

## **Congress Should Defund Hostilities in Yemen**



**A Policy Note by the Center for Ethics and the Rule of Law (CERL)**

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## *I. Introduction and Purpose*

It has been four years since the Saudi-led coalition intervened in the Yemen conflict, yet a military victory is nowhere in sight. Instead, millions of Yemenis are on the verge of starvation and the civilian death toll continues to rise beyond prohibitive levels.<sup>1</sup> The Trump Administration remains supportive of the Saudis and Emiratis in the face of credible allegations of war crimes and growing bipartisan demand in the U.S. Congress to end American complicity in this humanitarian catastrophe. After much wrangling in both chambers of Congress, a bill that would remove U.S. support for the Saudi-led coalition in Yemen made its way to the president's desk only to be vetoed on April 16, 2019.<sup>2</sup> The veto is one that falls in line with previous confrontations between the executive and legislative branches over the exact contours of the U.S.-Saudi relationship.<sup>3</sup> In fact, "Saudi Arabia has now been the topic of more presidential vetoes than almost any other country—outranked only by China in modern presidential history."<sup>4</sup> While Congress probably lacks the votes for a veto override, the fight is not over as proponents in the Senate are clamoring for the necessary 67 votes.<sup>5</sup> While S.J.Res.7 represents a bold and commendable effort by Congress to end U.S. involvement in Yemen, it will most likely fail to impact the current U.S. support for the Saudi-led coalition's bloody military campaign in Yemen. The purpose of this paper is to propose an alternative path for Congress to end the hostilities in Yemen.

The current administration has not articulated a specific national security objective that would justify our presence in Yemen other than "giving the Saudi-led coalition the support needed to defeat Iranian-backed rebels."<sup>6</sup> Our objective, it would seem, is to protect the U.S.-Saudi alliance and indirectly contain Iran, which in turn is arming the Houthi insurgency. In the wake of the murder of Saudi dissident and Washington Post journalist Jamal Khashoggi, an assassination that the CIA concluded was ordered by Saudi Crown Prince Mohammed bin Salman, along with the strong condemnation of the Saudi Kingdom both by our allies and by Congress, it would behoove the administration to reassess its current relationship with the Kingdom.<sup>7</sup> Most urgently, it is time to end the U.S. Armed Forces' support of the Saudi-led coalition's immoral war.

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<sup>1</sup> [https://www.washingtonpost.com/business/why-hunger-rivals-bombs-as-the-biggest-danger-in-yemen/2019/03/18/c5e763f6-49be-11e9-8cfc-2c5d0999c21e\\_story.html?utm\\_term=.29f58bd43c77](https://www.washingtonpost.com/business/why-hunger-rivals-bombs-as-the-biggest-danger-in-yemen/2019/03/18/c5e763f6-49be-11e9-8cfc-2c5d0999c21e_story.html?utm_term=.29f58bd43c77)

<sup>2</sup> <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7>

<sup>3</sup> <https://www.lawfareblog.com/yemen-resolution-and-historical-us-saudi-security-relationship>

<sup>4</sup> Id.

<sup>5</sup> <https://www.cnn.com/2019/04/16/politics/trump-vetoes-yemen-war-powers-resolution/index.html>;  
<https://www.cnn.com/2019/04/23/politics/bernie-sanders-yemen-veto-override-vote/index.html>

<sup>6</sup> <https://www.washingtonexaminer.com/policy/defense-national-security/pompeo-rebukes-senators-who-voted-to-end-us-involvement-in-yemen-civil-war>

<sup>7</sup> [https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d\\_story.html](https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html)

On March 8, 2019, CERL Faculty Director Claire Finkelstein and CERL Fellow Nicholas Saidel published an op-ed in *The Hill* recommending an appropriations-based strategy for Congress to effectuate change in U.S. policy in Yemen.<sup>8</sup> We argue the same herein with a more in-depth analysis of relevant issues. While S.J.Res.7 is praiseworthy, it does not utilize Congress' "power of the purse," a power that optimizes Congress' ability to end a military campaign. Defunding U.S. support for the Saudi-led coalition in Yemen would send the clearest and most robust signal to President Trump that Congress' war-making powers should not be circumvented.

Executive overreach in the war context is a dangerous trend that spans many administrations.<sup>9</sup> To end American complicity in a congressionally unauthorized war that is immoral and illegal and that could potentially expose U.S. personnel to liability in American and international courts is a paramount concern that can no longer be ignored. De-appropriating funds designated to support the Saudi-led coalition in Yemen will strengthen precedent established during the Vietnam War to combat illegal wars and will reassert Congress' war powers authority.

## ***II. Background to Yemen War and Humanitarian Crisis***

The war in Yemen has its roots in the Arab Spring of 2011.<sup>10</sup> Protests that year led to Yemeni President Ali Abdullah Saleh's removal from power. Saleh's former deputy, Abdrabbuh Mansour Hadi, assumed control of the country, which continued to be plagued by political and economic instability and threats from Sunni jihadists in the country.<sup>11</sup> The Houthi movement, also known as Ansar Allah, is a Yemeni armed militia with links to Iran that adheres to the Zaydi sect of Shi'a Islam.<sup>12</sup> The Houthis had been involved in battles with the Sunni central government dating as far back as the early 2000s.<sup>13</sup>

Capitalizing on Yemen's volatility and popular discontent with the Hadi regime, the Houthis were able to capture Yemen's capital, Sana'a, from the government in 2014.<sup>14</sup> Houthi leader Abdulmalek al-Houthi demanded reforms and a more representative government.<sup>15</sup> Following the breakdown in negotiations with the Hadi government, the Houthis seized the presidential palace in January 2015, forcing Hadi to temporarily resign and flee the country.<sup>16</sup> Since December 2017, Hadi has been in exile residing in Saudi Arabia.<sup>17</sup> As for Saleh, the Houthis partnered with

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<sup>8</sup> <https://thehill.com/opinion/international/432635-its-time-to-defund-the-saudi-led-coalitions-war-in-yemen>

<sup>9</sup> <https://www.law.upenn.edu/live/files/7911-aumf-policy-note-final20-april-2018pdf>

<sup>10</sup> <https://www.bbc.com/news/world-middle-east-29319423>

<sup>11</sup> Id.

<sup>12</sup> <https://www.aljazeera.com/news/middleeast/2014/08/yemen-houthis-hadi-protests-201482132719818986.html>

<sup>13</sup> <https://www.bbc.com/news/world-middle-east-29319423>

<sup>14</sup> <https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/war-in-yemen>

<sup>15</sup> <https://www.aljazeera.com/news/middleeast/2014/08/yemen-houthis-hadi-protests-201482132719818986.html>

<sup>16</sup> <https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/war-in-yemen>

<sup>17</sup> Id.

him in 2016, but distrust and infighting within this fragile alliance led to the Houthis killing Saleh in 2017 after he tried to break away and form a militia composed of his loyalists.<sup>18</sup>

In March 2015, Saudi Arabia formed a coalition of mostly Sunni Arab countries to fight the Houthi-led rebellion, and indirectly, its Iranian backers who have provided military and logistical support to the Houthis.<sup>19</sup> Lebanese Hezbollah, which most experts consider an Iranian proxy force, has also provided support to the Houthis.<sup>20</sup> In that same month, the Obama administration echoed the Saudi-led coalition's demand that the Houthis withdraw from seized territory. More importantly, the administration began providing "logistical and intelligence support" to the coalition's operations without taking direct military action in Yemen in support of this effort.<sup>21</sup> The misjudgment about the Saudi regime is thus longstanding and has been replicated and sustained by Democratic and Republican administrations alike.<sup>22</sup>

The U.S.-Saudi alliance is based on the United States' desire to protect its access to Saudi oil as well as the help of the Saudi government in subduing jihadist threats emanating from Saudi soil and, more generally speaking, to assist the United States in global counter-terrorism efforts.<sup>23</sup> The quid pro quo for the Saudis is the guarantee of protection under the American security umbrella, for example, through military and intelligence cooperation and U.S. weapons sales to the Saudi regime—weapons sales that are quite lucrative for the United States. The United States has also historically viewed Saudi Arabia as providing a much-needed bulwark against Iranian expansion in the region. The conflict in Yemen, so close to Saudi Arabia's borders, and more specifically, so close to Saudi regions with restive Shi'a populations, destabilizes the Saudi regime, endangers important maritime trade routes like the Bab el-Mandeb Strait, and provides Iran with a battleground to drain Saudi resources and bog down its military personnel.

The U.S.-Saudi alliance has been strained by the humanitarian toll exacted by the Yemen war. Saudi Arabia's assassination of Washington Post reporter and Saudi citizen-in-exile Jamal Khashoggi has contributed significantly to U.S. Congress' waning support for American involvement in the conflict, though the Trump Administration has remained steadfast in its support for the Saudi-led coalition.<sup>24</sup> Adding to the complexity of the conflict, Yemen continues to host a certain number of al-Qaeda fighters who are poised for a revival given the chaos caused by the Saudi-led campaign against the Houthis.<sup>25</sup> The U.S. Armed Forces are directly engaging

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<sup>18</sup> <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/killing-former-president-saleh-could-worsen-yemen-war>

<sup>19</sup> <https://www.businessinsider.com/members-of-saudi-led-coalition-in-yemen-their-contributions-2015-3>;  
<https://www.cfr.org/interactives/global-conflict-tracker#!/conflict/war-in-yemen>

<sup>20</sup> <https://www.lawfareblog.com/stockholm-agreement-and-yemens-other-wars>

<sup>21</sup> <https://fas.org/sgp/crs/mideast/R45046.pdf>

<sup>22</sup> <https://www.theguardian.com/us-news/2018/dec/04/george-hw-bush-saudi-arabia-donald-trump>

<sup>23</sup> <https://www.cfr.org/backgrounders/us-saudi-arabia-relations>

<sup>24</sup> [https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d\\_story.html](https://www.washingtonpost.com/world/national-security/cia-concludes-saudi-crown-prince-ordered-jamal-khashoggis-assassination/2018/11/16/98c89fe6-e9b2-11e8-a939-9469f1166f9d_story.html);  
<https://www.nbcnews.com/think/opinion/trump-s-support-saudi-arabia-contradicts-cia-subverts-national-security-ncna938591>

<sup>25</sup> <https://www.wsj.com/articles/yemens-war-opens-way-for-al-qaedas-revival-1542895200>

these al-Qaeda forces as a separate mission from supporting the Saudi-led coalition. The line between U.S. support of the Saudi-Coalition in the war against Yemen and the continuing U.S. fight against al Qaeda in Yemen is starting to blur as Saudi Arabia may be partnering with al-Qaeda in the fight against the Houthis, even providing al-Qaeda with U.S.-made weapons.<sup>26</sup>

Saudi-led coalition air strikes have killed thousands of innocent Yemeni civilians, and its punitive economic measures like blockades and import restrictions have caused famine-like conditions for millions of people.<sup>27</sup> According to the International Committee for the Red Cross, the war in Yemen has become the “world’s single largest humanitarian crisis,” a dismal assessment echoed by the UN.<sup>28</sup>

There are credible allegations that both sides have committed war crimes throughout the last four years of fighting—fighting that has, for all intents and purposes, resulted in a stalemate.<sup>29</sup> While a limited but promising ceasefire was negotiated in December 2018, i.e., the Stockholm Agreement,<sup>30</sup> both sides have accused the other of violations and clashes continue.<sup>31</sup> Most recently, both sides agreed to a compromise that would redeploy forces from the port city of Hodeidah, which would alleviate some of the civilian suffering and which provides a fragile path towards a political settlement.<sup>32</sup>

### **III. Background to U.S. Policy in Yemen and Congressional Efforts**

Substantial congressional interest in the war in Yemen did not begin until mid-2015 when it became clear that the Saudi-led coalition was not decisively winning, and civilian deaths began to mount considerably.<sup>33</sup> At first, Congress’ focus was on delaying or halting weapons sales, for example, of precision guided missiles (PGMs) that were being sold to Saudi Arabia. Members of Congress became more vocal in their reproach of the Obama administration’s support for the Saudi-led coalition in 2016 after an October Saudi air strike killed 140 people at a funeral procession in Sana’a.<sup>34</sup>

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<sup>26</sup> <https://theweek.com/speedreads/821874/al-qaedalinked-fighters-yemen-are-reportedly-using-usmade-weapons>; <https://www.cnn.com/interactive/2019/02/middleeast/yemen-lost-us-arms/>

<sup>27</sup> <https://www.nytimes.com/interactive/2018/10/26/world/middleeast/saudi-arabia-war-yemen.html>

<sup>28</sup> <https://www.icrc.org/en/where-we-work/middle-east/yemen>; <https://news.un.org/en/story/2018/11/1024782>

<sup>29</sup> <https://www.bbc.com/news/world-middle-east-45329220>; <https://www.crisisgroup.org/middle-east-north-africa/gulf-and-arabian-peninsula/yemen/killing-former-president-saleh-could-worsen-yemen-war>

<sup>30</sup> <https://www.washingtonpost.com/news/monkey-cage/wp/2018/12/21/what-does-the-stockholm-agreement-mean-for-yemen/>

<sup>31</sup> <https://osesgy.unmissions.org/full-text-stockholm-agreement>;  
<https://www.irinnews.org/analysis/2019/02/06/whatever-happened-ceasefire-deal-yemen>;  
<https://www.rescue.org/press-release/ceasefire-hodeidah-yemen-verge-failing-clashes-continue>

<sup>32</sup> <https://www.middleeasteye.net/news/warring-yemen-parties-agree-preliminary-compromise-hodeidah-pullback>; <https://www.reuters.com/article/us-yemen-security-hunt-idUSKCN1QK0FV>

<sup>33</sup> <https://fas.org/sgp/crs/mideast/R45046.pdf>

<sup>34</sup> Id.

In the aftermath of this massacre, President Obama put a hold on PGM sales to Saudi Arabia and restricted intelligence sharing, though overall support, including Saudi-coalition aircraft refueling, continued.<sup>35</sup> Of note, then Senator Patrick Leahy (D-VT) remarked that his eponymously named laws may be implicated in Yemen.<sup>36</sup> The Leahy Laws—which amend both the Foreign Assistance Act of 1961 and the Arms Control Act—prohibit assistance to foreign security forces that have been credibly identified as committing gross human rights violations.<sup>37</sup>

Nevertheless, when President Trump assumed office in 2017, he reconfirmed American support for Saudi Arabia and notified Congress of his plans to proceed with arms sales to Saudi Arabia that were deferred under the Obama administration.<sup>38</sup> Congressional debates in 2017 still focused on weapons sales, as did S.J.Res.42, which disapproved of PGM sales to Saudi Arabia but which was never enacted into law.<sup>39</sup> In 2017, the Saudi-led coalition instituted a full blockade of Yemen’s ports after an Iranian missile launched by Houthi fighters landed deep inside Saudi Arabia.<sup>40</sup> This led to a worsening of humanitarian conditions throughout war-ravaged Yemen, historically the poorest Arab state.<sup>41</sup>

This murder of Khashoggi, which angered members of Congress traditionally in favor of maintaining a close alliance with Saudi Arabia like Senator Lindsey Graham (R-SC), coalesced congressional concerns over U.S. complicity in the Yemen war and raising questions about the broader U.S.-Saudi alliance.<sup>42</sup> Congressional members, in an unprecedented move, decided to invoke the 1973 War Powers Act (WPA) as a basis for removing U.S. forces from the war in Yemen.<sup>43</sup>

As explained in more detail below, the WPA, in relevant part, is legislation that disallows the president from introducing U.S. Armed Forces into hostilities for more than 60 days without congressional approval in the form of a declaration of war or an authorization for the use of military force, with a 30-day extension should the president determine military necessity requires this additional time.<sup>44</sup> The WPA draws upon Congress’ war-making authority enshrined in the U.S. Constitution and, because it arguably curtails the president’s role as commander-in-chief, it has been a longstanding point of controversy—and a source of varying interpretations—between the executive and legislative branches.<sup>45</sup>

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<sup>35</sup> <https://fas.org/sgp/crs/mideast/R45046.pdf>

<sup>36</sup> Id; <https://www.justsecurity.org/42578/leahy-law-prohibiting-assistance-human-rights-abusers-pulling-curtain/>

<sup>37</sup> <http://securityassistance.org/publication/applying-leahy-law-us-military-and-police-aid>

<sup>38</sup> <https://fas.org/sgp/crs/mideast/R45046.pdf>

<sup>39</sup> <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/42>

<sup>40</sup> <https://www.nytimes.com/2017/11/08/world/middleeast/yemen-saudi-blockade.html>

<sup>41</sup> <https://www.hrw.org/news/2017/12/07/yemen-coalition-blockade-imperils-civilians>

<sup>42</sup> <https://www.nytimes.com/2018/12/04/us/politics/cia-senate-khashoggi-.html>

<sup>43</sup> <https://fas.org/sgp/crs/mideast/R45046.pdf>; [http://avalon.law.yale.edu/20th\\_century/warpower.asp](http://avalon.law.yale.edu/20th_century/warpower.asp)

<sup>44</sup> <https://www.loc.gov/law/help/war-powers.php>

<sup>45</sup> <https://www.law.cornell.edu/constitution/articlei#section8>;

<https://www.law.cornell.edu/constitution/articleii#section2>

In February 2018, Senator Bernie Sanders introduced S.J.Res.54, a WPA-reliant bill, to the Senate.<sup>46</sup> It passed the Senate in late 2018 but failed to become law. It was reintroduced in 2019 as S.J.Res.7 and passed the Senate on March 13, 2019.<sup>47</sup> H.J.Res.37, related legislation to S.J.Res.7 sponsored by Rep. Ro Khanna (D-CA), had already passed the House as of February 13, 2019, by a vote of 248-to-177.<sup>48</sup> However, Rep. David Kustoff's (R-Tenn.) last minute amendment to the bill de-privileged its status, thereby allowing Senate Majority Leader Mitch McConnell (R-KY) to block a vote in the Senate.<sup>49</sup> Notably, H.J.Res.37 differs from S.J.Res.7 in that it contains the Buck Amendment, which would continue intelligence sharing with the Saudi-led coalition.<sup>50</sup> On April 4, 2019, the House voted on and passed the narrower Senate proposal by a 247-to-176 margin.<sup>51</sup> On April 16, 2019, President Trump vetoed the resolution.<sup>52</sup>

In his veto message to the Senate, President Trump called S.J.Res.7 an “unnecessary, dangerous attempt to weaken [his] constitutional authorities,” adding that the bill would endanger the lives of the “80,000 Americans who reside in certain coalition countries that have been subject to Houthi attacks from Yemen.”<sup>53</sup> He also indirectly challenged the applicability of the WPA to U.S. involvement in Yemen by stating American forces are “not engaged in hostilities” there.<sup>54</sup> In all likelihood, the Senate will not be able to garner the 67 votes needed to override the veto, effectively ending this congressional effort to withdraw U.S. support for the Saudi-led coalition in Yemen through the WPA.<sup>55</sup> The Senate is due to take final action on S.J.Res.7 by May 3<sup>rd</sup>, 2019.<sup>56</sup>

One other piece of Yemen-related legislation passed the Senate in 2018—S.J.Res.69, which:

expresses the sense of the Senate that Saudi Crown Prince Mohammed bin Salman is responsible for the murder of the journalist Jamal Khashoggi and that there is no statutory authorization for United States involvement in hostilities in the Yemen civil war<sup>57</sup>

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<sup>46</sup> <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/54>

<sup>47</sup> <https://www.congress.gov/bill/116th-congress/senate-joint-resolution/7/text>;  
<https://www.vox.com/2019/3/13/18263894/yemen-war-senate-sanders-murphy-lee>

<sup>48</sup> <https://www.govinfo.gov/content/pkg/BILLS-116hjres37ih/pdf/BILLS-116hjres37ih.pdf>;  
<https://www.nytimes.com/2019/02/13/us/politics/yemen-war-saudi-arabia.html>

<sup>49</sup> <https://thehill.com/people/david-kustoff>; <https://www.politico.com/story/2019/02/25/yemen-civil-war-congress-1186302>

<sup>50</sup> <https://www.congress.gov/amendment/116th-congress/house-amendment/41?s=a&r=2>;  
[https://www.aclu.org/sites/default/files/field\\_document/2019-02-12\\_aclu\\_position\\_on\\_h.j.\\_res.\\_37\\_and\\_amendments.pdf](https://www.aclu.org/sites/default/files/field_document/2019-02-12_aclu_position_on_h.j._res._37_and_amendments.pdf)

<sup>51</sup> <https://www.nytimes.com/2019/04/04/us/politics/yemen-war-end-vote.html>

<sup>52</sup> <https://www.cnn.com/2019/04/16/politics/trump-vetoes-yemen-war-powers-resolution/index.html>

<sup>53</sup> <https://www.whitehouse.gov/presidential-actions/presidential-veto-message-senate-accompany-s-j-res-7/>

<sup>54</sup> Id.

<sup>55</sup> <https://www.cnbc.com/2019/04/04/house-passes-yemen-war-powers-resolution-setting-up-trump-veto.html>

<sup>56</sup> <https://thehill.com/homenews/senate/440721-senate-to-take-up-trumps-yemen-veto-next-week>

<sup>57</sup> <https://www.congress.gov/bill/115th-congress/senate-joint-resolution/69>

S.J.Res.69, like S.J.Res.54 and other bills introduced into both chambers during 2018, failed to become law. That said, Section 1290 of the 2019 National Defense Authorization Act (NDAA) conditions the use of federal funds to the ongoing hostilities in Yemen.<sup>58</sup> Required certifications made by the U.S. Secretary of State must confirm that the Saudi-led coalition is taking (1) measures to find a diplomatic solution to the war, (2) action to alleviate the humanitarian crisis, and (3) demonstrable actions to reduce the risk of harm to civilians and to civilian infrastructure. Secretary of State Mike Pompeo delivered such a certification to Congress on September 12, 2018.<sup>59</sup> Though only four months into the 116<sup>th</sup> Congress, more than a handful of Yemen-related bills have been introduced, some new and some like S.J.Res.7 that have roots in the previous Congress. Significant to this paper, one bill in the House, H.R.910, would *prohibit the use of funds* for in-flight refueling to Saudi-led coalition aircraft.<sup>60</sup>

#### **IV. Congress Should Defund American Operations in Yemen not Related to Al-Qaeda**

##### **A. Introduction**

Congress should use the full weight of its appropriations powers to defund American military operations in support of the Saudi-led campaign in Yemen. The campaign against Yemen's Houthi insurgents has caused an appalling number of civilian casualties and famine-like conditions.<sup>61</sup> According to the UN, an average of 123 civilians are killed or wounded every week, with the total number of civilians killed at approximately 16,000, many of them children.<sup>62</sup> Approximately 14 million people are at risk of starvation, and 85,000 children have already died of hunger.<sup>63</sup> A new UN report states that "by the end of 2019, fighting in Yemen will have claimed about 102,000 lives."<sup>64</sup> The United States is complicit in this humanitarian crisis.

##### **B. WPA-Reliant Bills Face Significant Challenges**

President Trump, like his predecessors, will likely succeed in evading congressional attempts to rein in presidential military action in the form of legislation that invokes the WPA like S.J.Res.7 due to the statute's room for interpretation. S.J.Res.7 itself is clear on its face: it calls for the removal of U.S. Armed Forces from Yemen, except for those fighting al-Qaeda, within 30 days of the adoption of the resolution. However, three Trump administration documents reveal

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<sup>58</sup> <https://www.congress.gov/bill/115th-congress/house-bill/5515/text#toc-HDFFC17DD4EF34ACFB07566069209CA22>

<sup>59</sup> <https://www.nytimes.com/2018/09/12/world/middleeast/saudi-yemen-pompeo-certify.html>

<sup>60</sup> <https://www.congress.gov/bill/116th-congress/house-bill/910/text?q=%7B%22search%22%3A%5B%22H.R.+910%22%5D%7D&r=1&s=1>

<sup>61</sup> [https://www.washingtonpost.com/opinions/congress-takes-critical-step-toward-reasserting-its-war-powers-control/2018/12/04/9e6b398c-f717-11e8-863c-9e2f864d47e7\\_story.html?noredirect=on&utm\\_term=.ac076d84fceb](https://www.washingtonpost.com/opinions/congress-takes-critical-step-toward-reasserting-its-war-powers-control/2018/12/04/9e6b398c-f717-11e8-863c-9e2f864d47e7_story.html?noredirect=on&utm_term=.ac076d84fceb)

<sup>62</sup> <https://www.apnews.com/3e5cff9378594c9aba2374644f3634d6>

<sup>63</sup> <https://www.nbcnews.com/news/world/14-million-people-yemen-face-imminent-great-big-famine-n923756>;  
<https://www.washingtonpost.com/world/2018/11/21/children-have-starved-death-during-saudi-led-intervention-yemen-says-new-report/>

<sup>64</sup> <https://www.middleeasteye.net/news/yemen-death-toll-surpass-230000-end-2019-un-report>



interpretive efforts that would remove the U.S. military's actions in Yemen from the ambit of the bill and the WPA, thereby marginalizing any role for Congress.<sup>65</sup>

The fact that the WPA itself is considered unconstitutional by some influential congresspersons, including Senator Lindsey Graham (R-SC), exacerbates the challenge of enacting a WPA-reliant bill as does the fact that there are two more Republicans in the Senate now.<sup>66</sup> Although there is sound reason to defend the constitutionality of the WPA, it must be recognized that Congress is not at its strongest when it invokes that Act as a basis for attempting to curb the president's ability to use military force abroad, given the precedent of administrations ignoring Congressional attempts of this sort in the past. A bill based on the WPA also impedes consensus-building in Congress as members who are firmly aligned with a sitting president can adopt his or her interpretation of the Act and base a vote on statutory construction alone.

Presidents and their legal teams have been able to sidestep the WPA—from Reagan in Lebanon to Clinton in Kosovo to Obama in Libya—effectuated through an interpretation of the WPA's reference to the term “hostilities.”<sup>67</sup> This term is undefined in the WPA yet is vital to its implementation. Only if the U.S. military is introduced into hostilities or into situations in which hostilities are imminent can Congress assert its war powers pursuant to the WPA. The Trump Administration, as other administrations have done, adopts a particularly narrow interpretation of the notion of “hostilities.” As stated in a February 27, 2018, letter from acting Department of Defense General Counsel William Castle to Senate Majority Leader Mitch McConnell (R-KY), “hostilities” are defined as “a situation in which units of U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.”<sup>68</sup> This would exclude America's arguably non-combat role in Yemen from the WPA.

By contrast, Congress takes a more expansive view of the term “hostilities” that includes an array of circumstances in which no exchanges of fire have yet occurred.<sup>69</sup> Moreover, Congress also points to the interpretive provision of the WPA, section 8(c), which states:

introduction of United States Armed Forces includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities<sup>70</sup>

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<sup>65</sup> <https://minbane.wordpress.com/2018/02/28/https-wp-me-p1xtjg-6rr/>; <https://www.whitehouse.gov/briefings-statements/text-letter-president-speaker-house-representatives-president-pro-tempore-senate-2/>; [https://www.whitehouse.gov/wp-content/uploads/2017/11/sapsj54s\\_20181128.pdf](https://www.whitehouse.gov/wp-content/uploads/2017/11/sapsj54s_20181128.pdf)

<sup>66</sup> <https://thehill.com/blogs/blog-briefing-room/news/167227-graham-durbin-debate-war-powers-act>

<sup>67</sup> <https://www.law.cornell.edu/uscode/text/50/chapter-33>

<sup>68</sup> <https://minbane.wordpress.com/2018/02/28/https-wp-me-p1xtjg-6rr/>

<sup>69</sup> <https://fas.org/sgp/crs/natsec/R42699.pdf>

<sup>70</sup> [http://avalon.law.yale.edu/20th\\_century/warpower.asp](http://avalon.law.yale.edu/20th_century/warpower.asp)

This disagreement in interpretation is pivotal in relation to the war in Yemen. While the U.S. military no longer conducts in-flight refueling to the Saudi-led coalition, it still provides logistical support, advice on lawful targeting, and border and missile defense assistance to the Saudi-led coalition.<sup>71</sup> Furthermore, U.S. arms sales contribute substantially to the Saudi-led efforts: for example, the United States is currently replenishing stocks of PGMs to Saudi Arabia, missiles linked to the latter's devastating air strikes in Yemen.<sup>72</sup>

### **C. U.S. Complicity Renders U.S. Personnel Potentially Vulnerable to War Crime Liability**

Support for the Saudi-led campaign puts the United States in a legally precarious position in terms of both domestic and international law. There is reason to believe the Saudi-led coalition is not properly vetting its air strikes as part of the coordinated effort envisioned by the establishment of a Joint Planning Cell with the United States.<sup>73</sup> Furthermore, the Saudi-led coalition reportedly "whitewashed an American-sponsored initiative to investigate errant air strikes and often ignored a voluminous no-strike list."<sup>74</sup> Air strikes in Yemen have resulted in over 4,600 civilian deaths.<sup>75</sup> As noted by Just Security:

Numerous reports suggest that the Saudi-led coalition has targeted protected persons and objects, including civilians, hospitals, and food supplies. Additional reports allege that U.S. military interrogators cooperated with United Arab Emirates officials accused of torturing AQAP detainees in secret prisons across southern Yemen.<sup>76</sup>

As an example, the Saudi-coalition's errant bombing of a cholera treatment center run by Médecins Sans Frontières/Doctors Without Borders (MSF) in June 2018 was reportedly due in part to a failure to "complete the necessary procedures used by the Coalition Forces."<sup>77</sup> Such a

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<sup>71</sup> <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/1688151/statement-by-secretary-of-defense-james-n-mattis-on-refueling-saudi-coalition-a/>; <https://www.washingtoninstitute.org/policy-analysis/view/u.s.-saudi-security-cooperation-part-2-restricting-operational-support-in-y>

<sup>72</sup> <https://www.washingtoninstitute.org/policy-analysis/view/u.s.-saudi-security-cooperation-part-1-conditioning-arms-sales-to-build-lev>; <https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html>

<sup>73</sup> <https://www.justsecurity.org/62363/saudi-coalition-admission-error-bombing-cholera-treatment-center-implicates-united-states/>; <https://obamawhitehouse.archives.gov/the-press-office/2015/03/25/statement-nsc-spokesperson-bernadette-meehan-situation-yemen>; <https://www.lawfareblog.com/us-support-saudi-air-campaign-yemen-legal-issues>

<sup>74</sup> <https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html>

<sup>75</sup> Id.

<sup>76</sup> <https://www.justsecurity.org/54472/u-s-federal-statute-aiding-abetting-war-crimes-yemen-part-ii/>; <https://www.hrw.org/report/2016/07/11/bombing-businesses/saudi-coalition-airstrikes-yemens-civilian-economic-structures>; <https://www.hrw.org/report/2015/11/26/what-military-target-was-my-brothers-house/unlawful-coalition-airstrikes-yemen>; <http://www.bbc.com/news/world-middle-east-39651265>; <https://www.theguardian.com/world/2017/dec/12/bombed-into-famine-how-saudi-air-campaign-targets-yemens-food-supplies>

<sup>77</sup> <http://www.alriyadhdaily.com/article/812807e44f9a47ddbfe1bbd99be1cd0c>

vetting failure may constitute a violation of international humanitarian law—one that implicates the Saudi-led coalition and possibly the United States.

One UN body already found that there are reasonable grounds to believe the “[Saudi-led] coalition may have conducted attacks in violation of the principles of distinction, proportionality and precaution that may amount to war crimes.”<sup>78</sup> Common Article 1 of the Geneva Conventions obligates states to “undertake to respect and to ensure respect” for the Geneva Conventions in all circumstances, which potentially implicates the United States.<sup>79</sup> Other possible international law violations include “aiding and assisting an internationally wrongful act” pursuant to Article 16 of International Law Commission’s (ILC) Draft Articles on State Responsibility.<sup>80</sup>

#### **D. U.S. Complicity Renders U.S. Personnel Vulnerable to Potential Domestic Liability**

In terms of exposure to domestic laws, U.S. Armed Forces personnel operating in Yemen are potentially liable for aiding and abetting violations of the War Crimes Act.<sup>81</sup> Moreover, as noted by the American Bar Association in a 2016 letter to Senators Chris Murphy (D-CT) and Rand Paul (R-KY) regarding concern over U.S. weapons being misused by the Saudi-led coalition, “[U.S. law] also prohibits sales of military equipment pursuant to the Arms Export Control Act to foreign units that are the subject of credible reports of human rights abuses.”<sup>82</sup> The Leahy Laws may be implicated given the growing evidence of human rights abuses being committed by the Saudi-led coalition.

This is not to say that there is sufficient evidence at this time or political will necessary to prosecute U.S. personnel in U.S. courts. The aiding and abetting statute is as follows:

- (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
- (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.<sup>83</sup>

Section (a) would require “an underlying violation of the War Crimes Act” by U.S. personnel.<sup>84</sup> This would be difficult to prove as the Act’s focus is on *direct* action in the context of grave

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<sup>78</sup> <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23479>

<sup>79</sup> <https://ihl-databases.icrc.org/ihl/WebART/365-570004>

<sup>80</sup> <https://www.justsecurity.org/55367/state-responsibility-u-s-support-saudi-led-coalition-yemen/>;  
[http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)

<sup>81</sup> <https://www.justsecurity.org/54472/u-s-federal-statute-aiding-abetting-war-crimes-yemen-part-ii/>;  
<https://www.law.cornell.edu/uscode/text/18/2>

<sup>82</sup> <https://www.law.cornell.edu/uscode/text/22/chapter-39>

<sup>83</sup> <https://www.law.cornell.edu/uscode/text/18/2>

<sup>84</sup> <https://www.law.cornell.edu/uscode/text/18/2441>; <https://www.justsecurity.org/54472/u-s-federal-statute-aiding-abetting-war-crimes-yemen-part-ii/>

breaches of Common Article 3 of the Geneva Conventions.<sup>85</sup> Such breaches include murder, torture, cruel and inhumane treatment, rape, and biological experiments.<sup>86</sup> While one could reasonably argue that the Saudi-led coalition is in grave breach of Common Article 3, the same cannot be said of the U.S. Armed Forces, which is playing a supportive, and therefore, indirect role in the hostilities in Yemen.

With respect to section (b), the applicable standard requires that U.S. personnel “willfully” aided the Saudi-led coalition in its violation of a crime laid out in the War Crimes Act.<sup>87</sup> It also contains a comparable *mens rea* component by virtue of the underlying act. “Willfully” could be interpreted by a federal court to mean “knowingly,” which would pose a greater risk that U.S. personnel could be held liable under this section. However, the more probable interpretation is that “willfully” means U.S. personnel *intentionally* caused the Saudi-led coalition to engage in an action prohibited by the War Crimes Act.<sup>88</sup>

As explained herein, the U.S. did attempt to ensure that the Saudi-led coalition was not engaging in conduct violative of international humanitarian law. Seeking assurances from the Saudis and Emiratis regarding civilian casualties and proportionality would constitute robust exculpatory evidence in favor of U.S. personnel were they to be tried in a domestic court. Similarly, the fact that President Trump requested guarantees from the Saudi-led coalition, even if ultimately ignored, provides a formidable barrier to the *mens rea* component of the War Crimes Act, and to a lesser extent, to the weapons sales statutes mentioned above.<sup>89</sup>

### E. What Does the U.S. Government Know?

The possible exposure of U.S. troops to prosecution depends in large part on what the government knows about the possible war crimes allegedly being committed by the Saudi-led coalition, and to what extent U.S. support, e.g., weapons and fuel, are a contributing factor. While the official line at the State Department and Pentagon is to deny any knowledge of whether U.S. munitions or fuel are being used in calamitous air strikes, the reality is less clear.<sup>90</sup> According to a New York Times report, one former State Department official said the “United States had access to records of every air strike over Yemen since the early days of the war, including the warplane and munitions used,” a statement corroborated by several other high-level sources.<sup>91</sup> A 2018 CNN investigation revealed remnants of an American-made bomb at the scene of an air strike that killed 40 school children riding on a school bus.<sup>92</sup> Similarly, Human Rights Watch

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<sup>85</sup> <https://www.justsecurity.org/54444/us-war-yemen-war-crimes-act/>

<sup>86</sup> <https://www.law.cornell.edu/uscode/text/18/2441>

<sup>87</sup> <https://www.justsecurity.org/54472/u-s-federal-statute-aiding-abetting-war-crimes-yemen-part-ii/>

<sup>88</sup> Id.

<sup>89</sup> <https://www.justsecurity.org/41221/jared-kushner-arms-deal-alleged-saudi-war-crimes/>;  
<https://www.reuters.com/article/us-usa-saudi-yemen-idUSKBN17M2ZK?feedType=RSS&feedNa>;  
<https://www.justsecurity.org/54472/u-s-federal-statute-aiding-abetting-war-crimes-yemen-part-ii/>

<sup>90</sup> <https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html>

<sup>91</sup> Id.; <https://www.nytimes.com/2018/12/25/world/middleeast/yemen-us-saudi-civilian-war.html>;

<sup>92</sup> <https://edition.cnn.com/2018/08/17/middleeast/us-saudi-yemen-bus-strike-intl/index.html>;  
<https://www.cnn.com/interactive/2018/09/world/yemen-airstrikes-intl/index.html>

concluded a U.S.-manufactured air-dropped GBU-12 Paveway II 500-pound laser-guided bomb was used during an October 8, 2016, air strike on a crowded funeral ceremony.<sup>93</sup>

With credible evidence mounting that connects the United States to these atrocities, an exculpatory argument based on U.S. government “ignorance” is dubious at best.<sup>94</sup> During the Obama administration, an internal debate was rightly sparked regarding continued arms sales to the Saudi-led coalition.<sup>95</sup> More recently, several bills in the 115<sup>th</sup> Congress took this issue head on, including S.3652 and H.J.Res.104, both of which would have suspended certain weapons transfers to Saudi Arabia.<sup>96</sup>

Apprehension over U.S. complicity in the Yemen quagmire was apparent as Secretary of State Pompeo prepared for his 2019 NDAA-required certification to Congress that Saudi Arabia and the UAE were undertaking demonstrable actions to reduce the risk of harm to civilians and civilian infrastructure resulting from military operations of these governments.<sup>97</sup> It turns out that Pompeo’s certification overruled a recommendation *not to certify* from most staff experts at the State Department involved in this decision. Their reason to object was “due to a lack of progress on mitigating civilian casualties.”<sup>98</sup> Pompeo’s decision was made after being warned that not certifying would result in a cutoff of refueling pursuant to the NDAA and that this “could jeopardize \$2 billion in weapons sales to America’s Gulf allies.”<sup>99</sup>

Some in Congress also voiced their skepticism of the certification.<sup>100</sup> Rep. Ro Khanna (D-CA) called it a “farce,” whereas a bipartisan letter to Pompeo from seven Senators stated in part that “after reviewing the unclassified and classified components [of the certification] and receiving updates from our staffs... we find it difficult to reconcile known facts with at least two of your certifications.”<sup>101</sup> In preparation for the next certification, a deadline *missed* by Pompeo on February 9, 2019, Senators Todd Young (R-IN) and Jeanne Shaheen (D-NH) wrote a bipartisan letter to Pompeo emphasizing concern over civilian casualties and requesting “a certification that better reflects the facts on the ground... [and] the Saudi-led coalition's commitment to adhering to all laws and requirements regulating defense articles purchased or transferred from the United States.”<sup>102</sup>

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<sup>93</sup> <https://www.hrw.org/news/2016/10/13/yemen-saudi-led-funeral-attack-apparent-war-crime>

<sup>94</sup> <https://www.hrw.org/news/2016/12/08/yemen-us-made-bombs-used-unlawful-airstrikes>

<sup>95</sup> <https://www.thenation.com/article/american-officials-could-be-prosecuted-for-war-crimes-in-yemen/>

<sup>96</sup> <https://www.congress.gov/bill/115th-congress/senate-bill/3652>; <https://www.congress.gov/bill/115th-congress/house-joint-resolution/104?q=%7B%22search%22%3A%5B%22yemen+khanna%22%5D%7D&s=1&r=5>

<sup>97</sup> <https://www.congress.gov/bill/115th-congress/house-bill/5515/text#toc-HDFFC17DD4EF34ACFB07566069209CA22>; <https://www.state.gov/secretary/remarks/2018/09/285861.htm>

<sup>98</sup> <https://www.wsj.com/articles/top-u-s-diplomat-backed-continuing-support-for-saudi-war-in-yemen-over-objections-of-staff-1537441200>

<sup>99</sup> *Id.*

<sup>100</sup> <https://www.defensenews.com/congress/2018/09/13/yemen-skeptics-in-congress-see-politics-shifting-their-wayand-against-trump/>

<sup>101</sup> <https://thehill.com/policy/defense/410764-senators-demand-answers-on-trump-administration-support-for-saudi-coalition-in>

<sup>102</sup> <https://www.cnn.com/2019/02/08/politics/yemen-us-senate-weapons-intl/index.html>

## **V. *What is the Case for Continued Support of the Saudi-led Coalition?***

Despite the bipartisan efforts in Congress to extricate the United States from the conflict in Yemen, there are still those who would argue it is in the U.S. national security interest to maintain close ties to Saudi Arabia and its government, not only for continued access to oil and to preserve a long-term alliance in a volatile region, but also to push back against what some consider to be Iranian expansionism. Some argue the Houthis, who are supported militarily by Iran, are a proxy force of the Islamic Republic, similar to Hezbollah in Lebanon, a Shi'a terrorist militia that is represented in Lebanese government as well. Given Iran's hostility towards the United States and in view of its nuclear ambitions, some would argue the greater good necessitates our continued support of the Saudi regime and of its wayward crown prince, Mohammed bin Salman.

Others have more specific gripes, for example Mitch McConnell not wanting to base any Yemen resolutions on the WPA. As he stated in December 2018: "If the Senate wants to pick a constitutional fight with the executive branch over war powers, I would advise my colleagues to pick a better case..."<sup>103</sup> McConnell's argument was recently underscored by House Foreign Affairs Committee top Republican Michael McCaul (R-TX) when he commented that "currently we don't have any active military engaged in combat hostilities against the Houthis."<sup>104</sup>

Former Secretary of Defense James Mattis, in a March 14, 2018, letter to Senate leaders, condemned Yemen-related legislation, claiming it would "embolden Iran," "raise the risk of regional conflict," and "negatively affect our ability to foster long term relationships... and security partnerships."<sup>105</sup> In November 2018, he rebutted critics of the U.S.-Saudi alliance by highlighting the need to balance human rights concerns with maintaining a "strategic relationship," remarking that "presidents don't often get the freedom to work with unblemished partners."<sup>106</sup>

## **VI. *The Case for Defunding Support for the Saudi-led Coalition***

President Trump, who supports the theory of unitary executive power, may attempt to ignore enacted Yemen-related bills by arguing that they infringe on the president's powers as commander-in-chief and his role as the government official primarily responsible for conducting foreign policy.<sup>107</sup> The Trump Administration has already expressed its reservations about congressional action aimed to tailor U.S. military action in Yemen. President Trump's signing statement to the 2019 NDAA, which sets restrictions on American military action in Yemen, states

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<sup>103</sup> <https://www.npr.org/2018/12/12/676152310/senate-poised-to-vote-to-end-u-s-military-support-for-war-in-yemen>

<sup>104</sup> <https://www.politico.com/story/2019/02/06/congress-trump-yemen-1153867>

<sup>105</sup> <https://apps.washingtonpost.com/g/documents/world/defense-secretary-jim-mattis-letter-to-congressional-leaders/2837/>

<sup>106</sup> [https://www.washingtonpost.com/world/national-security/mattis-says-us-must-balance-rights-concerns-with-strategic-saudi-ties/2018/11/21/ce13113e-edbf-11e8-baac-2a674e91502b\\_story.html?noredirect=on&utm\\_term=.19cea7820757](https://www.washingtonpost.com/world/national-security/mattis-says-us-must-balance-rights-concerns-with-strategic-saudi-ties/2018/11/21/ce13113e-edbf-11e8-baac-2a674e91502b_story.html?noredirect=on&utm_term=.19cea7820757)

<sup>107</sup> <https://www.law.cornell.edu/constitution/articleii>

he will only comply where feasible and consistent with his authority as commander-in-chief.<sup>108</sup> While there is no absolute barrier to judicial intervention should there be a war powers authority impasse between the executive and legislative branches, thus far the courts have been reluctant to weigh in on such matters.<sup>109</sup>

There is precedent for withholding appropriations as a strategy to help end U.S. involvement in a war. During the Vietnam War, Congress used this strategy to register its increasing objections to the Nixon administration's expansion of the war into Laos and Cambodia.<sup>110</sup> Notwithstanding Nixon's defiant claims regarding self-perceived broad powers as commander-in-chief, in January 1971 Congress passed the Cooper-Church Amendment, which prohibited the use any appropriated funds to introduce ground troops into Cambodia.<sup>111</sup> Senator Frank Church stated that the legislation would "draw the purse strings tight against a deepening American involvement in Cambodia."<sup>112</sup>

In 1973, Congress went further, attaching the Case-Church Amendment to a State Department appropriations bill.<sup>113</sup> These amendments, which helped hasten the U.S. withdrawal from Vietnam, illustrate that defunding military operations abroad is an effective wartime tool for Congress to place boundaries around the exercise of executive authority in war.

Where Yemen is concerned, one member of the 115<sup>th</sup> Congress did pursue a *conditional* defunding strategy, one that could be explored further and built upon in the current Congress. Senator Chris Murphy (D-Conn.) introduced an amendment to the FY 2019 Defense Appropriations bill that would have cut off funding for U.S. military support of the Saudi-led coalition until the Pentagon could certify that the coalition was not violating international law or U.S. policy regarding the protection of civilians.<sup>114</sup> Unfortunately, the amendment never came to a vote due to Republican opposition. However, with Republican objections to President Trump's stance on Saudi Arabia in the wake of the murder of journalist Jamal Khashoggi, and Democrats now in control of the House, it is worth revisiting the Murphy amendment or other initiatives with the same aim.

All of the proposed legislative efforts mentioned herein that would end U.S. support for the Saudi-led coalition would likely face a presidential veto, as did S.J.Res.7, and would thus require the substantial 2/3 vote in both chambers of Congress to override. A defunding bill could also

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<sup>108</sup> <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>; <https://www.lawfareblog.com/whats-new-nda>; [https://www.washingtonpost.com/world/national-security/trump-disputes-parts-of-defense-law-as-an-affront-to-his-authority/2018/08/14/39da0aae-9ffe-11e8-b562-1db4209bd992\\_story.html?utm\\_term=.7901b03166c5](https://www.washingtonpost.com/world/national-security/trump-disputes-parts-of-defense-law-as-an-affront-to-his-authority/2018/08/14/39da0aae-9ffe-11e8-b562-1db4209bd992_story.html?utm_term=.7901b03166c5)

<sup>109</sup> <https://caselaw.findlaw.com/us-supreme-court/414/1304.html>

<sup>110</sup> <https://prospect.org/article/how-congress-got-us-out-vietnam>

<sup>111</sup> <https://fas.org/sgp/crs/natsec/RL33803.pdf>

<sup>112</sup> <https://prospect.org/article/how-congress-got-us-out-vietnam>

<sup>113</sup> Id; <https://www.congress.gov/bill/93rd-congress/house-bill/7645>

<sup>114</sup> <https://www.murphy.senate.gov/newsroom/press-releases/murphy-amendment-cuts-off-funds-for-war-in-yemen-until-pentagon-certifies-saudi-led-coalition-is-not-violating-international-law-and-us-policy>; <https://www.congress.gov/bill/115th-congress/house-bill/6157>

face this hurdle, but presidents are less likely to veto omnibus legislation like NDAs that have “must-pass” provisions that address essential federal functions and are thus of great importance to the president.<sup>115</sup> As The Brookings Institution recently noted: “This may be particularly true for Trump, who has highlighted his support for prior NDAs as a sign of his commitment to U.S. soldiers and may try to use the forthcoming 2020 NDA to secure funding for the U.S.-Mexico border wall he wishes to build.”<sup>116</sup> Moreover, one could reasonably argue that 2019 NDA restrictions on in-flight refueling are what led to President Trump ending this component to U.S. support for the Saudi-led coalition.<sup>117</sup> All of this strengthens the argument that the best strategy would be to seek to defund the Saudi-led coalition through a defense spending bill such as the 2020 NDA.

### **VII. Weapons Sales**

The Sierra Leone war crimes tribunal in the *Prosecutor v. Taylor* decision that the U.S. military commissions prosecutor endorsed in 2013 ruled that for an individual to aid and abet a war crime, they must provide practical assistance that has a “substantial effect” on the commission of a crime; and know or be aware the assistance has a “substantial likelihood” of aiding that crime.<sup>118</sup>

A plausible case can be made that the United States’ years of arms sales to Saudi Arabia, arms then employed by the Saudi-led coalition to attack Yemeni targets, including a crowded market and a funeral hall full of people, constitutes both practical assistance and a “substantial effect” on military actions that someday may be adjudicated as war crimes.<sup>119</sup> Perhaps equally important to this paper’s thesis on the need to defund U.S. support for the Saudi-led coalition, it is imperative that Congress also thoroughly examine the continued weapons sales to the Saudi-led coalition that could potentially expose American personnel to either domestic or international legal liability.

### **VIII. Conclusion**

Recent peace efforts in Yemen are encouraging, such as the UN-sponsored talks in Sweden and a possible prisoner exchange, but long-term reconciliation remains elusive.<sup>120</sup> Laudable but

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<sup>115</sup> <https://www.lawfareblog.com/where-congress-stands-yemen>

<sup>116</sup> <https://www.brookings.edu/blog/order-from-chaos/2019/04/18/where-trumps-veto-leaves-the-yemen-resolution/>

<sup>117</sup> *Id.*

<sup>118</sup> <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/1389/SCSL-03-01-A-1389.pdf>

<sup>119</sup> <https://www.hrw.org/news/2017/05/04/us-officials-risk-complicity-war-crimes-yemen;>  
[https://www.usnews.com/news/world/articles/2016-04-07/report-saudi-coalition-used-us-bomb-in-yemen-market-strike;](https://www.usnews.com/news/world/articles/2016-04-07/report-saudi-coalition-used-us-bomb-in-yemen-market-strike)  
[https://www.nytimes.com/2016/10/16/world/middleeast/saudi-led-coalition-says-it-bombed-yemen-funeral-based-on-false-information.html?\\_r=0](https://www.nytimes.com/2016/10/16/world/middleeast/saudi-led-coalition-says-it-bombed-yemen-funeral-based-on-false-information.html?_r=0)

<sup>120</sup> [https://www.theguardian.com/world/2019/feb/03/yemen-peace-talks-held-on-un-chartered-boat-off-hodeidah;](https://www.theguardian.com/world/2019/feb/03/yemen-peace-talks-held-on-un-chartered-boat-off-hodeidah)  
[https://www.washingtonpost.com/opinions/2018/12/17/strange-scene-inside-yemen-peace-talks-sweden/;](https://www.washingtonpost.com/opinions/2018/12/17/strange-scene-inside-yemen-peace-talks-sweden/)  
[https://www.reuters.com/article/us-yemen-security-prisoners/yemen-prisoner-swap-terms-expected-incoming-days-government-delegate-says-idUSKCN1PH126;](https://www.reuters.com/article/us-yemen-security-prisoners/yemen-prisoner-swap-terms-expected-incoming-days-government-delegate-says-idUSKCN1PH126)  
<https://www.reuters.com/article/us-yemen-security-idUSKCN1PJ1Y5>



likely symbolic resolutions like S.J.Res.7 may prove to be useful as strong political statements.<sup>121</sup> Congressional efforts to cut military-exercise aid to Saudi Arabia, and new efforts to recoup money from Saudi Arabia and UAE for aerial refueling, also provide much needed leverage to curb the Saudi-led coalition’s behavior moving forward.<sup>122</sup>

To maximize impact and reaffirm its war powers, as well as to end American complicity in a serious human rights catastrophe in Yemen, Congress must exercise its “power of the purse” and withhold appropriations for any military action in Yemen that is not related to defeating al-Qaeda. Defunding operations will prove less susceptible to a presidential veto and will avoid the legal issues surrounding the applicability of the WPA to the current U.S. mission in Yemen. It will be the quickest and cleanest way to disengage the United States from a devastating war in which we never should have been involved in the first place.

#### **IX. *About the Center for Ethics and the Rule of Law (CERL)***

[CERL](https://www.law.upenn.edu/institutes/cerl/) is a non-partisan institute that preserves and promotes ethics and the rule of law in national security, democratic governance, and warfare. The only center of its kind housed within a law school, CERL draws from the study of law, philosophy, and ethics and unites scholars, policymakers, and practitioners to probe critical issues through the lens of ethics and the rule of law. Using the tools of interdisciplinary engagement and open dialogue, CERL experts answer the hard questions that arise when the rule of law is threatened or violated and provides guidance that helps safeguard U.S. democracy.

<https://www.law.upenn.edu/institutes/cerl/>

#### **X. *Authors of this Policy Note***

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<sup>121</sup> <https://www.mcclatchydc.com/news/nation-world/national/national-security/article222995600.html>;  
<https://www.lawfareblog.com/senate-acts-yemen>

<sup>122</sup> <https://www.al-monitor.com/pulse/originals/2019/01/congress-poised-saudi-arabia-millions-military-training.html>; <https://www.defensenews.com/congress/2019/01/29/pentagon-watchdog-to-investigate-yemen-refueling>

Rule of Law (CERL), a non-partisan interdisciplinary institute that seeks to promote the rule of law in modern day conflict, warfare, and national security. In 2019, she was named Senior Fellow at the Foreign Policy Research Institute (FPRI). An expert in the law of armed conflict, military ethics, and national security law, she is a co-editor (with Jens David Ohlin) of The Oxford Series in Ethics, National Security, and the Rule of Law, and a volume editor of its four titles thus far: Targeted Killings: Law & Morality in an Asymmetrical World (Oxford University Press, 2012); Cyber War: Law and Ethics for Virtual Conflicts (Oxford University Press, 2015); Weighing Lives in War (Oxford University Press, 2017); and Sovereignty and the New Executive Authority (Oxford University Press, 2018). Professor Finkelstein has briefed Pentagon officials, U.S. Senate staff, and JAG Corps members on various issues in national security law and practice. She is a frequent radio, broadcast, and print commentator and has published op-eds in The New York Times and The Hill. Her prior scholarly work focuses on criminal law theory, moral and political philosophy, jurisprudence, and rational choice theory. She is also the editor of Hobbes on Law (Ashgate Publishing, 2005) and is currently completing a book called Contractarian Legal Theory. <https://www.law.upenn.edu/cf/faculty/cfinkels/>

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