
PIONEERING PRESIDENTS: THE LEGAL QUANDARY OF PRESIDENTIAL WARFIGHTING

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I. INTRODUCTION

Article II of the U.S. Constitution appoints the President of the United States as the Commander in Chief of the U.S. military, giving the President supreme operational command over the U.S. Armed Forces.¹ While authorized to direct military operations and form military policy, the President is not constitutionally authorized to declare war.² Instead, the Constitution vests this authority in the U.S. Congress.³ Still, U.S. presidents have historically waged undeclared wars abroad without congressional approval, so long as such wars were limited in scope, duration, and involvement. Figuratively, White House lawyers have for decades successfully waged a war to empower the President to oversee light-footprint wars, a power that does not hinge on congressional authorization and is not expressly stated in the Constitution.

The President's unilateral war powers can make headlines and send global shockwaves, as seen in the drone strike against Iranian Major General Qassim Suleimani on January 3, 2020.⁴ The legal justification underpinning this strike and many others is of vital importance in national security law, highlighting a unique way in which law is used as an instrument of national power in longstanding and shadowy conflicts abroad. The White House has long used the law on a strategic level to interpret the President's war powers, shape the law of war, and sanction another instrument of national power: military power. This Article provides (1) historical context on presidential warfighting absent congressional authorization, (2) a legal analysis of such war powers, (3) a normative look at

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1. U.S. CONST. art. II, § 2, cl. 1.

2. *Id.*

3. U.S. CONST. art. I, § 8, cl. 11.

4. Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. TIMES (Jan. 2, 2020), <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html> [<https://perma.cc/QFW9-8SLA>].

whether the President should possess such authority, and (4) a proposal that Congress use a combination of options if it moves to assert its own war powers.

II. HISTORICAL CONTEXT

Congress last formally authorized a military use of force in 2002 when it approved the military invasion of Iraq.⁵ Only one year prior, Congress authorized war with those nations and organizations behind the attacks on September 11, 2001.⁶ Large-scale military operations followed both of these congressional war authorizations. Yet remarkably, counterterrorism deployments and operations under these two war authorizations persist today, even as today's counterterrorism targets and operations were not contemplated two decades ago.⁷ Perhaps for this reason, the Executive Branch increasingly elects use of force in the form of so-called light-footprint warfare, which is characterized by its relatively short duration and diminished intensity so that few American lives are risked.⁸

Light-footprint warfare began in proper with President Barack Obama's rejection of a "boots on the ground" approach in favor of airborne, cyber, and long-distance warfare.⁹ Such warfare is remarkable because it consists of military action largely outside of public view, from a remote location, and with little threat to American lives. In many cases, it is not formally authorized by Congress. Rather, the Executive Branch asserts that such operations are impliedly authorized under a generous reading of the 2001 and 2002 war authorizations.

A. *Prior Uses of Air Power*

Air power in the form of remotely piloted aircraft—but also piloted aircraft and cruise missiles—is the most prominent form of light-footprint warfare. So-called drone strikes are now a vital part of U.S. military operations abroad. By 2015, President Obama had carried out roughly ten times as many drone strikes as President George W. Bush in Pakistan, Yemen, and Somalia.¹⁰ Even as early

5. Alison Mitchell and Carl Hulse, *Threats and Responses: The Vote; Congress Authorizes Bush to Use Force Against Iraq, Creating a Broad Mandate*, N.Y. TIMES (Oct. 11, 2002), <https://www.nytimes.com/2002/10/11/us/threats-responses-vote-congress-authorizes-bush-use-force-against-iraq-creating.html> [<https://perma.cc/ET5S-CK22>].

6. *Congress Approves Resolution Authorizing Force*, CNN (Sept. 15, 2001), <http://edition.cnn.com/2001/US/09/15/congress.terrorism> [<https://perma.cc/3MSS-M3Z2>].

7. Annika Lichtenbaum, *U.S. Military Operational Activity in the Sahel*, LAWFARE (Jan. 25, 2019, 8:00 AM), <https://www.lawfareblog.com/us-military-operational-activity-sahel> [<https://perma.cc/F3XC-A96P>]. Although many of the groups the United States is targeting have some current or historic ties to al-Qaeda, many of them are also indigenous to the countries where they operate.

8. Brad Stapleton, *The Problem with the Light Footprint: Shifting Tactics in Lieu of Strategy*, CATO INST. (June 7, 2016), <https://www.cato.org/publications/policy-analysis/problem-light-footprint-shifting-tactics-lieu-strategy> [<https://perma.cc/J6PF-82EK>].

9. See JAMES JEFFREY & MICHAEL EISENSTADT, THE WASHINGTON INST. FOR NEAR E. POL'Y, U.S. MILITARY ENGAGEMENT IN THE BROADER MIDDLE EAST (2016), https://www.washingtoninstitute.org/uploads/Documents/pubs/PolicyFocus143_JeffreyEisen-4.pdf [<https://perma.cc/DTV3-J9YF>].

10. Micah Zenko, *Obama's Drone Warfare Legacy*, COUNCIL ON FOREIGN RELS. (Jan. 12, 2016), <http://blogs.cfr.org/zenko/2016/01/12/obamas-drone-warfare-legacy> [<https://perma.cc/H5GN-522D>].

as 2011, U.S. forces deployed manned and unmanned air power in the form of hundreds of bombing sorties to help remove Muammar al-Gaddafi from power.¹¹

Earlier examples of light-footprint warfare include President Bill Clinton's deployment of service members to the Balkans, President George H. W. Bush's deployment of troops to intervene in Somalia and invade Panama, and President Ronald Reagan's airstrikes in Libya and interventions in Grenada and Lebanon. Among these, President Clinton's bombing campaign in Kosovo in 1999 stands out, lasting nearly three months and costing approximately 500 civilian deaths.¹² Pundits criticized the intensity of the bombing and questioned the constitutionality of the Clinton administration's intervention, but President Clinton asserted that Congress implicitly approved of the intervention, citing later appropriations to fund the campaign.¹³

Perhaps the starkest example of unilateral presidential warfighting is the Korean War. President Harry Truman never received congressional approval to defend South Korean forces in a conflict that would last years and cost the lives of tens of thousands of military personnel.¹⁴ Notably, later military conflicts, including the Vietnam War, the two Iraq wars, and the persistent war against the Taliban, al-Qaeda, and their successors and associates, have received congressional authorization to proceed.

B. Obama Administration

As a presidential candidate, Barack Obama pledged not to engage in unauthorized military actions, especially if U.S. self-defense was not at issue, citing President Clinton's bombing campaign in Kosovo.¹⁵ Yet, during President Obama's terms in office, "drone strikes, cyber-attacks and special operations raids" became "the new, quick-and-dirty expression of military and covert power."¹⁶ Of course, these tactics were deployed by the Bush White House from 2001 to 2009, but such tactics were honed after President George W. Bush left office. The use of light-footprint warfare spread and became vital to

11. Ivo H. Daalder & James G. Stavridis, *NATO's Victory in Libya the Right Way to Run an Intervention*, FOREIGN AFFAIRS (Mar./Apr. 2012), <https://www.foreignaffairs.com/articles/libya/2012-02-02/natos-victory-libya> [<https://perma.cc/4JF8-JY6Q>]; JEREMIAH GERTLER, CONG. RSCH. SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS 7–11 (2011), <https://www.fas.org/sgp/crs/natsec/R41725.pdf> [<https://perma.cc/J2EG-USCG>].

12. Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1085 (2001).

13. See LOUIS FISHER, *PRESIDENTIAL WAR POWER 154–200* (3rd ed. 2013).

14. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY 127–35* (Mariner Books 2004) (1973).

15. Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE (Dec. 20, 2007), <https://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/> [<https://perma.cc/ZM84-HA66>] (Candidate Obama stated: "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.")

16. David Sanger, *Global Crises Put Obama's Strategy of Caution to the Test*, N.Y. TIMES (Mar. 16, 2014), <https://www.nytimes.com/2014/03/17/world/obamas-policy-is-put-to-the-test-as-crises-challenge-caution.html> [<https://perma.cc/ZCT5-3SMU>].

counterterrorism operations in part because such warfare minimizes the risks of escalation, mission creep, and quagmire.¹⁷

Notably, President Obama ordered U.S. military forces to help protect civilians from a Libyan massacre in early 2011, citing a use of force authorization from the United Nations Security Council (UNSC) while lacking congressional authorization. The Justice Department's Office of Legal Counsel (OLC) drafted a key legal opinion, citing past precedents and ultimately justifying unilateral presidential warfighting. The OLC said the President can constitutionally order unilateral forces to protect two national interests: "preserving regional stability" and supporting the UNSC's "credibility and effectiveness."¹⁸

The memo noted only one possible constitutional limit on the President's power: "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period," perhaps referring to a conflict like the Korean War.¹⁹ For President Obama's Libya campaign, however, no ground troops were present and uses of force were limited in their "nature, scope, and duration." Thus, the Executive Branch claimed no congressional authorization was needed. President Obama's lawyers succeeded in distancing the Libya intervention from the Korean War precedent, while bolstering a precedent for unilateral warfighting when the military footprint is minimal.

As airstrikes go, President Obama's Libya campaign offers the strongest support for future military operations lacking a direct threat to national security, lasting several months, and costing billions of dollars. In its legal opinion, the OLC placed significant weight on the UNSC's authorization for military intervention. Yet, the White House pushed the envelope still further just two years later when it ordered air strikes against the Syrian government based on interests of regional stability and the general prohibition on use of chemical weapons.²⁰ The OLC insisted on the unilateral authority to employ such strikes, even as Congress denied such authorization and the President later canceled the mission. Presumably, the President relied on the same justification in the context of airstrikes in Iraq in 2014 "to help forces in Iraq as they fight to break the siege of Mount Sinjar and protect the civilians trapped there."²¹

The Obama-era OLC legal opinions form a solid foundation for future light-footprint warfare lacking congressional authorization. Henceforth, if the

17. Off. Press Sec'y, *Remarks by the President at the Acceptance of the Nobel Peace Prize*, WHITEHOUSE.GOV (Dec. 10, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-acceptance-nobel-peace-prize> [<https://perma.cc/PT6H-SR52>].

18. *Authority to Use Military Force in Libya*, 35 Op. O.L.C. at 10 (Apr. 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/F47N-97RP>].

19. *Id.* at 8.

20. CHARLIE SAVAGE, *POWER WARS* 630–31 (2015); Charlie Savage, *Obama Tests Limits of Power in Syrian Conflict*, N.Y. TIMES (Sept. 8, 2013), <https://www.nytimes.com/2013/09/09/world/middleeast/obama-tests-limits-of-power-in-syrian-conflict.html> [<https://perma.cc/82PC-362Q>].

21. Off. Press Sec'y, *Letter from the President—War Powers Resolution Regarding Iraq*, WHITEHOUSE.GOV (Aug. 8, 2014), <https://whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq> [<https://perma.cc/2MPG-JCMF>].

President can claim a threat to regional stability or a violation of human rights or other international norm, even absent direct danger to the U.S., then unilateral presidential use of force may be used, so long as it is no more severe in “nature and scope” than the seven-month aerial bombardment in Libya. Thus, drone strikes and cyber-attacks are routinely justified without the oversight of Congress.

III. LEGALITY OF UNILATERAL PRESIDENTIAL WARFIGHTING

A. U.S. Constitution

The U.S. Constitution splits war powers between the President and Congress, authorizing Congress to declare war but naming the President as the Commander in Chief.²² Yet, since President John Adams, presidents have challenged a strict reading of the war powers provision, most notably after World War II.²³ Judicial clarity on the subject would be useful, but neither the U.S. Supreme Court nor the lower federal courts have opined on the division of war powers between the President and Congress.²⁴ The judiciary’s silence in this regard has left the matter to Congress, which has been at times preoccupied, fractured, or unable to speak with one voice.²⁵

All the while, presidents of both parties and their lawyers have staked out a forceful and broad stance on presidential unilateralism, expanding Article II war powers through decades of inter-branch practice and legal opinions.²⁶ Importantly, White House lawyers rely on past uses of force and the OLC legal opinions supporting them to justify ever-broadening powers that enable the

22. U.S. CONST. art. I, § 8, cl. 11 (power to declare war, grant letters of marque and reprisal, and make rules governing capture on land and water); *id.* at cl. 12 (authority to fund military operations); *id.* at cl. 13 (authority to provide and maintain a navy); *id.* at cl. 14 (power to make rules regulating land and naval forces); *id.* at cl. 15 and cl. 16 (various powers relating to raising and providing for militias); *id.* at cl. 18 (“make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States”).

23. The Quasi-War was an undeclared war between the U.S. and France between 1798 and 1800. *The XYZ Affair and the Quasi-War with France, 1798–1800*, OFF. HISTORIAN, <https://history.state.gov/milestones/1784-1800/xyz> [<https://perma.cc/PU66-FADX>].

24. *See, e.g., Smith v. Trump*, 731 App’x 8 (D.C. Cir. 2018) (dismissing as moot service member’s suit challenging executive branch interpretation of authorization for use of military force, after district court dismissed for lack of standing and due to non-justiciable political questions); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (dismissing lawsuit alleging violation of War Powers Resolution due to lack of standing, as plaintiffs—all members of Congress—had additional legislative remedies they did not pursue). Some decisions, however, have suggested that the courts may feel more pressure to reach the merits of a dispute if executive branch action directly and indisputably conflicts with a statutory restriction. *See, e.g., Zivotofsky v. Clinton*, 566 U.S. 189, 195–200 (2012) and *El-Shifa Pharmaceutical Industries Co. v. United States*, 607 F.3d 836, 855–59 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the judgment).

25. Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 461–68 (2012), <http://harvardlawreview.org/2012/12/historical-gloss-and-the-separation-of-powers> [<https://perma.cc/ZP66-VWXX>].

26. *See, e.g., April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. at 3–10 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/PQG8-PTFK>].

President to wage light-footprint wars without congressional oversight.²⁷ In effect, these uses of force and legal opinions become sources of constitutional law – or at least persuasive interpretations of constitutional law. As guideposts, they steer congressional oversight and public debates, normalizing expectations of presidential warfighting.²⁸ In this way, presidents have played a pioneering role in legal interpretations on the use of force, using law as an instrument of national power to justify unilateral warfighting.

B. 1973 War Powers Resolution

The primary statutory limitation on unilateral presidential use of force is the 1973 War Powers Resolution (WPR), which Congress enacted following the Vietnam War. Under the WPR, the President must cease unauthorized military action after 60 days when U.S. forces engage in hostilities (or possible hostilities), absent congressional authorization.²⁹ The WPR was at issue for the Obama administration when the 60-day mark approached during the Libya bombardment. While lawyers in the Justice Department and Defense Department counseled the White House to heed the 60-day mark and withdraw operations in Libya to comply with the WPR, the White House disregarded this advice, maintaining that the projected air strikes did not meet the definition of “hostilities” under the WPR.³⁰

The top State Department lawyer reasoned that U.S. military sorties fell short of “hostilities” because they occurred in the context of an “unusually limited” military mission that involves “limited exposure for U.S. troops and limited risk of serious escalation and employs limited military means.”³¹ Ultimately, this reasoning disposes of most of the restrictions that the WPR imposes on light-footprint warfare. There was prior precedent to exclude small and sporadic use of force from “hostilities,” but President Obama’s lawyers widened the aperture to include heavy air strikes lasting months. Congress took no action at that time to curtail the Executive Branch’s aggressive interpretation of “hostilities.”

Thus, while perhaps not within the spirit of the Constitution and the WPR, there is room to argue that presidential unilateral warfighting is within the letter of the Constitution and the WPR, even while this stance may lead to ever greater

27. See, e.g., *Authority to Use Military Force in Libya*, 35 Op. O.L.C. (Apr. 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/F47N-97RP>]; *Authority to Order Targeted Airstrikes Against the Islamic State of Iraq and the Levant*, 38 Op. O.L.C. (Dec. 30, 2014), <https://www.justice.gov/sites/default/files/opinions/attachments/2020/02/12/2014-12-30-airstrikes-isil.pdf> [<https://perma.cc/NGV6-JJLP>]; *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/PQG8-PTFK>].

28. See JOHN HART ELY, *WAR AND RESPONSIBILITY* 47–67 (1993).

29. 50 U.S.C. § 1544(b).

30. Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (June 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html> [<https://perma.cc/AX35-AHK7>].

31. *Testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State on Libya and War Powers Before the Senate Foreign Relations Committee*, U.S. DEP’T STATE (June 28, 2011), <https://2009-2017.state.gov/s/l/releases/remarks/167250.htm> [<https://perma.cc/DWY9-7QSF>].

deployments of light-footprint warfare.³² After all, if a president claims not to engage in “hostilities,” with little likelihood of boots on the ground or U.S. casualties, then the broad oversight of the WPR may be easily exploited.³³ Paired with the low bar for initiation of military operations based on a threat to regional stability or a violation of human rights, this stance gives the President wide latitude to initiate and sustain light-footprint warfare without congressional involvement.

C. 2001 Authorization for Use of Military Force

Next, the White House has liberally interpreted its authority under the 2001 Authorization for Use of Military Force (AUMF), the landmark congressional act following the attacks of September 11, 2001. The AUMF enables 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”³⁴ The Bush administration interpreted the AUMF to extend to al-Qaeda and its associated forces without geographical limitation, an interpretation that was adopted by the Obama administration.³⁵ Such a reading is defensible because the AUMF’s language of “all necessary and appropriate force” is tied to the attacks on September 11, 2001, rather than specific geographical locations.

While the Obama administration indicated that it wished to end the war against al-Qaeda, in 2014 it nevertheless asserted that the AUMF extends to the Islamic State.³⁶ The extension of the AUMF to the Islamic State was asserted because the Islamic State is the successor to al-Qaeda in Iraq, which was once associated with al-Qaeda, an enemy of the U.S. under the AUMF. However, opponents criticized this broad construction because the Islamic State, as such, did not yet exist in 2001 when the AUMF was passed. Moreover, the Islamic State broke ties with al-Qaeda in 2014, so it is no longer an “associated force” per the terms of the AUMF. While tracing the lineage of terrorist groups is anything but

32. See CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE (2019), <https://fas.org/sgp/crs/natsec/R42699.pdf> [<https://perma.cc/T2QR-TKXW>].

33. The first such exploitation took place in 1975, only two years after the passage of the WPR, when the Ford administration suggested that “hostilities” meant situations where “units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.” *Testimony by Legal Adviser Harold Hongju Koh*, *supra* note 31.

34. Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224, <https://www.congress.gov/107/plaws/publ40/PLAW-107publ40.pdf> [<https://perma.cc/MXA7-48SP>].

35. See *Address by Attorney General Eric Holder to Northwestern University School of Law*, U.S. DEP’T JUST. (Mar. 5, 2012), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law> [<https://perma.cc/3YV4-UL5H>].

36. Off. Press Sec’y, *supra* note 21; Charlie Savage, *White House Invites Congress to Approve ISIS Strikes, But Says It Isn’t Necessary*, N.Y. TIMES (Sept. 10, 2014), <https://www.nytimes.com/2014/09/11/world/middleeast/white-house-invites-congress-to-approve-isis-strikes-but-says-it-isnt-necessary.html> [<https://perma.cc/LNF3-C4PU>]; Charlie Savage, *Obama Sees Iraq Resolution As a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), <https://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html> [<https://perma.cc/HWC7-DLE4>].

straightforward, the extension of the AUMF to the Islamic State marks a one-sided extension that bolsters complaints of a “endless war” against all Islamic terrorist groups.³⁷

The Obama administration construed the AUMF as congressional approval for an indefinite conflict anywhere the Islamic State operates now and in the future. Such territories already include Iraq, Syria, and Libya. Moreover, while the WPR theoretically regulates unilateral use of force under the Constitution, the AUMF does not impose legal limitations on the territories, duration, or extent of force used, including the deployment of ground forces. The White House has boldly understood Congress to have gifted the President free rein for air strikes and cyber-attacks against al-Qaeda, its associates, the Taliban, the Islamic State, and any other group the President believes falls under the AUMF.

D. *The Executive Branch’s Modern Standard*

The Executive Branch has unilaterally developed a two-part test for determining when a president’s unilateral deployment of American military forces is justified.³⁸ First, the President must find that there is a sufficient “national interest” to justify the use of force.³⁹ Second, the President must determine whether the anticipated “nature, scope and duration” of military action take the country into “war in the constitutional sense.”⁴⁰ Ultimately, neither prong is particularly restrictive. The term “national interest” has been so broadly defined that it is now virtually meaningless.⁴¹ The second prong is often sidelined in light of expansive views on presidential power.⁴² Thus, the test for presidential use of force is not particularly limiting on the President’s war powers.⁴³ The Executive Branch’s

37. Dan De Luce, *Is the U.S. Ready for an Endless War Against the Islamic State?*, FOREIGN POL’Y, (Aug. 27, 2015, 8:48 PM), <http://foreignpolicy.com/2015/08/27/is-the-u-s-ready-for-an-endless-war-against-the-islamic-state> [https://perma.cc/96D6-BBQW].

38. This test was affirmed as recently as 2018 by the Trump administration. *See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. at 9 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [https://perma.cc/PQG8-PTFK].

39. *See, e.g., April 2018 Airstrikes Against Syrian Chemical Weapons Facilities*, 42 Op. O.L.C. at 1 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [https://perma.cc/PQG8-PTFK] (“Before the strikes occurred, we advised that the President could lawfully direct them because he had reasonably determined that the use of force would be in the national interest and that the anticipated hostilities would not rise to the level of a war in the constitutional sense.”). Note that the first prong is commonly viewed as “a question of policy more than law.” *Id.* at 10.

40. *Id.* at 10, 22.

41. Curtis Bradley & Jack Goldsmith, *OLC’s Meaningless ‘National Interests’ Test for the Legality of Presidential Uses of Force*, LAWFARE (June 5, 2018, 3:13 PM), <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force> [https://perma.cc/PK2V-TV4].

42. *See, e.g., Tess Bridgeman, Rebecca Ingber & Stephen Pomper, Bill Barr’s Extreme Views on War Powers Mean Congress’ Window to Stop War with Iran is Now*, JUST SECURITY (May 20, 2019), <https://www.justsecurity.org/64179/bill-barrs-extreme-views-on-war-powers-mean-congresss-window-to-stop-war-with-iran-is-now/> [https://perma.cc/7QXW-TLAT]; Patrick Hulme, *No Substitute for the Real Thing: International and Congressional Use of Force Authorizations*, LAWFARE (Oct. 15, 2019, 10:23 AM), <https://www.lawfareblog.com/no-substitute-real-thing-international-and-congressional-use-force-authorizations> [https://perma.cc/TR2W-SDPE].

43. Bradley & Goldsmith, *supra* note 41.

current stance on presidential use of force reflects a longstanding trend of more assertive executive claims to war powers on the one hand and congressional concessions on the other hand.⁴⁴

IV. SHOULD THE PRESIDENT BE ABLE TO WAGE LIGHT-FOOTPRINT WARS?

U.S. presidents have argued that broad unilateral war powers are legally permissible—at least for light-footprint warfare. While not strictly unlawful, it may be risky to concentrate in one branch—and one person—the non-war powers of the President, the Commander-in-Chief powers, and the ability to create new legal precedent enabling light-footprint warfare.

A. *One-Sided Interpretation*

Politically, to permit ever-expanding presidential war powers without congressional involvement is to condone one political branch annexing another political branch's power. Such a power move, if unchecked, can embolden the Executive Branch to eyeball additional powers or expand presidential war powers still further. After all, declaring and directing wars is an important matter that deserves maximum political input and democratic participation. Without congressional oversight, the President may be empowered to wage longstanding conflicts, free from accountability to Congress and the public.

The White House's arguments in support of presidential war powers are based largely on interpretations internal to the Executive Branch. They include no opinion from the other two branches of government concerning the Constitution, the WPR, or the AUMF. Yet, the body of Executive Branch interpretations carries outsized weight for future presidents whose lawyers will present their own past opinions as convincing legal authority. Further, such opinions and precedents are unlikely to be scrutinized in court, based on the judiciary's historic reticence. Ultimately, the opinions of the Executive Branch are the closest thing to an official view of "the law," in the absence of congressional intervention or judicial interpretation.

B. *Congressional and Public Approval*

Additionally, the precedent set by past presidential uses of force will likely guide discussions and provide context for future uses of force. If such uses of force were legal, or at least unquestioned by Congress and the judiciary when implemented, then the White House can more easily justify future uses of force that are similar in nature and scope. And while many past uses of force by presidents have not been accompanied by congressional authorization, Congress has generally shown implicit support for presidents' actions by way of later appropriations. Importantly, members of Congress may be loath to publicly challenge the President, opting to leave the spotlight and political risk to the President alone.

44. ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY 1–207* (Mariner Books 2004) (1973).

Still, implementation of light-footprint warfare by presidents, especially against known terrorists, may find broad approval in Congress and among the public, especially when such warfare does not cost the U.S. in lives and dollars like more conventional wars. After all, when President Obama considered a military intervention that the U.S. public did not appear to support—the threatened bombing of Syria in 2013—he opted to call off the operation, rather than risk public outcry and political retribution.⁴⁵ Future presidents may adopt or shun President Obama’s legacy, but his innovations and precedent remain at the disposal of later presidents, regardless of their military objectives and political agendas.

C. *Defense Requirements*

International conflicts often require a nimble response from the U.S. military. Enabling the President to act unilaterally can ensure a maximally effective U.S. response when adversaries threaten national interests or allies. As a matter of efficiency, too, it makes sense to cede a greater portion of war powers to the Executive Branch rather than Congress. After all, decision making and action by the President is infinitely swifter than deliberation before both congressional chambers. While the allocation of foreign relations powers under the Constitution has been called an “invitation to struggle” between the Executive and Legislative Branches, the Executive Branch has had an easier time of gaining ground.⁴⁶ Congress—with its two chambers and party divisions—is simply not positioned like the Executive Branch to move swiftly on defense decisions.

V. LEGAL OPTIONS GOING FORWARD

Because the President’s war powers are striking and largely unchecked, Congress should use a combination of legal options to protect its coexistent war powers. Certain political checks are already in place to limit further expansion of Article II war powers. Short of preexisting checks, institutional change may be necessary to ensure stronger limits on presidential war powers. Notably, some checks—like electoral blowback from a military operation gone wrong—are already featured in the current system and may limit the use of presidential war powers.⁴⁷ A careful inspection of the law may yield clues to incremental redistribution of war powers.

45. Paul Lewis, *US Attack on Syria Delayed After Surprise U-turn from Obama*, *GUARDIAN* (Sept. 1, 2013), <https://www.theguardian.com/world/2013/aug/31/syrian-air-strikes-obama-congress> [https://perma.cc/GV2F-D27E].

46. EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 201 (5th ed. 1984).

47. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER: CONGRESSIONAL CHECKS ON PRESIDENTIAL WAR POWERS* (2007); DOUGLAS L. KRINER, *AFTER THE RUBICON: CONGRESS, PRESIDENTS AND THE POLITICS OF WAGING WAR* (2010).

A. Building on Preexisting Legislation

Many critics of presidential unilateralism believe the only constitutional way forward is to insist that the President seek congressional approval for use of force in virtually every military offensive or intervention, especially for controversial uses of force.⁴⁸ In essence, presidential unilateralism should be the exception rather than the norm. This approach offers the benefit of greater congressional debate and approval of long-lasting U.S. conflicts after many years of public disengagement on the matter.⁴⁹

Indeed, lawyers for the White House have “generally recognized that Congress can still set statutory limits on the President’s ability to use military force.”⁵⁰ The War Powers Consultation Act of 2014 (WPCA), proposed but not yet passed, has broad support and would build on the WPR framework by legislatively directing the President to confer with Congress before ordering troops into significant conflicts. Further, the WPCA would require Congress to approve or disapprove of a conflict within 30 days.⁵¹ This act is the product of the bipartisan National War Powers Commission, which conducted fact-finding over two years before deciding on a recommendation for war powers reform.⁵²

Others would seek to add more teeth to the existing WPR. As drafted, the WPR permits the President to militarily intervene for 60 days without congressional approval. A more robust WPR might provide that any significant military

48. See, e.g., Katie Edmondson, *Pelosi Announces Vote to Limit Trump’s War-Making Power Against Iran*, N.Y. TIMES (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/us/politics/nancy-pelosi-trump-iran.html> [<https://perma.cc/2VGH-YN5V>] (“[Congressional Democrats] said the vote on Thursday would be on a measure that would require that Mr. Trump cease all military action against Iran unless Congress votes to approve it.”).

49. Katie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html> [<https://perma.cc/HU26-669Y>] (“‘After many decades of abdicating responsibility—under presidents of both parties—it is time for Congress to take this so very seriously,’ Senator Tim Kaine, Democrat of Virginia and the lead sponsor of the measure, said. ‘We need a Congress that will fully inhabit the Article I powers,’ Mr. Kaine added, referring to the portion of the Constitution that grants Congress the power to declare war. ‘That’s what our troops and their families deserve.’”).

50. See *Authority to Use Military Force in Libya*, 35 Op. O.L.C. at 6 (Apr. 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> [<https://perma.cc/F47N-97RP>] (describing the president’s authority as existing “at least insofar as Congress has not specifically restricted it”); “The President and the War Power: South Vietnam and the Cambodian Sanctuaries,” 1 Op. O.L.C. Supp. 321, 333 (1970), https://www.justice.gov/sites/default/files/olc/opinions/1970/05/31/op-olc-supp-v001-p0321_0.pdf [<https://perma.cc/J7ZW-3G55>] (“Congress undoubtedly has the power in certain situations to restrict the President’s power as Commander in Chief to a narrower scope than it would have had in the absence of legislation.”).

51. See Kaine, *McCain Introduce Bill to Reform War Powers Resolution*, Press Release from the Office of Tim Kaine, U.S. SENATOR TIM Kaine VA. (Jan. 16, 2014), <https://www.kaine.senate.gov/press-releases/kaine-mccain-introduce-bill-to-reform-war-powers-resolution> [<https://perma.cc/FMJ2-R8FY>]; MILLER CTR. PUB. AFF., NATIONAL WAR POWERS COMMISSION REPORT 7–9 (2008), <http://web1.millercenter.org/reports/warpowers/report.pdf> [<https://perma.cc/FJA3-XWYL>].

52. *How America Goes to War*, MILLER CTR. (Jan. 9, 2020), <https://millercenter.org/issues-policy/foreign-policy/national-war-powers-commission> [<https://perma.cc/WNV9-LKTT>].

action, however short, would require Congress's express authorization.⁵³ Short of this, Congress may rely on *ad hoc* legislation, such as the resolution under the WPR following the killing of General Suleimani to end U.S. military engagement in or against Iran.⁵⁴ This resolution would require congressional approval or bona fide self-defense for any further use of force against Iran.⁵⁵ Any of these measures could build on preexisting legislation to limit the President's use of light-footprint warfare.

B. *New Legislation*

Under another approach, Congress could draft new legislation, default "rules of the road," requiring congressional authorization for a military operation involving the use of force no more than two years after its initiation. Congress would need to re-authorize such an authorization every two years thereafter. For operations that are not re-authorized, the Executive Branch would be given a year to wind them down. Such milestones are vital because authorizations without time limitations can live on for years, as evidenced by the AUMF.

Similarly, Congress could create a system in which it approves the overall strategic direction of U.S. military operations at regular intervals. Certain powers could be delegated to the President based on key criteria, like posing a particular type of imminent threat to the U.S. The President would be required to report to the public and to Congress at set intervals and for unique developments in military operations, such as the identification of a new adversary.

Yet, in reality, military operations require an agile U.S. response to ever-changing conflicts. Thus, it is unrealistic to expect that a single statutory framework or congressional authorization can effectively regulate them all. As already witnessed, it is unwise to draw statutory lines at certain thresholds like armed "hostilities," such as in the WPR, or "significant armed conflicts," such as in the proposed WPCA. Such thresholds cannot envision every military conflict. Moreover, they likely invite controversial interpretations by the Executive Branch, which only serves as legal justification for military use of force. Still, the pointed debate over new legislation may appease members of the American public unhappy with the status quo.

C. *Non-Legislative Tools*

Alternatively, Congress could more assertively employ the tools already at its disposal to shape military policy and curtail presidential warfighting. Such tools include congressional hearings, spending bills, and the bully pulpit, all of which steer public opinion, signal U.S. foreign relations goals, and shape how

53. See, e.g., THE CONSTITUTION PROJECT, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES 37–38 (2005), https://archive.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf [<https://perma.cc/DRV8-KDSB>].

54. Hannah Kris, *Rep. Slotkin Introduces War Powers Resolution*, LAWFARE (Jan. 8, 2020, 4:30 PM), <https://www.lawfareblog.com/rep-slotkin-introduces-war-powers-resolution> [<https://perma.cc/J4GC-Y5JW>].

55. *Id.*

the White House exercises its war powers for current and future conflicts. Absent legislation, Congress members must seize these tools, aggressively enforce preexisting powers, and police presidential actions. For example, Congress should take pains to assertively and consistently enforce the terms of the WPR, including through potential litigation to seek judicial enforcement of congressional prerogatives.⁵⁶

Even absent new legislation, Congress could take a strong stance with a three-strikes approach. If Congress objects to a presidential use of force, it would first issue a formal notice to the President citing its objection. If there is no change in course, Congress would issue a second notice, reiterating its concern in greater detail and holding a series of hearings to give the public a chance to participate. If a third and final notice is given, the President must curtail the objectionable military operations as soon as possible, barring a national security justification, or else risk a congressional resolution to formally end operations.⁵⁷

D. *Using Executive Branch Precedent*

A final approach would limit presidential war powers using the language of the OLC's opinions. As discussed above, the OLC has developed a two-part test to determine when the President's unilateral use of force is justified. The President must find that there is a sufficient "national interest" and determine whether the anticipated "nature, scope and duration" of military action take the country into "war in the constitutional sense."⁵⁸ Congress can argue that strikes such as the one against General Qassim Suleimani violate the second prong of the Executive Branch's own test in terms of nature or scope of the strike.

Particularly, if such a strike is likely to escalate regional or national tensions, such that retaliation or even war is possible, then congressional approval would be required prior to presidential action. The OLC opinion in 2018 justifying airstrikes against Syrian chemical-weapons facilities states that the President should consider "the risk that an initial strike could escalate into a broader conflict against Syria or its allies, such as Russia and Iran."⁵⁹ Still, the OLC has stated that a risk of escalation "does not itself mean that the operation amounts to a

56. Tara Golsham, *Trump Ignored Congress on War Powers. Constitutional Scholars Want Democrats to Take Him to Court.*, VOX (May 27, 2019, 7:40 AM), <https://www.vox.com/2019/5/27/18634590/nancy-pelosi-donald-trumpsupreme-court-war-power>.

57. Katie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html> [<https://perma.cc/SH8R-T59E>] ("Both Republicans and Democrats who sponsored the resolution [to limit the president's war powers vis-à-vis Iran] insisted that the measure was not intended to tie Mr. Trump's hands, but to assert Congress's constitutional prerogatives on matters of war. For decades, lawmakers in both parties have ceded those powers with little resistance, deferring to an increasingly assertive executive branch.")

58. See *supra* Section III.D.

59. See *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities*, 42 Op. O.L.C. at 21 (May 31, 2018), <https://www.justice.gov/olc/opinion/file/1067551/download> [<https://perma.cc/PQG8-PTFK>] (citing *Haiti Deployment I*, 18 Op. O.L.C. at 179).

war.”⁶⁰ This is a compelling argument, but ultimately, opponents of expansive presidential war powers may be loath to link their reasoning to OLC legal opinions, since doing so would itself lend credence to the White House’s legal interpretations.

VI. CONCLUSION

The incremental expansion of presidential war powers is a unique and stunning feature of U.S. national security law, permitting the President to unilaterally order extensive and enduring military operations with minimal oversight. Now is the time to renew scrutiny of such powers as the Department of Defense pivots to the next chapter in global defense positioning, featuring a turn from irregular wars with distant terrorist groups to Great Power struggles with Russia and China.⁶¹ As the U.S. military adapts to new conflicts, Congress and the public should evaluate whether a break with precedent is appropriate. A combination of the legal options discussed herein could prove decisive in the zero-sum game over war powers between the President and Congress. However, doing so will require characterizing the White House’s legal opinions as what they truly are: an instrument of national power.

60. *Id.* (citing *Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. at 331; *Bosnia Deployment*, 19 Op. O.L.C. at 332).

61. Helene Cooper, Thomas Gibbons-Neff, Charlie Savage & Eric Schmitt, *Pentagon Eyes Africa Drawdown as First Step in Global Troop Shift*, N.Y. TIMES (Dec. 24, 2019), <https://www.nytimes.com/2019/12/24/world/africa/esper-troops-africa-china.html> [https://perma.cc/TRV5-M5GX].