

Crossing Back Over: Time to Reform Legal Culture and Legal Practice of the “War on Terror”

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When the United States went to war after 9/11, it crossed into new legal territory, and in so doing placed executive branch lawyers in an extraordinary role. The president’s war powers are vast and tend to be exercised in secret. They are often deemed unreviewable by the courts and are almost always under-supervised by Congress. This means that U.S. government lawyers often find themselves the *de facto* arbiters of the boundaries of presidential power. Their judgment is regulated less by the other branches of government and more by institutional positions within the executive branch, the views of allies and outside experts and (in those relatively rare cases where it is mobilized) public opinion.

This absence of strong checks and balances was never ideal from a rule of law perspective. For 20 years, however, the political leadership, national security legal community and public have lived with that situation. We speculate that this is for one of three possible reasons – perhaps out of respect for the weight of law and lore regulating the use of force, perhaps out of a sense that the professionalism of executive branch lawyers is an effective bulwark against the imprudent exercise of war powers, or perhaps because of a belief that there are no better alternatives.

We disagree on all three counts. As the nation turns the corner into the third decade of the war on terror, with no end in sight, we challenge certain myths underlying these justifications and argue that it is time to revisit the fundamental legal and bureaucratic culture within which decisions about war and peace are made.

Myth: The President’s war-making powers are already sufficiently constrained by law.

Reality: In practice, these constraints are pliant and unreliable.

In theory the use of military force is governed by the Constitution, the 1973 War Powers Resolution, the limits imposed by authorizing statutes where applicable, and international law. In practice, however, the executive branch has over time often found ways to bend and stretch these constraints to suit its needs.

First, although Article I of the Constitution vests in Congress the power to declare war, the executive branch has taken a very broad view of the President’s unilateral war-making powers under Article II’s Commander-in-Chief clause. According to the Department of Justice’s Office of Legal Counsel (OLC), there are some notional checks on this power: Namely, the president must be able to establish that the use of force serves a national interest and that the nature, scope and duration of the anticipated hostilities will not rise to the level of “war in the constitutional sense”. The former test, however, has been deemed to include everything from self-defense to regional stabilization, rendering it close to meaningless. The latter test is meant as a safeguard against unilateral military action that by its nature, scope, and duration implicates, in the executive branch’s view, Congress’s Article I war powers, but it has been unevenly applied and seemingly cast aside in some contexts. In the run up to the Afghanistan and Iraq invasions, for example, OLC issued opinions suggesting that President Bush would have unilateral authority even in the absence of statutory authority to launch those wars. Both opinions appear to remain on the books.

Second, the 1973 War Powers Resolution, which was supposed to reinvigorate congressional war powers in the wake of the Vietnam War, has been largely gutted by aggressive executive branch interpretation, adverse court decisions, and congressional acquiescence – all described in greater detail in this piece that Steve wrote with Tess Bridgeman. To be sure, the statute still notionally requires the president to withdraw U.S. forces introduced into hostilities within 60 days absent congressional authorization to continue fighting. But executive branch lawyers have read “hostilities” very narrowly – for example not to include waves of combat sorties flown against targets in Libya in 2011 – and also showed a creative capacity to delay counting to 60, as they did during the Tanker Wars of the 1980s.

What’s more, there is no real enforcement mechanism to stop a war other than Congress refusing to appropriate funds or mustering a veto-proof majority to pass a resolution of disapproval. With regard to the former, funding provisions are often ensnared in complex spending bills, and in any event members have historically been highly reluctant to deny funds to ongoing missions for fear that the military will claim that American troops are being left undefended. With regard to the latter, as we saw with efforts to curtail U.S. involvement in the Yemen conflict and bar war with Iran during the Trump administration, a veto override is a nearly insurmountable hurdle. Against this backdrop, it is hard to place much faith in the War Powers Resolution as a bulwark against executive power.

Third, the authorizing statute for the war on terror – i.e., the 2001 Authorization for Use of Military Force (2001 AUMF) – has through aggressive interpretation been transformed into a deep well of new unilateral authority for the executive branch. While on its face the statute approves the use of force against groups the president determines to have “planned, authorized, committed, or aided” the September 11 attacks, or those who harbored such groups or persons, successive administrations have looked past the statutory language requiring a nexus to 9/11. Through a gloss on the AUMF initially created by the executive branch, and in time ratified by other branches of government, groups can be unilaterally added as new enemies if they constitute “associated forces” and sometimes, as was the case with ISIS, even if they do not meet the requisite test (see below discussion). Administrations do not always make public which groups they have determined to be associated forces. The Biden administration has not yet done so.

Fourth, the president is also regarded to enjoy certain organic powers, shaped by the National Security Act, to use force covertly upon a finding that doing so is “necessary to support identifiable foreign policy objectives of the United States, and is important to the national security of the United States.” Because the law defines covert action as activity where the hand of the United States is intended to remain unseen, such actions are only rarely publicly disclosed and only reported to a limited circle in Congress. This authority can thus be used to initiate, shape, or expand conflict without effective checks or balances.

Fifth, the U.S. government has tended to take an envelope-pushing and sometimes entrepreneurial approach to international law to create the operational flexibility that it needs. For example, under international law measures taken in self-defense must be both necessary to address the threat and proportionate. Scholars have criticized both the Trump and Biden administrations for justifying counter-strikes against Iran-backed militias in and around Iraq on the basis of self-defense, even

though there was not always compelling evidence that the use of force was in fact necessary to address the threat to the United States. As Ryan Goodman describes [here](#), the U.S. has tended to justify counterstrikes that follow an attack or series of attacks on the basis of that they are broadly speaking necessary to deter future such activity. But whatever the merits of this theory, deterrence can be hard to establish, and sometimes the facts surrounding an operation seem inapposite. This was a glaring problem with the [justification](#) for the Trump administration's strike against General Soleimani, which instead of deterring armed activity prompted retaliatory ballistic missile attacks on U.S. forces. (Some accounts have [suggested](#) that this claim was [pretextual](#) and the real reason for the strike was nakedly [political](#).)

Myth: Strong executive branch processes and highly trained lawyers ensure compliance with the best reading of the law.

Reality: For all of these institutional strengths, there are nevertheless structural features that pull lawyers toward approving operations and enlarging executive powers.

As a practical matter, government lawyers often provide the last word in adjudicating how and where war can be waged. Of course policymakers within the administration drive the policy decision, but even then, the lawyers are generally required to vet proposals before they ever make it to the president's or the cabinet secretaries' desks. The normalization of war as the tool by which the United States advances its counterterrorism policies has thus placed an extraordinary weight on the shoulders of those lawyers. We both served in the State Department's legal office, collectively spanning all four administrations that have waged the war on terror, and we both prize our time in government and respect and admire our former colleagues. Still, we see this anniversary as an opportune moment to reflect on the culture in which they are required to take decisions of enormous gravity. In particular, the following features bear consideration.

First, executive branch lawyers are for the most part not required (with the exception of OLC) to confine their advice to the "[best understanding](#)" of the law. Instead, without explicit standards for rendering legal advice, lawyers across the government often default to whether a position is "legally available." In a field like national security law where there are elastic standards, and where the executive

branch has a history of unilaterally claiming the legality of novel theories to address emergent situations, this can make it difficult for dissenting lawyers to successfully shout down arguments that might be contrary to the weight of authority, scholarly opinion, or even the United States’ own prior positions.

The “legally available” standard may have contributed to the Obama administration’s decision to deem ISIS covered by the 2001 AUMF. A former official who participated in the surrounding discussions recently told one of us that none of the senior lawyers regarded this to constitute the best interpretation of the statute. Moreover, Secretary Kerry’s congressional testimony at the time appeared to omit the Justice Department/OLC (who as noted are bound by this standard) from the list of administration lawyers who approved of the legal interpretation.

Second, there is an emphasis on achieving consensus that can mask continuing disagreement and sometimes neutralize viewpoints that might inhibit operational flexibility. At one level, the emphasis on process and consensus is positive: When the Obama administration embraced collaborative national security lawyering among the agencies in 2009, it was an important step beyond the tendency, particularly during the early years of the Bush administration, to stovepipe national security decisions among the more hawkish legal offices and tune out moderating voices from less operational agencies. But while consensus has benefits in bringing new voices into the legal discussion, there can still be a group bias toward solutions that afford operating agencies the flexibility they are seeking. In these circumstances, dissenting voices may find themselves accommodated through formulations that allow them to maintain points of principle, even as they are losing as a practical matter.

The government’s inclusion of “substantial support” to an enemy group as a basis for detention in the March 13, 2009 brief in Guantanamo litigation is an example. The State Department saw the term as inconsistent with international law. Its lawyers hoped that language in the brief that pledged to interpret the government’s detention authority through an international legal lens would allow them to continue pushing back against reliance on it. But in reality they had little control over how the “substantial support” concept was applied. Lawyers sitting at Foggy Bottom would wrangle over whether it could be cited as a basis for detention in Guantanamo habeas briefs, and then go to conferences with special forces lawyers, or sit in on detention tribunals at Bagram, and realize that the term had been widely operationalized in ways that they would never be able to track or influence.

Third, as Rebecca Ingber has described, government decisions that are taken with hindsight, to rationalize actions that have already happened, can be among the most distorting. The implications of conceding error – e.g., accepting that killings once deemed lawful are in fact unlawful – are more than operating agencies, in the main, are willing to tolerate. Under those circumstances, there can be enormous pressure on the national security legal collective to adopt new and seemingly more tendentious legal positions to justify the past.

For example, the government decided to deem Al Shabaab an associated force of al Qaeda and thus targetable as a group under the 2001 AUMF after press reports revealed that U.S. forces in Somalia had for more than a year been ordering strikes in what they described as “collective self-defense” of partner forces. (Others we have spoken to in researching a forthcoming report for Crisis Group have described the strikes as more akin to close air support for offensive operations.) Regardless, the U.S. government had failed to report these strikes under the War Powers Resolution, which would have been required if they had they been conducted pursuant to the president’s Article II authority. The State Department’s lawyers had long resisted deeming Al Shabaab an associated force, believing many of its members to be focused on local concerns, and unaware that some of their leaders had affiliated themselves with Al Qaeda. Nevertheless, faced with the need to provide a retroactive legal rationale for the newly discovered operations, this resistance essentially melted away and the U.S. went to full-on war with Al Shabaab.

Myth: The current situation may not be perfect but there are no realistic alternatives.

Reality: The U.S. government has better options.

Essential decisions about the nation’s wars – with whom it is fighting, and where – should not routinely be taken in classified conference rooms by unelected executive branch officials. Often the only real accountability for these decisions comes when deliberations leak to an enterprising reporter and become fodder for back and forth in the press. In order for there to be real accountability, which is essential both for purposes of democratic governance and as a check on imprudent war-making, these

decisions must be shared with the public, and elected officials need to be on the hook for them. This will require a reset of the framework in which decisions about war and peace are taken by the political branches. Here are the key principles we would recommend to guide reform:

Only Congress Should Authorize Wars. Congress must reclaim from the president and the lawyers who advise him or her the power to decide with whom the United States is at war.

First, Congress should replace the 2001 AUMF with a more narrowly targeted law that identifies the specific groups with which the U.S. is at war, the locations where that war is occurring, and the mission that the war is seeking to achieve. The revised statute should remove the capacity of the executive branch to change the scope of the war by adding new “associated forces” without first obtaining congressional permission, and – to ensure that elected officials are required to examine whether the conflict is actually achieving its stated objectives – include a date no more than two or three years into the future by which the statute will lapse absent reauthorization. (Other features worth considering for the revised AUMF are included [here](#).)

Second, taking the longer view, Congress should replace the 1973 War Powers Resolution with a revised statute that narrows the executive branch’s discretion to wage unilateral war to the realm of true self-defense. The bipartisan draft [National Security Powers Act](#) introduced over the summer by Senators Lee, Murphy and Sanders would be a good place to start. In addition to common sense changes (such as changing the 60-day withdrawal clock to a 20-day clock that would be more difficult to manipulate), the Act would clearly define “hostilities,” effectively narrow the realm for unilateral executive branch war-making to true self-defense, and deny funding should the executive branch seek to wage war without Congress’s approval.

The U.S. Should Not Fight Secret Wars. A little advertised feature of the war powers provisions in the National Security Powers Act is that they would apply to operations undertaken by both “deployed military and paramilitary personnel.” The reference to “paramilitary personnel” suggests that the statute may be intended to pull sustained operations conducted by irregular forces under the president’s covert authorities into the overt world. If that is indeed the purpose it is a laudable one. [Reported accounts](#) suggest that the executive branch has at times relied on covert authorities to conduct sustained use of force operations beyond the scrutiny of both the public

and most members of Congress who lack requisite clearance. While there may be a legitimate national security interest for taking short term action on this basis, over the longer term that interest must be overtaken by the importance of transparency and democratic oversight and accountability.

OLC Should Rescind Overreaching Opinions. While new legislation is needed for any meaningful reset of executive branch lawyering, the executive branch should also take some steps to put its own house in order. Although some dismiss as dead letters the Bush-era opinions that claimed vast unilateral powers with respect to countering terrorism and weapons of mass destruction, that is not a good excuse for allowing them to remain on the books. Indeed, the failure of successive administrations to rescind these opinions (and potentially other non-public opinions) could send a tacit signal that the executive branch wishes to preserve the room for maneuver that those legal opinions afford. If the Biden administration has not already withdrawn them, it should do so publicly now as prior administrations have done with other opinions, including some of the more egregious OLC torture memos.

Agency Counsel Should Reconsider “Legally Available” Lawyering. Even comprehensive war powers reform will leave the president with some discretion in the use of force, particularly with respect to “one-off” strikes premised on self-defense such as the strike on Iranian General Qassem Soleimani (for which the Trump administration claimed a combination of Article II self-defense and statutory authority as well as self-defense under international law). The ultimate safeguard against presidential abuses of war power is political, namely electing a president who will take seriously his or her constitutional commitment to “take Care that the Laws be faithfully executed.” But general counsel offices in the national security agencies should consider helping their clients in implementing this constitutional obligation by providing the best interpretation of law, not merely an interpretation that they could (however uncomfortably) defend.

As a check on this process, Congress could empower a bipartisan board of national security law experts with appropriate security clearances to periodically review internal executive branch legal advice on matters of war and peace, and publish its assessment. Although it serves a different purpose, the membership of the State Department’s Advisory Committee on International Law (ACIL) may provide a model for the composition of such an outside panel of experts. Rebecca Ingber’s useful and complementary suggestions for improving the internal bureaucratic architecture for national security lawyering can be found [here](#).

Conclusion

The war on terror has taken on dimensions that members of Congress could scarcely have imagined twenty years ago. As the conflict has grown and changed, responsibility for these changes has too often been thrust on the shoulders of executive lawyers. Much of the time, the burden of these decisions does not belong there. At this moment of reflection, we hope that leaders in the executive and legislative branches will consider measures that both return responsibility for war-making decisions to the Congress where it is primarily meant to reside, and create an organizational culture in which administration lawyers are fully supported in offering their best reading of the law in this vitally important arena of public affairs.