

# HUMAN RIGHTS, CIVILIAN HARM, AND ARMS SALES:

A Primer on U.S. Law and Policy





## ABOUT THE ORGANIZATIONS

**Center for Civilians in Conflict (CIVIC)** is an international organization dedicated to promoting the protection of civilians in conflict. CIVIC envisions a world in which no civilian is harmed in conflict. Our mission is to support communities affected by conflict in their quest for protection and strengthen the resolve and capacity of armed actors to prevent and respond to civilian harm. CIVIC was established in 2003 by Marla Ruzicka, a young humanitarian who advocated on behalf of civilians affected by the war in Iraq and Afghanistan. Honoring Marla's legacy, CIVIC has kept an unflinching focus on the protection of civilians in conflict. Today, CIVIC has a presence in conflict zones and key capitals throughout the world where it collaborates with civilians to bring their protection concerns directly to those in power, engages with armed actors to reduce the harm they cause to civilian populations, and advises governments and multinational bodies on how to make life-saving and lasting policy changes. CIVIC's strength is its proven approach and record of improving protection outcomes for civilians by working directly with conflict-affected communities and armed actors. At CIVIC, we believe civilians are not "collateral damage" and civilian harm is not an unavoidable consequence of conflict—civilian harm can and must be prevented.

**The American Bar Association Center for Human Rights** promotes and protects human rights worldwide by defending human rights advocates facing retaliation, rallying thought leaders on crucial issues, and holding abusive governments accountable under the law.

## ACKNOWLEDGEMENTS

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### Cover Image:

A formation of F-16 Fighting Falcons  
flies over Wadi Rum, Jordan at sunset.  
October 31, 2009.

## ACRONYM LIST

**ABA:** American Bar Association

**AECA:** Arms Export Control Act

**CAT:** Conventional Arms Transfer

**CIVIC:** Center for Civilians in Conflict

**DCS:** Direct Commercial Sales

**DDTC:** Directorate of Defense Trade Controls

**DSCA:** Defense Security Cooperation Agency

**FAA:** Foreign Assistance Act

**FMF:** Foreign Military Financing

**FMS:** Foreign Military Sales

**HFAC:** House Foreign Affairs Committee

**IDL:** International Humanitarian Law

**ITAR:** International Traffic in Arms Regulations

**NATO:** North Atlantic Treaty Organization

**NSPM:** National Security Presidential Memorandum

**SFRC:** Senate Foreign Relations Committee

**USML:** United States Munitions List

# INTRODUCTION

How does U.S. law regarding arms transfers promote adherence to international human rights and humanitarian law? What is required of the executive branch, and what mechanisms can Congress invoke to prevent U.S. arms transfers from enabling violations of human rights and international humanitarian law (IHL)?<sup>1</sup>

The United States has consistently been the world's leading exporter of arms. From 2016-2020, the United States exported more arms than the next three countries combined,<sup>2</sup> with many of these exports going to parties to armed conflict.<sup>3</sup> In 2020 alone, government-authorized arms reached \$175 billion.<sup>4</sup> U.S. laws and policies regarding arms transfers, therefore, carry global implications for human rights, armed conflict, and the protection of civilians.

In recent years, U.S. arms transfers to governments that have violated human rights and committed significant civilian harm have drawn scrutiny from members of Congress and civil society. In the last five years alone, members of Congress have attempted to use legislation to block arms transfers to Saudi Arabia,<sup>5</sup> the United Arab Emirates,<sup>6</sup> Israel,<sup>7</sup> the Philippines,<sup>8</sup> and Honduras,<sup>9</sup> among others, on the basis of concern regarding human rights violations and civilian harm. The American Bar Association has noted its concern with the apparent failure of the State Department to adhere to relevant human rights provisions of U.S. law.<sup>10</sup> While some risky transfers have been modified in response to congressional concerns, transfers to security forces engaged in abuses remain common. This primer seeks to inform oversight and advocacy efforts by identifying the relevant sources of U.S. law governing arms transfers, compiling existing -- and at times underused -- human rights protections and oversight mechanisms in these sources of law, and clarifying the authorities of different U.S. government entities.<sup>11</sup> This primer focuses on U.S. law and policy, but international law also provides important legal standards for arms transfers.<sup>12</sup>

The primer begins by briefly defining the major types of arms transfers in **Part I**. **Part II** identifies constitutional authorities implicated in U.S. arms transfers. **Part III** outlines domestic legislation on arms transfers with a focus on the Arms Export Control Act (AECA) and Foreign Assistance Act (FAA). **Part IV** introduces sources of domestic policy and regulation that implement U.S. legislation.

## I. TYPES OF ARMS TRANSFERS

There are two main types of arms transfers covered under U.S. law, each with different legal implications, requirements, and procedures.

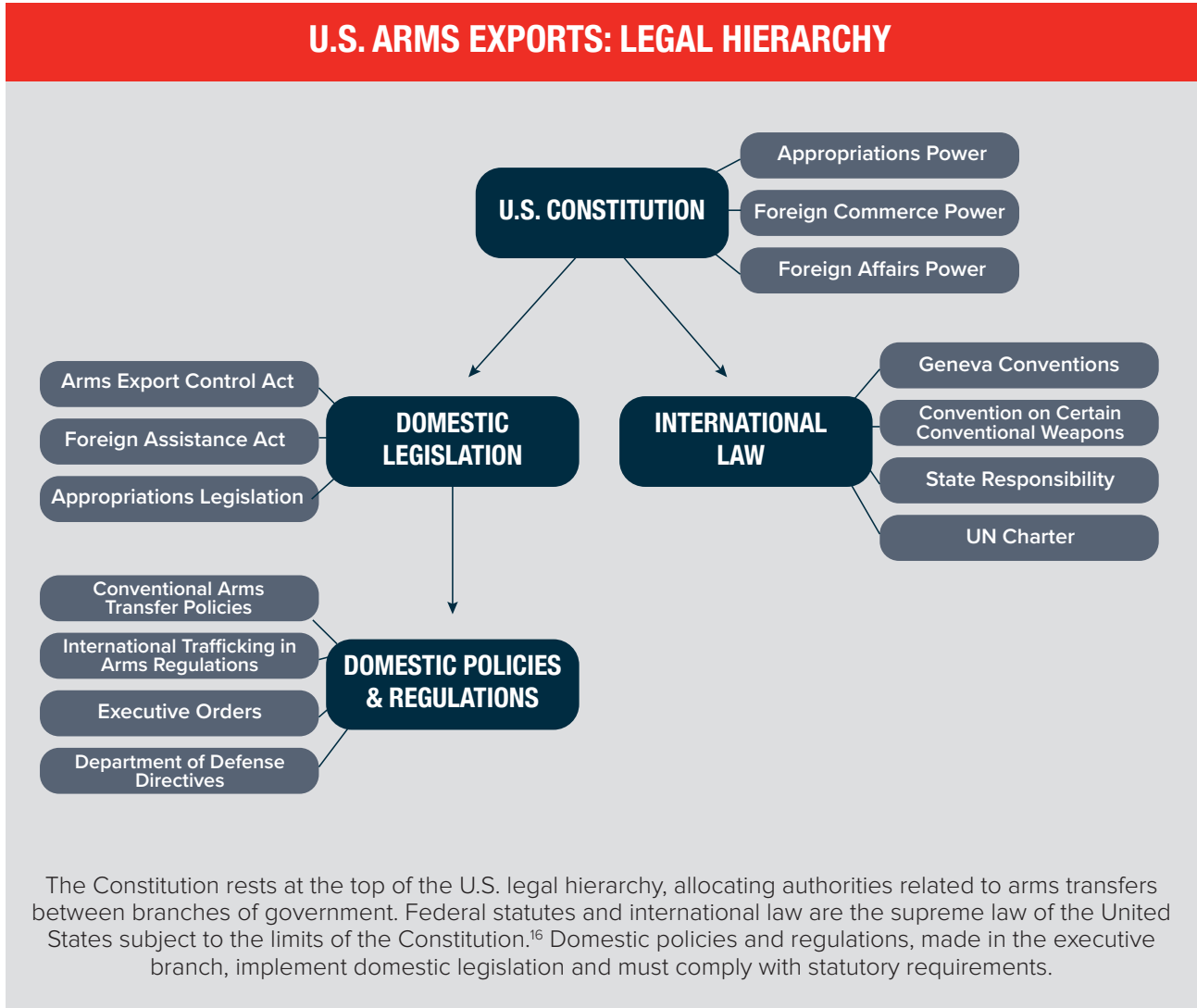
- **Foreign Military Sales (FMS):** In a Foreign Military Sale, the U.S. government directly sells defense articles to a foreign purchaser. The FMS program is overseen by the State Department and administered by the Defense Security Cooperation Agency (DSCA).
- **Direct Commercial Sales (DCS):** In a Direct Commercial Sale, a U.S. company sells defense articles directly to a foreign purchaser in compliance with U.S. government regulations and licensing requirements. The DCS program is implemented by the Directorate of Defense Trade Controls (DDTC) within the Department of State.

The United States also funds the purchase of U.S. defense articles and defense services by foreign governments through congressional appropriations.

- **Foreign Military Financing (FMF):** The U.S. government provides other countries with grants or loans to fund Foreign Military Sales or, less frequently, Direct Commercial Sales.

In addition to these main statutory authorities, the Defense Department has the authority to train and equip foreign security forces<sup>13</sup> and support counterterrorism partners, including irregular military forces.<sup>14</sup>

These authorities are not subject to the same level of congressional oversight as sales pursuant to the Arms Export Control Act. The Commerce Department also controls the export of older-generation military equipment, crime control equipment, and certain small arms, including semi-automatic assault rifles. Unlike the State Department, neither the Defense Department nor the Commerce Department has an obligation to notify the Congress before exporting weapons to consistent violators of human rights or those with a past record of end-use violations, as explained in more detail below.<sup>15</sup>



## II. ARMS TRANSFERS & THE U.S. CONSTITUTION

Arms transfers implicate multiple constitutional authorities, chiefly the foreign commerce power and appropriations power. Therefore, absent a delegation of authorities, the Constitution divides authority over different aspects of arms transfers between Congress and the executive branch.

- **Foreign Commerce Power:** Under the Constitution, Congress has the power “to regulate commerce with foreign nations.”<sup>17</sup> Arms export regulations, including human rights restrictions, are a clear exercise of the foreign commerce power.<sup>18</sup> The power encompasses arms transfers through both DCS and FMS.
- **Appropriations Power:** Congress also has exclusive appropriations power, often called the “power of the purse,” under Article I of the Constitution, which states that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>19</sup> The executive branch’s expenditure

of public funds is proper only when authorized by Congress.<sup>20</sup> This principle applies to Foreign Military Financing, as any grant to a foreign government for Foreign Military Financing must be authorized by Congress. To the extent that FMS and DCS are administered by U.S. personnel funded through federal appropriations, these activities are also controlled by the Congress.

- **War Powers:** The Constitution assigns to the Congress the authority to declare war.<sup>21</sup> The Congress' war powers can be implicated when the executive branch authorizes the export of defense services to parties to an armed conflict. The Arms Export Control Act prohibits personnel performing defense services authorized by the Act from performing any duties of a combatant nature.<sup>22</sup> However, a number of services that can be authorized pursuant to the AECA—including servicing an airplane, providing training on targeting, supporting intelligence operations, or providing personnel security—can have serious implications for limitations set by Congress on the introduction of U.S. personnel into conflict situations.

Congress may delegate authorities to the executive branch so long as it supplies an intelligible principle to which the executive branch must conform in carrying out the delegated authority.<sup>23</sup> Congress may revoke those authorities and, in general, restrict their exercise. The arms transfer laws described in Part III delegate Congress's authority over arms transfers to the President, expressly authorizing the President to carry out arms transfers in compliance with requirements in the relevant legislation, including requirements regarding human rights and IHL. Because arms transfers derive from Congress's foreign commerce power, Congress may revoke or modify those delegations as it sees fit.

### III. DOMESTIC LEGISLATION

The Arms Export Control Act of 1976 and the Foreign Assistance Act of 1961 are the two principal statutes governing arms transfers under U.S. law. Each law delegates congressional authorities to the executive branch, includes guiding principles the executive branch must follow, restricts U.S. arms transfers under particular circumstances, and establishes congressional oversight mechanisms. Additionally, Congress has passed appropriations laws and human rights legislation that amend the AECA and FAA or modify their requirements.

HUMAN RIGHTS AND PROTECTION OF CIVILIANS MECHANISMS	
Mechanisms	Source(s) in Law
Restriction on Recipient Countries	FAA 502B (22 U.S. Code § 2304(b))
Restriction on Recipient Units	FAA 620M (Leahy Law) (22 U.S. Code § 2378d)
Presidential Notification	AECA Section 36(a) (22 U.S. Code 2776(a))
Joint Resolution of Disapproval	FAA 502B (22 U.S. Code § 2304(c)(4)) AECA Section 36(b–c) (22 U.S. Code 2776(b–c))
End-Use Monitoring	AECA Section 3A (22 U.S. Code § 2785)



American-made cluster bomb, manufactured by Lanson Industries. Felton Davis screen capture from PBS News segment on “How we got the images you weren’t meant to see in Yemen.” July 3, 2018.

## Arms Export Control Act

The AECA states that “an ultimate goal of the United States continues to be a world which is free from the scourge of war and the dangers and burdens of armaments; in which the use of force has been subordinated to the rule of law; and in which international adjustments to a changing world are achieved peacefully.”<sup>24</sup> In furtherance of these goals, the AECA establishes congressional oversight mechanisms to prevent the transfer of arms that would be used in an unlawful manner, including in violation of the UN Charter, international human rights law, or IHL. The AECA delegates congressional authorities to the President and provides guiding principles that the President must follow, imposes requirements for the President to notify Congress of certain arms transfers, allows Congress to override an arms transfer with a joint resolution of disapproval, and mandates the establishment of end-use monitoring programs.

### **Delegation and Guiding Principles**

The AECA authorizes the President to control the export and import of arms to further world peace, U.S. security, and foreign policy.<sup>25</sup> President Carter’s Executive Order 11958 and President Obama’s Executive Order 13637 further delegated some of the President’s authorities under the AECA to the Secretaries of State, Defense, and the Treasury.<sup>26</sup>

As required by Supreme Court precedent, the AECA provides principles to which the President must adhere in exercising authorities that Congress delegated. The AECA requires that the executive branch “take into account whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”<sup>27</sup>

## ***Presidential Notification***

For arms transfers that reach a certain value threshold, the AECA requires the President to notify Congress before the government issues a license for DCS or a letter of offer for FMS.<sup>28</sup> Generally, the executive branch must notify Congress of a sale of major defense equipment valued at \$14 million or more and defense articles or services valued at \$50 million or more 30 days before the issuance of an export license for DCS or the government's agreement for FMS.<sup>29</sup> The chair and ranking member of the Senate Foreign Relations Committee (SFRC) or House Foreign Affairs Committee (HFAC) may also request an additional notification from the executive branch thirty days before shipment of defense articles that meet the value threshold.<sup>30</sup> The Department of Defense's Defense Security Cooperation Agency carries out the notification process.

Under the AECA, arms transfers to members of NATO, Australia, Japan, South Korea, Israel, and New Zealand require only 15 days' notice instead of 30 and have higher notification thresholds of \$25 million for major defense equipment and \$100 million for defense services and defense articles.<sup>31</sup>

Some exceptions to and gaps in the AECA's notification requirements exist.<sup>32</sup> First, if the President states in their certification to Congress "that an emergency exists which requires the proposed export in the national security interests of the United States," the executive branch may immediately send a letter of offer or issue an export license, bypassing the 15- or 30-day period of congressional review.<sup>33</sup> "Emergency" remains undefined in the statute, so the President can interpret the term at their discretion so long as they provide a "detailed justification" for the determination, as the Trump administration did when it bypassed the congressional review period for \$8.1 billion in arms sales to Saudi Arabia, Jordan, and the United Arab Emirates.<sup>34</sup> Second, individual sales under the value threshold do not require notification to Congress.<sup>35</sup> The executive branch has interpreted this provision to allow for the division of large transfers into smaller transactions that evade notification requirements.<sup>36</sup>

## ***Blocking Transfers: Joint Resolution of Disapproval***

The AECA gives Congress the power to block or modify any arms transfer under DCS or FMS through a joint resolution of disapproval.<sup>37</sup> Although Congress typically awaits presidential notification of an arms sale, it may pass independent legislation blocking or modifying an arms transfer or use the FAA's 502B resolution of disapproval mechanism, described below, at any time.<sup>38</sup>

A joint resolution of disapproval under the AECA is privileged in the Senate, meaning that any senator may send the resolution to the floor for consideration if it does not leave SFRC within ten days.<sup>39</sup> Resolutions in the House do not carry the same status, so HFAC must vote to refer the resolution to the House floor.<sup>40</sup>

To override the executive branch's approval of an arms transfer, Congress needs to either secure the President's signature or override the President's veto. Because the President would likely veto a measure designed to stop an arms transfer that their administration approved, successfully blocking a transfer typically requires supermajorities in both the House and the Senate to pass a joint resolution of disapproval under the AECA. Congress has never successfully passed a joint resolution of disapproval pursuant to the AECA and overcame a presidential veto.<sup>41</sup>

When Congress originally passed the AECA in 1976, a concurrent resolution, which requires a majority vote in the House and the Senate and no presidential signature, could override an arms transfer. However, the 1983 Supreme Court case *I.N.S. v. Chadha* required Congress to send such measures to the President for signature or veto for the action to have legal force.<sup>42</sup> Therefore, Congress amended the AECA in 1986 to require a joint resolution, and Congress must now secure a presidential signature to block an arms transfer.<sup>43</sup>



## **End-Use Monitoring**

The AECA directs the President to establish an end-use monitoring program to provide reasonable assurance that recipients of U.S. arms are complying with U.S. government requirements concerning the use, transfer, and security of defense articles and defense services and that such articles and services are being used for the purposes for which they are provided.<sup>44</sup> The law requires end-use monitoring to ensure that defense articles and services are only used for certain purposes delineated in the AECA, primarily “legitimate self-defense.”<sup>45</sup> While the AECA does not expressly require monitoring of human rights or IHL violations, any use of a defense article or service in a manner that violates international law would arguably not be consistent with the purposes for which such exports are authorized. In practice, however, end-use monitoring programs do not monitor the actual use of defense articles, including the use of U.S.-origin weapons in civilian harm, human rights abuses, or IHL violations.<sup>46</sup> Instead, current end-use monitoring programs mostly focus on the diversion of defense articles to third parties.<sup>47</sup>

End-use monitoring for DCS is conducted through the Blue Lantern program, administered by the State Department’s Directorate of Defense Trade Controls.<sup>48</sup> End-use monitoring for FMS is conducted through the Golden Sentry program, administered by the Defense Department’s Defense Security Cooperation Agency.<sup>49</sup> The Department issues a public report annually on military assistance<sup>50</sup> and end-use monitoring activities.<sup>51</sup>

The AECA requires the President to notify Congress when substantial violations of arms transfer agreements, including end-use agreements, may have occurred.<sup>52</sup> Such violations include unauthorized retransfer<sup>53</sup> and use of arms for purposes other than internal security, legitimate self-defense, counter-proliferation measures, or participation in collective security arrangements.<sup>54</sup> Substantial violations render a country ineligible to receive security assistance subject to a presidential waiver upon written certification to the Congress or a congressional determination by joint resolution.<sup>55</sup>

The definition of “legitimate self-defense” is left undefined in the AECA, but international law offers clarification as to its meaning. The UN Charter prohibits “the threat or use of force against the territorial integrity or political independence of any State” except in cases of self defense, recognizing 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.”<sup>56</sup> Customary international law requires that self-defense must be necessary and proportional to the threat faced.<sup>57</sup> The legitimacy of some invocations of self-defense remains contested,<sup>58</sup> but the UN Charter and customary international law provide a starting point for defining legitimate self-defense as mentioned in the AECA.

## **Foreign Assistance Act: Section 502B**

Section 502B of the Foreign Assistance Act contains two principal mechanisms to promote human rights in U.S. arms transfers, both of which have been relatively underutilized. After delegating authority to the President and providing guiding principles, the FAA institutes a blanket restriction on arms transfers to countries based on human rights abuses, establishes human rights restrictions on arms transfers to particular security force units, and creates a reporting mechanism that can trigger a joint resolution of disapproval to override a decision to transfer arms to a particular country. Unlike the AECA, Section 502B also covers the sale of older generation military equipment and crime control equipment, such as semi-automatic assault rifles and intrusion software, controlled by the Commerce Department.

## COMPARISON: RESOLUTIONS OF DISAPPROVAL UNDER FAA AND AECA

	Foreign Assistance Act	Arms Export Control Act
Provision	22 U.S. Code § 2304(c)	22 U.S. Code § 2776(b–c)
Timing	Thirty days after Congress passes a resolution or the SFRC or HFAC send a letter requesting a report from the Secretary of State about human rights conditions in the recipient country.	After the executive branch notifies Congress that the executive branch intends to send a letter of offer for a Foreign Military Sale or grant an export license for a Direct Commercial Sale that reaches the notification threshold.
Effect	“terminating, restricting, or continuing security assistance for such country”	“prohibiting the proposed sale”
Exception	There is no statutory exception specific to the 502B joint resolution of disapproval.	There is an exception to the 15- or 30-day review period if “the President states in his certification that an emergency exists which requires such sale in the national security interests of the United States”

### Delegation and Guiding Principles

The FAA authorizes the President to “furnish military assistance... to any friendly country or international organization” to strengthen the security of the United States and promote world peace.<sup>59</sup> Section 502 of the FAA limits the reasons for which the United States may furnish defense articles to another country to internal security, legitimate self-defense, participation in “regional or collective arrangements or measures consistent with the Charter of the United Nations,” or development assistance.<sup>60</sup>

The FAA also states that promoting increased observance of human rights shall be a principal goal of U.S. foreign policy and directs the President to formulate and conduct security assistance programs — including the sale of defense articles and services to foreign security forces — in a manner that advances human rights.<sup>61</sup>

### Country-Based Restrictions

Section 502B of the FAA prohibits the U.S. government from providing security assistance, including arms transfers, to “any country the government of which engages in a consistent pattern of gross violation of internationally recognized human rights.”<sup>62</sup>

The FAA defines gross violations of internationally recognized human rights to include:

- torture or cruel, inhuman, or degrading treatment or punishment,
- prolonged detention without charges and trial,
- causing the disappearance of persons by the abduction and clandestine detention of those persons, and
- other flagrant denial of the right to life, liberty, or the security of person.<sup>63</sup>

While the FAA does not define “other flagrant denial of the right to life, liberty, or the security of person,” a leading source on U.S. foreign relations law includes genocide, slavery, murder, and consistent violations of fundamental rights — when conducted pursuant to de facto or de jure state policy — among gross violations of internationally recognized human rights.<sup>64</sup> An expert opinion commissioned by the ABA Center



*President John F. Kennedy signs the Foreign Assistance Act. August 1, 1962. Abbie Rowe. White House Photographs. John F. Kennedy Presidential Library and Museum, Boston*

for Human Rights argued that intentional, disproportionate, or indiscriminate attacks resulting in the loss of civilian life would constitute a “flagrant denial of the right to life” within the meaning of this section of U.S. law.<sup>65</sup>

Section 620I of the FAA also prohibits assistance under the AECA or FAA to any country where “the government . . . prohibits or otherwise restricts, directly or indirectly, the transport or delivery of United States humanitarian assistance.”<sup>66</sup>

### ***Reporting and Override through a Joint Resolution of Disapproval***

Section 502B(4)(B) requires the President to provide annually “a full and complete report... with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance.”<sup>67</sup> The State Department implements this requirement through its annual Country Reports on Human Rights Practices.<sup>68</sup>

Members of Congress can utilize Section 502B to secure information about security assistance to high-risk countries at any point. To invoke Section 502B, any member of Congress can introduce a simple resolution requesting a report from the Secretary of State regarding human rights or other concerns in a particular country.<sup>69</sup> Such a resolution is privileged in the Senate.<sup>70</sup> Alternatively, HFAC or SFRC can request such information by letter. If the Secretary of State does not provide a report within thirty days, “no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.”<sup>71</sup> After receiving such a report from the Secretary of State, Congress may “adopt a joint resolution terminating, restricting, or continuing security assistance” to the country in question.<sup>72</sup> Such a resolution is privileged in the Senate.<sup>73</sup>

Until recently, this little-known provision was largely ignored by both branches. While the Congress has never voted on a joint resolution under 502B, the mechanism remains an effective tool to trigger a debate on arms sales outside of the notification process.

## USING SECTION 502B

Because Section 502B has been used less frequently than AECA joint resolutions and Leahy vetting, the exact process for its invocation is not widely understood.<sup>74</sup> However, if used effectively, 502B provides legislators a mechanism to promote accountability for violations of human rights and IHL.

Before officially invoking 502B, congressional leaders can hold an annual hearing on the human rights report and the Section 655 report to identify those countries with a consistent pattern of human rights abuses as well as those receiving defense articles that have been used in such abuses.

Leaders of SFRC and HFAC could also use 502B to establish a practice of requesting further information about human rights conditions for high-risk countries that meet particular criteria,<sup>75</sup> such as countries that have, inter alia:

- Been listed in the annual human rights reports as engaging repeatedly in gross violations of human rights and/or have a record of impunity for gross violations of human rights;
- Received items that typically receive lower relative levels of oversight, such as items formerly controlled under the U.S. Munitions List, crime control equipment, or semi-automatics now subject to Department of Commerce regulations to assess the Department's 502B compliance;
- Been the subject of a congressional notification regarding a potential end-use violation where no final determination was made by the State Department;
- Denied access or information to U.N. or U.S. monitoring personnel;<sup>76</sup>
- Unfavorable end-use monitoring ratings of over 50% or a history of diversion or misuse of firearms;<sup>77</sup> or
- Evaded licensing requirements for intelligence services.<sup>78</sup>

A resolution of disapproval could also be tailored to permit certain sales while restricting others or to impose conditions on sales to ensure compliance with international law and prevent civilian harm. For example, legislators could draft resolutions approving sales contingent upon:

1. Enhanced end-use monitoring;
2. Demonstrated capacity to use the weapon lawfully in realistic circumstances;
3. Agreement to not rely on unverified information for targeting;
4. Sharing after-action reports on the use of weapons that have previously been the subject of end-use violations; or
5. Agreeing to independent third-party monitoring of allegations of misuse.

The overarching goal of any such oversight activities would be to ensure regular adherence to the law by the executive branch. A review by the ABA Center for Human Rights found over 10 countries that received over \$10 million in U.S. security assistance in one year notwithstanding the fact that the annual human rights report by the State Department found, for at least the last three years, that the security forces of those countries were engaged in gross human rights abuses and had a culture of impunity. In none of these cases did the executive branch issue the required presidential certification to continue security assistance. To respond to such non-compliance, the Congress could censure relevant officials or amend the FAA and AECA to allow for judicial review of relevant factual determinations.<sup>79</sup>



## 1 Congress Requests a Report [22 U.S.C. § 2304 (C)(1)]

### A

Any member of Congress introduces a simple resolution, which is privileged in the Senate, requesting from the Secretary of State "a statement... with respect to the country designated in such request."

### B

The Senate Foreign Relations Committee or House Foreign Affairs Committee requests by letter "a statement... with respect to the country designated in such request."

## 2 Secretary of State Prepares a Report [22 U.S.C. § 2304 (C)(1)]

The Secretary of State, with the assistance of the Assistant Secretary of State for Democracy, Human Rights, and Labor, prepares a report setting forth:

- all the available information about observance of and respect for human rights and fundamental freedom in that country and a detailed description of practices by the recipient government with respect thereto
- the steps the United States has taken to: (i) promote respect for and observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and (ii) publicly or privately call attention to, and disassociate the United States and any security assistance provided for such country from, such practices;
- whether, in the opinion of the Secretary of State, notwithstanding any such practices: (i) extraordinary circumstances exist which necessitate a continuation of security assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and (ii) on all the facts it is in the national interest of the United States to provide such assistance; and
- such other information as such committee or such House may request.

## 3 Secretary of State Transmits Report to Congress [22 U.S.C. § 2304 (C)(3–4)]

### A

If a statement is not transmitted within thirty days after receipt of such request, no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.

### B

The Secretary of State transmits to the Senate Foreign Relations Committee and House Foreign Affairs Committee.

## 4 Congress Introduces Joint Resolution of Disapproval [22 U.S.C. § 2304 (C)(3–4)]

"[T]he Congress may at any time thereafter adopt a joint resolution terminating, restricting, or continuing security assistance for such country. In the event such a joint resolution is adopted, such assistance shall be so terminated, so restricted, or so continued, as the case may be. The resolution shall be privileged under section 601(b) of the International Security Assistance and Arms Export Control Act of 1976."

## Leahy Laws

The so-called “Leahy Laws,” named for their champion, Senator Patrick Leahy, refer to two statutory provisions prohibiting the U.S. Government from providing security assistance to units of foreign security forces implicated in the commission of gross violations of human rights: the State Department Leahy Law, Section 620M of the FAA; and the Department of Defense Leahy Law, included in annual Defense appropriations acts since 1999 and later made permanent in Section 362 of Title 10 of the U.S. Code. The key provision of the State Department Leahy Law contained in Section 620M of the FAA reads:

*No assistance shall be furnished under [the Foreign Assistance] Act or the Arms Export Control Act to any unit of the security forces of a foreign country if the Secretary of State has credible information that such unit has committed a gross violation of human rights.<sup>80</sup>*

### Definitions

The definitions of “gross violation of human rights” and “assistance” affect the scope and implementation of the Leahy Laws.

The State Department has adopted the definition of gross violation of human rights established in Section 502B for the purpose of Leahy vetting.<sup>81</sup> Unlike Section 502B, the Leahy Laws do not require a consistent pattern of gross violations of human rights.

In identifying relevant security assistance, the Leahy Laws explicitly name assistance provided under both the FAA and the AECA, implicating arms transfers including both FMS and DCS. Despite this fact, the executive branch has chosen to interpret the term “security assistance” as limited to assistance provided with appropriated funds, such as grants through Foreign Military Financing.<sup>82</sup> As such, the executive branch has not applied Leahy vetting — the process by which the executive branch meets its legal obligations under the Leahy Laws — to most arms transfers.<sup>83</sup> CIVIC supports clarifying the AECA language to subject all FMS to Leahy vetting, not just sales under the Foreign Military Financing program.<sup>84</sup>

### Human Rights Vetting

To comply with the Leahy Laws, the executive branch carries out vetting of individuals, commanders, and units designated to receive U.S. security assistance.

Historically, the State Department argued that it was impracticable to ask recipient governments to list the unit that would receive arms exports, even though doing so is necessary for both unit-level vetting and conducting statutorily mandated end-use monitoring. To address this challenge, the 2021 Consolidated Appropriations Act included a provision requiring the Secretary of State to regularly provide to recipient governments a list of units prohibited from receiving assistance under the Leahy Laws.<sup>85</sup>

### Remediation

To resume assistance to a previously rejected unit under the Leahy Laws, the Secretary of State must determine that the government receiving assistance “is taking effective steps to bring the responsible members of the security forces unit to justice.”<sup>86</sup> Senator Leahy has expressed that the Leahy Laws are meant to promote accountability, saying that their purpose is “to build professional, disciplined, transparent, and accountable security forces who are sustainable and effective partners for the United States.”<sup>87</sup>

## COMPARISON: RESTRICTIONS UNDER FAA 502B AND THE LEAHY LAW

	FAA 502B	Leahy Law (FAA 620M)
Source	Foreign Assistance Act § 502B	Foreign Assistance Act § 620M; National Defense Authorization Act
Scope	Restriction applies to an entire country.	Restriction applies to a specific unit of a country's armed forces.
Trigger	"a consistent pattern of gross violation of internationally recognized human rights"	"the Secretary of State has credible information that such unit has committed a gross violation of human rights"
Application	Applies to security assistance, defined to include Foreign Military Sales, Direct Commercial Sales to foreign security forces, Foreign Military Funding, and crime control equipment.	Executive branch interprets Leahy to apply only to security assistance granted with appropriated funds, so restrictions cover Foreign Military Financing but not Foreign Military Sales or Direct Commercial Sales.
Invocation	Enforced through a joint resolution by Congress following a request of a report on the target country's human rights record to the Secretary of State.	Enforced through Leahy unit vetting by the State Department's Bureau of Democracy, Human Rights, and Labor and in-country embassy staff.
Remediation	The President finds that such a significant improvement in its human rights record has occurred as to warrant lifting the prohibition on furnishing such assistance in the national interest of the United States.	The government receiving assistance "is taking effective steps to bring the responsible members of the security forces unit to justice."
Exceptions	"[T]he President determines and reports to the Congress...that an unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization... he may direct [for military assistance and sales]...the drawdown of defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training, of an aggregate value of not to exceed \$100,000,000 in any fiscal year.	The government receiving assistance "is taking effective steps to bring the responsible members of the security forces unit to justice."  "[T]he President determines and reports to the Congress...that an unforeseen emergency exists which requires immediate military assistance to a foreign country or international organization... he may direct [for military assistance and sales]...the drawdown of defense articles from the stocks of the Department of Defense, defense services of the Department of Defense, and military education and training, of an aggregate value of not to exceed \$100,000,000 in any fiscal year.

## Annual Appropriations Acts

The appropriations process offers an opportunity for Congress to exercise its power of the purse to promote accountability in U.S. arms transfers, including by conditioning FMF or restricting the use of appropriated funds for particular purposes.

Congress allocates funding for executive branch security assistance and licensing activities through annual appropriations. In so doing, Congress may subject such funds to human rights or other governance conditions. For example, the Congress can restrict funds provided to foreign recipients (e.g., FMF) that are used to purchase defense articles and services using the FMS process. While Congress has typically included in such conditions a national security waiver allowing the President to bypass those conditions, such a mechanism is not required by law.

Standalone appropriations laws authorizing FMF, including provisions specific to Egypt, Iraq, Afghanistan, and Israel, often include language that waives other requirements through “notwithstanding” provisions. For example, the 2020 appropriations bill that allocated FMF to Egypt stipulated that the funds may be made available “notwithstanding any other provision of law restricting assistance for Egypt, except for this subsection and section 620M of the Foreign Assistance Act of 1961.”<sup>88</sup>

In other situations, Congress may prohibit the use of appropriated funds for particular purposes, including arms transfers. For example, Congress can prohibit the use of funds in a particular geographic area, prevent the use of funds to support a particular entity, or block funds intended for a particular policy goal. Such appropriations riders are among Congress’s most potent tools to check executive power in foreign affairs.<sup>89</sup> Expenditures of government funds in violation of an appropriations restriction would violate the Antideficiency Act, subjecting the government employee who authorized the expenditure to administrative sanctions or criminal penalties.<sup>90</sup>

The 2020 appropriations bill that allocated Foreign Military Financing to Egypt subjected \$300 million to human rights conditions. The law stipulated that the \$300 million “shall be withheld from obligation until the Secretary of State certifies and reports... that the Government of Egypt is taking sustained and effective steps” to advance six specified goals related to human rights and democracy.<sup>91</sup> The law further provided that the Secretary of State could waive the certification requirement if they determine that “to do so is important to the national security interest of the United States.”<sup>92</sup>

## Additional Legislation

In addition to the FAA and the AECA, Congress has passed legislation that restricts arms transfers in specific contexts or for particular reasons. For example, the Child Soldiers Prevention Act prohibits Foreign Military Sales or Direct Commercial Sales to “the government of a country that is clearly identified...as having governmental armed forces or government-supported armed groups... that recruit and use child soldiers.”<sup>93</sup>

Section 110 of the Victims of Trafficking and Violence Protection Act of 2000 similarly restricts “nonhumanitarian, nontrade-related foreign assistance to any government that...does not comply with minimum standards for the elimination of trafficking; and is not making significant efforts to bring itself into compliance with such standards.”<sup>94</sup>

Each of these laws includes a waiver for when the president determines that providing assistance would be in the national interest of the United States.<sup>95</sup>

In a provision similar to Section 502B, the International Security and Development Cooperation Act of 1981



prohibits FMS or DCS to “any country determined by the President to be engaged in a consistent pattern of acts of intimidation or harassment directed against individuals in the United States.”<sup>96</sup> The law requires the President to report such a determination to the Speaker of the House and the chairs of the SFRC and HFAC.<sup>97</sup> While the restriction does not explicitly invoke human rights or IHL, it could be used to hold governments accountable when human rights or IHL violations coincide with intimidation or harassment of individuals in the United States.

Congress has also passed measures to block arms transfers to particular countries based on violations of IHL or human rights. Such measures have included both prohibitions on the use of U.S. funds for particular purposes, which prevents the provision of FMF, and arms embargoes on particular countries, which block DCS and FMS.

## IV. U.S. POLICY AND REGULATIONS

The executive branch implements regulations to comply with legal requirements established by Congress. Domestic policies and regulations must be consistent with the AECA and FAA, but different administrations interpret some aspects of federal law differently, and those interpretations are reflected at the policy and regulatory level.

### International Trafficking in Arms Regulations

The International Traffic in Arms Regulations (ITAR) implement the Arms Export Control Act by providing licensing requirements for the sale of defense articles and services. Exporters and manufacturers of defense articles, as defined in the United States Munitions List generally register as such and then secure export licenses for commercial sales.<sup>98</sup> ITAR prohibits exports to certain states and individuals for reasons including United Nations Security Council sanctions, arms embargoes, and terrorism.<sup>99</sup> ITAR, therefore, implements congressional legislation and executive measures by prohibiting the export of defense articles and services to some countries for human rights reasons while partially restricting export to others.

Part 121 of the ITAR defines the United States Munitions List (USML), which designates what types of arms and equipment are included under the Regulations.<sup>100</sup> The executive branch designates which defense articles to include on the USML, reviews the USML, and informs relevant congressional committees when removing items from the USML.

Items with “substantial military utility” are supposed to be designated on the USML as “significant military equipment.”<sup>101</sup> In practice, however, the executive branch has removed some such items, including semi-automatic assault rifles, and transferred oversight of these items to the Commerce Department.<sup>102</sup> Unlike items on the USML, Commerce Department-controlled items are not subject to Leahy vetting, congressional reporting of end-use violations, or public reporting on most exports.<sup>103</sup> While certain former USML items and crime control equipment controlled by the Commerce Department are statutorily subject to Section 502B, in practice, the Commerce Department has authorized the export of such items without the requisite presidential certification.

The State Department’s Directorate of Defense Trade Controls (DDTC) administers and enforces the ITAR by reviewing, granting, and denying export license applications.<sup>104</sup>

## Conventional Arms Transfer Policies

Several presidents have issued presidential directives called Conventional Arms Trade (CAT) policies to guide the executive branch in considering both Foreign Military Sales and Direct Commercial Sales. Each of these policies must be consistent with the legal requirements of the AECA and FAA. President Carter issued the first CAT policy in 1977, and four other presidents — Reagan, Clinton, Obama, and Trump — have followed with their own, each of which has revoked and replaced its direct predecessor.<sup>105</sup>

President Trump issued National Security Presidential Memorandum 10 (NSPM-10) on April 19, 2019, replacing the Obama administration’s CAT policy as described in Presidential Policy Directive 27. NSPM-10 offers five factors to consider Foreign Military Sales or Direct Commercial Sales: U.S. national security, U.S. economic security and innovation, relationships with allies and partners, human rights and IHL, and non-proliferation.<sup>106</sup> For human rights and IHL, NSPM-10 stipulates that the United States will not transfer arms when it has actual knowledge at the time of authorization that the transferred arms will be used to commit “genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, serious violations of Common Article 3 of the Geneva Conventions of 1949, attacks intentionally directed against civilian objects or civilians who are legally protected from attack, or other war crimes.”<sup>107</sup>

The Biden administration has signaled its intent to institute a new CAT policy with an increased emphasis on human rights and the protection of civilians compared to its predecessor.<sup>108</sup> As of this primer’s publication in February 2022, the Biden administration has not yet enacted a new policy.

## CONCLUSION

A variety of statutes and policies can serve as tools to promote compliance with human rights and IHL in U.S. arms sales. This primer has focused on the Arms Export Control Act, Foreign Assistance Act, Leahy Laws, annual appropriations legislation, International Trafficking in Arms Regulations, and Conventional Arms Transfer policies.

However, given the long track record of evasion of the law by the executive branch, additional congressional oversight is necessary to ensure compliance with the law. Using the provisions outlined in this primer, including those that have not been used to their full potential, legislators and advocates can better use legal tools to promote accountability and compliance with human rights and IHL in U.S. arms transfers.

## ENDNOTES

- 1 The views expressed herein represent the opinions of the authors. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association or any of its entities.
- 2 Pieter D. Wezeman, Alexandra Kuimova & Siemon T. Wezeman, Trends in International Arms Transfers, 2020, Stockholm Int'l Peace Rsch. Inst. (Mar. 2021), at 3, [https://www.sipri.org/sites/default/files/2021-03/fs\\_2103\\_at\\_2020\\_v2.pdf](https://www.sipri.org/sites/default/files/2021-03/fs_2103_at_2020_v2.pdf).
- 3 "Of the 82 countries identified by the Uppsala Conflict Data Program as a party or secondary party to an armed conflict in 2016, the U.S. delivered major military items (measured in Foreign Military Sales) to at least 62 of them; in 34 countries where conflict took place, the US delivered arms in 27." With Great Power: Modifying US Arms Sales to Reduce Civilian Harm, Ctr. for Civilians in Conflict and Stimson Center (2018), 2, <https://civiliansinconflict.org/wp-content/uploads/2018/01/With-Great-Power.pdf>.
- 4 U.S. Arms Transfers Increased by 2.8 Percent in FY 2020 to \$175.08 Billion, U.S. Dep't of State (Jan. 20, 2021), <https://www.state.gov/u-s-arms-transfers-increased-by-2-8-percent-in-fy-2020-to-175-08-billion/>.
- 5 E.g., H.J. Res. 63, 117th Cong. (2021).
- 6 E.g., S.J. Res. 37, 116th Cong. (2019).
- 7 E.g., S.J. Res. 19, 117th Cong. (2021).
- 8 E.g., H.R. 3884, 117th Cong. (2021).
- 9 E.g., H.R. 2716, 117th Cong. (2021).
- 10 See Am. Bar Assoc., House of Delegates Resolution Dated August 12-13, 2019, available at <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2019/113c-annual-2019.pdf>.
- 11 This primer uses the colloquial term "arms" to refer to all defense articles and services covered by the Arms Export Control Act.
- 12 For more on international law regarding arms transfers, see generally The Legal Framework Regulating Proxy Warfare, Am. Bar Assoc. (Dec. 2019), 13–35, [https://www.americanbar.org/groups/human\\_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/](https://www.americanbar.org/groups/human_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/); With Great Power, supra note 3 at 11–18.
- 13 See 10 U.S.C. § 333.
- 14 See 10 U.S.C. § 127e.
- 15 See Brittany Benowitz and Barry Kellman, Rethink Plans to Loosen U.S. Controls on Arms Exports, Arms Control Assoc. (Apr. 2014), <https://www.armscontrol.org/act/2013-04/rethink-plans-loosen-us-controls-arms-exports>.
- 16 For more on international law regarding arms transfers, which is not the focus of this primer, see generally The Legal Framework Regulating Proxy Warfare, Am. Bar Assoc. (Dec. 2019), 13–35, [https://www.americanbar.org/groups/human\\_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/](https://www.americanbar.org/groups/human_rights/reports/report-legal-framework-regulating-proxy-warfare-2019/); With Great Power, supra note 3 at 11–18.
- 17 U.S. Const. art. I, § 8, cl. 3.
- 18 Louis Henkin, Foreign Affairs and the US Constitution 66 (1996).
- 19 U.S. Const. art. I, § 9, cl. 7.
- 20 See *United States v. MacCollom*, 426 U.S. 317, 321 (1976).
- 21 U.S. Const. art. I, § 8, cl. 11.
- 22 22 U.S.C. § 2761(c).
- 23 *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power").
- 24 22 U.S.C. § 2751.
- 25 22 U.S.C. § 2778(a)(1).
- 26 Exec. Order No. 11958, 42 FR 4311 (1977); Exec. Order No. 13637, 78 FR 16129 (2013).
- 27 22 U.S.C. § 2778(a)(2).
- 28 22 U.S.C. § 2776(b-c).
- 29 *Id.*
- 30 22 U.S.C. § 2776(i).
- 31 22 U.S.C. § 2776(b–c).
- 32 In addition to narrower exceptions, Section 614(a) of the FAA allows the president to bypass any provision of the AECA, FAA, or other laws regarding funds provided pursuant to either act. See 22 U.S.C. 2364(a)(1). To invoke the waiver authority, the president must consult with relevant congressional committees, determine that it is "vital" to the "national security interests" of the United States to use the waiver, and notify Congress of the determination in writing. *Id.* at § 2364(a)(1–3). The exception includes fiscal restrictions. The president cannot provide more than \$750 million in cash arms sales or \$250 million in funds under the waiver authority. See *id.* at § 2364(a)(4). In a given year, a single country can receive no more than \$50 million in funds or \$500 million in cash sales through the waiver authority unless the country is a "victim of active aggression." *Id.*
- 33 22 U.S.C. § 2776(c).
- 34 Scott R. Anderson, Untangling the Yemen Arms Sales Debate, *Lawfare* (June 14, 2019), <https://www.lawfareblog.com/untangling-yemen-arms-sales-debate>. See also Michael R. Pompeo, Sec'y of State, Emergency Notification of Arms Sales to Jordan, the United Arab Emirates, and Saudi Arabia (May 24, 2019), transcript available at <https://2017-2021.state.gov/emergency-notification-of-arms-sales-to-jordan-the-united-arab-emirates-and-saudi-arabia/index.html> (outlining Secretary Mike Pompeo's justification for invoking the emergency waiver to bypass the congressional review period for \$8.1 billion in arms transfers to Saudi Arabia, Jordan, and the United Arab Emirates).
- 35 Although the value of under-threshold sales rarely enters the public record, a 2020 State Department report found "the Department approved a total of 4,221 below-threshold arm transfers involving Saudi Arabia and the United Arab Emirates, with an

estimated total value of \$11.2 billion” from January 2017 to August 2020. Off. of Inspector Gen., U.S. Dep’t of State, Review of the Department of State’s Role in Arms Transfers to the Kingdom of Saudi Arabia and the United Arab Emirates 11 (August 2020).

36 See Great Responsibility: A Legislative Reform Agenda for U.S. Arms Transfers and Civilian Harm, Ctr. for Civilians In Conflict & Stimson Ctr. (Oct. 2020), at 2, <https://civiliansinconflict.org/wp-content/uploads/2020/10/US-Arms-Sales-Brief.pdf>. See also U.S. Arms Exports Under Congressional Notification Thresholds, Forum on the Arms Trade, <https://www.forumarmstrade.org/underthreshold.html>.

37 22 U.S.C. § 2776(c).

38 See Paul K. Kerr, Arms Sales: Congressional Review Process, Cong. Rsch. Serv. (Oct. 20, 2021), at 6, <https://sgp.fas.org/crs/weapons/RL31675.pdf>.

39 See Alexandra Stark, Managing U.S. Security Partnerships: A Toolkit for Congress, New Am. (Oct. 2020), at 28, [https://d1y8sb8igg2f8e.cloudfront.net/documents/Managing\\_U.S.\\_Security\\_Partnerships.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/Managing_U.S._Security_Partnerships.pdf).

40 See id.

41 See Kerr, *supra* note 38 at 4.

42 See *I.N.S. v. Chadha*, 462 U.S. 919, 958 (1983) (“To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution’s prescription for legislative action: passage by a majority of both Houses and presentment to the President.”).

43 Pub. L. No. 99-247, 100 Stat. 9.

44 22 U.S.C. § 2785a(1–2).

45 22 U.S.C. § 2754.

46 Demystifying End-Use Monitoring in U.S. Arms Exports, Ctr. for Civilians in Conflict, Stimson Ctr., & Ctr. for Int’l Pol’y Sec. Assistance Monitor (2021), at 1, <https://civiliansinconflict.org/wp-content/uploads/2021/09/EUM-Brief.pdf>.

47 See id. at 2.

48 See id. at 1.

49 See id.

50 See Directorate of Defense Trade Controls, Section 655 Annual Military Assistance, Dep’t of State, <https://www.state.gov/section-655-annual-military-assistance/>.

51 See U.S. Dep’t of State, Report to Congress on End-Use Monitoring of Defense Articles and Defense Services 22 USC 2785(c): End-Use Monitoring of Defense Articles and Defense Services (2020) (available at [https://www.pmdtdc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=1852993f1b01b8502b6ca932f54bcb66](https://www.pmdtdc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=1852993f1b01b8502b6ca932f54bcb66)).

52 22 U.S.C. § 2753(c)(2).

53 22 U.S.C. § 2753(c)(1)(a).

54 22 U.S.C. § 2754.

55 22 U.S.C. § 2753(c)(3).

56 U.N. Charter arts. 2, 51.

57 See Caroline Case, 29 British and Foreign State Papers (1841) 1137–1138, available online at [https://avalon.law.yale.edu/19th\\_century/br-1842d.asp](https://avalon.law.yale.edu/19th_century/br-1842d.asp) (“It will be for that Government to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation.”) See generally David Kretzmer, The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*, 24 Eur. J. of Int’l L. 235 (2013) (clarifying the difference between proportionality requirements in *jus in bello* and *jus ad bellum*).

58 For a more comprehensive discussion of self-defense in international law, see generally Claus Kress, On the Principle of Non-Use of Force in Current International Law, Just Sec. (Sept. 30, 2019), <https://www.justsecurity.org/66372/on-the-principle-of-non-use-of-force-in-current-international-law/>. See also Elvina Pothelet, U.S. Military’s “Collective Self-Defense” of Non-State Partner Forces: What Does International Law Say?, Just Sec. (Oct. 26, 2018), <https://www.justsecurity.org/61232/collective-self-defense-partner-forces-international-law-say/> (analyzing legal issues with the invocation of the self-defense on behalf of non-state actors in Syria); Elena Chachko & Ashley Deeks, Which States Support the ‘Unwilling and Unable’ Test?, Lawfare (Oct. 10, 2016), <https://www.lawfareblog.com/which-states-support-unwilling-and-unable-test> (discussing states’ positions on self-defense against non-state actors located in a non-consenting state that is unwilling or unable to take action against them).

59 22 U.S.C. § 2311(a).

60 Id.

61 22 U.S.C. § 2304.

62 Id. at § 2304(b).

63 Id. at § 2304(d).

64 Restatement (Third) of Foreign Relations Law § 702 (1987).

65 Letter from Michael Pates, Director of the American Bar Association Center for Human Rights, and Brittany Benowitz, Chief Counsel of the American Bar Association Center for Human Rights, to the U.S. Senate (May 29, 2017), at 7, (available online at <https://s3.documentcloud.org/documents/3727674/ABA-CHR-Assessment-of-Arms-Sales-to-Saudi-Arabia.pdf>).

66 22 U.S.C. § 2378–1.

67 22 U.S.C. § 2304(b).

68 Bureau of Democracy, Hum. Rts. & Lab., 2020 Country Reports on Human Rights Practices, U.S. Dep’t of State (Mar. 30, 2021).

69 A simple resolution does not require a presidential signature and, therefore, cannot be vetoed. A simple resolution need not be bicameral. However, its use in the context of a 502B request could be subject to litigation given *INS v. Chadha*’s invalidation of the legislative veto.

70 See Pub. L. 94-329 § 601(b), 90 Stat. 729.

71 22 U.S.C. § 2304(c)(3).



- 72 22 U.S.C. § 2304(c)(4).
- 73 See Pub. L. 94-329 § 601(b), 90 Stat. 729.
- 74 For a more extensive discussion of congressional oversight in general, see Project on Gov't Oversight, *The Art of Government Oversight: A User's Guide to Doing It Right* (2nd ed. 2015). For recommended legislative reforms of arms transfer law, see generally *Great Responsibility*, *supra* note 36.
- 75 For an example of how to identify high-risk arms sales, see A. Trevor Thrall and Jordan Cohen, 2021 Arms Sales Risk Index, Cato Inst. (Jan. 18, 2022), <https://www.cato.org/study/2021-arms-sales-risk-index>.
- 76 See, e.g., U.S. Gov't Accountability Off., U.S. Government Should Strengthen End-Use Monitoring and Human Rights Vetting for Egypt 17–25 (2016) (describing Egyptian authorities restricting access of end-use monitors).
- 77 See, e.g., U.S. Dep't of State, End-Use Monitoring of Defense Articles and Defense Services: Commercial Exports FY 2019 4 (2019) (available at [https://www.pmdrtc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=c13d692b1b9154102dc36311f54bcb2b](https://www.pmdrtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=c13d692b1b9154102dc36311f54bcb2b)).
- 78 See, e.g., Press Release, U.S. Dep't of Jus., Three Former U.S. Intelligence Community and Military Personnel Agree to Pay More Than \$1.68 Million to Resolve Criminal Charges Arising from Their Provision of Hacking-Related Services to a Foreign Government (Sep. 14, 2021) (available at <https://www.justice.gov/opa/pr/three-former-us-intelligence-community-and-military-personnel-agree-pay-more-168-million>) (describing evasion of licensing requirements for Emirati intelligence services).
- 79 See Harold Hongju Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair*, 181–184 (1990) (proposing ways to adjudicate separation-of-powers issues in foreign policy and re-establish the judiciary's role in legislative-executive disputes).
- 80 22 U.S.C. § 2378d.
- 81 U.S. Dep't of State, Introduction to Leahy Vetting Policy, at 12 (available at [https://www.state.gov/wp-content/uploads/2020/06/PP410\\_INVEST\\_v2.1.pdf](https://www.state.gov/wp-content/uploads/2020/06/PP410_INVEST_v2.1.pdf)). The 502B definition includes: torture or cruel, inhuman, or degrading treatment or punishment; prolonged detention without charges and trial; causing the disappearance of persons by the abduction and clandestine detention of those persons; and other flagrant denial of the right to life, liberty, or the security of person. 22 U.S.C. § 2304(d).
- 82 See Paul K. Kerr, *Arms Sales: Congressional Review Process*, Cong. Rsch. Serv. (Oct. 20, 2021), at 2, <https://sgp.fas.org/crs/weapons/IF11197.pdf>.
- 83 Paul K. Kerr & Liana W. Rosen, *U.S. Arms Sales and Human Rights: Legislative Basis and Frequently Asked Questions*, Cong. Rsch. Serv. (Apr. 30, 2021), at 2, <https://sgp.fas.org/crs/weapons/IF11197.pdf>.
- 84 See *Great Responsibility*, *supra* note 36 at 9.
- 85 See Pub. L. 116–260 § 7035. (a)(7), 134 Stat. 1182.
- 86 22 U.S.C. § 2378d(b).
- 87 Patrick Leahy, U.S. Senator from Massachusetts, Remarks of Senator Patrick Leahy “Leahy Law” Workshop On Accountability And Prevention at United States Institute of Peace (Mar. 26, 2015) (available online at <https://www.leahy.senate.gov/press/remarks-of-senator-patrick-leahy-leahy-law-workshop-on-accountability-and-prevention-united-states-institute-of-peace>).
- 88 See Pub. L. No. 116-94 § 741(a)(3), 133 Stat. 2534.
- 89 See Koh, *supra* note 79 at 131.
- 90 See U.S. Gov't Accountability Off., B-201260, *Legal Opinion Regarding Applicability of Antideficiency Act to Executive Branch Expenditures* (Sep. 11, 1984) (“an expenditure in violation of [the Boland Amendment’s] prohibitive language would violate the Anti-Deficiency Act and would subject the authorizing official to administrative and criminal penalties.”). See also U.S. Gov't Accountability Off., GAO-06-382SP, *Principles of Federal Appropriations Law*, 3d. Ed. Vol. II, 6-79–84 (Feb. 2006) (discussing the application of the Antideficiency Act for specific purpose violations and appropriations restrictions).
- 91 See Pub. L. No. 116-94 § 741(a)(3), 133 Stat. 2534.
- 92 See *id.* at § 741(b).
- 93 Pub. L. No. 110-457 § 404(a), 122 Stat. 5044.
- 94 Pub. L. No. 106-386 § 110(a), 114 Stat. 1464.
- 95 Pub. L. No. 110-457 § 404(c), 122 Stat. 5044; Pub. L. No. 106-386 § 110(d)(4), 114 Stat. 1464.
- 96 22 U.S.C. § 2756; Pub. L. No. 97-13 § 115, 95 Stat. 1519.
- 97 See *id.*
- 98 See 22 C.F.R. § 122.1.
- 99 See 22 C.F.R. § 126.
- 100 See 22 C.F.R. § 121.
- 101 See 22 C.F.R. § 120.7.
- 102 E.g., *Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)*, 86 FR 46,590 (Sep. 20, 2021).
- 103 See Benowitz & Kellman, *supra* note 15.
- 104 See DDTC Overview: Who We Are, What We Do, and Why, DECCS Industry Service Portal, [https://deccs.pmdrtc.state.gov/deccs?id=ddtc\\_kb\\_article\\_page&sys\\_id=8249bf04dbc7bf0044f9ff621f96197d](https://deccs.pmdrtc.state.gov/deccs?id=ddtc_kb_article_page&sys_id=8249bf04dbc7bf0044f9ff621f96197d).
- 105 U.S. Gov't Accountability Off., GAO-19-673R, *Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria 1* (Sep 09, 2019).
- 106 National Security Presidential Memorandum on United States Conventional Arms Transfer Policy 5 (Apr. 19, 2018) (available online at <https://www.govinfo.gov/content/pkg/DCPD-201800254/pdf/DCPD-201800254.pdf>).
- 107 *Id.*
- 108 Mike Stone and Patricia Zengerle, Biden plans shift in arms policy to add weight to human rights concerns, Reuters (Aug. 4, 2021), <https://www.reuters.com/world/us/exclusive-biden-plans-shift-arms-export-policy-favor-human-rights-sources-2021-08-04/>.

