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War Powers and Terror Threats

The early 2000s ushered in a new era of American vulnerability – one that reshaped the practice and politics of constitutional war powers. Throughout the 1990s, the United States had waged distant wars of choice and confronted far-off crises with little fear of reprisal at home. The 9/11 attacks abruptly shattered that sense of security. Over the next two decades, constitutional war powers were directed against rogue states and nonstate terrorist groups – some already capable of striking the homeland, others feared to be on that path.

In response to those threats, the George W. Bush Administration at first staked out an ambitious view of presidential power – one that permitted launching major wars, even preemptively, to stop rogue states and terrorist groups from threatening the homeland. That claim has fed portrayals of his presidency as distinctly unilateralist. Yet its boldest constitutional claims were never tested, because Congress authorized the wars Bush chose to wage, including campaigns that toppled hostile regimes in Afghanistan and Iraq.

His administration also claimed unilateral control over how to wage wars, especially the congressionally approved Global War on Terror against al Qaeda and the groups or states aligned with it. Although all three branches came to support a long-term war against the al Qaeda network, the other two branches checked executive branch efforts to set tactics alone – and the Executive Branch itself also moved from unbounded claims of unilateral power to more moderate ones and from resisting shared constitutional governance to embracing it.

For the first time in decades, war-powers questions were directed inward – toward domestic actors and institutions. The World Wars and the Cold War strained democracy on the home front; after 9/11, the home front became part of the battlespace itself, in a conflict without clear temporal boundaries, forcing all three branches to confront new civil-liberties dilemmas. Just as they had with respect to foreign policy, Congress and the judiciary exercised their powers in the domestic sphere to constrain the President's policies, striving to reconcile national security imperatives with protection of rights.

The Global War on Terror continues. Though it no longer goes by that name and its geographic scope has contracted, successive presidents have continued to treat it

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as a war. Bush's successors have asserted a combination of presidential powers and congressionally authorized ones to wage this global conflict. They do so because terror groups pose perpetual threats, even as the political salience of those dangers has faded. But presidents also continue to wield these authorities because the difference between peacetime and wartime powers for countering terror threats has narrowed over time – a change that has made it politically harder, not easier, to close out extraordinary war authorities.

DECLARING GLOBAL WAR ON TERROR

On September 11, 2001, al Qaeda attacked the United States' seat of government, military headquarters, and financial center, killing 3,000 people. The President wasted little time in proclaiming that "the deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war."[1] Bush pledged to a joint session of Congress on September 20 that the United States would use "every necessary weapon of war" to defeat the enemy terrorist network.[2] This was no rhetorical flourish. In short order, his administration would argue that the conflict should be considered war in a legal sense under both constitutional and international law.

This should not have been surprising. Had al Qaeda's attacks been carried out by a state, no one would have doubted that the United States was at war.[3] Instead, a transnational terrorist network had been able to use a combination of high-tech and primitive methods to commit violence of a scale, sophistication, and geographic reach previously feasible only by states. To critics, a war frame risked distorting constitutional and international law. They argued that treating terrorism as war – rather than crime – would erode civil liberties at home and encourage military adventurism abroad. Since September 11, however, all three branches have generally agreed that the United States is engaged in an armed conflict – even as the government continued to employ the criminal justice system in parallel – and much of the post-9/11 conflict with al Qaeda and its allies has therefore been governed by constitutional war powers.

Immediately after the attacks, White House lawyers took the view that the President could respond with armed force. That was hardly exceptional. From the Founding, it was widely understood that the President could unilaterally defend against sudden invasions or attacks on the United States, no matter who carried them out. Indeed, during the 1990s, the United States was already using armed force covertly and overtly against al Qaeda after the group attacked a U.S. warship, American embassies in East Africa, a military facility in Saudi Arabia, and the World Trade Center.[4] But, in a September 2001 memo issued shortly after the 9/11 attacks, the Bush Justice Department offered a bolder interpretation of the President's powers. The memo asserted that "the President may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or

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not they can be linked to the specific terrorist incidents of September 11."[5] In other words, the President's war powers extended to other enemies besides al Qaeda.

The memo also revived and broadened Reagan-era claims that Congress could not limit the President's power to define threats or to decide the scale and methods of the military response: "These decisions, under our Constitution, are for the President alone to make." The central conclusions were that the President did not need congressional authorization to make war on al Qaeda and its allies, and Congress could not restrict the President's use of force in waging it.

The notion that the President could unilaterally wage war at any intensity or scale was far-reaching. But it was never tested: only three days after 9/11, Congress authorized the President to wage war. When, on September 14, Congress passed the 2001 Authorization for the Use of Military Force (AUMF), the government was still locked down, and fires at the Pentagon and World Trade Center still smoldered. Every senator and all but one House member voted in support. Many of them knew little about al Qaeda before that week, and the AUMF's mere sixty operative words of text would carry huge legal consequences. "The President is authorized to use all necessary and appropriate force," it read, "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."[6] In signing it, President Bush described the resolution as recognizing his own constitutional power to wage war; he maintained that he did not need Congress's blessing.[7]

One notable feature of the AUMF is its open-endedness. It resembles some prior war measures, like the Gulf of Tonkin Resolution (Chapter 10), but it can be read even more broadly. The 2001 resolution links the force authorization back to the 9/11 attacks, yet it does not specify enemies, geography, or a duration for the war. The language is flexible in each direction. It authorized a war in Afghanistan that overthrew its government and lasted twenty years, evolving from a sharp campaign to destroy al Qaeda and its Taliban sponsors into an extended nation-building occupation. Since its passage, presidents have used the AUMF to justify the use of armed force not just in Afghanistan but in Yemen, Somalia, Libya, Syria, Iraq, the Philippines, and elsewhere. They have used it to justify war against related terrorist organizations in Iraq and Syria that did not even exist back in 2001, but that had spun off from al Qaeda since then. And they have used it to justify the continued detention of enemy fighters for almost twenty-five years, and counting.

A combination of the President's own constitutional powers plus those delegated by Congress in 2001 thus formed the domestic-law basis for the sprawling, overt war against al Qaeda and other terrorist groups. But there was also a parallel covert war. Together, these overt and covert campaigns created a dual-track war – one publicly authorized, the other rooted in longstanding but quietly exercised presidential authorities.

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Since 1986, the CIA had been waging a secret campaign against terrorist organizations around the world, pursuant to a broadly worded finding signed by President Reagan. As required by covert action statutes, the Executive Branch had provided that document to the congressional intelligence committees. Over the years, successive presidents informed congressional leaders of various activities they were directing within that general instruction.[8]

Six days after 9/11, the President notified the congressional intelligence committees of an unprecedented expansion in the CIA's counterterrorism role. Previously, the CIA had been tasked with capturing specific terrorists, often to render them to third countries for criminal prosecution. Now, it was instructed to "undertake operations designed to capture and detain persons" – not just named ones – "who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities."[9] In the words of a top CIA official, "the gloves came off" that day.[10] Both the CIA and the Defense Department now conducted kill, capture, or interrogation operations. But each agency worked under separate legal bases, separate rules, and separate oversight. In the coming years, the CIA's covert war was an increasingly open secret, and CIA paramilitary operations were interwoven with regular U.S. military operations. Though the CIA's expanded role in targeting terrorists with lethal force abroad has been widely reported, the government has never officially acknowledged it.[11]

Constitutionally, the United States faced little difficulty classifying the struggle against al Qaeda and its affiliates as a "war." Over time, all three branches came to accept that premise. The real tensions emerged not over *whether* the United States was at war, but over *how*, *where*, and *for how long* the President may wage it.

WAGING GLOBAL WAR ON TERROR

Yaser Hamdi, a Saudi-American, and Salim Hamdan, a Yemeni, were captured in Afghanistan in 2001 and detained indefinitely without trial at U.S. naval bases.[12] Hamdan was later put before a wartime military tribunal for supporting terrorism.[13] Abu Zubaydah, a Saudi-born al Qaeda planner, was held at a covert CIA detention site and subjected to waterboarding and other "enhanced interrogation techniques."[14] In 2002, a senior al Qaeda operative suspected of plotting an attack on a U.S. warship was reportedly killed by a CIA drone while driving across the Yemeni desert, far outside any conventional battlefield.[15] These and similar cases became a legal crucible in which the Administration's most sweeping war-powers claims were tried.

A small cadre of Bush Administration lawyers pushed an aggressive theory that the President could direct such actions even when Congress legislated otherwise. These actions and legal claims fueled a narrative of a wartime presidency intent on pushing past legal and institutional limits. By the end of Bush's terms, however, both Congress and the courts – as well as many other officials within the Executive

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Branch – had forcefully pushed back against that extreme theory of presidential power. If anything, early executive overreach strengthened the other branches' will and capacity to check the President.

To many, the Administration's use of war powers seemed unprecedented from the start because the fight against diffuse transnational terrorist organizations lacked the organizational, geographic, and temporal boundaries of modern warfare. If, however, one accepts the premise that this was war, many controversial Bush Administration practices were remarkably *ordinary*. The context in which the government sought to use them was surely extraordinary, but measures like killing, capturing, and holding enemy fighters are traditional to military conflict. They are even akin to the basic eighteenth-century military functions that many constitutional Framers experienced firsthand. The Administration therefore insisted that the AUMF, and even the President's Article II powers alone, authorized such measures.

The 2001 U.S. campaign in Afghanistan to oust the Taliban for harboring al Qaeda produced large numbers of captives, like Hamdi and Hamdan. So did counterterrorism sweeps in other countries, often in cooperation with foreign intelligence services. The Bush Administration sought not only to prevent detainees' return to terrorism but also to interrogate them and, in some cases, to prosecute and execute them for war crimes. And, it wanted to do these things mostly outside the regular criminal justice system. The government even detained some suspected sleeper agents in the United States as enemy combatants – including one accused of plotting to detonate a "dirty bomb" – before prosecuting them in civilian courts.[16]

International laws of war – like the Geneva Conventions governing the treatment of prisoners of war (POWs) – are usually understood to constrain how the Executive Branch wages war. After 9/11, however, Bush joined a tradition of presidents interpreting the laws of war to broaden that freedom.[17] In state-on-state conflicts, the Geneva Conventions forbid the inhumane treatment of POWs and sharply restrict intelligence-gathering from them. Not so in the War on Terror, Bush decided. With one hand, he drew on the laws of war to justify the detention of combatants, or enemy fighters. With the other, he denied POW protections – like strict limits on interrogation and full procedural protections for any military trial – claiming some detainees were not covered by the Geneva Conventions at all, and others forfeited POW status through their unlawful conduct.[18]

The U.S. military initially transferred Hamdi – the Saudi captured in Afghanistan – to detention facilities at the U.S. military installation in Guantanamo Bay, Cuba, along with several hundred other enemy fighters or agents. But upon learning that he was an American citizen by birth, the government moved him to a South Carolina military brig. Hamdi's U.S. citizenship meant that he could bring a habeas corpus petition challenging his captivity without trial as a violation of due process. When he did so, the Executive Branch defended the President's power to detain suspected enemy operatives for the war's duration, just like he could detain enemy soldiers in any war with a state.

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In *Hamdi v. Rumsfeld*, a majority of Supreme Court justices sided partly with the government. Justice Sandra Day O'Connor wrote for a plurality that, at least for Taliban and al Qaeda fighters captured battling American forces, detention for the conflict's duration "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress ha[d] authorized the President to use" in the 2001 AUMF.[19] Drawing on a World War II Supreme Court case upholding the detention and military trial of German saboteurs, she noted that the laws of war authorize detention to keep enemy fighters off the battlefield. So, therefore, did Congress's 2001 authorization to use all necessary and appropriate force against al Qaeda and its allies. The Court also held that Hamdi, as a U.S. citizen, was entitled to minimal procedures to contest his detention, and two dissenters argued that only a congressional suspension of habeas corpus could justify holding a citizen on U.S. soil.[20]

If the AUMF implicitly authorized detention for the war's duration, even for U.S. citizens, what else did it encompass? Lethal force is no doubt a traditional incident of warfare. Likewise, intercepting enemy communications is a traditional wartime activity – so did the force resolution implicitly legalize broad surveillance that would otherwise be unlawful? Bush's Justice Department adopted that view – along with other claims about the President's exclusive and unilateral powers – in justifying radical expansions of warrantless surveillance, which it argued were needed to combat terrorism.[21] In a letter to congressional intelligence committees defending surveillance programs that exceeded statutory limits, the Department explained that "throughout history, signals intelligence has formed a critical part of waging war." Analogizing to *Hamdi*, it argued that the 2001 AUMF should be read to authorize such activities.[22] When they came to light, the surveillance programs were subjected to statutory reform and greater court oversight.

In the early Bush years, the Executive Branch went far beyond asserting that the Commander in Chief had vast powers for waging war. It asserted that Congress lacked the power to restrict much of that conduct. Some key Administration officials, like their Reagan Administration predecessors, were determined to roll back statutory limits they viewed as unconstitutional, including some dating back to the Watergate era. The war against al Qaeda was their opportunity to do so. On no issue was this more controversial than CIA-led interrogation.

Soon after the President expanded the covert war against al Qaeda in September 2001, the CIA established a network of secret "black sites" in third-countries to hold select high-value detainees. There, suspected al Qaeda leaders and planners like Abu Zubaydah were subjected to coercive techniques such as stress positions, prolonged sleep deprivation, and simulated drowning, a practice that President Barack Obama and the Chair of the Senate Intelligence Committee later called torture.[23] A pivotal Office of Legal Counsel memo advised that the choice of interrogation methods was a core commander-in-chief prerogative, which no anti-torture statute could restrict: "Just as statutes that order the President to conduct warfare in a

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certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States."[24]

The other branches pushed back. In 2005, Congress passed the Detainee Treatment Act, which prohibited "cruel, inhuman, or degrading treatment."[25] Those standards, drawn from the UN treaty banning torture, applied to any detainee held by any U.S. government agency. According to lead sponsor Senator John McCain, who had survived torture during the Vietnam War, "We are Americans. We hold ourselves to humane standards of treatment of people, no matter how evil or terrible they may be. To do otherwise undermines our security, but it also undermines our greatness as a nation."[26] President Bush signed the bill while stating that the law would be interpreted "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief."[27] On its face, that caveat could be read as gutting the law, given the Administration's broad views of presidential power. But McCain and key Senate allies claimed to have extracted a pledge from the President that three "extreme" interrogation techniques, including waterboarding, would no longer be used.[28]

The next year, it was the Supreme Court's turn to push back against the Bush Administration's interrogation policies, even if indirectly. In *Hamdan v. Rumsfeld*, the Court reviewed the Executive's bid to try Hamdan for war crimes in a military commission lacking normal court-martial safeguards. A majority held the commission invalid because its procedures violated the congressionally enacted Uniform Code of Military Justice. Citing Justice Jackson's concurrence in the Korean War *Steel Seizure Case*, Justice Stevens wrote for the Court that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." The Court did not stop there, though. It also held that Common Article 3, a core provision of the Geneva Conventions, requires trying detainees before a court with standard trial rights.

The upshot of that decision went far beyond military commissions. By holding that Common Article 3 applied in the war against al Qaeda, the Court also rejected the Administration's reading of the laws of war – a reading that afforded only limited constraints on detainee treatment – and effectively constrained the conduct of future interrogations. A Court typically deferential to the Executive's views of that body of law thus reined in presidential overreach.

Wartime authority was shifting away from the Executive's claimed monopoly in the early years after 9/11 toward a more genuinely shared constitutional space. For one thing, the Executive lost some major clashes with the other branches. This included disputes over practices, like enhanced interrogation, that the President had defended as vital to winning the war.[29] Not since the Korean War had the Supreme Court so squarely invalidated a president's wartime action for violating statutory limits, as it did in *Hamdan*. When Bush's warrantless surveillance program

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came to light and faced greater judicial scrutiny, Congress authorized most of it, but subject to new oversight checks.[30] The Supreme Court held in a 2008 case, *Boumediene v. Bush*, that the constitutional right to seek a writ of habeas corpus extends to Guantanamo detainees, even as four dissenting justices charged that the decision of the Court – "the branch that knows least" about national security – would "almost certainly cause more Americans to be killed."[31]

In losing these legal battles over the President's conduct of the war, the Executive Branch also saw its exorbitant claims – that the other branches held virtually no constitutional power to check presidential choices – discredited. Indeed, the Executive Branch itself pulled back from some of its most extreme opinions. Before handing over the reins to the incoming Obama Administration, the Bush Justice Department's Office of Legal Counsel issued a memo repudiating several of its earlier opinions issued in the wake of the September 11 attacks. Although acknowledging the President's substantial constitutional powers in these areas, the 2009 memo abandoned the "sweeping assertions" that the "President's Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants."[32]

Since September 2001 – and across multiple Democratic and Republican presidencies – the Executive Branch and Congress have been united in endorsing a wartime framework for prosecuting the Global War on Terror and supported general policies for waging it, like detention, interrogation, surveillance, and lethal targeting. But many of the specific tactics have been calibrated through processes of interbranch collaboration and checking.

Beyond the question of who controls how wars are waged, these constitutional battles also stood out because they turned inward, centering on fears that wartime urgency would spur government overreach and erode rights at home. For the two decades prior to the September 11 attacks, controversies over war powers were entirely about foreign affairs. Could the President intervene in regional crises? Could Congress stop him from doing so, or pull troops home? Those questions were bound up in political debates over America's role in the post–Cold War world.

The renewed scrutiny on the domestic dimensions of war powers – on the limits of executive authority, threats to civil liberties, and governance of the home front – was, in many ways, a return to the roots of America's war-powers debates. As earlier chapters showed, for much of American history before the late Cold War, the exercise of war powers was very much about internal affairs and preserving republicanism. The Framers sought to balance effective war-making with safeguards against centralization that might imperil liberty. Civil War debates over war powers questioned whether there were any limits to federal government power in a fight for national survival. World War I and II debates questioned how long and how extensively the government could mobilize society for "total war" without undermining self-rule: Could the United States defeat militarized or fascist regimes without

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becoming one? The Cold War's permanent military buildup sparked fears that the republic might deform into a garrison state. Yet, when democracy triumphed over communism and the United States no longer faced an immediate foreign threat (or so it seemed), these concerns faded away. The 1990s' relative silence on war powers and republicanism at home was an anomaly.

While some post-9/11 war powers debates, like the war's geographic scope, concerned foreign affairs, others went to the heart of constitutional rights like due process and privacy.[33] These debates marked a return to an older constitutional pattern in which wartime powers were inseparable from questions of domestic governance. In *Hamdi*, Justice O'Connor responded to unbounded executive war-powers claims by noting that "an unchecked system of detention carries the potential to become a means for oppression." "War powers are awesome powers," wrote the ACLU in a report for the tenth anniversary of the Global War on Terror. "Once given to the executive," it continued, "they vest largely unchecked authority in the president to unleash the coercive power of the state to kill or imprison individuals without affording them traditional procedural protections."[34] Critics on Capitol Hill likewise warned that indefinite military detention was corroding American democracy.[35] For its part, the Bush Administration defended some policies like domestic military detention (used only rarely) and warrantless surveillance (used broadly) on the grounds that wartime commander-in-chief powers and the AUMF apply equally to terrorists at home and abroad – especially given that the United States had been under attack within its borders. One of the earliest post-9/11 Justice Department memos on the scope of presidential war powers began with the premise that "in this current conflict the war front and the home front cannot be so clearly distinguished."[36] That sounded like the Executive of World War II and Korea, insisting that modern war depended on a healthy economy and vigorous domestic production (see Chapters 7 and 8).

Although, as noted earlier, the Supreme Court stepped into these matters a few times, the most important players were still the two elected branches. And, yet, the possibility of further judicial intervention hung over political debates. The Court itself emphasized so. Writing for the majority in *Boumediene*, Justice Kennedy remarked that "[b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined." But "[i]f, as some fear, terrorism continues to pose dangerous threats to us for years to come," he went on, "the Court might not have this luxury." Kennedy put the onus on the political branches to "engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism."[37] The implication was clear: If they failed to do so, the judiciary would draw those lines itself.

Kennedy here stressed that the Global War on Terror's indefinite duration posed special dangers of excessive war powers. More than fifteen years later, this problem has yet to be resolved.

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FOREVER-WAR POWERS

In her 2004 *Hamdi* opinion, Justice O'Connor reasoned that the AUMF implicitly authorized the detention of enemy combatants during wartime because the laws of war acknowledged that custom. She also noted a problem. If there could never plausibly be a peace agreement with al Qaeda or total extinction of its movement, would the President's extraordinary Global War on Terror powers last forever? Would perpetual war someday mean perpetual detention without any trial?[38] The Court left those questions for another day, and they remain unresolved.

To some degree, this is a modern extension of an old problem. Prior American wars – the Civil War, World War I, and others – did not promptly draw to a close when the fighting stopped on the battlefield. Earlier chapters showed that expanded wartime constitutional powers therefore did not suddenly retract. Even in those prior wars, though, a definitive end – and the closure of wartime powers – was ultimately expected. The Global War on Terror is different. Its anticipated end state will not likely be victory, defeat, or negotiated settlement. The war will be a long-term condition: a perpetual seesaw of threat and security. This raises a specter that activated war powers may never fully switch off.

When Obama won the presidency in 2008, many critics of Bush's Global War on Terror had high hopes that the new administration would wind it down – not by changing the aims but by withdrawing exceptional war powers in favor of more ordinary peacetime practice. Those projections were wrong. Obama's administration abandoned the name "Global War on Terror." He curbed some alleged excesses, often with additional procedural safeguards. He immediately ordered that the detention facility at Guantanamo be shuttered (though Congress soon stepped in and set statutory limits on the transfer of detainees that stymied his ability to do so), and he imposed restrictions on interrogations (though Congress and the courts had already imposed many limits).[39] And he relied more heavily on statutory powers rather than broad assertions of presidential powers.

Yet by institutionalizing a war footing with more rules and oversight, the Obama Administration also ensured the war's continuation. The President continued to detain enemy fighters without trial, even if fewer and with more rigorous and frequent reviews for each case than in the previous administration. He continued to use military commissions to prosecute them for war crimes, even if he relied more heavily overall on civilian courts. Use of lethal drone strikes in Yemen and Pakistan (and beyond) expanded sharply under Obama – even including the targeted killing of a U.S. citizen in Yemen who was a senior al Qaeda planner – though with tighter rules for approving most strikes.[40] "We are a nation at war," declared his Attorney General Eric Holder in March 2012, a year after U.S. special forces had killed al Qaeda leader Osama bin Laden.[41] Two years later, when the United States battled the so-called Islamic State – an offshoot of al Qaeda that did not exist in 2001 and was, at times, in open conflict with it – the White House concluded that Congress's

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September 2001 force resolution nonetheless covered this new foe.[42] By adopting procedural reforms and accepting interbranch checks, the Obama Administration gave the government's use of war powers for counterterror operations greater legal grounding and political staying power. In that way, Congress's authorization may have indirectly extended the conflict.

Alongside this process of entrenching the Global War on Terror, political leaders have episodically debated whether and how the 2001 AUMF should be repealed or narrowed. After twenty years of counterinsurgency warfare in Afghanistan, President Joe Biden withdrew U.S. forces in 2021. Lethal counterterrorism strikes persist, but occur at a tiny fraction of their levels two decades ago. Surveillance programs and military commissions are now authorized and governed by their own statutes and oversight mechanisms. The Executive Branch's legal authority to continue holding detainees at Guantanamo may depend on whether or not the AUMF remains on the books, but the population of prisoners there has dwindled. Meanwhile, the President can direct the CIA to take covert counterterrorism actions under separate legal authorities and oversight.

As of this writing, the AUMF appears increasingly outdated. This has prompted calls for amending or repealing the measure. For some reform advocates, this is a matter of principle: Force authorizations should not remain on the books by default, and Congress has a continuing constitutional duty to reassess and reapprove such a long-term war. Others worry that presidents will stretch and stretch the force resolution to cover operations with virtually no link to 9/11. And still others suggest that the AUMF's expansive language should at least be narrowed to reflect the decimation of al Qaeda's core leadership and forces and to restrict where force may be used.

But the slower pace and lower visibility of counterterrorism operations also lessen political pressure on Congress to act. Of course, the legal and political situation could suddenly change if the country again suffered major terror attacks or if the President began exercising war powers in more controversial ways. The former might push Congress to expand the AUMF; the latter might push Congress to restrict or repeal it. As it stands today, the AUMF looks more and more out of date each year, and yet its reform remains elusive.

The political challenge of indefinite war powers today is in some ways the opposite of those faced in earlier eras. In the Civil War and World War I, the gap between peacetime and wartime powers was immense, creating a strong temptation for the government to extend its extraordinary authorities beyond the end of fighting and a corresponding urgency for opponents of wartime policies to try to retract those authorities. Rolling back exceptional war powers was hard because the practical stakes were so high. In the "forever war" on terror, the gap between peacetime and wartime powers is thin. Turning off or refining exceptional war powers is politically hard because the practical stakes have – for many years, at least until recently – been *low*.

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PREEMPTIVE WAR POWERS

At the same time that the United States was waging a Global War on Terror, it launched a major ground war against Saddam Hussein's Iraq (the second such offensive, the first being the 1991 Gulf War discussed in the last chapter). An overwhelming "shock and awe" campaign swiftly overthrew his government and then devolved into a decade-long counterinsurgency battle. As in the 1991 Iraq conflict, the power to start wars was the central constitutional issue. The strategic logic running through the issue was different this time, though.

Between 1987 and 2002, each year or two the White House published a congressionally mandated *National Security Strategy*; since then, it has appeared only every few years, usually with little fanfare. The 2002 document was different. The Bush Administration used it to broadcast – at home and abroad – its "preemption doctrine":

> We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends. … Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past.

Besides al Qaeda, the Administration had in mind what Bush termed an "Axis of Evil": Iraq, Iran, and North Korea, each of which the Administration believed either had or was pursuing nuclear weapons and other weapons of mass destruction (WMD). The document continued: "The greater the threat, the greater is the risk of inaction – and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack." Therefore, "the United States will, if necessary, act preemptively."[43] This stance assumed the United States could not rely on international legal bodies like the UN Security Council or on Cold War–style deterrence to address the worst threats.

The preemption doctrine was in some ways a bold policy statement. The report contemplated war to prevent states or terror groups from ever obtaining WMD, not merely to stop their immediate use. Critics of this policy viewed it as a radical departure from prior American strategy. They also viewed it as contrary to international law, which long confined self-defense to actual or imminent attacks. Bush was not just flexing constitutional powers to broaden American national-defense policy but bending international law to fit it.

However, the strategic pedigree of preemption runs deep in American history, long before the United States became a military heavyweight. In the early nineteenth century, Monroe warned that foreign political interference in the hemisphere might be treated as an attack – a proto-preemption doctrine he could announce unilaterally but could not carry out without Congress or foreign partners, given the nation's meager military.[44] A century and a half later, Kennedy issued a nuclear-era version of the Monroe Doctrine during the 1962 Cuban Missile Crisis, signaling that

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Soviet nuclear deployments in Cuba would be treated like an attack; administration lawyers advised that he was constitutionally and statutorily empowered to act, too.[45] Clinton reportedly considered preemptive strikes against North Korea's emerging nuclear program, though little is publicly known about how seriously his advisers viewed that option and its legality.[46] In his post-9/11 public declarations, President Bush was using his constitutional power to threaten force not just for a specific moment but to establish a new policy for how the United States would use force going forward. And, with the United States now the world's sole superpower, he openly pushed the boundaries of international self-defense law using that same constitutional power.[47] The preemption doctrine, therefore, seemed in many observers' eyes to fit with Bush's go-it-alone approach to both diplomacy and war powers.

The Bush Administration codified preemption more deliberately, explicitly, and expansively than any previous administration had. And unlike those prior episodes, Bush followed through: In 2003, he invaded Iraq to oust Saddam and destroy supposed WMD programs. Yet, in the end, Bush waged no preemptive wars that Congress had not affirmatively authorized.

Immediately after the 9/11 attack, the Administration had considered waging wars without going to Congress. The Justice Department advised Bush that he could use military force without any immediate threat, declaring: "The President may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11."[48] That September 2001 memo invoked precedents such as the Civil War *Prize Cases*, discussed in Chapter 4, to justify presidential responses to dangers. Cold War administrations had already broadened those precedents geographically to include attacks against third-party allies like South Vietnam, as discussed in Chapter 10. The Justice Department now broadened them in another dimension – time – by advising that the President could use force to extinguish latent threats as well. The sweep of that 2001 advice contrasts with the more modest (but still broad) claims of presidential power seen in the Clinton and Obama Administrations' memos on Haiti, the Balkans, and Libya discussed in Chapter 11.

But much of the 2001 legal opinion was hypothetical. The Global War on Terror was really about responding to a catastrophic attack that had already occurred, and the President's subsequent military actions could be justified by the 2001 AUMF and covert action laws. The Global War on Terror was neither preemptive nor unilateral.

Two years later, by contrast, Bush went to war in Iraq preemptively, but not unilaterally. The Justice Department had advised him the previous year that "were [he] to conclude that Iraq's development of WMD might endanger our national security, he could direct the use of military force against Iraq to destroy its WMD capability" – including through regime change – without congressional authorization.[49] The Founders never envisioned a president unilaterally wielding defensive war powers this broadly.

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And yet – as in every major U.S. ground war but Korea – the President secured specific legislative authorization for the 2003 invasion (and his administration pointed to UN Security Council resolutions from the first Gulf War as this war's international legal basis).[50] At Bush's urging, Congress passed a resolution, with bipartisan support, authorizing him to use necessary and appropriate force to defend the United States against threats posed by Iraq.[51] The Executive Branch actively pursued congressional approval but never conceded that it was necessary. In signing the resolution, the President stated publicly – much like Reagan and the first President Bush had with respect to prior force resolutions – that it was legally unnecessary.[52] Similar to the resolution authorizing the first Iraq war a decade earlier, this was also a congressional delegation of vast discretion to the President – in this case, including the power to wage preemptive war if and when he saw fit.

A lesson of American wars is that in exercising its powers for initiating war, Congress depends heavily on the Executive Branch for information. In the Mexican–American War, discussed in Chapter 4, President Polk distorted the truth in asking Congress to declare war. In the Vietnam War, discussed in Chapter 10, President Johnson exaggerated some facts and hid others when asking Congress to authorize war. In 2002–2003, President Bush and his team overconfidently and selectively touted U.S. intelligence about Iraq – intelligence that turned out to be badly wrong – and many members of Congress deferred heavily to the Executive Branch's claims when it delegated power to initiate war.[53]

With that lesson in mind, a notable aspect of presidential or congressionally delegated powers to wage preemptive war against Iraq is the degree of speculation involved in activating them. That war rested on a double speculation: that Iraq possessed or was close to acquiring WMD, and that it intended to use them directly or indirectly against the United States. "America must not ignore the threat gathering against us," said Bush in a 2002 speech. "We cannot wait for the final proof – the smoking gun – that could come in the form of a mushroom cloud."[54]

The Bush Administration's aggressive arguments for preemption could cut either for or against increased congressional involvement. One might argue that wider conjecture deserves stronger checks to ensure the soundness of intelligence before initiating war. On the other hand, one might argue instead that if international self-defense rules should be more permissive for looming, catastrophic dangers – "the greater the threat, the greater is the risk of inaction" – any constitutional restrictions on presidential wars against such dangers should be loosened for the same reasons. Indeed, the Justice Department's post-9/11 opinions read as though uncertainty about WMD-armed rogue enemies cuts for, not against, sole executive judgment in neutralizing them.

In the Iraq case, the Bush Administration misjudged enemy capabilities. It also misjudged what would be needed to fill a political vacuum once the United States overthrew Saddam's regime. These faulty assessments lie with the Executive Branch. But the process by which Congress approved going to war did not rigorously

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and thoroughly probe them. If anything, it lent those misjudgments credibility. Not until the Democrats regained control of Congress in the 2006 midterm elections did lawmakers push back – through hearings, nonbinding resolutions, and threatened funding cutoffs – on whether and how the United States continued to wage a bloody counterinsurgency campaign in Iraq.[55] And yet – as noted in the book's conclusion – postwar calls for war-powers reform focused almost entirely on presidential authority to start wars, not on Congress's role in enabling them or its weak oversight of how they were fought.

CONCLUSION

For much of the nation's history, major foreign attacks on U.S. soil had been rare. In the War of 1812, British forces burned Washington. In 1941, Japan blitzed American territories and forces across the Pacific. During the Cold War, Americans lived their daily lives under nuclear terror, but the United States and the Soviet Union only ever battled abroad and through proxies. For a generation after the Berlin Wall fell, the United States could safely wage distant wars of choice. The 9/11 attacks instantly shattered America's sense of invulnerability.[56]

In the early 2000s, war powers were trained on rogue states and rogue groups, both those that had already attacked America and those believed able to do so in the future. Aiming outside the United States, the Executive Branch asserted its power to make major war even against inchoate threats. But those sweeping claims were never tested because Congress authorized the wars Bush waged.

Some war powers were aimed inside the United States. All three branches wrestled over the scope of wartime constitutional rights and with wartime policies that bore on civil liberties. Some of the government's most controversial claims of war powers – like detention without trial and targeted killing – were extraordinary in context but rooted in ordinary incidents of warfare.

The conflict against sprawling transnational terrorist groups lacks the organizational, geographic, and temporal boundaries of most modern warfare. Until curbed and self-repudiated, the Executive Branch's claims of power in the early Bush Administration were also unusually grand in their refusal to admit limits or checks. Yet although the context was exceptional, many of the measures themselves were akin to the wartime powers that the constitutional Framers experienced and wielded firsthand. Many people were deprived of their freedom or privacy – some of them severely so, and most often by virtue of the government's *non-war* powers, like its emergency economic authorities or new and aggressive law enforcement measures. But the government did not draw on reservoirs of *war* powers to support comprehensive national mobilization like in past wars against major adversaries (or smaller ones sponsored by a superpower). There was no draft. No industry takeovers. Throughout the Global War on Terror, issues of war powers made themselves felt far more concretely within the halls of government than in the daily lived experiences of most

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Americans. It is easy today to forget what a full flex of war powers looks like, because the United States has not had to fight a major war against a peer enemy since 1945. Unfortunately, as the next chapter notes, today's great-power rivalry – above all between the United States and China – makes that sobering military and constitutional prospect real again.

Through its first two-and-a-half decades, the persistent Global War on Terror has not, as critics first feared, rendered the President's war powers much more imperial. Whether its legal groundwork could do so in the future, however, remains an open question. The Epilogue explains that as I finish writing in late 2025, the Trump Administration is expanding the arguments and precedents traced in this chapter to support what it characterizes as a war against foreign drug cartels – an evolution suggesting that the constitutional story of post-9/11 war powers is not over.

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