



# UPDATED: Recent U.S. Airstrikes: Legal Authorities and Questions

Updated February 18, 2020

*Update: The Trump Administration has [reported](#) to Congress a “change in application of the existing legal and policy frameworks” regarding the use of military force, which presented the following legal justification for the January airstrikes:*

*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 of Iran, a state responsible for conducting and directing attacks against United States forces in the region. In addition, under the 2002 Authorization for 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. (Footnotes omitted).*

*The House Committee on Foreign Affairs [posted this report](#) on its website on February 14, 2020. The original Legal Sidebar from January 8, 2020 appears below.*

Recent U.S. airstrikes in Iraq and Syria have [raised legal questions concerning](#) the scope of the President’s power to use force against Iran and Iran-backed organizations. In late December, U.S. forces [conducted airstrikes](#) against five facilities in Iraq and Syria used by Kata’ib Hizbollah—an entity with ties to Iran [designated](#) by the Department of State as a [foreign terrorist organization](#). According to a Department of Defense (DOD) [statement](#), the strikes came in response to attacks on military bases in Iraq that host U.S. forces engaged in the campaign to defeat the [Islamic State](#). Two days later, Kata’ib Hizbollah supporters and others marched to the U.S. Embassy in Baghdad, damaging property and setting fire to outer buildings. Then, on January 2, 2020, the U.S. military, at the direction of the President, [killed](#) Qasem Soleimani, the head of the [Islamic Revolutionary Guard Corps-Quds Force](#) (IRGC-QF) and [Abu Mahdi al Muhandis](#), an Iraqi security official and Kata’ib Hizbollah founder [named](#) as a specially

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LSB10391

designated global terrorist by the U.S. government. According to a DOD [statement](#), Soleimani “approved” the attack on the U.S. Embassy in Baghdad and was “actively developing” plans to attack American diplomats and service members in the region. The Secretary of State [described](#) the threats as “imminent,” but did not publicly offer specific information.

According to [media outlets](#), the President described the legal bases for the Soleimani strike in a fully classified letter under the [War Powers Resolution](#) (a 1973 law detailed in this [CRS Report](#)). While the letter’s text has not been made public, [media outlets reported](#) that National Security Advisor Robert O’Brien made the following on-the-record statement concerning the legal authority for the strike:

It was a fully authorized action under the 2002 [Authorization for Use of Military Force (AUMF)] and is consistent with his constitutional authority as commander in chief to defend our nation and our forces against [an] attack like those that Soleimani has directed in the past and was plotting now.

This Sidebar examines the President’s domestic legal authority to initiate military action under the two sources cited in the National Security Advisor’s statement: the Constitution and the 2002 authorization for use of military force related to Iraq ([2002 AUMF](#)). Although not discussed in O’Brien’s statement, this Sidebar also examines the implications of the ban on assassinations in [Executive Order 12333](#) as well as the international legal framework governing the strikes.

## Did the President Have Constitutional Authority for the Strikes?

As discussed in this [CRS InFocus](#), the Constitution purposefully divides war powers between Congress and the President. The Supreme Court has [made clear](#) that the President has the constitutional power to defend the nation from an armed attack or insurrection within its borders without congressional authorization. But the High Court has not defined the extent to which this independent authority applies when there has been no sudden attack on the homeland. The executive and legislative branches have offered differing views on when the President needs Congress’s approval for such military action.

### Executive Branch Framework

During the [Obama](#) and [Trump Administrations](#), the Department of Justice’s Office of Legal Counsel (OLC) opined that the Constitution empowers the President to conduct military operations without congressional authorization under two conditions. First, the President must reasonably determine that the military action serves “[important national interests](#)”—a broad category in which the President possesses a “[great deal of discretion](#).” Second, the anticipated [nature, scope, and duration](#) of the conflict must not rise to the level of “war” such that it intrudes on Congress’s power to declare war in [Article I, Section 8, Clause 11](#) of the Constitution. According to OLC, generally only [prolonged and substantial](#) military engagements amount to “war” in the constitutional sense.

Some features of the recent airstrikes in Iraq and Syria are similar to military action that OLC concluded satisfies its two-prong test for the President to act alone. For example, OLC [opined](#) that protecting [American lives and property abroad](#) is a sufficiently important national interest to satisfy the first prong. It also has [opined](#) that some [air and missile strikes](#) do not pass the threshold of “war” in the second prong. At the same time, the current situation presents features that arguably were not present in earlier analyses. For example, in prong two, OLC [examines](#) the risk that an initial strike will escalate into a broader conflict—a possibility reflected in the President’s public [warning](#) concerning Iranian retaliation and [pledge](#) to respond to any such attacks.

Further, OLC has not always been consistent in its legal framework. In 2001, OLC [opined](#) that Congress’s power to declare war does not constrain the President’s “[plenary](#)” constitutional authority to use military force to respond to terrorist threats. OLC expressed a similarly expansive view in a [2002 opinion](#) concerning Iraq. Although it has rarely cited these opinions, OLC has not withdrawn them [as it has](#) other

[opinions](#) related to post-9/11 military action. Reviving this line of reasoning could lead OLC to conclude that the President possesses broader authority than under its two-prong test.

## Congressional Framework

In contrast to OLC, Congress has interpreted the Constitution to create a different legal framework for evaluating the President's power to use military force. In [Section 2\(c\)](#) of the War Powers Resolution, Congress expressed the view that the Constitution permits the President to introduce U.S. forces into hostilities (or circumstances where hostilities are imminent) only when: (1) Congress has declared war; (2) Congress has provided specific statutory authorization; or (3) there is a national emergency created by an attack on the United States or its territories, possessions, or Armed Forces. Courts have not interpreted the meaning of "national emergency" in the War Powers Resolution, leaving [observers](#) to debate whether such an emergency existed in Iraq and Syria at the time of the recent strikes.

The War Powers Resolution's analytic framework may require congressional approval to initiate military action in a broader set of circumstances than what OLC has described. Thus far, however, there has been no definitive resolution as to which legal framework governs. OLC's opinions [are not binding](#) "law." At the same time, the executive branch [does not view](#) Congress's interpretation of the Constitution in the War Powers Resolution as legally binding. Federal courts, for their part, [generally](#) have been [unwilling](#) to resolve the conflict or adjudicate challenges to the President's authority to initiate military action. Courts [often dismiss](#) such cases on [threshold legal grounds](#) without reaching the merits. The ultimate result is that any congressional disagreement with the President's claim of constitutional authority may need to be pursued through political processes rather than in the judicial system. For instance, Congress retains the [power of the purse](#), which has been effective in limiting the executive branch's ability to conduct military operations abroad in some cases.

## Did the 2002 AUMF Authorize the President to Conduct the Strikes?

The [2002 AUMF](#) authorizes the President to use the Armed Forces to the extent "he determines to be necessary and appropriate" to:

1. Defend the national security of the United States against the continuing threat posed by Iraq; and
2. Enforce all relevant United Nations Security Council resolutions regarding Iraq.

The executive branch [relied](#) on the 2002 AUMF as domestic legal authority for the 2003 military operations in Iraq and deployment of American forces in Iraq in the years that followed (although it also [claimed](#) independent constitutional authority as support for those operations). Since the fall of Saddam Hussein's regime, observers have debated whether the authorization to defend against the "continuing threat posed by Iraq" remains viable. [Some argue](#) that the contemplated threat was limited to the dangers posed by the Hussein regime. [Others contend](#) this provision authorizes force for post-Hussein regime threats emanating from the country of Iraq, regardless of who is in power.

In 2014, the Obama Administration [stated](#) it no longer relied on the 2002 AUMF for military action and supported the statute's repeal. But later that year the Obama Administration [began citing](#) the 2002 AUMF as domestic authority for its campaign against the Islamic State. Since then, both the [Obama](#) and [Trump Administrations](#) have stated that the 2002 AUMF is not limited to threats created by the defunct Hussein regime. Instead, [both Administrations stated](#) that the 2002 AUMF authorizes force for (1) "helping to establish a stable, democratic Iraq," and (2) "addressing terrorist threats emanating from Iraq." [Both Administrations claimed](#) that Congress "ratified" this interpretation by appropriating funds to support continued military operations in Iraq. In a [2018 report](#), the Trump Administration [stated](#) that the 2002 AUMF "contains no geographic limitation on where authorized force may be employed."

During a July 2019 [hearing](#) before the Senate Foreign Relations Committee, the Acting Legal Adviser to the Department of State, Marik String, addressed the Trump Administration’s view of how the 2002 AUMF relates to Iran. He [testified](#) that, as of that time, the Trump Administration had *not* interpreted the 2002 AUMF as authorizing force against Iran *except* as “may be necessary to defend U.S. or partner forces as they pursue missions authorized” under the 2002 AUMF. String described the latter exception as a “[nuance](#)” that preserved U.S. and partner forces’ right of self-defense. He [elaborated](#):

where U.S. forces are engaged in operations with partner forces anywhere in the world pursuant to ... [the] 2002 AUMF, if those forces either come under attack or are faced with an imminent armed attack, U.S. forces are authorized to use appropriate force to respond where it is necessary and appropriate to defend themselves or our partners.

Based on this description, the Trump Administration appears to interpret the 2002 AUMF to include a *primary* authorization for offensive military action for certain purposes and a *secondary* authorization to act in self-defense when performing the primary mission. The Trump Administration’s public statements do not articulate definitively which facet of the 2002 AUMF the President relied upon for the recent airstrikes. However, the Administration’s emphasis on the defensive purpose of the strike on Soleimani and Al Muhandis suggests the Administration may argue the secondary authorization applied.

According to String’s [testimony](#), the 2002 AUMF’s secondary authorization arises when U.S. forces are under attack or faced with an “imminent” attack. As discussed in more detail below, the concept of imminence often relates to international law and the U.N. Charter. By invoking the imminence requirement in its interpretation of the 2002 AUMF, however, the Trump Administration may have tied this heavily debated concept to the President’s claim of *domestic* authority for the recent airstrikes.

Some Members of Congress [have filed](#) lawsuits [challenging](#) past Presidents’ conclusions on whether military conflict was “imminent” in other contexts. But courts have [dismissed](#) the [suits](#), reasoning that the judicial branch was unequipped to resolve the complex factual questions about military threats, and that the dispute was more appropriately resolved in the political branches. (For discussion of the limits on congressional participation in litigation and recommendations for what Congress can do in the face of adverse legal rulings, see this [CRS Report](#).)

## Do the Strikes Implicate the Assassination Ban?

[Section 2.11](#) of Executive Order 12333 provides that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” President Gerald R. Ford first put a [predecessor assassination ban](#) into place in 1976 after a select committee chaired by Senator Frank Church (the Church Committee) released a [report](#) addressing allegations of possible U.S. involvement in assassination plots against foreign leaders. While the text of current ban in Executive Order 12333 appears straightforward, neither it nor [earlier executive orders](#) define the term “assassination.” The lack of clarity has led to [longstanding debate over what activities](#) the order prohibits.

A [1989 Department of Army memorandum](#) (known as the Parks Memorandum) separated the legal framework governing assassinations between peacetime and wartime killings. According to this [memorandum](#), some peacetime killings for “political purposes” may be considered prohibited assassinations. During wartime, by contrast, legally sanctioned killing is part of the role of the Armed Forces, and military forces have much broader legal authority to target and kill enemy forces, the memorandum [posits](#).

The Parks Memorandum [concludes](#) by emphasizing that, regardless of whether it is peacetime or wartime, Executive Order 12333 does not limit the U.S. forces ability to defend against legitimate threats to national security. OLC similarly stated in a [partially unredacted 2010 opinion](#) that “killings in self-defense are not assassinations” within the meaning of Executive Order 12333. Accordingly, while the Trump

Administration did not directly address Executive Order 12333, it may have concluded that the assassination ban does not apply inasmuch as the recent airstrikes were an act of self-defense.

Finally, in 2016, the Obama Administration [stated](#) that using targeted lethal force against an enemy does not constitute an assassination when it is carried out in manner consistent with the international law governing the use of force. Consequently, the role of international law (discussed below) may inform application of the domestic ban on assassination.

## What are the Implications under International Law?

The missile strikes against Kata'ib Hizbollah, the Iranian head of IRGC-QF, and the deputy commander of Iraq's state affiliated Popular Mobilization Forces may raise questions under international law, including whether the action is consistent with U.S. obligations under the [U.N. Charter](#). The U.N. Charter recognizes sovereign equality among Member states, implying an obligation not to interfere in the domestic matters and territories of one another. Additionally, [Article 2\(4\)](#) of the U.N. Charter prohibits the "threat or use of force against the territorial integrity or political independence" of another Member state, or a use of force that is "in any other manner inconsistent with the Purposes of the United Nations," unless an exception exists. U.S. forces present in Iraq are operating there pursuant to 2014 [requests](#) by the government of Iraq to the United Nations Security Council [seeking](#) international military assistance in the fight against the Islamic State. Because the recent U.S. airstrikes targeted an Iranian military official but took place on Iraqi territory, they implicate international legal issues related both to the use of force against Iran and the territorial integrity of Iraq.

### Self-Defense

One exception to Article 2(4) limitations on the use of force is action taken in self-defense. [Article 51 of the Charter](#) explicitly recognizes the right of self-defense as an exception to Article 2(4)'s prohibition. Specifically, Article 51 states, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations...." [Some theorists and practitioners](#) consider that there also exists a customary doctrine of an inherent right to anticipatory self-defense outside of the circumstances identified by Article 51. This doctrine would permit military action to counter an imminent grave threat even if no actual armed attack has yet occurred. Under this view, armed action to counter an imminent threat is not a prohibited "use of force" under Article 2(4) so long as it is not aimed at taking a state's territory or subjecting the state's people to political control, and is not otherwise inconsistent with the purpose of the U.N. Charter.

An otherwise justified defensive military operation on the territory of another state that does not consent to the use of force on its territory may violate Article 2(4)'s prohibition against the use of force against that state. Iraq [officials reportedly](#) reacted angrily to the military strikes, and publicly stated that they did not consent and considered the strikes to be violations of Iraq's sovereignty and prevailing bilateral agreements governing the U.S. presence in Iraq. In other instances, the United States has taken the [position](#) that such uses of armed force, arguably like the rocket attacks that took place in Iraq and Syria, are permissible where the territorial state is "unwilling or unable" to prevent a non-state actor from carrying out its attacks. To date, U.S. officials have not publicly described Iraq's government as unwilling or unable to prevent attacks on U.S. personnel, and President Trump and others have requested that Iraqi officials continue to uphold their responsibilities to protect U.S. diplomatic facilities.

### Imminence

Perspectives differ regarding the meaning of "imminent threat" that would give rise to a right of self-defense within the meaning of international law. The classic definition of "imminent threat" in this

context [means](#) a threat that is “instant, overwhelming, and leaving no choice of means and no moment for deliberation.” However, over the last two decades, some U.S. government officials have [suggested](#) that a broader definition taking multiple factors into consideration should apply. For example, former Attorney General Eric Holder [stated](#) that the requirement for imminence, at least in the context of hostilities involving terrorist organizations, entails “considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks against the United States.”

## Rules Governing Defensive Force

The DOD interprets international law to require self-defensive uses of force to comply with the principles of necessity and proportionality. To satisfy the [necessity](#) requirement, there must be no alternative means of redress available, and all diplomatic means must either be exhausted or provide no reasonable prospect of stopping an armed attack. The [proportionality](#) requirement involves weighing the contemplated use of force with the justification for taking action. Self-defense actions are permissible only to the extent that they are required to repel an armed attack and to restore security. If an actual or imminent attack is part of an ongoing pattern of attacks, the attacked party may consider what force is reasonably necessary to deter future armed attacks.

Uses of force taken in self-defense [must comply](#) with the rules governing [armed conflict](#), known as [international humanitarian law](#) (IHL) or the law of war, even outside the context of a recognized armed conflict. Consequently, the armed forces carrying out the defensive actions should minimize the possibility of civilian casualties and avoid targeting protected objects, including civilian objects not being used for military purposes or objects whose destruction would likely cause excessive environmental harm. Cultural sites have additional protection under the [Convention for the Protection of Cultural Property in the Event of Armed Conflict](#) (1954 Hague Convention), which applies “in the event of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by, one or more of them.” Both the United States and Iran are parties to the 1954 Hague Convention.

## Does International Law Bind the President?

The extent to which such legal constraints on the use of force bind the executive branch is the subject of an ongoing debate. It is the DOD’s [policy](#) to comply with U.S. obligations under the law of war. However, OLC concluded in a [1989 opinion](#) by then-Assistant Attorney General William Barr that the President has authority to “override” certain elements of international law, including Article 2(4) of the U.N. Charter. Although treaties are “supreme law of the Land” under the [Constitution](#), the opinion took the view that the U.N. Charter is not self-executing (a concept discussed in this [CRS Report](#)) and consequently not binding on the President. Barr wrote that “the decision whether to act consistently with an unexecuted treaty is a political issue rather than a legal one, and unexecuted treaties, like customary international law, are not legally binding on the political branches.” Some scholars [disagree](#) with that assessment, however.

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