

The Legal Legacy of Light-Footprint Warfare

Candidate Barack Obama pledged in 2008 to end the Bush administration's heavy military deployments, but not to end the war against al-Qaeda and its associates. He said that as President he would keep a small residual force in Iraq to target al-Qaeda remnants, and promised to "tak[e] the fight to al-Qaeda in Afghanistan and Pakistan," a goal that required, among other things, "more troops, more helicopters, more satellites, more Predator drones in the Afghan border region."¹ The troops Obama had primarily in mind were "Special Operations resources along the Afghanistan–Pakistan border, including intelligence-gathering assets." He wasn't bluffing when he said that "if Pakistan cannot or will not take out al-Qaeda leadership when we have actionable intelligence about their whereabouts, we will act to protect the American people."²

These were some of the hints on the 2008 campaign trail about what the Obama administration would later call its "light footprint" alternative to the large and expensive deployments of the Bush era. Under Obama, "drone strikes, cyber attacks and Special Operations raids that made use of America's technological superiority" became "the new, quick-and-dirty expression of military and covert power," says David Sanger of the *New York Times*.³ While President Bush deployed these tactics to some extent, President Obama expanded their use significantly and made them central to U.S. counterterrorism operations and to projecting U.S. military force more generally.

Undergirding Obama's use of drones, cyber-operations, and Special Operations forces are constitutional and statutory innovations that enhance the President's

Jack Goldsmith, the Henry L. Shattuck Professor of Law at Harvard Law School and a Senior Fellow at the Hoover Institution, was Assistant Attorney General for the Office of Legal Counsel from 2004–05. Matthew Waxman, the Liviu Librescu Professor of Law at Columbia Law School, served in senior positions at the State Department, Defense Department and National Security Council during the George W. Bush administration.

Copyright © 2016 The Elliott School of International Affairs
The Washington Quarterly • 39:2 pp. 7–21
<http://dx.doi.org/10.1080/0163660X.2016.1204305>

Legal innovation has enhanced the President's discretion to start and continue military interventions.

discretion to start and continue military interventions that deploy these tools. Many of Obama's predecessors, of course, widened presidential war power. But

Obama's innovations pose a distinctive challenge to U.S. democracy and military strategy because light-footprint warfare does not attract nearly the same level of congressional and especially public scrutiny as do more conventional military means.

The next President might reject or alter Obama's national security strategy. The legal precedents established by the Obama administration, however, will remain on the books to be deployed by any future White House occupants, including those who embrace very different

strategies and tactics than the current president.

Light-Footprint War

President Obama's rejection of a "boots on the ground" approach—and his devotion to small-tread, clandestine, and often long-distance warfare—reflected political and budgetary pressures as well as beliefs about the limits and proper uses of U.S. military power. At home, U.S. public exhaustion concerning combat casualties helped carry Obama to office, and fiscal strains made it difficult to continue costly military commitments. Looking abroad, the administration believed large-scale military occupations were ineffective and risked emboldening enemy extremist movements while ensnaring the United States in endless conflicts. Obama's reluctant decision in 2009 to "surge" the number of ground troops in Afghanistan to almost 100,000 was an exception to this thinking, but he followed it with a significant drawdown to fewer than 10,000 there today, mostly in military bases.⁴

Obama's desire to end the Iraq war and shrink U.S. military presence and combat operations in Afghanistan did not reflect a general dovishness. In his 2009 Nobel Prize acceptance speech, he defended an essential role of U.S. military force in national self-protection as well as in upholding international norms and institutions. "I face the world as it is, and cannot stand idle in the face of threats to the American people," he declared. "Whatever mistakes we have made," he continued, "the plain fact is this: The United States of America has helped underwrite global security for more than six decades with the blood of our citizens and the strength of our arms." He further emphasized a moral imperative to use force in some circumstances to avert humanitarian catastrophes. Obama

embraced the need to wield U.S. military power, but he sought to do so only when he could minimize the risks of escalation, mission creep, and quagmire.⁵

Many new threats and unexpected events have tested this approach over the last eight years. A resurgent Taliban still endangers Afghanistan, and a resilient al-Qaeda still operates in Pakistan, Yemen, and elsewhere. The Islamic State rose from the ashes of al-Qaeda in Iraq to conquer vast swaths of Iraq and Syria, launching terrorist attacks around the globe. The NATO-facilitated removal from power of Libyan leader Muammar Qaddafi brought chaos in Libya, as well as other parts of North Africa, and has allowed an Islamic State branch to take root there. The unending Syrian civil war has produced humanitarian calamity in the Middle East and Europe even as Russia, Iran, and other powers vie for influence in the war-ravaged country.

None of these threats, however, have caused the Obama administration to alter its fundamental commitment to a light-footprint strategy.

High-tech air power, especially unmanned drones but also piloted aircraft and cruise missiles, has been the most salient tool of the light-footprint way of war. Obama has relied heavily on drone strikes in the continuing conflict with the remaining core of al-Qaeda in Afghanistan and Pakistan, as well as its franchise in Yemen and its partners in Somalia. By the end of 2015, Obama had launched about ten times as many drone strikes as his predecessor in Pakistan, Yemen, and Somalia.⁶ In Libya, the United States contributed manned and unmanned air power—many hundreds of bombing sorties as well as the vast majority of aerial intelligence, surveillance, and reconnaissance—to the 2011 international operation that ultimately helped unseat Qaddafi.⁷ And beginning in 2014, he deployed manned and unmanned aircraft to strike Islamic State targets in Iraq, Syria, and Libya.

Cyber attacks are even less visible. Though many actions in this context are highly classified, selective leaks and reports by third parties make plain that President Obama has ordered numerous forward-leaning cyber attacks and preparations for cyber attacks. One of the most consequential known cyber attacks in history is Olympic Games, the covert cyber operation that reportedly began under President Bush but reached its crescendo under President Obama and eventually damaged 1000 Iranian nuclear centrifuges. The administration also reportedly developed elaborate plans for an all-out cyber attack on Iran, but shelved the operation after the nuclear deal was reached last summer.⁸ A leaked 2013 intelligence budget says that the United States carried out 231 “offensive cyber-operations” in 2011 (which could include espionage, preparation for attacks, and attacks), according to the *Washington Post*.⁹

On the ground in physical space, the Obama administration has leaned heavily on the 70,000-strong Special Operations forces and reserves. These elite commando forces fight stealthily in small units and train and support indigenous

forces.¹⁰ Special Operations forces, as well as CIA paramilitary units, conduct manhunts and raids against high-value targets and collect valuable intelligence to support other U.S. and allied operations.¹¹ The Obama administration has never matched the number of Special Operations forces that President Bush had in use during the heaviest fighting in Afghanistan and Iraq, but it has expanded the overall size and resources of these forces. It relies on them more as a percentage of forces deployed abroad. And it deploys them more widely throughout the Middle East, Africa, and Asia, and in more than 80 countries overall, which is more than in any previous administration.¹²

The light-footprint approach has been evident in the Obama administration's efforts to combat the Islamic State. In his September 2014 address to the nation, the President emphasized that he would use U.S. air power and Special Operations units in conjunction with local partner forces on the ground. In December 2015, the President announced that the United States had carried out nearly 9,000 airstrikes against the Islamic State. At about the same time, the *New York Times* published a report that detailed how "the spread of the Islamic State over the past year—from its hubs in Syria and Iraq to affiliates in Africa and South Asia—has led the White House to turn to elite troops to try to snuff out crises in numerous locations."¹³ These Special Forces missions have continued to grow in 2016, with a steady stream of reports about new deployments in Iraq, Libya, and Syria, among other places.¹⁴ Administration officials have also heralded escalating U.S. cyber attacks against the Islamic State and its forces, which President Obama says are "disrupting their command-and-control and communications."¹⁵

A defining characteristic of light-footprint warfare, however, is that it occurs largely out of public view.

A defining characteristic of light-footprint warfare, however, is that it occurs largely out of public view, often from a distance, and in many cases with limited threat to U.S. personnel. This is not always true, of course. Some light-footprint operations—like the bin Laden operation—are hazardous and made public soon after completion. More generally, hostage rescues, night raids, or target-mapping by Special Operations forces can involve up-close encounters and be quite dangerous. But on the whole, and especially compared to

Bush-era warfare, Obama's approach to war is stealthier, exposes U.S. personnel to less risk, involves fewer U.S. casualties, and is conducted more often from afar. Because of these features, light-footprint warfare attracts less public, congressional, and diplomatic scrutiny than the operations it replaced. The president thus has a freer hand politically than he would with heavier-footprint warfare.

With political constraints diminished, legal constraints and authorities such as the Constitution, the War Powers Resolution, and congressional authorizations to use military force take on a larger role in guiding and limiting the executive branch's use of force. The Obama administration has interpreted these authorities and constraints to expand its discretion to conduct light-footprint warfare.

Loosening Constitutional Constraints

The U.S. Constitution allocates to Congress the power to “declare War” but designates the President as “Commander in Chief” of the U.S. armed forces. Dating back at least to Jefferson, presidents have interpreted these provisions to permit deployment of U.S. military force abroad without congressional authorization in many situations short of declared war. The constitutional boundaries of the president's unilateral power to use military force abroad have always been contested, especially since the United States became a global superpower after World War II.

Neither the Supreme Court nor lower federal courts have addressed the constitutionality of this presidential practice in any detail. The judiciary's reluctance to weigh in has left the issue largely to the political branches to work out. Congress has usually been quiet, and it has not staked out a clear or consistent constitutional position.¹⁶

By contrast, presidents of both parties, and their lawyers, have justified presidential war unilateralism in an ever-increasing array of circumstances. The lawyers tend to treat these precedents, and the legal opinions that support them, as sources of constitutional law that in the aggregate become an important element of justification for future presidential uses of force. The precedents reflected in past uses of force also become important points of reference for public debates in Congress and by the U.S. people.¹⁷

The most extreme historical example of U.S. presidential unilateralism was the Korean War. President Harry S. Truman, without congressional authorization, sent U.S. troops to defend South Korea in a war that would last more than three years and cost the lives of over 33,000 U.S. troops.¹⁸ In most large-scale military conflicts since the Korean War—including the Vietnam War; the two Iraq wars; and the ongoing war against the Taliban, al-Qaeda, and its associates—presidents sought and received congressional authorization.

Many smaller-scale military deployments in the post-Korea era, however, were initiated without congressional authorization. This was true, for example, of

Lawyers tend to treat these precedents as important justification for future presidential uses of force.

President Clinton's military operations in the Balkans, George H.W. Bush's intervention in Somalia and invasion of Panama, and Reagan's strikes against Libya and interventions in Grenada and Lebanon. The most significant of these engagements was the Clinton administration's eleven-week bombing campaign in Kosovo in 1999. Many commentators at the time argued that the initiation of unilateral war of such intensity was unconstitutional. The Clinton administration never offered a public legal justification for the constitutionality of its initial intervention, but did claim that Congress later implicitly authorized it by passing an appropriation to fund it.¹⁹

Candidate Barack Obama pledged that he would not engage in unauthorized military actions, like Kosovo, where U.S. self-defense was not an issue. "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation," he emphatically told then-*Boston Globe* reporter Charlie Savage in 2007.²⁰

President Obama did not follow through on this pledge. In March 2011, he ordered the U.S. military to join the intervention to protect civilians from massacre in Libya that the UN Security Council (UNSC) authorized but Congress did not. Obama's Justice Department issued an important legal opinion that rationalized past precedents on the way to blessing the unilateral executive action.

The opinion said that the President had the constitutional power to use unilateral force in order to protect two national interests—"preserving regional stability" in North Africa and supporting the UNSC's "credibility and effectiveness."²¹ It acknowledged only one "possible" constitutional limit on this power, probably with the 1950s Korea precedent in mind. If the President's planned military action involved "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial

The Libya operation now stands as the baseline for permissible unilateral force from the air.

period," it reasoned, the Constitution might require the president to seek approval from Congress. But it concluded that no such authorization was required for the Libya campaign, which involved no ground troops and which anticipated uses of force deemed to be limited in their "nature, scope, and duration." The Obama legal team may have been distancing itself from the "large-footprint" Korea precedent, but it carved out constitutional space for small-footprint war-making.

The Libya operation—which was not based on a direct threat to U.S. national security, lasted seven months, cost over a billion dollars, and involved thousands of air sorties including a substantial percentage of targeting sorties—now stands as the baseline for permissible unilateral force from

the air. In justifying that operation, Obama's lawyers relied heavily on the fact that it had the imprimatur of the UNSC. That factor was absent in 2013, however, when President Obama claimed unilateral authority to conduct strikes against the Syrian government, based on the U.S. interest in preserving regional stability and enforcing the international prohibition on the use of chemical weapons.²² The President and his lawyers insisted on this unilateral authority even as they unsuccessfully sought Congress's authorization and then cancelled the mission. The President likely relied on a similar rationale when he unilaterally launched airstrikes in Iraq in the summer of 2014 in order, as he told Congress, "to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there."²³

These precedents together clarify the foundation for unilateral light-footprint warfare. President Obama has established that the president can deploy significant unilateral military force whenever s/he perceives a threat to regional stability and human rights or other established international norms, even when the threat poses no direct danger to the United States. If these oft-satisfied circumstances are present, the Libya opinion and practice establish that a president can use force for many months as long as the force is no more intensive in "nature and scope" than the very intensive seven-month aerial bombardment in Libya. Under this rationale, air strikes, especially by drone, or powerful cyber attacks would often lack the "nature and scope" that require congressional approval. The Obama precedents also allow a future president to deploy Special Operations forces unilaterally in many discrete mission contexts. In these and other ways, President Obama has clarified and strengthened the constitutional space for light-footprint warfare.

Stretching Legislative Strings

In addition to interpreting the Constitution to narrow its constraints on unilateral presidential force, the Obama administration has watered down the already-weak War Powers Resolution and broadly extended the 2001 congressional authorization of force that responded to the 9/11 attacks.

The main statutory limitation on unilateral presidential uses of force is the 1973 War Powers Resolution (WPR), which Congress enacted at the end of the Vietnam War. The WPR requires the president to cease unauthorized military actions after 60 days in any situation where U.S. forces are engaged in hostilities or likely hostilities, unless Congress authorizes the mission. The WPR became a problem for the Obama administration when the 60-day mark of the congressionally unauthorized Libya intervention approached. Lawyers in the Justice Department and Defense Department counseled the White House to pull back its offensive operations in Libya to ensure compliance with the WPR. But the

White House decided to press ahead, arguing that the continuing air strikes against Libya did not amount to “hostilities” under the WPR.²⁴

The administration’s top State Department lawyer reasoned that the extensive U.S. sorties that resulted in the decimation of Libyan army units were not “hostilities” because they came in the context of an “unusually limited” military mission that involved “limited exposure for U.S. troops and limited risk of serious escalation and employs limited military means.”²⁵ This argument is similar to the one that supported the President’s initiation of the conflict. It is also one that wipes away WPR limits for much light-footprint warfare. Some earlier precedents suggested that much smaller and sporadic uses of force might not be “hostilities,” but the Obama administration extended these precedents into altogether different terrain of heavy air deployments over many months. Although many in Congress and the academy criticized this new interpretation as an implausible reading of the WPR, Congress as an institution declined to push back.

The result of these interpretations is a WPR loophole to accompany the constitutional innovations for extensive air or cyber attacks that involve little likelihood of ground troops or U.S. casualties. Going forward, a president who is able to meet the relatively low constitutional threshold for the initiation of light-footprint warfare will now also have a powerful precedent for circumventing the WPR’s 60-day limit on that warfare. In short, the legal precedents are now in place for extended light-footprint warfare without congressional authorization, so long as the president can point to regional instability and the violation of an international norm to justify the intervention in the first place. Depending on a future president’s aims, the Obama precedents could have enormous implications for U.S. foreign policy and national security.

In addition to reducing the legal hurdles to light-footprint warfare, the Obama administration has very generously interpreted its authorities under the 2001 Authorization for Use of Military Force (AUMF) that Congress enacted in the wake of the 9/11 attacks. The AUMF authorized the president to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”²⁶

The Obama administration continued the Bush administration’s practice of construing this law to extend to al-Qaeda and its associated forces, without geographical limitation.²⁷ That interpretation is reasonable because the AUMF’s authorization for “all necessary and appropriate force” is keyed to the 9/11 attacks, but not to specific territory. For years, however, Obama signaled that he wanted to narrow and eventually repeal the AUMF, with an eye toward declaring the end of the war with al-Qaeda. But beginning in September 2014, the

administration reversed course and extended the AUMF's mandate dramatically when it determined that the statute applied to the Islamic State.²⁸

This extension of the 2001 AUMF to the Islamic State was based on the notion that the Islamic State is the successor to al-Qaeda in Iraq, an organization that was once associated with al-Qaeda and that the United States once fought against under the AUMF. There can be no doubt that mapping Congress's language onto protean terrorist organizations is a complex endeavor. The Obama administration's view has nonetheless been widely criticized because the Islamic State, as such, did not exist in 2001 when the AUMF was enacted. Despite its predecessor's historical connections with al-Qaeda, the Islamic State broke ties in early 2014 with al-Qaeda—and thus cannot be an “associated force” under the AUMF.

Legal debates aside, the extension of the 2001 AUMF to reach the Islamic State undoubtedly marks a significant unilateral extension of what some people call the “Forever War” against Islamist terrorists. Vice Chairman of the Joint Chiefs of Staff Admiral Sandy Winnefeld likened the conflict with the Islamic State to a “generational struggle” akin to the Cold War.²⁹ Recently retired Army Chief of Staff General Ray Odierno described it as a “10- to 20-year problem.”³⁰ The Obama administration has now deemed Congress to have authorized this very long conflict in any nation to which the Islamic State might spread, and has already relied on the 2001 AUMF to use force against the Islamic State in Iraq, Syria, and Libya.

The interpretive extension of the 2001 AUMF is important because, in contrast to unilateral uses of force under the Constitution that are theoretically regulated by the WPR, there are no apparent domestic-law limitations on the geographical scope, duration, or intensity of force—including the introduction of ground forces—under the 2001 AUMF. The executive branch has thus understood Congress to have delegated to the president extremely broad discretion to use air and cyber attacks and to deploy Special Operations forces against al-Qaeda, its many associates, the Taliban, the Islamic State, and any other group that the president deems to fall under the AUMF.

Obama's War Power Legacy

All of President Obama's legal maneuvers and arguments in support of his war powers are based on executive branch interpretations. They are thus but one branch's view of the Constitution, the WPR, and the AUMF, and they remain highly contested. Nonetheless, the interpretations will be influential in guiding future presidents, both because executive branch lawyers treat the precedents as legal authorities in future wars and because the precedents are unlikely to be scrutinized in court.

Beyond the legalisms, the precedents established by Obama's uses of force will prove influential more broadly in public debates, where politicians and commentators invariably scramble for past examples to measure the legitimacy of a new presidential use of force.

The precedents Obama has set may be unusually influential for two reasons.

If a new military deployment (or something like it) has been done before, it is easier to justify again. The precedents Obama has set may be unusually influential for two reasons: Obama's claims of legal power have been advanced by a president who is a constitutional lawyer (and by executive branch attorneys who did not bring to office a reputation for hardline executive supremacy); and many of the legal justifications have

been elaborated in public testimony, opinions, and speeches. It is hard to speculate about the precise contexts in which future presidents may deploy these precedents, since tomorrow's threats are unknowable. But President Obama's actions have made it easier, legally and politically, to claim constitutional justification for unilateral uses of light-footprint force against future threats, to minimize the impact of the WPR on these uses of force, and to justify new unilateral extensions of the 2001 AUMF.

While almost all of the Obama legal innovations related to war have taken place without specific congressional authorization, none of the innovations comes as news to Congress. In some instances, such as the extension of the AUMF to include the Islamic State, Congress has gone along via appropriations, even while failing to approve the actions explicitly. And more members of Congress than not have supported the President's actions—for example in the air war in Libya, and in the fight against the Islamic State—in informal statements. But Congress as an institution has declined the opportunity to weigh in expressly on the President's interpretation of his war authorities. Most notably, it failed to pass (or reject) a force authorization specific to the Islamic State, or to respond to the Obama administration's efforts to explain away WPR limits in Libya.

Both political branches are responsible, and courts will remain reluctant to fix it.

Both political branches are responsible for this state of affairs, which courts will remain reluctant to fix. President Obama, motivated by opposing impulses on war powers, has shown little appetite for the hard work needed to secure congressional authorization for light-footprint interventions. Meanwhile, Congress is mired in partisan feuding and has

shown little institutional capacity or interest in playing a significant role in

authorizing them. Deadlock over a new AUMF for the Islamic State is unlikely to be broken soon, for example, because the President's legal needs are served by a stretched 2001 AUMF, and many congressional members see possible political downside but little upside to committing themselves in a vote on an express authorization.

The United States has a long history of presidential military initiative borne of responsibility and opportunity, and congressional acquiescence borne of irresponsibility and collective action hurdles. This historical pattern of executive unilateralism has not meant that the president is unchecked. It has simply meant that the checks were political, not legal, and were imposed by the threat of congressional retaliation if the president's initiatives go terribly wrong, and by the U.S. public through electoral accountability.³¹

It may be that Obama's light-footprint warfare falls within this tradition. Neither Congress nor the public opposes Obama's use of light-footprint military tools—especially against terrorist threats—that don't cost the United States heavily in blood or treasure compared to President Bush's military adventures. The one time President Obama considered a military intervention that the U.S. public did not appear to support—the threatened bombing of Syria in 2013—he backed down. In many respects, President Obama has been less hawkish than the Republicans who have controlled both Houses of Congress since 2014. Especially in an era marked by fierce partisan gridlock in other contexts, the formalities of overt congressional approval might matter less than the reality of broad congressional and public support for the president's military actions.

A more pessimistic view, however, would acknowledge light-footprint warfare's costs to U.S. democracy and its risks to a politically sustainable foreign policy over the long run. The United States wields military force today in ways starkly different from 2001. The conflict that began fifteen years ago has been characterized by ever-morphing enemies, an uncertain though expanding geographical scope, and an indefinite duration unlike any war in previous eras in U.S. history. The United States has stumbled into its current military posture with stunted public debate and intermittent congressional attention. This is no accident, since light-footprint warfare takes place largely in secret, largely from a distance, and largely without threat to U.S. personnel. President Obama's legal approach to war powers emphasizes the very factors that invite low domestic scrutiny to support unilateral presidential action. It reflects the idea that the smaller the footprint and the lower the risk of substantial U.S. casualties, the less the imperative to obtain overt approval by Congress or the U.S. people.

Light-footprint warfare costs U.S. democracy and risks a politically sustainable long-term foreign policy.

As a matter of democratic principle, this attitude probably has matters backwards. Light-footprint warfare is still lethal and very consequential warfare, and the lightness of the tools make them relatively easy for a President to deploy extensively. Light-footprint warfare thus has large foreign policy, strategic, and reputational consequences for the United States, akin to much heavier deployments, yet much less public examination. The President's legal theories treat this as a feature of such warfare. But it is also a bug for U.S. democracy, since the stealthy features mean that public debate and political checks—which reduce error as well as excess, and promote legitimacy—function ineffectively.

This is not just an issue of principle, but of practical consequence for long-term security strategy. While operational stealth is often critical to successful war-fighting, robust checks on presidential unilateralism help ensure that a chosen strategic path can withstand tough scrutiny. Congressional buy-in certainly does not guarantee it, but it does help sustain broad political support for strategy over time—especially in the face of later setbacks.

Most critics of presidential unilateralism insist that the only proper constitutional answer to this conundrum is that, except in very rare circumstances, the president should seek a congressional resolution explicitly authorizing force whenever the President engages in a military intervention or opens up a new front in an ongoing war. It would indeed be very useful to have Congress weigh in expressly on the current direction of U.S. military actions after such a long period of public disengagement. But a requirement that Congress formally approve each new development against a quickly shifting enemy is not realistic and probably not wise. The political incentives for such formal congressional engagement are rarely present, and the foreign policy costs of congressional dithering are often too high.

At least with respect to combating amorphous and ever-changing terrorism threats, a more realistic approach—and one better suited to light-footprint warfare—could be for Congress to establish a system where it approves the overall strategic direction of U.S. counterterrorism operations at regular multi-year intervals. It could remain involved in the interim with something akin to the model of approval and oversight it currently uses with respect to administrative agencies and covert operations. Congress could delegate authority to use force against terrorists that meet certain criteria, such as possessing organizational coherence and posing a particular type or degree of imminent threat to the United States. In return, the president could be required to report publicly and to Congress about each new entity against which it is invoking this delegated power, where, and on what factual basis. If such an authorization contained a sunset clause that mandated congressional reauthorization after a given period, the system would foster ongoing inter-branch deliberation about the way and extent that force is being used. This would improve the current system, one of relentless

unilateral presidential expansion of war in the face of congressional inactivity, other than off-the-radar-screen appropriations for the military.

In the meantime, the sprawling, indefinite, and stealthy light-footprint warfare will continue apace for years and years. Especially considered against expectations from eight years ago, the Obama administration's guiding legal precedents underlying such warfare will constitute a remarkable legacy of presidential power to use military force.

Notes

1. "Obama's Remarks on Iraq and Afghanistan," July 15, 2008, <http://www.nytimes.com/2008/07/15/us/politics/15text-obama.html>.
2. "Q&A: Obama On Foreign Policy," *The Washington Post*, March 2, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/03/02/AR2008030201982_pf.html.
3. David E. Sanger, "Global Crises Put Obama's Strategy of Caution to the Test," *New York Times*, March 16, 2014, http://www.nytimes.com/2014/03/17/world/obamas-policy-is-put-to-the-test-as-crises-challenge-caution.html?_r=0.
4. Peter Baker, "How Obama Came to Plan for 'Surge' in Afghanistan," *New York Times*, December 5, 2009, <http://www.nytimes.com/2009/12/06/world/asia/06reconstruct.html>.
5. Office of the Press Secretary, The White House, "Remarks by the President at the Acceptance of the Nobel Peace Prize," in Oslo, Norway, December 10, 2009, <https://www.whitehouse.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize>.
6. Micah Zenko, "Obama's Drone Warfare Legacy," January 12, 2016, Politics, Power, and Preventive Action, blog, Council on Foreign Relations, <http://blogs.cfr.org/zenko/2016/01/12/obamas-drone-warfare-legacy/>.
7. Ivo H. Daalder and James G. Stavridis, "NATO's Victory in Libya: the Right Way to Run an Intervention," *Foreign Affairs*, (March/April 2012), <https://www.foreignaffairs.com/articles/libya/2012-02-02/natos-victory-libya>; Jeremiah Gertler, *Operation Odyssey Dawn (Libya): Background and Issues for Congress*, (CRS Report No. R41725) (Washington, DC: Congressional Research Service, March 30, 2011), <https://www.fas.org/sgp/crs/natsec/R41725.pdf>.
8. David E. Sanger & Mark Mazzetti, "U.S. Had Cyberattack Plan Ready If Iran Nuclear Dispute Led to Conflict," *New York Times*, February 16, 2016, http://www.nytimes.com/2016/02/17/world/middleeast/us-had-cyberattack-planned-if-iran-nuclear-negotiations-failed.html?_r=3.
9. Barton Gellman & Ellen Nakashima, "U.S. Spy Agencies Mounted 231 Offensive Cyber-Operations in 2011, Documents Show," *The Washington Post*, August 13, 2013, https://www.washingtonpost.com/world/national-security/us-spy-agencies-mounted-231-offensive-cyber-operations-in-2011-documents-show/2013/08/30/d090a6ae-119e-11e3-b4cb-fd7ce041d814_story.html.
10. Andrew Feickert, *U.S. Special Operations Forces (SOF): Background and Issues for Congress*, (CRS Report No. RS21048) (Washington, DC: Congressional Research Service, April 8, 2016), <https://www.fas.org/sgp/crs/natsec/RS21048.pdf>; Office of the Press Secretary, The White House, "Remarks by the President at the Acceptance of the Nobel Peace Prize."

11. Craig Whitlock & Greg Miller, "Paramilitary Force is Key for CIA," *The Washington Post*, September 23, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092206141.html>; Greg Miller & Julie Tate, "CIA shifts focus to killing targets" *The Washington Post*, September 1, 2011, https://www.washingtonpost.com/world/national-security/cia-shifts-focus-to-killing-targets/2011/08/30/gIQA7MZGvJ_story.html.
12. Mark Mazzetti & Eric Schmitt, "Obama's 'Boots on the Ground: Special Forces Are Sent to Tackle Global Threats,'" *New York Times*, December 27, 2015, http://www.nytimes.com/2015/12/28/world/middleeast/more-and-more-special-forces-become-obamas-military-answer.html?_r=0; Statement of General Joseph L Votel, Commander, U.S. Special Operations Command, before the House Armed Services Committee Subcommittee on Emerging Threats and Capabilities, March 18, 2015, https://fas.org/irp/congress/2015_hr/031815votel.pdf.
13. Mazzetti & Schmitt, "Obama's 'Boots on the Ground: Special Forces Are Sent to Tackle Global Threats.'"
14. Jon Street, "U.S. to Send 200 More Troops to Iraq to Fight Islamic State," *The Blaze*, April 18, 2016, <http://www.theblaze.com/stories/2016/04/18/u-s-to-send-200-more-troops-to-iraq-to-fight-islamic-state/>; Eric Schmitt, "Obama Is Pressed to Open Military Front Against ISIS in Libya," *New York Times*, February 4, 2016, http://www.nytimes.com/2016/02/05/world/africa/isis-libya-us-special-ops.html?_r=0; By Barbara Starr and Kevin Liptak, "Obama announces an additional 250 special operations forces to Syria," *CNN*, <http://www.cnn.com/2016/04/24/politics/obama-special-operations-syria/>.
15. Shane Harris and Nancy A. Youssef, "U.S. Ratchets Up Cyber Attacks on ISIS," *The Daily Beast*, April 17, 2016, <http://www.thedailybeast.com/articles/2016/04/17/u-s-ratchets-up-cyber-attacks-on-isis.html>; David E. Sanger, "U.S. Cyber attacks Target ISIS in a New Line of Combat," *New York Times*, April 24, 2016 http://www.nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html?_r=0.
16. Curtis A. Bradley & Trevor W. Morrison, "Historical Gloss and the Separation of Powers," *Harvard Law Review* 126, no. 2 (December 2012), pp. 461–468, <http://harvardlawreview.org/2012/12/historical-gloss-and-the-separation-of-powers/>.
17. On recent practice among the branches, see John Hart Ely, *War and Responsibility*, (Princeton University Press, 1993), pp. 47–67.
18. Arthur M. Schlesinger, Jr. *The Imperial Presidency*, (Boston: Houghton Mifflin Co., 2004), pp. 127–135.
19. These episodes are documented in Louis Fisher, *Presidential War Power*, 3rd ed., (University Press of Kansas, 2013), pp. 154–200.
20. Charlie Savage, "Barack Obama's Q&A," *Boston Globe*, December 20, 2007, <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.
21. Memorandum Opinion for the Attorney General, "Authority to Use Military Force in Libya," April 1, 2011 <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.
22. Charlie Savage, *Power Wars* (New York: Little Brown & Co.: 2015), pp. 630-31; Charlie Savage, "Obama Tests Limits of Power in Syrian Conflict," *New York Times*, September 8, 2013, <http://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html>.

23. Office of the Press Secretary, The White House, "Letter from the President – War Powers Resolution Regarding Iraq," August 8, 2014, <https://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq>.
24. Charlie Savage, "2 Top Lawyers Lost to Obama in Libya War Policy Debate," *New York Times*, June 17, 2011, <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>.
25. U.S. Department of State, "Libya and War Powers," Harold Hongju Koh, Legal Advisor U.S. Department of State, Testimony Before the Senate Foreign Relations Committee, June 28, 2011, <http://www.state.gov/s/l/releases/remarks/167250.htm>.
26. Authorization for Use of Military Force, Public Law No. 107-40, 115 Stat. 224 (September 18, 2001), available at: <https://www.911memorial.org/sites/all/files/Authorization%20for%20use%20of%20military%20force.pdf>.
27. The U.S. Department of Justice, Address by Attorney General Eric Holder to Northwestern University School of Law, March 5, 2012, <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>.
28. Office of the Press Secretary, The White House, "Letter from the President – War Powers Resolution Regarding Iraq"; Charlie Savage, "White House Invites Congress to Approve ISIS Strikes, But Says It Isn't Necessary," *New York Times*, September 10, 2014, http://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html?_r=1; Charlie Savage, "Obama Sees Iraq Resolution As a Legal Basis for Airstrikes, Official Says," *New York Times*, September 12, 2014, <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html>.
29. Dan De Luce, "Is the U.S. Ready for an Endless War Against the Islamic State?" *Foreign Policy*, August 27, 2015, <http://foreignpolicy.com/2015/08/27/is-the-u-s-ready-for-an-endless-war-against-the-islamic-state/>.
30. Aaron Mehta, "Odierno: ISIS Fight Will Last '10 to 20 Years,'" *Defense News*, July 17, 2015, <http://www.defensenews.com/story/defense/2015/07/17/odierno-isis-fight-last-10-20-years/30295949/>.
31. On the role of Congress in politically checking executive war-making, see William G. Howell & Jon C. Pevehouse, *While Dangers Gather: Congressional Checks on Presidential War Powers*, (Princeton University Press, 2007); Douglas L. Kriner, *After the Rubicon: Congress, Presidents and the Politics of Waging War*, (University of Chicago Press, 2010).