

remove any such content that violates our guidelines.”⁸⁷ On March 5, YouTube announced it had removed five channels run by the Burmese military and their affiliated videos.⁸⁸

Despite increasing pressure from much of the international community, including the overwhelming passage of a UN General Assembly Resolution condemning the coup, Burma’s military appears unwilling to reverse course.⁸⁹

USE OF FORCE, ARMS CONTROL, AND NONPROLIFERATION

Biden Administration Relies on Constitutional Authority and Unwilling or Unable Theory of Self-Defense for Airstrikes in Syria

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On February 25, 2021, the United States conducted a strike targeting Iranian-backed militia group facilities in Syria. The strike, which came in response to a February 15, 2021 attack on U.S. interests in Iraq, marked the Biden administration’s first known exercise of executive war powers. As domestic authority for the strike, President Joseph Biden, Jr. cited his authority under Article II of the U.S. Constitution and did not rely on the 2001 or 2002 Authorizations for the Use of Military Force (AUMFs). For international legal authority, Biden relied on individual self-defense under Article 51 of the UN Charter, stating that Syria was “unwilling or unable” to prevent further attacks on the United States by these non-state actors within its territory. The strikes garnered mixed reactions from Congress, where efforts are underway to repeal or reform extant AUMFs as well as the War Powers Resolution (WPR). The Biden administration is also undertaking a review of current U.S. military policy on the use of force, and during this process, it has prohibited drone strikes outside of conventional battlefields, absent presidential approval.

Violence attributed to the activities of Iranian-backed militia groups in Iraq has long been a source of tension between the United States and Iran.¹ The U.S. strike that killed Iranian Quds Force Commander Qassem Soleimani while he was visiting Iraq in January 2020 marked a high point of tensions.² In January and February 2021, as the Biden administration prepared to reopen negotiations on the Joint Comprehensive Plan of Action (JCPOA) concerning Iran’s nuclear program, Iranian-backed militia groups again increased rocket attacks on U.S. assets in Iraq.³ A February 15, 2021 militia group rocket attack in Erbil,

⁸⁷ *Id.*

⁸⁸ Paul Mozur, *YouTube Bans Myanmar Military Channels as Violence Rises*, N.Y. TIMES (Mar. 5, 2021), at <https://www.nytimes.com/2021/03/05/business/youtube-myanmar.html>.

⁸⁹ Adam Taylor & Sammy Westfall, *U.N. Adopts Resolution Condemning Myanmar’s Military Junta*, WASH. POST (June 18, 2021), at <https://www.washingtonpost.com/world/2021/06/18/un-set-adopt-resolution-condemning-myanmars-military-junta>.

¹ See Jean Galbraith, *Contemporary Practice of the United States*, 114 AJIL 288, 313 (2020).

² For background on the legal issues surrounding the Soleimani strike, see *id.*

³ Missy Ryan & Mustafa Salim, *Militia Strike Constitutes Key Test of Biden’s Plan to Engage, Restrain Iran*, WASH. POST (Feb. 26, 2021), at https://www.washingtonpost.com/national-security/us-attack-iran-militias-syria/2021/02/26/13227e0a-7841-11eb-ae66-8b9e3c6918a1_story.html. For additional information on the U.S.

Iraq “wounded one [U.S.] service member, wounded four [U.S.] contractors, including one critically, and killed one Filipino contractor.”⁴ A militia group called “Awliya al Dam, or Guardian of the Blood, brigades” claimed responsibility, but U.S. officials have asserted that the group is a “front” for more notorious Iranian-backed militia groups.⁵

In response to the February 15 attack, the United States launched a strike against Iranian-backed militia group assets in Syria on February 25, 2021. The strike included seven 500-pound bombs⁶ and “destroyed multiple facilities located at a border control point used by a number of Iranian-backed militant groups, including Ka[ta’ib] Hezbollah (KH) and Ka[ta’ib] Sayyid al-Shuhada.”⁷ Unnamed U.S. officials said the strike killed a “handful” of militia members, but “Saberin News Telegram channel, which is affiliated with Iranian-backed militia[s] in Iraq, reported one dead and several injured.”⁸ U.S. Defense Secretary Lloyd Austin expressed confidence that the buildings targeted belonged to the responsible Iranian-backed militia groups, remarking that “[we] wanted to be sure of the connectivity and that we had the right targets.”⁹ However, an aide for a “senior” KH commander commented that “[i]t’s strange the United States bombed [KH] over an attack that was condemned by [KH] themselves.”¹⁰ Biden reportedly called off a strike at a second location at the last minute due to the presence of women and children.¹¹ The Pentagon noted that the United States had “acted in a deliberate manner that aims to de-escalate the overall situation in both eastern Syria and Iraq,”¹² and Biden clarified that the message he intended to send to Iran was “[y]ou can’t act with impunity” and “[b]e careful.”¹³

In his letter to Congress that was sent “consistent with the War Powers Resolution,” Biden explained that he “directed this military action consistent with my responsibility to protect

withdrawal from the JCPOA, see Kristen Eichensehr, *Contemporary Practice of the United States*, 115 AJIL 115, 140–46 (2021).

⁴ White House Press Release, *A Letter to the Speaker of the House and President Pro Tempore of the Senate Consistent with the War Powers Resolution* (Feb. 27, 2021), at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/27/a-letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution> [<https://perma.cc/3PNV-QDGE>] [hereinafter WPR Letter].

⁵ Helene Cooper & Eric Schmitt, *U.S. Airstrikes in Syria Target Iran-Backed Militias That Rocketed American Troops in Iraq*, N.Y. TIMES (Feb. 25, 2021), at <https://www.nytimes.com/2021/02/25/us/politics/biden-syria-airstrike-iran.html>.

⁶ *Id.*

⁷ U.S. Dep’t of Defense Press Release, *U.S. Conducts Defensive Precision Strike* (Feb. 25, 2021), at <https://www.defense.gov/Newsroom/Releases/Release/Article/2516518/us-conducts-defensive-precision-strike> [<https://perma.cc/TKF5-YJYQ>].

⁸ Cooper & Schmitt, *supra* note 5.

⁹ Missy Ryan, Anne Gearan & Alex Horton, *Biden Administration Conducts Strike on Iranian-Linked Fighters in Syria*, WASH. POST (Feb. 26, 2021), at https://www.washingtonpost.com/national-security/biden-administration-conducts-strike-on-iranian-linked-fighters-in-syria/2021/02/25/7ff2447e-77ca-11eb-ae66-8b9e3c6918a1_story.html (citing Meghann Myers, *Biden Orders US Airstrikes Against Iran-Backed Militia Targets in Eastern Syria*, MIL. TIMES (Feb. 25, 2021), at <https://www.militarytimes.com/news/your-military/2021/02/26/biden-orders-us-airstrike-against-iran-backed-militia-target-in-eastern-syria>).

¹⁰ *Id.*

¹¹ Gordon Lubold, Michael R. Gordon & Nancy A. Youssef, *Biden Called Off Strike on a Second Military Target in Syria Last Week*, WALL ST. J. (Mar. 4, 2021), at <https://www.wsj.com/articles/a-military-strike-in-syria-shows-biden-team-at-work-11614866795>.

¹² U.S. Dep’t of Defense Press Release, *supra* note 7.

¹³ Ryan & Salim, *supra* note 3.

[U.S.] citizens both at home and abroad and in furtherance of [U.S.] national security and foreign policy interests, pursuant to my constitutional authority to conduct United States foreign relations and as Commander in Chief and Chief Executive.”¹⁴ Notably, Biden did not cite the 2001 AUMF related to the September 11 attacks or the 2002 AUMF related to Iraq as domestic legal authority for the strikes.¹⁵ Presidents George W. Bush, Barack Obama, and Donald J. Trump had previously used those AUMFs as partial justification for uses of force in Iraq and Syria,¹⁶ including the Trump administration’s controversial citation of the 2002 AUMF as authority for the Soleimani strike.¹⁷

The WPR letter addressed not just domestic authorities but also international law. Because the WPR does not require presidents to provide Congress with the international legal basis for military action, many presidents, including Obama and Trump, have declined to include it in their WPR notifications.¹⁸ Biden’s WPR letter regarding the Syria strike explained that “[t]he United States took this action pursuant to . . . [its] inherent right of self-defense as reflected in Article 51 of the United Nations Charter,” in response to the Iranian-backed militia group rocket attacks and indications that the militia groups were “engaged in ongoing planning for future such attacks.”¹⁹ The letter explained that the United States will “take necessary and proportionate action in self-defense, including when, as is the case here, the government of the state where the threat is located is unwilling or unable to prevent the use of its territory by non-state militia groups responsible for such attacks.”²⁰ This marked the first known instance where the United States has cited the “unwilling or unable” theory of self-defense in a WPR report.²¹

As required by Article 51 of the UN Charter,²² the United States sent a letter to the UN Security Council reporting on its action and cited the same international legal authority for the strike as it did in the WPR letter. The Article 51 letter explained, “[i]n recent weeks, [U.S.] and Coalition partner forces in Iraq have been the target of an escalating series of threats and attacks by . . . [Iran-supported] non-State militia groups,” including the February 15 rocket attack, and asserted that the responsible groups are planning further attacks.²³ The letter framed the U.S. strike as “necessary and proportionate action . . . to defend [U.S.] personnel

¹⁴ WPR Letter, *supra* note 4.

¹⁵ John Bellinger, *President Biden’s Inaugural War Powers Report*, LAWFARE (Mar. 1, 2021), at <https://www.lawfareblog.com/president-bidens-inaugural-war-powers-report>. The strike’s location on the Syrian side of the border may have influenced the Biden administration’s decision not to cite the 2002 AUMF. See Ryan Goodman, *Legal Questions (and Some Answers) Concerning the U.S. Military Strike in Syria*, JUST SECURITY (Mar. 1, 2021), at <https://www.justsecurity.org/75056/legal-questions-and-some-answers-concerning-the-u-s-military-strike-in-syria>.

¹⁶ Bellinger, *supra* note 15. For additional information on the Office of the Legal Counsel’s test for determining when the president may use force without congressional authorization, see Letter from Steven A. Engel, Assistant Attorney General, Office of Legal Counsel, to the Counsel to the President (May 31, 2018), at <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/QP7P-SS6W>].

¹⁷ Galbraith, *supra* note 1, at 319–20.

¹⁸ Bellinger, *supra* note 15.

¹⁹ WPR Letter, *supra* note 4.

²⁰ *Id.*

²¹ Bellinger, *supra* note 15.

²² UN Charter, Art. 51.

²³ Letter Dated 27 Feb. 2021 from Ambassador Linda Thomas-Greenfield, Rep. of U.S. to the UN, to Dame Barbara Woodward, President of the UN Security Council, UN Doc. S/2021/202 (Mar. 3, 2021), at <https://undocs.org/en/S/2021/202> [<https://perma.cc/2TVP-3UA8>].

and to deter further attacks.”²⁴ Citing a 2014 Article 51 letter that invoked the “unwilling or unable” justification for U.S. actions against the Islamic State in Syria, the letter stated:

States must be able to defend themselves, in accordance with the inherent right of self-defense reflected in Article 51 of the Charter of the United Nations, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory by non-State militia groups responsible for such attacks.²⁵

The strike prompted mixed reactions from the international community. UK Foreign Secretary Dominic Raab tweeted that “[t]he [United Kingdom] supports the [U.S.] targeted response against militia groups which attack coalition bases in an effort to destabilize the region,” adding that the United Kingdom “recognise[s] the threat posed by the militia and share[s] the [U.S.] aim to work together with partners to de-escalate the situation.”²⁶ However, the Syrian Ministry of Foreign Affairs criticized the U.S. action, stating that “[t]his aggression is a negative indication of the new American administration’s policies, which are supposed to follow international legitimacy, not the law of the jungle that the previous administration had employed to deal with regional and international crises around the world.”²⁷ Per Iran’s state media, Iran’s Foreign Ministry also condemned the strikes as “illegal aggression” and “a violation of human rights and international law.”²⁸ Meanwhile, Russia’s foreign minister protested that “[o]ur military was warned four or five minutes in advance,” which “has no value even from the angle of deconfliction, as they say in relations between Russian and U.S. servicemen.”²⁹ For its part, Iraq made clear that it did not assist with the strike, stating that “cooperation with the international coalition forces is limited to a specific goal . . . to fight [the Islamic State] and its threat to Iraq, in a way that preserves the sovereignty of Iraq.”³⁰

Some commentators, including former U.S. government officials, raised questions about the administration’s legal arguments. In particular, questions focused on whether the U.S. strike was necessary to prevent further attacks and why the United States did not strike the groups in Iraq, where the U.S. operates with the consent of the territorial government, if they posed a threat to U.S. forces in Iraq.³¹

²⁴ *Id.*

²⁵ *Id.*

²⁶ Dominic Raab (@DominicRaab), TWITTER (Feb. 26, 2021, 6:25 AM), at <https://twitter.com/DominicRaab/status/1365261647854600193>.

²⁷ Robyn Dixon & Sarah Dadouch, *Russia Says U.S. Gave Only a Few Minutes’ Warning Before Strike in Syria*, WASH. POST (Feb. 26, 2021), at https://www.washingtonpost.com/world/russia-syria-us-strike/2021/02/26/57e602b2-782a-11eb-9489-8f7dacad51e75_story.html.

²⁸ *First US Military Action Under Biden Draws Criticism*, AL JAZEERA (Feb. 26, 2021), at <https://www.aljazeera.com/news/2021/2/26/unconstitutional-us-airstrikes-on-syria-draw-strong-criticism>.

²⁹ Dixon & Dadouch, *supra* note 27.

³⁰ Ryan & Salim, *supra* note 3.

³¹ See, e.g., Goodman, *supra* note 15; Oona Hathaway, *Knowns and Unknowns of US Syria Strike: Looming Int’l and Domestic Law Issues*, JUST SECURITY (Mar. 5, 2021), at <https://www.justsecurity.org/75198/knowns-and-unknowns-of-us-syria-strike-looming-intl-and-domestic-law-issues>; Adil Ahmad Haque, *Biden’s First Strike and the International Law of Self-Defense*, JUST SECURITY (Feb. 26, 2021), at <https://www.justsecurity.org/75010/bidens-first-strike-and-the-international-law-of-self-defense> (asserting that the United States “may not legally take military action in Syria to improve the long-term security of its forces and contractors *in Iraq*” and that “[n]eedless to say, it is unlawful to bomb one country [Syria] to avoid ‘causing issues’ with another [Iraq]”). Concerns about the Iraqi government’s relationship with militia groups have been particularly prevalent since

Congressional reactions to the strike were divided. Senator Marco Rubio (R-FL), described the strike as “targeted, proportional and necessary,”³² while Representative Michael McCaul (R-TX), a member of the House Foreign Affairs Committee, noted that “[r]esponses like this are a necessary deterrent and remind Iran, its proxies, and our adversaries around the world that attacks on U.S. interests will not be tolerated.”³³ However, Senator Tim Kaine (D-VA) observed that “[o]ffensive military action without congressional approval is not constitutional absent extraordinary circumstances,”³⁴ and Representative Ro Khanna (D-CA) argued that “[w]e cannot stand up for [c]ongressional authorization before military strikes only when there is a Republican [p]resident.”³⁵ Libertarian and Independent senators also expressed concern, with Senator Bernie Sanders (I-VT) commenting that “for too long administrations of both parties have interpreted their authorities in an extremely expansive way to continue war,”³⁶ and Senator Rand Paul (R-TN) asking “[w]hat authority does [Biden] have to strike Syria?”³⁷

The February strike reinvigorated congressional interest in repealing or reforming extant AUMFs. Past efforts to rescind, amend, and or supplement those AUMFs during the Obama³⁸ and Trump³⁹ administrations faltered, but on March 3, Senator Kaine and a bipartisan group of cosponsors introduced a joint resolution to repeal the 2002 AUMF, as well as the still-in-force 1991 AUMF related to the First Gulf War.⁴⁰ A bill to repeal the 2001 AUMF is also pending.⁴¹ In the wake of the Syria strike, the Biden administration stated that it will work “with Congress ‘to ensure that the authorizations for the use of military force currently on the books are replaced with a narrow and specific framework that will ensure we can protect Americans from terrorist threats while ending the forever wars.’”⁴²

Iraq incorporated some Iranian-backed militia groups known as the *Hashd al-Sha’abi*, or Popular Mobilization Forces, into the Iraqi military in late 2016. Crispin Smith, *It’s Time Iraq Accepts Legal Responsibility for Its Iran-Backed Militias*, JUST SECURITY (Mar. 23, 2020), at <https://www.justsecurity.org/69273/its-time-iraq-accepts-legal-responsibility-for-its-iran-backed-militias>. Due to potential connections between certain segments of the Iraqi armed forces and Iran, the U.S. military has long been required to vet each Iraqi military unit for ties to Iran before providing training and assistance. See, e.g., Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 1236(e)(1) (2014).

³² Marco Rubio (@marcorubio), TWITTER (Feb. 25, 2021, 8:55 PM), at <https://twitter.com/marcorubio/status/1365118325802565634>.

³³ Michael McCaul (@RepMcCaul), TWITTER (Feb. 26, 2021, 9:25 AM), at <https://twitter.com/RepMcCaul/status/1365307065774858240>.

³⁴ Office of Senator Tim Kaine Press Release, Kaine Statement on Airstrikes in Syria (Feb. 26, 2021), at <https://www.kaine.senate.gov/press-releases/kaine-statement-on-airstrikes-in-syria-> [<https://perma.cc/LG2X-BLT4>].

³⁵ Ro Khanna (@RoKhanna), TWITTER (Feb. 26, 2021, 6:58 AM), at <https://twitter.com/rokhanna/status/1365270015956631557?lang=en>.

³⁶ Bernie Sanders (@SenSanders), TWITTER (Feb. 26, 2021, 1:03 PM), at <https://twitter.com/SenSanders/status/1365361968513744897>.

³⁷ Rand Paul (@RandPaul), TWITTER (Feb. 26, 2021, 7:25 AM), at <https://twitter.com/randpaul/status/1365276855205580801>.

³⁸ The Obama administration requested specific congressional authorization for operations to counter the Islamic State in Iraq and Syria, along with the repeal of the 2002 AUMF. See Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 407, 429–32 (2015).

³⁹ The House passed a bill to repeal the 2002 AUMF following the Soleimani strike, but the bill did not pass the Senate. H.R. 550, 116th Cong. (2020).

⁴⁰ S.J. Res. 10, 117th Cong. (2021); see also H.R. 3261, 117th Cong. (2021) (proposing repeal of 1991 AUMF).

⁴¹ H.R. 255, 117th Cong. (2021).

⁴² Charlie Savage, *Biden Seeks Update for a Much-Stretched Law that Authorizes the War on Terrorism*, N.Y. TIMES (Mar. 5, 2021), at <https://www.nytimes.com/2021/03/05/us/politics/biden-war-powers.html>. Overall,

On June 14, the White House announced its support for a bill to repeal the 2002 Iraq AUMF,⁴³ and the House passed the repeal on June 17.⁴⁴

More broadly, the Syria strike has also prompted Congress to consider reforms to the WPR. On March 8, 2021, Representative Peter DeFazio (D-OR) introduced a joint resolution that would significantly overhaul the WPR.⁴⁵ Among other changes, the joint resolution would limit the “emergency use” of U.S. armed forces, decrease the deadline for removal of U.S. forces from hostilities (absent congressional authorization) from the WPR’s current sixty days to thirty days, create a sunset provision for funding, and define “hostilities” broadly.⁴⁶ Another bill, sponsored by Representative James Himes (D-CT), would prohibit funds made available for the U.S. armed forces from being “obligated or expended for introduction of [U.S.] Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, in the absence of” a formal declaration of war, an AUMF, or a “national emergency created by an attack or imminent threat of attack upon the United States, its territories or possessions, or the Armed Forces.”⁴⁷

Apart from the congressional authorizations, the Biden administration is reviewing other policies related to the use of force. On inauguration day, the Biden administration “imposed temporary limits on drone strikes targeting suspected terrorists outside the battlefields of Afghanistan, Syria and Iraq, tightening a Trump-era policy while officials review how much leeway to give the military and the CIA in counterterrorism operations.”⁴⁸ National Security Council Spokesperson Emily Horne noted that “[t]he purpose of the interim guidance is to ensure the president has full visibility on proposed significant actions into these areas while the National Security Council staff leads a thorough interagency review of the extant authorizations and delegations of presidential authority with respect to these matters.”⁴⁹ The decision to elevate approval authority for these counterterrorism strikes may “explain a recent lull in such operations.”⁵⁰

Biden has called for broad presidential powers *and* more congressional oversight. JM Rieger, *Biden Has Pushed for Both More Congressional Oversight and Broad Presidential Authority*, WASH. POST (Mar. 9, 2021), at <https://www.washingtonpost.com/politics/2021/03/09/war-powers-biden-has-pushed-both-more-congressional-oversight-broad-presidential-authority/>; see also Patrick Hulme, *Biden and War Powers*, LAWFARE (Feb. 3, 2021), at <https://www.lawfareblog.com/biden-and-war-powers>.

⁴³ Executive Off. of the President, Statement of Administration Policy (June 14, 2021), available at <https://www.whitehouse.gov/wp-content/uploads/2021/06/SAP-HR-256.pdf> [<https://perma.cc/8U7Z-YCPV>].

⁴⁴ H.R. 256, 117th Cong. (2021); see also Jennifer Steinhauer, *As Wars Wind Down, Congress Revisits Presidential Powers*, N.Y. TIMES (June 17, 2021), at <https://www.nytimes.com/2021/06/17/us/politics/presidential-war-powers.html>.

⁴⁵ H.J. Res. 29, 117th Cong. (2021).

⁴⁶ *Id.*; see also Alexander Bolton, *Kaine Plans New Push on War Powers After Biden’s Syria Strike*, HILL (Mar. 2, 2021), at <https://thehill.com/homenews/senate/541241-kaine-plans-new-push-on-war-powers-after-bidens-syria-strike>.

⁴⁷ H.R. 1457, 117th Cong. § 3(a)(1) (2021); see also H.R. 2108, 117th Cong. (2021) (prohibiting the use of federal funds “in contravention of the” WPR).

⁴⁸ Ellen Nakashima & Missy Ryan, *Biden Orders Temporary Limits on Drone Strikes Outside War Zones*, WASH. POST (Mar. 4, 2021), at https://www.washingtonpost.com/national-security/biden-counterterrorism-drone-strike-policy/2021/03/04/f70fedcc-7d01-11eb-85cd-9b7fa90c8873_story.html; see also Charlie Savage, *Trump’s Secret Rules for Drone Strikes Outside War Zones Are Disclosed*, N.Y. TIMES (May 1, 2021), at <https://www.nytimes.com/2021/05/01/us/politics/trump-drone-strike-rules.html>.

⁴⁹ Charlie Savage & Eric Schmitt, *Biden Secretly Limits Counterterrorism Drone Strikes Away from War Zones*, N.Y. TIMES (Mar. 3, 2021), at <https://www.nytimes.com/2021/03/03/us/politics/biden-drones.html>.

⁵⁰ *Id.*