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

**Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force** (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. The memo was framed as notice of a change in the application of the legal and policy frameworks for the use of American military force that had been submitted to Congress in the spring of 2018. The administration issued the notice in keeping with the reporting requirements included in the 2018 defense budget. The notice included a classified appendix. Congress released the notice to the public.*

*The National Defense Authorization Act of 2018 required President Donald Trump to deliver to several congressional committees a report on the legal and policy frameworks governing the use of American military force and related national security operations. The body of the report was to be unclassified, though the administration had the option of including an appendix of classified material. In March 2018, the administration delivered the report. The statutory mandate required the administration to note any changes that it had made since the one that the Obama administration had voluntarily released the previous year. Although the administration did not make the report publicly available, Congress soon did. The 2018 report offered the first public legal justification for the administration’s missile strike against a Syrian military base in the spring of 2017.*

. . . .

At the President’s direction, United States Armed Forces conducted an air strike in Iraq on January 2, 2020, killing Qassem Soleimani, leader of Iran’s Islamic Revolutionary Guard Corps-Qods Force, a designated foreign terrorist organization. The President directed this action in response to an escalating series of attacks in preceding months by Iran and Iran-backed militias on United States forces and interests in the Middle East region. The purposes of this action were to protect United States personnel, to deter Iran from conducting or supporting further attacks against Untied States forces and interests, to degrade Iran’s and Qods Force-backed militias’ ability to conduct attacks, and to end Iran’s strategic escalation of attacks on, and threats to United States interests.

Article II of the United States Constitution, empowers the President, as Commander in Chief, to direct the use of military force to protect the Nation from an attack or threat of imminent attack and to protect important national interests. Article II thus authorized the President to use force against forces in Iran, a state responsible for conducting and directing attacks against United States forces in the region. In addition, under the 2002 Authorization for the Use of Military Force against Iraq (2002 AUMF) “the President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq.” Although the threat posed by Saddam Hussein’s regime was the initial focus of the statute, the United States has long relied upon the 2002 AUMF to authorize the use of force for the purpose of establishing a stable, democratic Iraq and addressing terrorist threats emanating from Iraq. Such uses of force need not address threats from the Iraqi Government apparatus only, but may address threats to the United States posed by militias, terrorist groups, or other armed groups in Iraq.

The airstrike against Soleimani in Iraq is consistent with this longstanding interpretation of the President’s authority under Article II and the 2002 AUMF. Iran’s past and recent activities, coupled with intelligence at the time of the air strike, indicated that Iran’s Qods Force posed a threat to the United States in Iraq, and the air strike against Soleimani was intended to protect United States personnel and deter future Iranian attack plans against United States forces and interests in Iraq and threats emanating from Iraq. The use of military force against Iranian Armed Forces was tailored narrowly to the identified Qods Force target’s presence in Iraq and support to, including in some cases direction of, Iraqi militias that attacked United States personnel.

As a matter of international law, the strike targeting Soleimani in Iraq was taken in United States national self-defense, as recognized in Article 51 of the United Nations Charter, in response to a series of escalating armed attacks that Iran and Iran-supported militias had already conducted against the United States. . . . Although the threat of further attack existed, recourse to the inherent right of self-defense was justified sufficiently by the series of attacks that preceded the January 2 strike.

1. Excerpt taken from Notice on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (February 14, 2020). [↑](#footnote-ref-1)