AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

Howard Gillman • Mark A. Graber • Keith E. Whittington

Supplementary Material

Chapter 12: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

*Mike Lee*, **Speech on Iran War Powers Resolution** (2020)[[1]](#footnote-1)

*On January 2, 2020, the United States conducted a drone strike near the Baghdad international airport in Iraq that targeted and killed Qassem Soleimani, an Iranian general who had been orchestrating anti-American activities in the region for years. Abu Mahdi al-Mohandes, a pro-Iranian Iraqi militia leader, was also killed in the attack. The immediate precipitating events leading to the drone strike included a rocket attack that killed an American civilian near Kirkuk, a city in northern Iraq, and a December 31 militia attack on the American embassy in Baghdad. On January 8, the Iranian military responded with a missile strike on American military bases in Iraq.*

*In the days after the drone strike, American officials offered conflicting justifications for the attack, raising questions about its legality under international and American constitutional law. A few weeks later, the administration sent to Congress a brief memo outlining its legal justification for the drone strike.*

*Shortly before the administration sent Congress its formal legal justification for the drone strike, a bipartisan group of senators introduced a war powers resolution declaring that the president did not have statutory approval for the use of military force against Iran and directed the president to terminate any hostilities against Iran, its government, or its military. The resolution was adopted by the Senate with a significant number of Republican votes, and it was passed by the House on a largely party-line vote. In May 2020, the president vetoed the resolution, and a vote to override the veto in the Senate failed. In his veto message, the president said that the resolution was “unnecessary and dangerous” and that the president needed the flexibility “to respond to threats beyond imminent attacks on the United States and its forces.”*

*Utah Republican Mike Lee was among the Republican senators who sponsored the resolution.*

. . .

This is how security policy in our republic is supposed to be made: Congress authorizes the use of military force, and the president – as commander in chief – directs the military to complete the missions.

This arrangement gives the American people the best of both worlds – a deliberative, representative legislature to declare war, and a single, decisive commander-in-chief to lead the troops

Unfortunately, Congress has not held up our end of this responsibility. Our system of checks and balances, while beneficial to the American people, imposes rigor and accountability on Congress, which its members prefer to shirk when we can. This trend has gained momentum for decades under presidents, Houses, and Senates of both parties. And now – two decades into multiple wars without clear missions or paths to victory – it is time for Congress to reassert, on behalf of our constituents, our vital constitutional role in American war-making.

. . . .

[T]his resolution is about is Congress reclaiming its rightful powers to restore accountability and consensus to this most grave of all policy decisions.

I understand why members of Congress are okay with pretending to be pundits on national security – cheering the troops when things go well, and attacking the president when they don’t. But we are not political pundits on cable news. We have a job to do based on an oath that we took right here in this chamber to uphold and “protect and defend the Constitution of the United States.”

In order to enable the President of the United States to do his job correctly, we have to be willing to do ours. You see, this part of the evil design of the military industrial complex to convince members of Congress, first and foremost, that they don’t have to and shouldn’t want to put their name on the line when it comes to war power. This unfairly puts the blame and the accountability all on the President of the United States. That is wrong.

Just as importantly, it disconnects the American people from their elected representatives here in the Senate and in the House of Representatives from a process that really could put not just American treasure but also American blood – the blood of our own sons and daughters – on the line. That is not right.

The Founders could not have been clearer about this. That is especially true when it comes to the greatest Founder of them all. When the Miami and Wabash Indians attacked Americans north of the Ohio River between 1791 and 1794, President George Washington confined his military operations to only defensive measures. “The Constitution,” Washington wrote, “vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure.” . . .

So, yes, he was a humble man, and he was a modest man, but this wasn't just an act of humility or modesty; it was duty. He understood that he had taken an oath to uphold, protect, and defend the Constitution of the United States. As President, he would not deviate from it because he had taken an oath that he wouldn't.

Under the Constitution – whose drafting President Washington oversaw before he was President of the United States, while he was President of the Constitutional Convention and to which he swore an oath of office later – the power to direct war would reside in him as President of the United States as Commander in Chief, but the power to declare war resided exclusively with Congress.

This was, of course, very different than the form of government that we had left just a few years prior to that. Under our previous system of government, the one based in London, the Parliament had no role in declaring war. Declaring war was up to the Executive, the Monarch, the King. The King could – and in many instances would and did – take the country to war. It was the job of the legislative branch of government, of the Parliament, to figure out what to do about it, how to fund it, and where to go from there, but it was up to the King and the King alone to take us to war.

This, Alexander Hamilton explained in *Federalist 69*, was exactly the kind of system we didn't want. It would be up to Congress in the first instance to declare war. Congress and Congress alone would have this power. Why? Well, because it is the branch of government most accountable to the people with the most regular intervals. When the American people are called upon to put their own blood and treasure – their own sons and daughters on the line in the name of safety, security, freedom – nothing else can suffice but a vote in Congress. George Washington understood that.

. . . .

I stand firmly behind President Trump in this course of action, and like President Trump, I believe that we ought to avoid war if we can. After nearly two decades of military entanglement in Iraq and Afghanistan – much of which was fostered by Department of Defense bureaucrats deceiving Congress and misleading the American people, as we have recently tragically learned – the last thing we need is another aimless, protracted conflict in the Middle East. The other last thing we need is to have such a conflict occur without Congress even authorizing it.

In any event, war with Iran is currently neither warranted nor consistent with our strategic interests. To be very clear, under this resolution, the President would retain all of his authority as Commander in Chief to take defensive measures against active threats to U.S. persons, assets, and the homeland, including our Armed Forces abroad and our diplomats in U.S. Embassies, even without a declaration of war or authorization for the use of military force. Such power inheres and resides in article II. He already has that power. Nothing in this resolution can or would or even attempts to undermine or erode that power.

However, even when defensive measures are conducted, the administration should share the justifying evidence with Congress. This, you see, is how this inherent tension between, on the one hand, the congressional war declaration of power in article I and, on the other hand, the Article II power that the President has as Commander in Chief. This is how they are held in balance. It is for that information-sharing process to be ongoing.

As a separate branch of government – the branch with the constitutional prerogative over the power to declare war – we are not required to simply accept an administration's talking points as a matter of faith, especially after almost two decades of deception in Afghanistan. Intelligence-sharing ensures that Congress can appropriately determine whether it should or should not provide the administration with further authority to conduct offensive military force.

The intelligence so far shared with Congress on recent actions taken against Iran has fallen short, but my main concern with the briefing that I called the ``worst'' that I had ever witnessed on military matters in my more than 9 years in the Senate was that we were given no indication, whatsoever, that any ongoing offensive action against Iran would occur with consultation and authorization from Congress. This was inexcusable.

. . . .

For too long, Congress has deliberately and in a very cowardly manner shrunk from its constitutional responsibility for its own narrow, selfish, shallow, political interests. Yet, by taking itself out of the process of debating and declaring war, Congress has taken the American people out of the process, and that is simply unacceptable. It is time to turn the page.

Osama bin Laden is dead, and so are the 9/11 terrorists. General Soleimani is dead, and Iran is weakened and isolated. Saddam Hussein is dead and has been out of power for a generation, and Iraq is a sovereign nation that can and should dictate its own course. We now face new challenges. Our priorities have rightfully changed, and they must.

While this resolution speaks only to offensive action against Iran, I believe it is time to repeal the 2002 AUMF and bring our troops in Iraq home. It is also time to repeal the 2001 AUMF and bring our troops in Afghanistan home. That is a question that we can and should address in this body.

In the meantime, we as a body and as a nation should at least agree that there is no justification for further military action in Iran in the absence of a new authorization for use of military force or a declaration of war by Congress.

. . . .

1. Excerpt taken from Cong. Rec., 116th Cong., 2nd sess. (February 12, 2020), S1026. [↑](#footnote-ref-1)