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Trump, Iran, and the Constitution

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As a constitutional matter, was President Trump required to have congressional authorization before he militarily struck Iran's nuclear facilities? The answer is, "no."

The Congress's authority "to declare war"—found in Article I, sec. 8 of the Constitution—is not the same as "to make war." As deliberations in the Constitutional Convention make clear, the change in the draft constitution's text from "make" to "declare" was intended to give the president the authority to deal with obvious pending threats and situations in which the United States was already under attack. In short, the power to declare war was the authority to move the country formally from a state of peace to that of war, with all the domestic and international legal ramifications that follow from that declaration.

The key point is that Iran's government and Iranian-directed proxies have been waging unconventional war on the United States for decades. It began with its "students" attacking the US embassy in Tehran in 1979 and holding more than five dozen Americans hostage. Through proxies, Iran has subsequently killed more than a thousand US military and diplomatic personnel in Lebanon, Saudi Arabia, Syria, Jordan, and Iraq. It also has sought at times to impede and/or shut down commercial traffic in an international waterway, the Persian Gulf. Moreover, in recent years, it has plotted to assassinate former National Security Advisor John Bolton, former Secretary of State Mike Pompeo, and President Trump. All of these acts are causa belli.

The fact that the US has not responded to these attacks by hitting Iran directly was a matter of policy discretion tied, at times, to different administrations' hopes for reducing America's role in the region; husbanding resources for the ongoing wars in Iraq and Afghanistan; renewing diplomatic initiatives; and addressing concerns over the scale of an Iranian retaliation directed at Israel. That the US has not previously taken the fight to Iran directly does nothing to change the fact that Iran sees the United States as an enemy. The US is an enemy for its military presence in the region, its ties to Saudi Arabia, its support for Israel, and for being the most important ideological alternative ("the Great Satan") to the Islamic Republic's claim of legitimacy—and Iran has so acted consistently over the years. Given Iran's behavior, the radically changed strategic and tactical environment since October 7, 2023, and Iran's decision to move forward with producing even more highly enriched uranium, the Trump administration has a credible case for arguing the constitutional merits of its bombing of the Iranian nuclear program sites.

But will it make such a case, and what will that case look like?

In 2020, after President Trump ordered the killing of Qassem Soleimani, the Iranian general in charge of Iran's Islamic Revolutionary Guard Corps' Quds Force, the White House and the Justice Department issued constitutional justifications for the action. As lawyers are wont to do, both had a bit of the kitchen-sink character, with differing legal justifications tossed in. The least credible was suggesting the 2002 Authorization for Use of Military Force Against Iraq was grounds for eliminating Soleimani. The most credible was that he had led the Iranian force and its proxies in planning and executing attacks on American military personnel and showed no signs of stopping. As a matter of selfdefense, the president's order to kill him was constitutionally justified.

But rather than stick with this straightforward justification, both the White House and the Justice Department slip in grounds for the president unilaterally employing the military offensively that are of a more recent (and problematic) vintage. The White House memorandum states the president not only has the authority to protect Americans from imminent attack but also "to protect important national interests." In turn, the Department of Justice document argues that the president was not required to seek congressional approval because the action taken would not "bring the Nation into the kind of protected conflict that would rise to the level of war"—and hence, fell outside of the Congress's prerogative of declaring war. Both arguments are found in the April 2011 opinion issued by the Office of Legal Counsel laying out the constitutional grounds for President Obama decision to order the American air campaign over Libya.

One might hope that President Trump would in this instance stick with a more traditional and more easily justified constitutional argument rather than cobbling the argument for self-defense with these looser, potentially more expansive, justifications. However, given the administration's own proclivities to see the president's executive power as virtually unlimited, it seems unlikely it will see any benefit in claiming any less authority—reaffirming the idea that this imperial aspect of the modern presidency is now firmly bipartisan.

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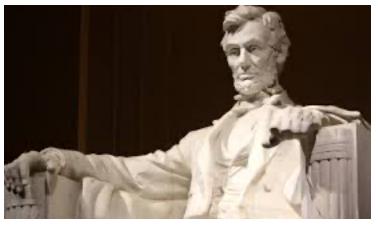
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