSOF's irregular warfare operations. Both of these programs require congressional reporting.

For ARSOF, operational authorities can enable activities that counter adversarial aggression without

escalating competition to conventional war; serve to understand and shape the environment in anticipation of potential future conflicts; increase partner forces' ability to counter adversary action through training or direct advising; help U.S. and partner forces develop a fuller intelligence picture of adversary networks and actions; and assist in countering those networks and leveraging others to support ARSOF operations.

Permissions

Beyond authorities, military forces, including ARSOF, must have requisite *permissions* to conduct authorized operations. Authorities provide the legal basis upon which a U.S. military force may conduct specified activities, while permissions are required to execute specific activities under those authorizations. The level of specificity required to provide permission for an activity varies depending on a number of circumstances, including the sensitivity of the operation, the location of the operation, and the preferences of the policymakers involved.

To conduct an activity, permissions might be required, for example, from chiefs of mission in a particular country, host-nation leadership, combatant commanders, the National Security Council, or the President. In some cases, the *authority* might have been granted quickly and might be fairly broad, but the *permission* to operate might be very narrowly and/or rarely granted. Under most circumstances, foreign governments must also grant permission for U.S. military forces to operate in sovereign territory.

Notes

- ¹ For more detailed explanations of War Powers notification requirements, see Elsea and Weed, 2014, and Elsea, Garcia, and Nicola, 2013.
- ² For more information on the defense budget cycle, see, for example, Saturno and McGarry, 2018; and on domestic uses of the military, see Congressional Research Service, 2018.
- ³ Unconventional warfare, which refers to “operations and activities 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, and guerrilla force in a denied area” (Joint Publication 3-05, 2014, p. xi), is one of SOF’s core activities, per Joint Publication 3-05, *Special Operations*.
- ⁴ For purposes of scope, this report does not include discussion of potential activities the U.S. military can conduct under Title 50.
- ⁵ This categorization excludes the role that international laws and authorizing bodies, such as NATO and the United Nations, have on U.S. military activity overseas. While these certainly have substantial bearing on U.S. military presence and operations abroad, we do not include them here as a separate category of authorities along the spectrum of U.S. military operations.
- ⁶ As an example, the presence of U.S. SOF in Niger in 2017, when four Special Forces soldiers were killed, caused confusion in the U.S. government and the public about which authorities enabled the SOF personnel to be in Niger, and to conduct the activities they were undertaking at the time of the attack. For more information, see Carter and Swick, 2017.
- ⁷ Although a small portion of these missions might result in combat because of the inherent risk of operating in these types of environments, there are legal and strategic reasons that these missions are delineated from war. The intended purpose of the mission defines how these activities are categorized.

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About This Report

This report documents research and analysis conducted as part of a project entitled *Leveraging Operational and Strategic Maneuver to Counter Revisionist States*, sponsored by the U.S. Army Special Operations Command. The purpose of the project was to establish a strategic framework for U.S. Army Special Operations Forces (ARSOFF) support to countering Russian irregular threats in the competition space.

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