

POLITICS

Could President Trump Rely on Legal Advice to Order the Offensive Use of Military Force at His Discretion?

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ABSTRACT

Although the US Constitution permits presidents to order the use of military force without congressional approval only in an emergency context, presidents since Truman—especially after 9/11—have unilaterally ordered the offensive use of military force without congressional approval. Unless Congress asserts its constitutional role, President Donald Trump could continue to draw on this precedent to claim broad discretion to order the use of military force.

In April 2016, President Barack Obama described “failing to plan for the day after what I think was the right thing to do in intervening in Libya” in 2011 as “probably” the worst mistake he made while in office (Fox News 2016). President Obama was referring to his failure to plan for the aftermath of his unilateral decision to order military action against the Qaddafi regime, not to his decision to act without congressional approval. Obama’s comment has at least two important implications for Trump’s presidency. First, it is based on the constitutionally incorrect assumption that presidents have authority to order the use of military force even when the United States is not facing an actual or imminent attack. Obama expressed no regret about acting without congressional authorization. Second, it highlights the dangers involved when presidents make unilateral decisions to order the use of military force outside of the emergency self-defense context.

With President Trump now in office, it is well worth considering what authority he could claim (legitimately or not) to use military force. It is a real possibility that President Trump, like his predecessors, will seek to justify military action not permitted by the Constitution. This article considers how executive-branch lawyers could seek to justify such action, whether their arguments would be plausible, and how to ensure that constitutional limits apply to presidential war power. It discusses (1) the war power that the Constitution assigns to the president; (2) how presidential power has expanded extraconstitutionally since the Korean War and especially since 9/11; (3) which precedents (including recent practice by the executive branch) the Trump administration could draw on in seeking to justify the use of military force;

and (4) how constitutional limits on presidential power can be restored.

THE CURRENT SCHOLARLY DEBATE: APPROACH AND METHODS

There are two opposing schools of thought for defining the scope and limits of presidential national security power under the Constitution. In one camp are those who either defend or rationalize concentration of power in the hands of the executive. For example, Yoo (2009; 2001) argued that the Constitution was intended to grant the president broad authority to order the use of military force outside of the emergency context. He relied on public law analysis, finding justification for plenary power in the framers’ intentions and in the constitutional text (Yoo 2001). Posner and Vermeule (2010) developed a theoretical model to criticize the Madisonian system of checks and balances, arguing that legal principles should no longer limit the modern president. Howell and Pevehouse (2007, 8) argued that when making decisions involving the use of military force, “unilateral [presidential] powers [can reap] special rewards.” They praised “the advantages of unilateral action,” claiming that “[i]f presidents had to build broad-based consensus behind every deployment before any military planning could be executed, most ventures would never get off the ground” (ibid). They concluded that presidents “can more effectively [than Congress] manage these [military] responsibilities” (ibid). All of these scholars share the view that unilateral executive power to use military force—even outside of the emergency context—can be beneficial, promising positive results for the nation.

In the other camp, scholars emphasize the need to set limits on executive power, holding the president accountable to the rule of law (Farrier 2016; Fisher 2014; Pfiffner 2008; Pyle and Pious 2010;

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Sollenberger 2014). These scholars are sometimes pejoratively described as “pro-Congress,” with the implication that they subjectively favor Congress over the president (Zeisberg 2013, 11). Scholars in the Fisher school would respond by explaining that their position appears to favor Congress only because in recent years, acquiescent legislators have deferred to expanding assertions of presidential power (Buchanan 2013, 4). Under these circumstances, restoring constitutional balance requires reining in presidential power. Under different circumstances—if the presidency were weak and Congress were overstepping its bounds—the emphasis would be on limiting congressional power.

Making sense of this debate requires an objective methodological approach. Public law analysis provides such an approach; accordingly, it is applied in this article. As Sollenberger (2014, 769) observed, public law analysis provides objective standards for determining “when presidential actions [are] constitutionally or [otherwise] legally justified.” Public law analysis proceeds from the Constitution and depends on an understanding of the document’s text, which is informed by understanding what the framers had in mind when they created the office of the presidency. A public law approach provides a way to determine which scholars have the most persuasive argument in defining presidential power. Not all applications of public law analysis are equally valid, however. Analysis must be supported by evidence. Yoo’s plenary power model is undermined by evidence (both in the Constitution’s text and other historical records) that the framers intended to break with the then-existing British model, which centralized war power in the hands of the monarch (Fisher 2013; Pfiffner 2008).

THE CONSTITUTIONAL FRAMEWORK AND POST-KOREA PRACTICE

Presidents since Truman have claimed authority to order the offensive use of military force (i.e., outside of the emergency self-defense context) even though such authority is not granted by the Constitution (Fisher 2014, 351). Records from the Constitutional Convention reveal that the framers intended to assign Congress the authority to initiate war, allowing the president unilateral authority to act only when necessary “to repel sudden attacks” (Farrand 1937).

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The framers consistently emphasized the need for presidents to gain congressional authorization for the offensive use of military force. In *Federalist No. 69*, Alexander Hamilton explained that the American president would have far less war power than the British king. The president’s title of commander in chief would “amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy,” in contrast with the monarch’s authority to declare war (Wright 2002). Adler (2010) observed that “Hamilton, throughout his career, never asserted a presidential power to initiate military hostilities.” Hamilton’s views are consistent with the views of other framers (Fisher 2014, 316; 2013, 8–10).

History has shown that the framers of the Constitution made the right decision: allowing the executive unilateral war power outside of the emergency context is neither wise nor necessary (Edelson and Starr-Deelen 2015).

PRESIDENTIAL WAR POWER AFTER 9/11

The precedent begun by President Truman has only been strengthened since the 9/11 terrorist attacks and, at times, has been expanded to justify unilateral executive action for purposes in addition to the use of military force. In a September 25, 2001, memorandum, then–Office of Legal Counsel (OLC) attorney John Yoo concluded that decisions regarding the use of military force in response to terrorist attacks—including the preemptive use of force against nations or terrorists who have not attacked the United States—“are for the President alone to make” (Yoo 2001). Yoo described decisions regarding the use of military force as governed by “plenary” executive power that could not be limited by statute (ibid.). He was applying the unitary executive theory, a doctrine championed by then–Vice President Dick Cheney (Goldsmith 2007). In its most extreme form, this theory claims that presidents can independently take any action they believe is necessary for national security, even if it means setting aside statutory limits (Edelson 2016, 14). The Bush administration did not have to rely on the unitary executive theory to justify military action because it obtained congressional authorization to use force against al Qaeda, the Taliban, and Iraq (Authorization for Use of Military Force 2001; 2002). However, the Bush administration never repudiated the unitary executive theory and relied on it to justify surveillance and torture in violation of federal statutes (Edelson 2016). As Pfiffner observed, “the precedents of [Bush’s] constitutional claims [to plenary power], unless effectively challenged, will remain ‘loaded weapons’ that future presidents can use to justify their own unilateral assertions of executive power” (Pfiffner 2008, 12).

As a candidate for the presidency, then–Senator Barack Obama explained that “[t]he 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” (Savage 2007). Candidate Obama correctly described the constitutional allocation of war power and promised

to restore the rule of law (ibid). President Obama, however, took a different approach. In April 2011, he unilaterally ordered military action against Libya, a country embroiled in a civil war and ruled by a brutal dictator but not posing an imminent threat to the United States. In an April 1, 2011, OLC memorandum, OLC attorney Caroline Krass concluded that the president can unilaterally order the offensive use of military force as long as (1) the president “reasonably determine[s] that such use of force is in the national interest”; and (2) military operations do not rise to the level of “war” under the Constitution (Krass 2011). However, even these apparent limits on executive power give significant latitude to the president. “National interest” is an ambiguous, subjective,

and potentially expansive term. Krass found that, based on past practice, presidents could reasonably determine the United States has a national interest in preserving regional stability that justifies the use of military force (*ibid.*, 10). She cited previous OLC memoranda that had approved unilateral presidential decisions to order the use of military force advancing national interests (e.g., Haiti, Somalia, and Kosovo) (*ibid.*, 6–7, 11).

Because most military conflicts and much terrorist activity can threaten regional stability, presidents could use Krass's reasoning to justify US military action in most cases in which other nations are at war or terrorist organizations are active—even when such activities do not directly threaten the United States.¹ Krass's conclusion that presidents can authorize military action short of “war” also

Obama's actions required congressional authorization, but none has been provided. The Obama administration suggested that the 2001 and/or 2002 statutory Authorization for Use of Military Force (AUMF) supported military action against ISIS (Obama 2015). However, this argument is implausible; ISIS did not exist when the 2001 and 2002 AUMFs were enacted, and these statutes authorized military action against nations or groups distinct from ISIS (Edelson 2016, 100). The Obama administration seemed to acknowledge these problems by asking Congress in February 2015 to pass an AUMF that would apply to ISIS (Obama 2015). However, although Congress has taken no action on the administration's proposed legislation, military action has continued.

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fails to meaningfully limit presidential power. Krass defined “war” under the Constitution as being “generally...satisfied only by prolonged and substantial military engagements, typically involving exposure of US military personnel to significant risk over a substantial period” (*ibid.*, 8). As Fisher (2012, 180) observed, Krass's standard would permit the US president to unilaterally order devastating military attacks against another nation through the use of air power.

Krass (2011, 8) did observe a potentially meaningful statutory limit on presidential war power: under the War Powers Resolution (WPR), military operations unilaterally initiated by the president would have to stop after 60 or 90 days in the absence of congressional approval. However, President Obama set aside this limit when military operations in Libya continued after the WPR window had closed. He relied on State Department Legal Adviser Harold Koh's conclusion that military operations did not even rise to the level of hostilities—that is, the WPR simply did not apply (Koh 2011). Under Koh's interpretation, the president could unilaterally order missile strikes and air attacks as long as the exposure of US troops to harm was limited (Fisher 2012, 181–2; Koh 2011). Krass disagreed with Koh, concluding that US military action did amount to hostilities, meaning that congressional approval for continued operations was necessary (Savage 2011). Jeh Johnson, then-General Counsel for the Pentagon, agreed with Krass that military operations could not continue without congressional authorization once the WPR window had closed. White House Counsel Robert Bauer sided with Koh. President Obama chose to rely on Koh and Bauer's analysis (Fisher 2012, 181–2; Koh 2011).

Future executive branch lawyers could cite the 2011 Libya episode as recent support for the argument that past practice serves as precedent in justifying unilateral presidential decisions to order the use of military force (Krass 2011, 6–7). The Obama administration's decision to use military force against ISIS also could be cited for the same point. In the summer of 2014, President Obama ordered military action against ISIS in Iraq; military operations against ISIS have continued since then and have expanded to include operations in Syria (Burningham 2016). Because ISIS's forces in Iraq and Syria have not (to date²) posed a direct or imminent threat to the United States, President

HOW EXECUTIVE-BRANCH LAWYERS COULD ADVISE PRESIDENT TRUMP ON THE USE OF MILITARY FORCE

Executive branch lawyers for President Trump could cite past practice, especially post-9/11 practice, to support broad unilateral presidential war power. Consider, for example, the following hypothetical scenario. A new terrorist group begins operating in North Africa and the Middle East. The group includes some former members of ISIS, although the new terrorist organization has publicly broken with ISIS. It takes control of territory in multiple countries and threatens civilian populations. A new flood of refugees heads for Europe. President Trump decides it is necessary to take military action against the new terrorist group and asks the OLC to determine whether he has authority to do so.

Executive branch lawyers in the Trump administration could identify at least two legal rationales supporting presidential authority to use military force against this new terrorist group. First, drawing on the 2011 Krass OLC memorandum, they could conclude that the president has authority to unilaterally order the use of military force, short of war, if he reasonably determines that the use of such force is in the national interest (Krass 2011). OLC lawyers could inform the president that he has discretion to act against the new terrorist group if he reasonably determines that an influx of refugees from North Africa and the Middle East to Europe threatens regional stability, and it is within US national interest to preserve that stability (Krass 2011, 10). OLC lawyers might caution against using ground troops or planning sustained operations because Krass's memorandum defined “war requiring congressional approval” as characterized by “prolonged and substantial military engagements, typically involving exposure of US military personnel to significant risk over a substantial period” (*ibid.*, 8). However, that would leave ample room for significant military action, including air strikes. OLC lawyers might further inform President Trump that, based on Koh's reasoning, military action against the terrorist group could continue beyond the 60- or 90-day WPR window as long as operations did not rise to the level of “hostilities” (Koh 2011). This would permit the president to continue to unilaterally order missile strikes and air attacks as long as the exposure of US troops to harm was limited. Executive branch

lawyers could further point to military operations against ISIS: President Obama unilaterally ordered military action—mainly through the use of air power—that lasted more than two years. This would provide further support to Koh’s conclusion in 2011 that air campaigns are not governed by the WPR.

OLC lawyers also could rely on an alternative argument: the unitary executive theory described in Yoo’s 2001 memorandum. Under this approach, justified by reference to the Vesting and Commander in Chief clauses of Article II, the president has plenary power to decide how and when to use military force—even whether to use it preemptively (Yoo 2001, 23–4). Under Yoo’s approach, plenary presidential authority cannot be limited by statute; therefore, the WPR simply does not apply (whether or not military action rises to the level of hostilities) (*ibid.*, 23).

HOW CONSTITUTIONAL LIMITS COULD BE ENFORCED TO LIMIT PRESIDENTIAL WAR POWER

It is correct to state that OLC lawyers *could* apply the same arguments relied on by Krass, Koh, and/or Yoo to justify unilateral presidential action. Two important questions remain, however: (1) Would these arguments be persuasive?; and (2) If these arguments are not persuasive, how could presidential power be restrained?

The Krass, Koh, and Yoo arguments about presidential power are not persuasive and would allow President Trump extraconstitutional power to order the use of military force. It is essential to embrace the constitutional understanding of presidential war power described by Fisher (2013, 8–9). Under the Constitution,

and indefensible. If they did invoke it, they would be endorsing a view of unlimited presidential power directly at odds with the constitutional framework of checks and balances (Fisher 2013, 1–16). The unitary executive theory renders legal limits on power meaningless by allowing the president to operate free from statutory or constitutional limits.

Therefore, the Krass, Koh, and Yoo approaches should not be relied on for these reasons. However, the Constitution is not self-enforcing. Executive branch lawyers found ways to justify extraconstitutional actions by Bush and Obama; current or future executive branch lawyers may do the same. For the system of checks and balances to work as designed, each branch of government must be engaged. When it comes to war power, Congress is best positioned to limit presidential power, especially because the courts have been reluctant to play a role (Farrier 2016). The 2013 Syrian episode provides recent evidence that Congress can be effective: President Obama was poised to order military action against the Assad regime but changed course when more than 140 members of Congress signed a letter making clear that, under the Constitution, the president could not take this action without congressional authorization (Edelson 2016, 97). The difficulty lies in moving Congress to act; presidents often can take advantage of congressional deference or acquiescence (Koh 1990). This is evident most recently with Congress’s failure to take any action regarding President Obama’s unilateral decision to use military force against ISIS—and, indeed with President Trump’s own unilateral decision to order missile strikes against the Assad regime in Syria.³

Members of Congress, as well as the public at large, should consider whether they are comfortable with President Trump having broad discretion to order the use of military force, even when the United States is not directly threatened.

Congress is assigned authority to move the country from a state of peace to a state of war; the president has unilateral authority to use military force only in an emergency context. Krass (2011, 7) is correct in that presidents since Truman have ordered the use of force outside of the limited self-defense context. However, “repeated violations of the provisions of the Constitution do not make them constitutional” (Pffiffer 2008, 70). President Obama lacked constitutional authority to order the use of military force against Libya in 2011; executive branch lawyers citing his decision (or similar unilateral actions by Obama’s predecessors) would be relying on bad precedent. Koh’s suggestion that the WPR does not apply to the use of air power when the risk of US casualties is low depends on flawed statutory interpretation. As Fisher (2012, 181) pointed out, the WPR was clearly intended to apply to air campaigns, even when US ground troops are not present and the risk of US casualties is low. Nevertheless, even if the WPR expressly assigned presidents the authority to conduct ongoing missile strikes or bombing campaigns, the Constitution would stand in the way. The WPR, of course, being a statute, cannot amend the Constitution. Congress has the constitutional authority and responsibility to declare war, and any reasonable definition of “war” must include the use of air power. Yoo’s argument is the most radical of the three, and it is possible that current or future executive-branch lawyers would find it simply implausible

CONCLUSION

Presidential elections suggest that there is a stark choice between competing candidates offering different approaches to government. However, concerning war power, recent history indicates that there is more continuity than change (Edelson 2016; Glennon 2015). Presidential national security power is not a partisan question; presidents of both parties seek to expand their authority, especially since 9/11. Scholars have an important role in focusing attention on these issues and providing an objective way to determine when presidential action is justified and when it is not. Scholars are understandably reluctant to reach conclusions about politically sensitive topics. However, weighing in on the legitimacy of presidential decisions to use military force is not a partisan matter as long as objective standards are applied.

History, and what we’ve already seen in the early days of the administration, provides reason to be concerned that President Trump will not voluntarily abide by constitutional or statutory limits on war power. Executive branch lawyers will have ample precedent to cite as support for extraconstitutional actions. Members of Congress, as well as the public at large, should consider whether they are comfortable with President Trump having broad discretion to order the use of military force, even when the United States is not directly threatened. For those concerned

about restoring constitutional limits, it is essential to watch President Trump closely and urge Congress to insist on playing a central role in decisions about the use of military force. Scholars have a role in highlighting these issues and focusing attention on the problem of national security power concentrated in the hands of the president.

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NOTES

1. Even assuming such military action was legitimate under US law, there is a separate question as to whether it would be justified under international law. Krass identified a second, independent national interest—"supporting the [United Nations Security Council's] credibility and effectiveness"—that could support unilateral military action ordered by the president (Krass 2011, 10). UN Security Council resolutions provide a legitimate basis for military action under international law. However, these resolutions do not provide authority for military action under US law (Fisher 2014, 333).
2. This is not to minimize the threat posed by ISIS. It is only to state that, under current circumstances, military action against ISIS requires congressional authorization.
3. No legal rationale has been provided as of this writing, for this action.

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