AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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

Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers/Presidential War and Foreign Affairs Powers

**Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force** (2018)[[1]](#footnote-1)

*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 report was quite brief and did not provide significant detail or analysis, and simply built on what the administration had already provided in keeping with the terms of the War Powers Resolution of 1973. The report noted American military actions in several Middle Eastern and African countries over the course of 2017, including Afghanistan, Iraq, Syria, Yemen, Libya, Somalia, and Niger. All the military strikes were characterized as taking place against forces associated with Al-Qaida or the Islamic State of Iraq and Syria (ISIS) (with the exception of American “non-combat” assistance to Saudi Arabian forces operating in Yemen). The administration offered two sources of legal authority for its use of force – the Authorization for the Use of Military Force resolutions passed by Congress and Article II of the U.S. Constitution. The report offered the first public legal justification for the administration’s air strike against a Syrian military base, which could not be credibly justified as authorized by either the 2001 AUMF focused on Afghanistan and Al-Qaida or the 2002 AUMF focused on Iraq.*

. . . .

*Statutory Authorization: The 2001 AUMF*

The Scope of the 2001 AUMF: The classified annex contains more information on the application of the Authorization for Use of Military Force (2001 AUMF) to particular groups and individuals.

*Statutory Authorization: The 2002 AUMF*: Although the Authorization for the Use of Military Force against Iraq (2002 AUMF) was mentioned in the original report with respect to its authorization to use force against ISIS in Iraq and in certain circumstances in Syria, the original report did not provide a full explanation of the scope of the 2002 AUMF.

Under the relevant portions of the 2002 AUMF, “[t]he 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 in Iraq was the primary focus of the 2002 AUMF, the statute, in accordance with its express goals, has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and for the purpose of addressing terrorist threats emanating from Iraq. After Saddam Hussein’s regime fell in 2003, the United States continued to take military action in Iraq under the 2002 AUMF to further these purposes, including action against al-Qaida in Iraq (now known as ISIS). Then, as now, that organization posed a terrorist threat to the United States and its partners and undermined stability and democracy in Iraq. Congress ratified this understanding in the 2002 AUMF by appropriating funds over several years. Furthermore, although the Iraq AUMF limits the use of force to address threats to, or stemming from, Iraq, it (like the 2001 AUMF) contains no geographic limitation on where the authority for military operations against ISIS in Iraq and, to the extent necessary to achieve the purposes described above, in Syria or elsewhere.

*The President’s Constitutional Authority to Take Military Action in Certain Circumstances Without Specific Prior Authorization of Congress*: In addition to these statutes, Article II of the Constitution provides authority for the use of military force in certain circumstances even without specific prior authorization of Congress. For example, on April 6, 2017, the President directed a military strike against the Shayrat military airfield in Syria pursuant to his authority under Article II of the Constitution to conduct foreign relations and as Commander in Chief and Chief Executive. United States intelligence indicated that Syrian military forces operating from that airfield were responsible for the chemical weapons attack on Syrian civilians in southern Idlib Province, Syria. The President directed this strike in order to degrade the Syrian military’s ability to conduct further chemical weapons attacks and to dissuade the Syrian government from using or proliferating chemical weapons, thereby promoting regional stability and averting a worsening of the region’s current humanitarian catastrophe. In directing this strike, the President acted in the vital national security and foreign policy interests of the United States. Congress was notified of this particular strike on April 8, 2017, in a Presidential report, consistent with the War Powers Resolution.

. . . .

1. Excerpt taken from Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations (March 12, 2018). [↑](#footnote-ref-1)