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**COUNTER-TERRORISM
FROM THE OBAMA
ADMINISTRATION
TO PRESIDENT TRUMP**

Caught in the Fait
Accompli War

Donna G. Starr-Deelen



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The Fait Accompli War

Abstract Starr-Deelen explores the last two years of the Obama administration and its use of force in counterterrorism, beginning with a discussion of the war paradigm versus the law enforcement approach to international terrorism. The chapter examines the “fait accompli” war that George W. Bush bequeathed to Barack Obama and how Obama attempted to forge a third way, or hybrid approach to combating terrorism. Michael Glennon’s theory of a “double government” and Harold Koh’s pattern of executive initiative, congressional acquiescence, and judicial tolerance are introduced as a lens to view the Trump administration and its national security policies.

Keywords War on terror • National security • Trump • Obama • Use of force • Executive initiative • Congressional acquiescence • Judicial tolerance • Trumanite network • Security directorate

Writing in 2014, I observed in my book that the Obama administration was plagued by the long shadows cast by the George W. Bush administration and its use of force in the ongoing war on terror. President Bush launched his war on terror in 2001 after the 9/11 attacks that left nearly 3000 people dead. This war was not merely a rhetorical device but an actual armed conflict with emphasis placed on the use of force to counter transnational

terrorist groups, particularly al Qaeda. As detailed in Chap. 6 of my book, President Bush built on precedents from previous administrations, especially the Reagan administration, in his war on terror. The rhetoric of both the Reagan administration and the George W. Bush administration included the militarization of foreign policy although, in fact, the Reagan administration only responded twice in a manner that matched its harsh language regarding terrorism. This occurred when the hijackers of the cruise ship *Achille Lauro* were captured in 1985, and in 1986 when the USA bombed Libya in response to its support of terrorism.

By the middle of President Obama's second term, the political narrative about the Obama counterterrorism architecture tended to divide into two schools of thought: those who contended Mr. Obama was essentially the same as his predecessor, Mr. Bush, only liberated from the protests of a noisy liberal opposition, and those who argued that substantive differences existed between the two administrations. By the end of his second term in 2016, it was clear that President Obama's actions in national security affairs did not always match the rhetoric of his earlier promises to break with the excesses of the war on terror.¹ While many have been swift to brand Obama's policies as a continuation of the policies pursued by the Bush administration after 9/11, a close examination reveals a more nuanced and complicated assessment is in order.²

The starting point for that assessment is the "fait accompli" war that George W. Bush bequeathed to his successor, Barack Obama. A fait accompli, something decided before those affected hear about it, leaves them with no option but to accept it; this is the war Bush left Obama in 2008. It is a war comprising all the virtually irreversible policy choices President Bush made regarding the use of force and targeting, detention, and interrogation methods. When Mr. Obama became Commander-in-Chief, he was left to direct three ongoing conflicts, the war in Afghanistan, the war in Iraq, and the fait accompli war in which the armed-conflict approach to counterterrorism was predominant.

Unlike his predecessors in the Reagan, Clinton, and both Bush administrations, President Obama did not have the same freedom of maneuver regarding his preferred counterterrorism strategies. Instead Mr. Obama was left with the dilemma of how to manage the various ramifications left from the second Bush administration and its war on terror, in addition to the global economic crisis of 2008. Broadly speaking, there are two approaches to the issue of international terrorism and how liberal democracies should respond. These are the "armed conflict" or war on terror approach and the

“law enforcement” approach. These are not merely descriptive designations, but “provide moral frameworks for judging the actions of governments and determining what the law should be.”³ The war on terror approach defines international terrorism as a national security threat that imperils the existence of the state, not as mere criminal activity. It follows that international terrorism is more like war, with its signature violence and indiscriminate killing, than a crime, where the motive is usually economic gain. Terrorists violate the laws of war and if captured, “it is morally and legally permissible to try them in military courts and accord them a less rigorous form of due process than is found in civilian criminal courts.”⁴ As a grave national security threat, lethal force may be used against terrorists; another name for this approach is the armed-conflict model.

In contrast, the law enforcement paradigm treats terrorism as a serious criminal act, not a national security threat like an invasion by a nation-state. Proponents of the law enforcement model contend that terrorism should be handled like any other severe crime; police, prosecutors, and trials in civilian criminal courts with the usual due process standards are appropriate.⁵ The underlying philosophy is that even though a terrorist episode may inflict significant harm and casualties, terrorist acts are more like sporadic criminal events than a real war. In addition, the failure to treat terrorists as criminals unintentionally rewards them with the status of “warriors” and may inadvertently play into terrorists’ narratives about their motivations.⁶ The status of those who perpetrate politically motivated violence is an important point; jihadists in al Qaeda, Islamic State of Iraq and Syria (ISIS), and similar organizations want to be treated not as mere criminals but as soldiers in a larger, ongoing engagement against the USA and the West.

There were three choices available to President Obama in January 2009 related to the war or crime dichotomy of international terrorism. The first was to announce that President Bush’s war on terror was over; this would acknowledge that the USA espoused a war paradigm against al Qaeda since 9/11 but signal that the Obama administration would henceforth no longer follow that path. The second option was to renounce the war on terror and forcefully confront all the illegal activity (including enhanced interrogation methods, extraordinary renditions, etc.) that occurred during the previous eight years; it also would acknowledge the war paradigm of the second Bush administration. The final option was to move toward a third, hybrid approach to counterterrorism that preserved certain policy choices from the Bush era but eliminated some of the more egregious and controversial

aspects. This choice would blend aspects of the law enforcement and war approaches.

The first option, simply announce an end to the war on terror, was not plausible in January 2009 because the main terrorist perpetrator behind the 9/11 attacks, Osama bin Laden, remained at large and was able to inspire his followers to plan more attacks against the USA and its allies. Renouncing the war paradigm with all its problems, the second option, was legally and politically quite complicated for the incoming Obama administration. If President Obama had chosen to renounce the war on terror, then some Bush-era policies on interrogations, extraordinary renditions, and targeting would be illegal under various international laws. For instance, Central Intelligence Agency (CIA) drone strikes could be categorized as “extrajudicial executions assuming that they do not comply with human rights law” if there was no actual “armed conflict.”⁷ Moreover, the Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment requires state parties to try or extradite those accused of torture and prohibits using national security as a justification for “enhanced interrogation techniques.” The new administration, faced with the task of finding Osama bin Laden and directing the ongoing wars in Iraq and Afghanistan, chose not to renounce the war on terror, partially because it did not want to become mired in investigations and prosecutions of those responsible for questionable practices.

In addition to the legal issues left over from the Bush administration’s war on terror, renouncing it would have ignited a political firestorm that the Obama administration would have struggled to contain. The economic crisis of 2008 was one of the biggest priorities for the new administration and it consumed a great deal of time and political capital. As he managed the economic crisis, President Obama did not want to appear weak on national security issues, a stance that would have imperiled both his domestic agenda and his chances for winning a second term. The safer, more political astute option was to move cautiously toward a third, more nuanced approach to counterterrorism that would preserve particular policy choices from the Bush war on terror but eliminate some of the worst excesses, for instance, indefinite detention of terrorism suspects at Guantanamo.

Mr. Obama opted for the last alternative, a more nuanced approach that John Brennan outlined in August of 2009 in a speech at the Center for Strategic and International Studies. After a close examination of the use of force in counterterrorism in the Obama administration, it is clear that the third way proposed by the Obama administration never materialized. For

the reasons enumerated below, the Obama administration remained mired in the war on terror approach of the previous administration. Moreover, the Trump administration, even if it wanted to, will be caught by the policy choices of the George W. Bush administration, thus leaving a fait accompli war with an armed-conflict paradigm in place. This research will analyze the reasons for the failure to get beyond the fait accompli war, along with a discussion of ISIS, Syria, Libya, and implications for the future of American counterterrorism. It will also explore how the Trump administration approaches national security policies and why it matters for the rule of law and constitutional government.

In *How Everything Became War and the Military Became Everything*, Rosa Brooks examines the post 9/11 world where the distinction between a state of “war” and the state of “peace” is very blurred.⁸ Although the USA has been undertaking combat missions against al Qaeda, ISIS, and related entities since October 2001, most of the American people have been spared the real work of waging war, allowing a semi-war, semi-peacetime atmosphere to prevail outside the Pentagon. The book explains how the US military has been increasingly tasked with assignments once given to civilian institutions and agencies. Brooks advocates moving beyond the war paradigm or law enforcement approach to modern security challenges because the current state of perpetual war demands new and more innovative categories to protect rights and deter arbitrary uses of power. Her suggestion is to “focus instead on developing norms and institutions that support human rights and the rule of law, but are not premised on the existence of sharp lines between war and peace.”⁹ In an interview with the author, Dean Brooks discussed the Trump administration and the future of US counterterrorism.

USE OF FORCE: LEGAL QUESTIONS

An examination of executive branch decisions to use force against international terrorism from Ronald Reagan to Donald Trump reveals there are fewer existent constraints on executive action than one might expect in a constitutional republic. My research explored both the domestic constraints on presidents as they attempted to respond to international terrorism and international legal norms that prohibit the resort to force except under limited circumstances. There are two questions that American presidents must ask before using force: (1) When does the president have the authority under the US Constitution to use force; and (2) does international law permit the proposed use of force? On the domestic level, the pattern

identified by Harold Koh of executive initiative, congressional acquiescence, and judicial tolerance continues to characterize many national security decisions. As explored in later sections, this is evident in both the Obama administration and the Trump administration. There is a lack of balanced institutional decision-making regarding the use of force against ISIS or Islamic State of Iraq and the Levant (ISIL), the self-proclaimed Islamic State and related extremist groups.

Resolving the second question, essentially an international law query, involves a calculation by the American executive branch about the international laws regulating the resort to force. Interpreting these laws begins with the UN Charter, specifically articles 2(4) and 51, and customary international law. Successive American administrations have justified the use of military force against terrorists and state sponsors of terrorism by referencing the inherent right of individual and collective self-defense, under article 51, in the event of an “armed attack.” Acts of terrorism tend to be classified by the victim state as armed attacks, instead of large-scale criminal acts, thereby allowing the victim state to use force as a measure of self-defense. The issue for the world community is the relatively clear prohibitions on the use of force in article 2(4) of the Charter might be dislodged by more malleable and ambiguous norms regulating when a state may resort to military force to secure its territory and citizens against international terrorism.

President Obama took the oath of office in January 2009, after a decisive victory against Senator John McCain, and promised to bring “hope and change” to the White House. Many commentators heard a repudiation of controversial Bush-era practices in the war on terror and a return to a less aggressive foreign policy as Senator Obama campaigned in 2008. For example, as a candidate for president, Mr. Obama sought to reassure voters that, as president, he would follow the constitutional requirement regarding the deployment of force by engaging Congress in the decision-making. When asked about the powers of the president to deploy force, Mr. Obama responded that the “President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.”¹⁰ Mr. Obama also indicated that other controversial practices regarding surveillance and excessive secrecy from the war on terror in the Bush administration would end after he took office.

Soon after his inauguration in January 2009, Mr. Obama signed three executive orders that signaled his intentions about how to proceed in the

war on terror. The first order was intended to close the prison at Guantanamo within one year. Although the prison population decreased from 242 to 41 during the Obama administration, Guantanamo Bay Naval Base (GITMO) remains open, and President Trump has said he will be keeping it operational and sending more prisoners there during his time in office. The second order signed by President Obama, Executive Order 13491, banned the use of torture or other dubious tactics when questioning terrorist suspects by requiring that all interrogations follow the Army Field Manual. The third executive order, signed on January 22, 2009, established an interagency task force to review detention policies in the war on terror. The Obama administration appeared to be ready to chart a new direction in the ongoing campaign against international terrorism.

Evidence of this new direction for counterterrorism came in August 2009 when Mr. Obama's deputy national security advisor, John Brennan, outlined the administration's plans for a third way. According to this plan, the Obama administration would implement a "fundamentally new and more effective approach" to the problem of international terrorism, instead of following either the law enforcement paradigm or the war on terror approach. The model proposed by the Obama administration would not treat terrorism as a crime or war, but would instead incorporate elements of both the state's criminal law system and the limited use of special military forces in specific instances. Brennan, who became the director of the CIA, detailed the administration's plans in a 2009 speech at the Center for Strategic and International Studies and explained its five key elements. The first key element of Obama's third way was to frame the fight against international terrorists as just one part of American foreign policy, as opposed to the Bush administration where, according to Brennan, the war on terror defined the "entire national security and foreign policy" of the USA.

The second element of the new model for terrorism involved defining the problem more precisely; henceforth, the president would not describe the USA as engaging in a war on terrorism and the term "global war" would not be used to avoid promulgating the image of al Qaeda as a worldwide entity, capable of behaving like a sovereign nation. This careful choice of words created some controversy. For example, by Obama's second term, he was criticized for not saying "radical Islamic terrorism" with some Republicans suggesting his reluctance to say this phrase signified his inability to defeat the enemy. Candidate Trump assured voters that he understood the threat and would avoid "political correctness" by telling it like it is. In addition,

President Trump's first National Security Advisor, retired Lieutenant General Michael Flynn, maintained that the USA was unable to win the war on terror because American leaders like President Obama and Hillary Clinton were unable to describe the threat from radical Islamic terrorism. Nevertheless, President Obama continued to argue that his cautious choice of words was meant to reinforce the government's stand that the USA is not at war with Islam.

The third key element in the Obama approach was a willingness to tackle the "conditions that help fuel violent extremism" because, according to Brennan, failing to eliminate these conditions meant that the USA would continue to face new recruits. The fourth part of the new approach was the recognition that the solution is "ultimately not a military operation but a political, economic, and social campaign to meet the basic needs and legitimate grievances of ordinary people." If the USA could do that, it would isolate the extremists from the people they were claiming to serve. Finally, the fifth element of Obama's new counterterrorism approach was supposed to be the integration of every type of American power to concentrate on the "underlying causes and conditions that fuel so many national security threats." Obama's ambitious approach was intended to be multidimensional and multinational but by 2014 it was clear that this counterterrorism agenda had been swamped by the fait accompli war, the choices and architecture left from Bush's war on terror. When President Trump took the oath of office in January 2017, promulgating the armed-conflict model of counterterrorism was facilitated by the ongoing threat from ISIS, a constant state of crisis due to terrorism, and sporadic terrorist attacks in the USA and Europe that kept the general public frightened of terrorists and convinced the use of force was essential for national security.

PRESIDENT TRUMP: DEFYING EXPECTATIONS

The success of Donald Trump as a politician defied expectations, and analysis of his presidency often collides with the turmoil generated by wide-ranging tweets, rousing campaign-style speeches, revolving staff members, and competing narratives about his motivations. This research will attempt an analysis of his national security policies by referencing concepts from two ground-breaking books: *National Security and Double Government* by Michael Glennon and *The National Security Constitution: Sharing Power after the Iran-Contra Affair* by Harold Koh.

Double Government

In Michael Glennon's thought-provoking book *National Security and Double Government*, Glennon builds on nineteenth-century scholar Walter Bagehot's theory of double government and examines a system of dual institutions.¹¹ Bagehot's theory stated that over time two sets of institutions emerged in Great Britain: the "dignified" institutions including the monarchy and House of Lords, and the "efficient" institutions like the House of Commons and Prime Minister, where the real work of governing happened. Glennon then applied these concepts to the USA. Examining the gap between what candidate Barack Obama wanted to do and what President Obama did vis-à-vis national security policies, Glennon asked, "Why does national security policy remain constant even when one president is replaced by another who as a candidate repeatedly, forcefully, and eloquently promised fundamental changes in that policy?" According to Glennon, two sets of institutions have emerged in the USA. The "Madisonian" institutions of the government, the executive, legislative, and judicial branches, appear to make national security decisions in accordance with the US Constitution but are not the real wielders of power. Instead, it is a "network of several hundred high-level military, intelligence, diplomatic and law enforcement officials within the executive branch who are responsible for national security policymaking."¹² Glennon calls this group Trumanites (or the "security directorate") because it was President Harry Truman who was largely responsible for establishing the national security apparatus after World War II.

The Trumanite network responsible for national security operates largely outside the public's view and, according to Glennon, "judicial review over their actions is negligible, congressional oversight is dysfunctional, and presidential control is nominal." The president may formally approve the policies but it is the Trumanites who formulated them. The benefits of such a network are the following: "technical expertise, institutional memory and experience, quick-footedness, opaqueness in confronting adversaries, policy stability, and insulation from popular political oscillation and decisional idiosyncrasy."¹³ Nevertheless, the risks of centralized power and unaccountability menacing democratic government and responsibility are obvious, while the remedy is an engaged and enlightened citizenry. Without this, history shows an "unrestrained security apparatus" is "one of the principal reasons that free governments have failed."¹⁴ Usually the president

and the security directorate maintain the appearance of harmony, although this may end in the Trump era.

The most relevant and revealing assertion in Glennon's book for this research is that national security policy has remained largely constant from the Bush administration to the Obama administration due to the Trumanite network. His theory posits that the Trumanite network remains largely in place, controlling the US national security apparatus, from one administration to another, even as the Madisonian institutions garner most of the public's attention. Applied to the Trump administration, if his theory of a double government with Madisonian institutions and a Trumanite network is valid, the amount of national security policy continuity between the Obama administration and the Trump administration will be high, *despite the rhetoric* from the Trump campaign that indicates sharp differences. After all, during the 2016 campaign, Mr. Trump reassured his audiences on the campaign trail that he would be tougher and smarter than President Obama in dealing with terrorism and his approach to ISIS would yield victory.

Yet the first few months of the Trump administration have not been dominated by substantial policy swings from the Obama administration as far as national security is concerned. There is a heavy reliance on the military operating drones and directing special forces raids in the ongoing war on terror. In addition, the Pentagon's new counterterrorism plan targeting ISIS for President Trump is quite similar to the strategy employed by the Obama administration; officials describe it as little more than an "intensification" of Obama's slow and steady approach to degrade ISIS. One senior diplomat I interviewed for this research maintained that the differences between the Obama administration's counterterrorism approach and the Trump administration's were ones of style, not substance.

At the same time, President Trump and members of his administration are rhetorically differentiating the Trump administration from its predecessor by emphasizing an "American First" approach in foreign policy and by vowing to defeat, and not merely degrade, ISIS. It is difficult to predict what will happen in the remainder of President Trump's term in office. A catastrophic terrorist attack could radically alter the calculus of the president and his national security advisors. Nevertheless, this book will examine the amount of national security policy continuity between the Obama and Trump administrations and apply Glennon's analysis to the current Trump policies. The underlying question is whether the USA also has two sets of institutions and a system where an unelected but skilled group of national security managers (the security directorate) essentially runs

national security. The following section continues with a discussion of the theory and relevance of the second book, Harold Koh's *The National Security Constitution*.

The National Security Constitution: The Pattern on Steroids?

The extraordinary rise of Donald Trump as a major politician in 2016 morphed into President Trump on January 20, 2017, and the unusual first months of the Trump administration were like no other in modern times. Retired Lieutenant General Michael Flynn, who held the title of National Security Advisor for just 24 days, remains an enigma and ongoing concern for the administration due to his many transgressions regarding contacts with foreign governments and the possibility that the Special Prosecutor, Robert Mueller, will uncover criminal activity. The sudden firing of FBI director James Comey and reports that Comey kept copious contemporaneous notes of his conversations with President Trump mean that reporters and pundits tend to focus on the Russia investigation and obstruction of justice allegations. This book will attempt to look beyond the tumultuous start of the Trump administration and examine a more troubling possibility. This is the possibility that the Trump administration will correspond to the pattern of executive initiative, congressional acquiescence, and judicial tolerance in a manner that dwarfs the George W. Bush administration. In other words, the Trump administration is on track to exhibit the pattern on steroids.

First, this section will briefly outline the pattern of *executive initiative, congressional acquiescence, and judicial tolerance* which was identified and explained by Harold Koh in his book *The National Security Constitution: Sharing Power after the Iran-Contra Affair*.¹⁵ In *Presidential Policies on Terrorism*, I explored this pattern in an attempt to explain the use of force against international terrorism during the Reagan, Clinton, Obama, and both Bush administrations. Then later sections will explore why the Trump administration and its activities correspond to the pattern and, most importantly, why this is so dangerous in a republican form of government. The major premise of Koh's seminal book was that fundamental defects exist in the structure of the American national security decision-making process and Koh illustrated this with the Iran-Contra scandal during the Reagan administration. In his book, Koh stressed that the realm of foreign policy making, including the initiation of war and the use of force, was based upon the principle of "balanced institutional participation," meaning that all three

branches of the US government had roles in foreign relations.¹⁶ Most foreign policy choices fall into the sphere of concurrent authority, which the executive branch supervises, subject to the checks provided by congressional consultation and judicial review.

Executive Initiative

According to Koh, the American system of foreign policy making since US involvement in Vietnam has been dominated by the executive branch and distorted by a pattern of executive initiative, congressional acquiescence, and judicial tolerance. The first element, executive initiative, refers to the tendency of the president to initiate action in foreign relations; this flows from the fact that he is elected nationally and people expect the president to instigate policy in foreign affairs. Unlike congress, which is bicameral and composed of many individual members with various constituencies, the president is primed to direct the foreign policy process and dominates the narrative when he speaks to the media and citizens. He controls the various intelligence agencies and, thus, possesses superior knowledge on foreign affairs. Additionally, as Commander-in-Chief, the president may act quickly in response to a crisis and he speaks with one voice in articulating the policy justifications to the public afterwards. As one former executive branch staffer noted, “unilateral executive actions has advantages in surprise, speed, and secrecy.”¹⁷

Congressional Acquiescence

As one legal scholar wrote, “If law were math, we might add up the clauses and declare Congress the winner.”¹⁸ He was referring to the numerous clauses in Article I of the US Constitution that grant Congress considerable powers in foreign affairs, including the following:

- to declare war, grant letters of marquee and reprisal, and make rules concerning capture on land and water;
- to lay and collect taxes . . . to . . . provide for the common defense;
- to define and punish . . . offenses against the law of nations;
- to raise and support armies;
- to provide and maintain a navy;
- to make rules for the government and regulation of the land and naval forces;
- to provide for calling forth the militia to execute the laws of the union, suppress insurrection, and repel invasions;
- to provide for organizing, arming, and disciplining the militia.

Furthermore, Congress controls the appropriations process necessary to fund wars and other uses of force, an indispensable tool that Congress could, in theory, wield to check executive initiatives. According to Louis Fisher, a constitutional law scholar, the Framers of the Constitution granted the power of the purse specifically to Congress while, in the same document, making the president Commander-in-Chief to “separate the purse and the sword.”¹⁹ Although Congress has the power to control executive branch war making or uses of force by cutting off the necessary funding, in practice this would present Congress with a dilemma. After troops are deployed, it is politically difficult for Congress to halt all the funding when the military is engaged in combat situations.

The numerous powers granted to Congress in Article I should be contrasted with the powers of the president, enumerated in Article II of the Constitution. According to section 2 of Article II, the president is Commander-in-Chief and has the power, by and with the advice and consent of the Senate, to make treaties. As the chief executive, the president is obligated to “take care that the laws be faithfully executed.” Clearly, law is not math so the president has more power to direct foreign affairs than a causal reading of the text of the Constitution would indicate. Corwin described the situation as an “invitation for Congress and the president to struggle for the privilege of directing American foreign policy.”²⁰

The first months of the Trump administration have witnessed no real struggle between the Congress and President Trump regarding the conduct of American foreign policy. Congressional acquiescence, the second element of Koh’s pattern, is the most apt description of how the 115th Congress has reacted to President Trump’s first foreign policy decisions. With the Republican Party in control of both houses of Congress, President Trump has reveled in Republican congressional support for his initiatives, despite some grumbling and expressions of discontent by individual congressmen and senators from time to time. One exception was the passage by Congress of a sanctions bill in August that targeted Russian energy and defense interests, in addition to new sanctions against North Korea and Iran. Although the Trump administration claimed it encroached on executive branch authority to negotiate, President Trump signed the bill.

In his book, Koh noted that the president “almost always seems to win in foreign affairs” and he diagnosed the causes for this as “legislative myopia, inadequate drafting, ineffective, legislative tools, or sheer lack of political will.”²¹ An examination of the Trump administration’s travel ban, detailed

in the last chapter, illustrates that the overriding explanation for congressional acquiescence in the 115th Congress is sheer lack of political will.

The history of the drafting of the US Constitution reflects the Founding Fathers' expectation that Congress would check the executive branch as a matter of institutional loyalty and pride. They did not take into account the possibility that political parties would become a potent force and power broker in the American system of government. When the president and both houses of Congress are controlled by the same political party, there is little incentive for the leaders of Congress to aggressively challenge the White House or conduct rigorous oversight. In fact, individual members of Congress calculate that their success depends more on how their political party is faring with the electorate than on how well Congress performs its collective duty as a check on executive branch power. They "have a greater personal interest in the President's success as leader of their party than they have in Congress as an institution."²² In the first 200 days of the Trump administration, individual Republican members of Congress either support the "Make America Great Again" agenda of President Trump or fear alienating the Republican Party faithful who fervently believe in the president and his proposed programs. In short, the bonds of party loyalty and concern for electoral victories have kept members of the Senate and House of Representatives meek in the face of President Trump's foreign policy initiatives, even when those initiatives (the travel bans) appear to contradict fundamental American values found in the Establishment Clause of the Constitution.

Judicial Tolerance

The final element in Koh's pattern is judicial tolerance which was explained as the tendency of the federal courts to tolerate acts of executive initiative, either "by refusing to hear challenges to those acts or by hearing the challenges and then affirming presidential authority on the merits."²³ Federal courts are reluctant to adjudicate cases that involve foreign affairs and rely on several judicial avoidance doctrines to dismiss cases, thereby tolerating acts of executive initiative that violate the principle of balanced institutional participation in foreign relations. The legal doctrines that permit federal courts to decline to hear cases are the following: standing, ripeness, mootness, the state secrets doctrine, and the political question doctrine.²⁴ The first, the doctrine of *standing*, means a plaintiff cannot bring a case against the president unless he has standing to sue which requires the plaintiff to show actual injury from the executive branch conduct. Even if

the court finds the plaintiff has standing to sue, according to the concept of *ripeness*, the case may still be dismissed because the court decides the issue is not ready or “ripe” for adjudication. In addition, the court may refuse to hear a case because the challenged event has already happened, making the issue before the court *moot*.

Furthermore, the *state secrets* privilege is another judicial avoidance doctrine. It applies when the subject matter of the suit is itself a state secret; when the plaintiffs cannot make their case without disclosure of the secret; or when the defendants cannot defend themselves fairly without disclosing the secret.²⁵ When a lawsuit against the government is dismissed due to the state secrets privilege, there is no way to assess whether the privilege was applied correctly, or whether the government was merely claiming the privilege to hide malfeasance or incompetence. The final judicial avoidance doctrine that courts rely on to avoid hearing a case is known as the *political question* doctrine. There are three instances when courts refuse to adjudicate a case under the political question doctrine:

1. When the issue presented hinges on a grant of authority that is textually assigned to one or both of the political branches of government (e.g., whether the USA should go to war, a power granted to the Congress and president).
2. Where the matter raised is incapable of discoverable or manageable standards of judicial review (e.g., where the president’s use of force is questioned on the grounds that the use of force was not vital to national security).
3. Where the issue is really one of policy disagreement and not law (e.g., whether the president was correct to conclude that the intelligence warranted the use of force).²⁶

The final chapter incorporates Koh’s pattern of executive initiative, congressional acquiescence, and judicial tolerance by exploring President Trump’s attempts to implement a travel ban, in accordance with his campaign promise to ban Muslims as a means of keeping the USA safe from international terrorists. It examines how the judiciary, instead of tolerating this initiative, has acted as a check on executive branch behavior in this instance. The next chapter will examine the rise of ISIS, how its territorial gains surprised the Obama administration, and how that administration attempted to degrade ISIS during the last two years of President Obama’s second term.

NOTES

1. See DePlato, Justin. (2015). *American Presidential Power and the War on Terror*. New York: Palgrave Pivot and Edelson, Chris. (2016). *Power without Constraint*. Madison: University of Wisconsin Press.
2. See Goldsmith, Jack. (2012). *Power and Constraint: The Accountable Presidency after 9/11*. New York: W. W. Norton and Company.
3. Finkelstein, Claire, Ohlin, Jens David, and Altman, Andrew, eds. *Targeted Killings: Law and Morality in an Asymmetrical World*. (New York: Oxford University Press, 2012), 9.
4. Ibid.
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The Rise of ISIS

Abstract As an ongoing national security problem, ISIS and its jihadi ideology challenged President Obama during his last two years in office, and will continue to plague the Trump administration. This chapter explores how Abu Musab al-Zarqawi became the brutal leader of al-Qaeda in Iraq after the US invaded Iraq in March 2003. He was killed by a US drone in 2006 but his terrorist organization continued. Abu Bakr al-Baghdadi became leader of the successor group which is known as ISIS or ISIL. How the Obama administration fought to contain and degrade ISIS and the arguments assessing the legality of using force against ISIS in the absence of specific authorization are discussed.

Keywords ISIS • Al-Qaeda • Authorization for Use of Military Force against Terrorists (AUMF)

The rise of the Islamic State, or ISIS, during President Obama's second term is one of the most significant national security challenges that the administration faced. When President Trump took the oath of office, the challenge of degrading or defeating ISIS was still a top priority. The origins of ISIS can be traced to a Jordanian terrorist who assumed the name of Abu Musab al-Zarqawi because he was born in Zarqa, Jordan in 1966.¹ In the late 1980s Zarqawi joined the anti-Soviet jihad then going on in

Afghanistan. He was imprisoned in Jordan from 1994 to 1999 and formed a close relationship with a cleric named Abu Muhammad al-Maqqdisi; as a result of this relationship, Zarqawi espoused the “strict tenets of Jihadi-Salafism.” Zarqawi was released from prison in the spring of 1999 under a general amnesty and went to Pakistan and then to Afghanistan, where intelligence sources believe he was involved in several terrorist plots. One of the plots was successful; in October 2002, a USA diplomat named Laurence Foley was killed outside his home in Amman, Jordan, part of a plan formulated by Zarqawi.²

Zarqawi and his followers eventually moved to the Kurdish areas of northern Iraq in 2002 and established an explosive training camp. It was this training camp that Secretary of State Colin Powell described to the UN Security Council in a now-famous speech on February 5, 2003. Powell systematically articulated the Bush administration’s case for invading Iraq with slides, tapes, and charts. When he discussed the nexus of international terrorism and Saddam Hussein, Powell maintained that “Iraq and terrorism go back decades.”³ He then presented a slide entitled, “Terrorist Poison and Explosives Factory, Khurmāl” to illustrate the dangerous potential of poisons like ricin. Although other parts of Powell’s presentation proved to be false, the terrorist training camp he described near Khurmāl did, in fact, exist and the Bush administration contemplated a military strike against it in 2002. However, the USA never took any action until after the invasion of Iraq in 2003. Analyzing why the Bush administration failed to strike a known terrorist training camp in Iraq in 2002, one scholar concluded, “President Bush did not want to undertake any actions that could have derailed the option of regime change in Iraq.”⁴

The US invasion of Iraq in March of 2003 provided Zarqawi and his followers with a myriad of opportunities to pursue their jihadist agenda. They became known as al-Qaeda in Iraq (also known as AQI) after Zarqawi pledged an oath of loyalty to bin Laden in 2004. As the chaos increased and the insurgency grew inside Iraq, Zarqawi and his group took advantage of the power vacuum to foment violence against Shiites and the alliance against Saddam Hussein, led by the USA. Zarqawi and his followers cultivated a reputation for fearsome tactics and alarming brutality. For example, in May of 2004, a grisly video emerged of the beheading of American businessman Nicholas Berg; Zarqawi starred in the video which was titled “Abu Musab al-Zarqawi slaughters an American.” Zarqawi was the man doing the beheading. Al-Qaeda in Iraq was also blamed for other attacks, including the bombing of UN Headquarters in Iraq in August of 2003 and the Shia

shrines in Karbala in March of 2004. In November of 2005, AQI planned the suicide bombings of three hotels in Amman, Jordan, which killed 60 people. Then, in February 2006, AQI blew up the Askari Mosque in Samarra, which led to waves of killings and reprisals between Shiite and Sunnis groups.⁵ At times the violence against Shiites and other Muslims worried leaders in the core al-Qaeda, such as Ayman al-Zawahiri, because they feared they could not control AQI with its extreme violence against fellow Muslims.

That the chaos and anarchic situation in Iraq after the American invasion proved to be the perfect environment for a terrorist group as brutal as AQI was not totally unanticipated by some terrorism analysts. For instance, Paul Wilkinson, who studied terrorism and liberal democracies, warned that a “total militarization of Western response” to international terrorism would backfire as it would “encourage the very anarchy in which terrorism flourishes.”⁶ The failure of the Bush administration to secure Iraq after the invasion is well documented. Despite the fact that over a decade has passed since the invasion, the USA continues to struggle with the aftermath of the Bush administration’s decision to invade, including the rise of AQI and its eventual transformation into ISIS.

FROM ZARQAWI TO ISIS

The USA finally tracked Zarqawi down in June 2006, in a safe house, near Baqubah in Iraq. Two US Air Force jets dropped guided bombs to destroy the house and Zarqawi and five others were killed.⁷ The news of his death was announced the next day, sparking hopes that the violence he and his followers incited would subside. However, the insurgency in Iraq continued and the Bush administration eventually put in place a troop surge to quell the violence and restore stability. In 2008 President George Bush signed the Status of Forces agreement with Iraqi Prime Minister Nouri al-Maliki; the agreement stated that all American forces would leave Iraq by 2011. President Obama, who consistently claimed the war in Iraq was never the “central front” in the war on terror, implemented the Bush–Maliki agreement and all US troops left Iraq by December 18, 2011.

In the absence of American troops, the Maliki government, predominantly Shia, did not make enough effort to continue training Iraqi troops or to include important Sunni decision-makers. Then the Arab Spring began in Tunisia in December 2010 and this led to spontaneous uprisings and protests throughout the region. By then, a more effective leader, Abu Bakr

al-Baghdadi, was in charge of the successor group that grew out of AQI; this is the organization now known as ISIS. Baghdadi was born in Samarra, Iraq in 1971 and is a religious scholar. According to Warrick, if the US invasion of Iraq in 2003 had not occurred, Baghdadi would have “lived out his life as a college professor.”⁸ He was detained by US forces in Iraq in February 2004 and held at Camp Bucca until December 2004, when he was released as a low-level prisoner. According to the *Washington Post*, Camp Bucca served as an ideal place for both “prisoner radicalization” and “inmate collaboration.” Two important groups, central to the success of ISIS, came together in Camp Bucca: Baathist military officials with military and administrative expertise from Saddam Hussein’s regime, and Islamic fundamentalists. These groups used their time together in US detention for collaboration and radicalizing those who happened to be detained with them. Warrick termed Camp Bucca a “jihadi university” and noted that Baghdadi would become its “greatest alumnus.”

In 2011, small antigovernment protests began in Dera’a in Syria and grew more violent when the regime of President Bashar al-Assad began firing on protesters demanding political reforms. Assad, a member of the Alawite elite, became president of Syria in 2000, after his father died. The Syrian civil war proved to be another perfect environment for a terrorist group; the ensuing chaos allowed jihadists and other groups to enlist recruits and compete for power. At the end of 2011, Baghdadi sent some jihadist fighters into Syria to exploit the turmoil and they built a power base in Syria, while fighting other jihadist groups for control. Ideological fissures divided ISIS supporters and al-Qaeda supporters.⁹ As a result, in February 2014, the head of al-Qaeda after the death of Osama bin Laden, Ayman al-Zawahiri, publicly disavowed Baghdadi’s organization, thus formally ending the affiliation between al-Qaeda and ISIS.¹⁰ The rupture between the two jihadi groups has implications in more realms than counterterrorism. As explored below, it has repercussions regarding the lawfulness of relying upon the Authorization for Use of Military Force of 2001 (AUMF) as a basis for fighting ISIS.

In 2014, ISIS began gaining territory in Iraq and in June of that year, it burst into the headlines in the West with news that it was attacking Mosul, Iraq’s second-largest city.¹¹ They captured the city with surprisingly little resistance from Iraqi forces and then threatened Baghdad and Erbil. ISIS declared a caliphate in portions of Iraq and Syria, giving Baghdadi the title of “Caliph Ibrahim.”¹² As a predecessor to ISIS, Zarqawi and his group, AQI, remain influences on how ISIS operates the caliphate. Additionally,

Zarqawi's most prominent ideological tenets contribute to ISIS: an extreme antipathy toward Shiites and a focus on restoring the Islamic caliphate.¹³ Unlike al-Qaeda which envisaged the establishment of the caliphate in the future, ISIS is focused on a "law-based political order" right now.¹⁴ The ISIS legal system is based on sharia law with harsh punishments meted out for various offenses. Those who are categorized as non-believers, such as a minority religious faith known as Yazidis, have been singled out for particularly harsh treatment, including sexual slavery. Although many in the West were horrified at the rise of ISIS, it has "energized the jihadi movement, attracting tens of thousands of young Muslims around the globe."¹⁵

OBAMA ADMINISTRATION AND ISIS

At the beginning of August 2014, President Obama announced he was authorizing air strikes against ISIS in Iraq because Americans in Erbil needed protection, in addition to thousands of Yazidis, who were escaping ISIS on Mount Sinjar. According to the president, the "imminent threat to Erbil and the dire situation unfolding on Mount Sinjar met both his criteria for deploying American force: protecting American lives and assets, and averting a humanitarian disaster." Not long after the US air strikes against ISIS in Iraq began, ISIS released a video of an American journalist named James Foley being beheaded in the desert and warned that other American captives would suffer the same fate if air strikes continued. About two weeks later, ISIS released a second video showing the beheading of American Steven Sotloff. Clearly, ISIS intended to terrify viewers with these shocking, brutal murders and they had the effect of horrifying American viewers, most of whom watched the World Trade Center towers burning in 2001. In brief, ISIS was motivated by the three things that, in general, inspire terrorist movements: revenge (for the air strikes), renown (generating publicity), and reaction (provoking retaliation).¹⁶

On September 10, 2014, President Obama extended the air strikes against ISIS into Syria. In his speech explaining the need for air strikes in Syria, President Obama noted that ISIS posed a threat to the people of Iraq and Syria and the broader Middle East, including American citizens, personnel, and facilities. He added that the strategy to defeat and degrade ISIS involved not only American air strikes, but also the deployment of more American forces to Iraq to support Iraqi and Kurdish troops. According to the president, he had all the authority he needed to take action against ISIS but he welcomed congressional support for the effort. The lack of specific

congressional authorization for the use of military force against ISIS has generated lively scholarly debate, because ISIS did not exist when the AUMF against Terrorists was enacted in September 2001. The debate continued till the end of Obama's time in office but no new authorization was passed.

On one side of the debate about domestic lawfulness are those who argue that the statutory authorities cited by President Obama are not sufficient authority for the use of military force against ISIS in Iraq and Syria. Mr. Obama referenced two authorizations: the 2001 AUMF, which was signed in September 2001, shortly after the 9/11 attacks; and the 2002 AUMF against Iraq (AUMF Iraq). The 2001 AUMF was intended by Congress to grant authority to President Bush to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or person." The problem is that al-Qaeda, with the tacit aid of the Taliban, organized the 9/11 attacks, not ISIS. In fact, ISIS did not even exist in 2001 so Congress could not have been authorizing the use of force against it in the AUMF. The AUMF against Iraq granted authority to President Bush to use force against Saddam Hussein's government in Iraq, not ISIS. Again, ISIS did not even exist in 2002 so it is too much of a stretch to suggest Congress was granting the president the authority to use force against ISIS when it passed the AUMF against Iraq.

The other side of the debate is represented by lawyers for the Obama administration who argued that ISIS is a splinter group of al-Qaeda, and it would not exist but for the emergence of al-Qaeda and its jihadi adherents. Since the 9/11 attacks, there have been several factions fighting the USA that began as al-Qaeda affiliates. The AUMF of 2001 does "encompass a war against a group that *formerly* was aligned with al Qaeda."¹⁷ As the Pentagon's general counsel, Stephen Preston, argued in April of 2015, "the name may have changed, but the group we call ISIL (or ISIS) today has been an enemy of the United States within the scope of the 2001 AUMF continuously since at least 2004."¹⁸ The fact that ideological fissures split ISIS from the core al-Qaeda in 2014 does not affect the legality of relying upon the 2001 AUMF, according to the Obama administration's legal reasoning.

The international legal questions regarding the air strikes against ISIS differentiate between those occurring in Iraq and the ones in Syria. The easiest case to make is that the air strikes against ISIS units in Iraq are lawful as an exercise of collective self-defense under article 51 of the UN Charter.

The government in Iraq asked the USA for help against ISIS so they consented to American air strikes in Iraq. The Assad government in Syria, on the other hand, did not consent to American air strikes. The analysis there hinges on whether the Assad government was “unable or unwilling” to defeat terrorist groups like ISIS present in Syria, a more difficult argument for American administrations to maintain. If Syria is unable or unwilling to combat ISIS, the justification for the use of force becomes collective self-defense of the states bordering Syria.

NOTES

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The Obama Administration and Syria

Abstract The Syrian civil war is examined, along with the use of chemical weapons on civilians in Syria. President Obama’s “red line” statement about Syria in 2012 regarding the use of chemical weapons and how he sought congressional authorization in 2013 are discussed. Starr-Deelen analyzes the domestic legal questions by referring to the historical record concerning the Founding Fathers, defensive uses of force, and the role of Congress in authorizing offensive war. The chapter also explores the international law questions, including articles 2(4) and 51 of the UN Charter, involved in a potential military strike by the US against Syria.

Keywords Syria • Use of force • Articles 2(4) and 51 UN Charter • Self-defense • Chemical weapons • Chemical Weapons Convention

The civil war in Syria continues to pose a foreign policy dilemma for the Trump administration, just as it did for the Obama administration. Americans are both wary and weary of more intensive involvement in the region and recognize that sectarian disputes have animated politics there for many decades. Yet two developments forced President Obama, before he left office, to take action regarding the Syrian civil war: first, the use of chemical weapons on civilian targets crossed a “red line,” and, second, the rise and rapid advance of ISIS forced the US national security apparatus to rethink getting involved.

The last chapter analyzed the Obama administration and ISIS; this chapter will examine the Syrian civil war and chemical weapons. In August 2012, Mr. Obama warned President Assad and his regime that using chemical weapons would cross a “red line” that the USA could not ignore.¹ One year later, on August 21, 2013, credible reports of a chemical weapons attack on the outskirts of Damascus, which killed approximately 1400 civilians, forced the administration to act. President Obama and his national security team planned a limited military strike to punish the Syrian regime and reinforce international norms against the use of chemical weapons.

As noted above, when the executive branch considers the use of military force, there are two levels of analysis: the international legal question and the issue of domestic legality. The argument that a limited military strike against Syria in 2013 was legal under international and domestic laws was a difficult one to make. The domestic legal analysis, which involves asking whether the president has the power under the US constitution to authorize the use of force, is not entirely straightforward; if congress approved an air strike against Syria, then the Obama administration would be on solid legal ground domestically. The more difficult situation is when the president acts without congressional authorization. The constitution requires that congress be involved in declaring war but presidents from Harry Truman on have sought to expand the powers of the presidency regarding the use of force. There are now many precedents that administrations rely on in arguing that a proposed use of force is lawful without the input of congress. In particular, the administration of George W. Bush advanced the theory that there were inherent powers associated with the Commander-in-Chief clause of Article II that permitted the president to use force against terrorists as a matter of national security.

Traditionally, the decision to commit US forces to military action required the collective judgment of both the president and Congress. According to one noted scholar, the historical record on the Founding Fathers clearly establishes their desire “to circumscribe the President’s authority to take unilateral military actions” except in cases where the president is defending the USA against sudden attacks.² Outside of the defensive use of force to repel an attack, “anything of an offensive nature (taking the country from a state of peace to a state war) was reserved to Congress.”³ Even with the most skillful lawyers, it would have been a stretch for President Obama to argue that air strikes against Syria in 2013 qualified as defensive uses of force.

Late in the summer of 2013, President Obama surprised many observers by seeking congressional authorization for a military strike against the Assad regime. Savage quotes Ben Rhodes, an Obama national security adviser, as saying it was a choice, not a necessity, to get congress to authorize a strike because “it’s not like the lawyers couldn’t have come up with a theory.”⁴ This cavalier attitude regarding the constitutional requirement to involve congress in decisions about committing US forces to war (or even a limited strike) is not exceptional.⁵ Other modern presidents have claimed that authorization from congress, although welcome, is not required prior to the use of force. It is not certain that congress would have approved Obama’s request; public opinion polls showed most Americans were against air strikes. In addition, the British parliament rejected Prime Minister David Cameron’s request about participating in military action, leaving the USA without their most reliable ally and making it impossible for the Obama administration to claim any action taken was part of a coalition.

The international law questions presented by a US military strike against Syria in 2013 were also murky due to the circumstances. Generally, the UN Charter provides that a state is prohibited from using force or threatening to use force against another state unless an exception applies, or the UN Security Council authorizes the use of force. In this instance, the UN Security Council could not act because Russia and China refused to allow any resolution to pass. The USA could have attempted a claim of self-defense under article 51 of the Charter. However, this was a difficult argument to make, given that the chemical weapons were used against Syrians, and not Americans. Savage pointed out a creative self-defense argument: if the chemical weapons attacks occurred along the Syrian–Turkish border, “maybe the United States could invoke its right to protect American forces stationed in Turkey, or Turkey might ask the United States to help in its collective right to self-defense.”⁶

In the end, the Obama administration avoided both the problem of how to respond if congress did not authorize military force, and how to justify a strike under international law. On September 14, 2013, Secretary of State John Kerry and his Russian counterpart announced a deal in which Assad would give up chemical weapons and Syria would sign the Chemical Weapons Convention.⁷ The diplomatic solution allowed the president to avoid a showdown with congress, and it averted air strikes against Syria, which would have created casualties and tough questions for the USA at the UN Security Council. The experience remains an uncertain precedent for

future administrations to rely upon. Some scholars view it as a positive development in that diplomacy meant the path to war was “clogged,” as the Founding Fathers hoped it would be when they wrote the constitution and divided war powers among the branches of government.

After the Assad government acceded to the Chemical Weapons Convention, the Organization for the Prohibition of Chemical Weapons (OPCW) began working on a verifiable program to eliminate the country’s chemical stockpile.⁸ Syria’s chemical weapons stockpiles included sarin, mustard gas, and VX and the plan for their elimination meant moving the toxic substances to a US cargo ship, the *Cape Ray*, which was specially outfitted for the destruction of the chemicals. Despite the ongoing Syrian civil war and the obstacles that entailed, the OPCW was able to destroy over 97% of Syria’s chemical weapons. Unfortunately, even the small success story of President Assad’s signing the Chemical Weapons Convention has been overshadowed by recent events involving the use of chemical weapons. In 2016, a team from the UN and the OPCW accused the Syrian regime of using chlorine gas in two-barrel bomb attacks and ISIS fighters of using mustard gas in one. Allegations persist that the Assad regime has hidden chemical weapons from the OPCW, and that it continues to employ them against civilians.

When President Obama left office in January 2017, the Syrian civil war raged on with uncountable civil deaths, widespread destruction, and a migration crisis that roiled countries far beyond the Middle East. Most American citizens remained convinced that sending a large American force into the conflict would not further the national interest. The Syrian civil war occasionally came up on the campaign trail in late 2016, but how to end it or whether another Authorization for the Use of Military Force was needed for the use of force against ISIS did not dominate the campaign discourse. Candidate Trump assured voters that Hillary Clinton’s plan for Syria would lead to “World War Three” due to the potential for conflict with Russian military forces. His priority was defeating ISIS, not solving the civil war, or persuading President Assad to step down. By the end of January 2017, the responsibility for responding to the Syrian civil war was President Trump’s. The next chapter will explore the Trump administration and its foreign and security policies.

NOTES

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The Trump Administration

Abstract Important personnel (current and former) in the Trump administration such as Rex Tillerson, Steve Bannon, James Comey, James Mattis, Michael Flynn, H.R. McMaster, Sebastian Gorka, and others are discussed regarding their impact on national security policies. Starr-Deelen examines the outlines of President Trump’s foreign policy and his approach to counterterrorism. A diplomat from a NATO ally describes the March 2017 summit on terrorism in an interview with the author. Trump’s use of force in Somalia, Yemen, Iraq, Syria, and Afghanistan are explored, in addition to questions regarding accountability, secrecy, and the need for another authorization for the use of military force.

Keywords Donald Trump • Rex Tillerson • Michael Flynn • Radical Islamic Terrorism • Russia • James Comey • “America First” • “Make America Great Again” • Afghanistan • Iraq • Syria • Yemen • Somalia

Most election predictions pointed to a Hillary Clinton win on November 8, 2016, despite ongoing controversy surrounding her use of a private email server during her tenure as Secretary of State in the first term of the Obama administration. Her opponent, Donald Trump, had no government or military experience, ran an unconventional campaign, and was believed to be unelectable. His campaign provoked controversy repeatedly with

remarks generally considered racist, xenophobic, and misogynistic. His policy proposals were summarized by the slogan, “Make America Great Again.” Finally, his speeches were short on specifics about proposed policies, such as his plan to build a wall to prevent more illegal immigration from Mexico and other states south of the US border. Although his crowds adored him, few pollsters or pundits predicted that he would attain the necessary 270 electoral college votes to win. In fact, Mr. Trump won 304 electoral college votes even though he lost the popular vote by about 2.9 million.

The election of 2016 did not revolve around foreign policies, such as resolving the Syrian civil war, the continuing military engagements in Iraq and Afghanistan, or the threat posed by international terrorism. Rather, it was largely a referendum on how voters perceived Hillary Clinton. Whether she was a competent public servant or the most corrupt politician to run for the presidency dominated the narrative. Historians may marvel later at the slight amount of attention paid to pressing national and international issues even as the Trump campaign disregarded rhetorical boundaries to portray Clinton as bound for jail, deficient in stamina, and certainly lacking the “presidential look.” At the end of the day, the Trump campaign surprised many and Donald Trump took the oath of office on January 20, 2017. This chapter will not attempt any explanation for his win, but will assess his foreign policy vision in general, and the contours of his counterterrorism approach. An accurate assessment is hampered by the fact that his campaign, in contrast to the Clinton campaign, was noticeably lacking specifics regarding foreign and national security policies.

Prior to his election win, Mr. Trump often insinuated that he would be harsher and smarter than President Obama regarding national security and the threats posed by ISIS, al Qaeda, and other terrorist groups. Trump was consistently critical of Obama’s failure to use the phrase “radical Islamic terrorism,” emphasizing that accurately naming the threat would greatly facilitate eradicating it. Mr. Trump also advocated placing a temporary ban on Muslims coming to the USA as a way to protect against terrorist attacks. Subsequent sections will explore how these campaign themes are playing out in the Trump administration.

Many presidential scholars have observed that one of the most important determining factors regarding a new administration is how it is staffed. The Trump administration, in contrast to other modern presidencies, may be even more dependent on the national security advice and expertise of aides to Donald Trump due to his lack of foreign policy experience. During the

campaign, Donald Trump articulated an “America First” foreign policy approach but used the phrase more as a slogan than a foreign relations agenda; he remained focused more on domestic issues. Forceful personalities in an administration can exert a powerful influence on the direction of administration policy, as I noted when discussing Dick Cheney’s enormous influence in the George W. Bush administration.¹ Moreover, dynamic personalities in that administration combined with the tragedy of the 9/11 attack and pervasive fears of another large-scale attack created a “perfect storm” of sorts during the Bush administration. This perfect storm was an ideal environment for executive branch initiatives in the treatment of detainees, surveillance of the public, and the use of force in counterterrorism during that administration. Most importantly, the constitutional system in place allowed the Bush administration to “push the envelope” in many areas, and the possibility exists that the Trump administration will proceed in a similar manner.

THE TRUMP ADMINISTRATION: PERSONNEL

Presidential observers often note that candidates pick someone as their vice presidential running mate in an effort to balance out the ticket geographically or to enhance the ticket in an area in which the candidate is seen as lacking experience. Barack Obama, for example, selected Joe Biden as his running mate because Biden had a great deal of foreign relations experience. Many political pundits were surprised when Donald Trump picked Mike Pence of Indiana to be his running mate because Pence did not balance the ticket geographically or bring foreign policy expertise. However, Pence retains serious conservative credentials in contrast to Trump’s variable positions on social issues like abortion and gay rights. In addition, Pence has experience in government, having been elected to the House of Representatives in 2000 and serving as governor of Indiana from 2013 to 2017. His mentor is Dick Cheney, the powerful vice president during the eight years of the George W. Bush administration. Like Cheney, Pence does not seek the spotlight and he understands how the levers of power work in Washington, DC. Like Cheney, Pence may turn out to be a largely unseen but quite an influential member of the Trump administration.

The other members of President Trump’s cabinet who directly influence US foreign policy are the Secretary of State, Rex Tillerson, the National Security Advisor, the Secretary of Defense, retired General James Mattis, and retired General John F. Kelly who began at the Department of

Homeland Security. In July, Mr. Kelly became President Trump's chief of staff; these are discussed in more detail in following passages. Additionally, Mr. Trump's son-in-law, Jared Kushner, is close to the president and has his confidence, having been given responsibilities in several foreign policy areas including Palestine–Israel relations. It is too early to know how extensive Kushner's influence will be on concrete foreign and security policies but the president has given him great reviews and enormous responsibilities. Finally, the Trump administration has a noted concentration of distinguished retired and acting military men, which may result in a preference for military, as opposed to diplomatic, economic, or other, policy options in the event of a foreign policy crisis.

President Trump's contentious relationship with the intelligence community has caused concern with commentators who contend that the executive branch is more effective when it forges a relationship of trust with the various intelligence agencies. In January, former Representative Mike Pompeo (R-Kansas) became the new CIA director. A graduate of West Point, Mr. Pompeo vowed during his confirmation hearings not to resume the harsh interrogation techniques of the Bush era, despite candidate Trump's promises at campaign rallies to waterboard terrorism suspects and kill their families. President Trump repeatedly expressed skepticism at the intelligence community's assertions that Russia interfered in the US elections, so it is unclear how the White House and the intelligence community will cooperate in the next four years.

Glennon noted that Presidents, Congress, and the judiciary have an incentive to remain "in sync" with the intelligence agencies; this is the "if only" argument. "If only you had heeded the advice of the security experts, this devastating attack would not have occurred."² President Trump, however, appears nonchalant about a break with the intelligence agencies. He has questioned their assessment that Russia interfered with the 2016 elections and he is uninterested in advice from so-called experts, assuring his supporters that he has a "huge" brain. How this nonchalance translates into effective policy in the future remains to be seen.

Another important staffing decision regarding the direction of the ongoing war on terror is the choice of Secretary of State. President Trump decided to ask the CEO of ExxonMobil, Rex Tillerson, to be his Secretary of State after one meeting, even though Mr. Tillerson, like Donald Trump, has no experience in government or the military. President Trump, who claimed during the campaign that he did not need to read much because he has a great deal of "common sense," was impressed with Tillerson's record

at ExxonMobil where he worked his entire adult life. According to Coll, who wrote an extensive history of ExxonMobil, Tillerson implemented an employee medal program that was based on the Boy Scouts merit badge program.³ In addition, in a rare encounter with the press, Tillerson told a reporter that he did not want to be Secretary of State but his wife urged him to take the position because God was not finished with him yet.⁴

The first Trump budget includes large cuts in the Department of State's budget, a proposal that normally would be resisted by the head of the department. However, Tillerson has not objected to the cuts under the rationale that the USA will be reducing its military footprint abroad. Instead, he acquiesced to them as a necessary part of the Trump administration's plans for smaller government. Moreover, Tillerson views his job at the State Department as similar to his position at ExxonMobil, that is, business acumen will result in a more effective and efficient organization. His early statements indicate he may be unaware of the State Department's role in using public diplomacy to promote human rights, democracy, and religious freedoms via its annual reports. Critics have questioned Tillerson's close ties to Russia and familiarity with Putin, citing the Order of Friendship award that he received in 2013 for signing a deal to drill in the Arctic with the state-owned Russian oil company Rosneft. The project was put on hold after Russia annexed the Crimea and the USA, during the Obama administration, imposed sanctions.

Radical Islamic Terrorism

The appropriateness of the term "radical Islam" is an animating theme among some of President Trump's appointees and supporters. One of President Trump's early and vocal supporters was retired Lieutenant General Michael Flynn. Flynn strongly criticized President Obama for his persistent omission of the term "radical Islam" in speeches explaining the Obama administration's counterterrorism policies. After Mr. Trump's election, Flynn became the first National Security Advisor in the Trump administration, a position that does not require Senate confirmation. His worldview and policies are shared by many in the Trump administration and may be gleaned from a book he wrote in 2016 with Michael Ledeen. *The Field of Fight: How We Can Win the Global War Against Radical Islam and Its Allies* begins by describing Flynn's experience as an intelligence officer in the US Army and as the director of the Defense Intelligence Agency (DIA) from July 2012 till August 2014.⁵

In *The Field of Fight*, Flynn and Ledeen make the case that there is an “international alliance of evil countries and movements” that coordinate efforts in an attempt to destroy the USA. These entities include Russia, China, Iran, Syria, Cuba, North Korea, ISIS, Hezbollah, and al Qaeda. The seemingly disparate group is united in its “hatred of the democratic West and their conviction that dictatorship is superior.”⁶ Moreover, there is no “serious debate about the global war, because our own government won’t let the facts reach the American people.”⁷ Flynn and Ledeen are also quite clear throughout their book about the role of Iran in international security. Iran, described as a “classic example of clerical fascism,” sponsors terrorism all over the world, beginning with the assault on the Grand Mosque in Mecca in 1979 (note that many scholars doubt that Iran was behind the assault).

Mr. Flynn’s tenure as National Security Advisor came to an abrupt end on February 13, 2017 as a result of his contacts at the end of December 2016 with Sergey Kislyak, the Russian ambassador to the USA. The Obama administration imposed sanctions on Russia on December 29, 2016, for interfering with the November elections and shortly thereafter, Mr. Flynn and Ambassador Kislyak spoke and sent text messages. It is unclear at this time whether he did this on his own initiative, or was told to contact the ambassador. At first, Mr. Flynn denied that the sanctions were discussed and, to support this story, Vice President Mike Pence went on several TV programs to dismiss that allegation. However, once the existence of transcripts of the calls surfaced and the transcripts were reported by the *New York Times* and *Washington Post*, Mr. Flynn was caught in a falsehood and a brewing scandal that no amount of White House spin could dispel. His resignation was immediately accepted by President Trump. The revelations about contacts between Mr. Flynn and the Russian ambassador became part of a larger, and possibly more explosive story, about the Trump campaign and its contacts with Russian officials prior to the election.

This is an evolving story and many questions remain. Both the House of Representatives and the Senate have ongoing investigations into the Russian contacts of the Trump campaign. Moreover, on May 17, the Justice Department appointed a Special Prosecutor, Robert Mueller, to investigate Russian interference in the 2016 election and related matters. Mueller’s investigation is reported to include scrutiny of Russian money laundering and aspects of the Trump business empire but little is definitively known because Robert Mueller and his team have been silent. For the purposes of this research, the point is that hearty oversight by the Congress into the

conduct of the Trump campaign is vital; the integrity of the American electoral system is at stake and this should be a bipartisan priority. Currently, with Republicans controlling both houses of Congress, political incentives suggest that neither body is eager to investigate the Trump campaign and its contacts with Russia because that might endanger the Republican legislative agenda—an agenda that would have little chance of succeeding without a Republican in the White House.

Another relevant point about the short tenure of former National Security Advisor Flynn is that many other policy advisors close to President Trump share his perspectives about Islam and the threat posed by Islamic extremism. For instance, Steve Bannon, former editor of the Breitbart website, and Trump campaign strategist, was a high-ranking advisor to President Trump until August 18 when he abruptly left the Trump administration and returned to Breitbart News. He analyzed the current counterterrorism campaign as a *war against Islam*, according to his speeches and multiple radio shows discussing threats facing the USA. In a 2014 speech, Bannon claimed that the West is in the “beginning stages of a global war against Islamic fascism.” In January 2017, President Trump made the unusual decision to include him as a regular participant in the Principle’s Committee of the National Security Council (NSC). His inclusion was a controversial departure from practice under previous administrations and it ensured his views on Islamic fascism were strong themes at NSC meetings. Then, in April the Trump administration reversed itself and Bannon was removed from his permanent seat at the NSC, although he still attended meetings where his “expertise” was needed.

According to anonymous sources, Bannon was a surreptitious power broker in the White House, along with Stephen Miller, a senior policy advisor who was previously an aide to Senator (now Attorney General) Jeff Sessions. Reports suggested that Bannon tried to formulate an in house policy group (termed the “Strategic Initiatives Group”) that would bypass the normal policy-making processes in the executive branch. If so, it would be reminiscent of the “War Council” that formulated national security policy and wrote memos for the war on terror in the George W. Bush administration “with virtually no experience in law enforcement, military service, counterterrorism, or the Muslim world.”⁸ Circumventing the interagency policy-making process may be quicker but it also leaves the White House open to charges that policies are not well developed or supervised by lawyers before they are hastily implemented.

Steve Bannon was not the only person formerly at Breitbart who joined the Trump administration to potentially influence the direction of US national security policy. Dr. Sebastian Gorka, author of *Defeating Jihad: The Winnable War* was a national security editor at Breitbart news and a Fox news contributor. He became deputy assistant to the president and part of the strategic initiatives group. Both Bannon and Gorka have ties with Frank Gaffney, an anti-Muslim writer who founded the Center for Security Policy. Like the former National Security Advisor Michael Flynn, Dr. Gorka advocated using the phrase “radical Islamic terrorism” and clearly naming our enemies, although it is unclear how this actually transforms into more effective counterterrorism policies.

Dr. Gorka advises his listeners to know the enemy, echoing Sun Tzu’s advice for winning a war. He draws a comparison between the “20th century battle waged against godless materialist Communism” and our current struggle against “theocratic Islamism” and he criticized the Obama administration for its failure to see this. According to Gorka, the USA and its allies must delegitimize the ideology of jihad, just as Ronald Reagan destroyed the totalitarian ideology of Marxism. His view is that the war against ISIS will consist of “25% killing” while the rest of the fight will be “destroying the ideology.”

Although Dr. Gorka frequently appeared in TV interviews and combatively defended the Trump administration and its national security policies, several events made his position in the White House precarious. There was renewed scrutiny of his credentials as a terrorism expert and then his former Breitbart colleague Steve Bannon left the Trump administration. One week after Bannon’s departure, on August 25, Gorka left the Trump administration amid competing narratives over whether he resigned or was fired. Reports suggested that retired General John F. Kelly, the chief of staff selected for that position in July to instill order and discipline, wanted Gorka out of the White House. Trump’s second National Security Advisor also wanted Dr. Gorka gone, according to White House insiders. However, Dr. Gorka quickly explained his departure to the media as a resignation due to the fact that President Trump’s campaign slogan and professed policy agenda of “Make America Great Again” was being systemically undermined by forces in the White House. Gorka referred to the president’s August 21 speech on Afghanistan and lamented that it did not mention the phrase “Radical Islamic Terrorism” which, according to Gorka, was an integral part of candidate Trump’s appeal to the electorate. In the end, Gorka concluded

he would be more effective in furthering President Trump's agenda as an outsider.

Moreover, Gorka's wife, business partner, and co-author, Katharine Gorka, works at the Department of Homeland Security. Prior to the November election, the Gorkas ran a consulting firm called the Threat Knowledge Group and wrote papers analyzing threats to the USA from ISIS, al Qaeda, and related groups. In a November 2015 report about ISIS, they claimed that ISIS has a significant base of support in the USA and wrote, "the key failing of U.S. efforts to fight terrorism" is "we have not understood the importance of ideology."⁹ Their report also called on the USA to stop downplaying the seriousness of the ISIS threat and warned that "the old rules of engagement no longer pertain, and terror is the order of the day."¹⁰ Critics contend that this approach risks alienating the vast majority of Muslims (who are not radicalized) with provocative rhetoric that also inadvertently gives some legitimacy to Islamic extremists who present the conflict as a clash of civilizations between the West and Islam. In fact, ISIS and other terrorist groups thrive on narratives centered on civilizational conflict between the USA and the West on one side and Islam on the other.

One of Michael Flynn's choices for the National Security Council was Kathleen or "K.T." McFarland, a former speechwriter in the Reagan White House and Pentagon. In 2006, she ran in the New York Republican primary in a bid to challenge Hillary Clinton for the Senate seat. She lost but remained in the public eye as a national security commentator for Fox News. Her worldview and approach to national security mesh well with the hard power philosophy of many on the Trump foreign policy team. For instance, although she believes water boarding "may" be torture, nevertheless she claimed, it is "probably worth doing." Like President Trump, McFarland is a harsh critic of former President Obama's foreign policies, particularly those related to the Syrian civil war. Writing in 2013, after the Syrian government, under pressure from the USA and Russia, acceded to the Chemical Weapons Convention; McFarland stated that "Putin has saved the world from near-certain disaster."¹¹ She went on to claim, "the world knows that Vladimir Putin is the one who really deserves that Nobel Peace Prize."¹² As a former staffer in the Reagan White House, McFarland has traveled a long way from President Reagan's discourse on the Soviet Union as the "evil empire" to this statement in praise of Russian President Vladimir Putin. Like Dr. Gorka, McFarland and her worldview were not compatible with Trump's second National Security Advisor, so she was

nominated for Ambassador to Singapore in June, a position that will take her far away from the White House.

Trump's Second National Security Advisor

On February 20, 2017, President Trump announced that Lieutenant General H. R. McMaster would become the administration's next National Security Advisor. McMaster, who has been praised as a prudent choice for the position, will remain on active duty while serving as National Security Advisor. He wrote the book *Dereliction of Duty: Lyndon Johnson, Robert McNamara, The Joint Chiefs of Staff, and the Lies that Led to Vietnam* as part of his PhD dissertation. It explores the failure of high-ranking military officials to confront President Lyndon Baines Johnson on his faulty strategy regarding the war in Vietnam. In 2013, McMaster wrote an opinion piece in which he warned that the USA needed to guard against wishful thinking vis-à-vis modern conflict. According to McMaster, a decorated combat veteran, the following age-old truths about war should be kept in mind: war is political, war is human, and war is uncertain "precisely because it is political and human."¹³

The approach of President Trump's second National Security Advisor, McMaster, contrasts sharply with that of retired Lieutenant General Michael Flynn on the dangers of radical Islam. In fact, McMaster has a more nuanced view of the role of Islam in motivating jihadists and this nuance contrasted sharply with the worldviews of both Steve Bannon and Dr. Gorka. Although McMaster does not use the phrase "radical Islamic terrorism," President Trump did use it in his first State of the Union speech to Congress in February 2017. Six months later, in his August 21 Afghanistan speech, President Trump did not use the notorious phrase and observers speculate that this is the result of McMaster's influence. How the differences regarding radical Islamic terrorism, the role of religion, and semantics will influence and shape concrete policies in the field of national security is not certain and should be watched closely in the next four years.

JAMES COMEY AND THE FBI

Shortly after passing the first 100 days of his administration, President Trump surprised the country by abruptly firing the director of the Federal Bureau of Investigation (FBI), James Comey. Comey, a former deputy attorney general during the second Bush administration was appointed to a ten year term as FBI director by President Obama in 2013. His actions

regarding the investigation into Hillary Clinton's email server angered many Democrats; in July 2016, he announced there would be no charges against Clinton but criticized her as being "extremely careless." Then, shortly before the November 2016 election, he sent a letter to Congress stating that the Clinton email investigation was re-opened. Many fault Comey for Clinton's subsequent electoral college loss because polls indicate his letter persuaded voters in crucial swing states that Clinton was not reliable. At the time, candidate Trump praised Comey for sending the letter to Congress, saying he had done the right thing. The point here is that Comey was criticized by both Republicans and Democrats, while others praised him for his independence.

Although the President has the power to fire the director of the FBI, this has only been done once before; President Bill Clinton fired William Sessions in 1993 due to ethical lapses including using the FBI plane for private travel. The FBI director serves for a ten-year term—a term designed to insulate him from political pressure. Writing in 2003, two former National Security staffers described the tensions between President Clinton and his second FBI director, Louis Freeh, and noted the politics of the relationship. "The one remedy available to the President by law, dismissing Freeh, was a political impossibility. *A chief executive who was being investigated by the FBI could not fire the FBI director*: it would be another Saturday Night Massacre, the second coming of Richard Nixon."¹⁴

This conventional wisdom contrasts sharply with circumstances in the Trump administration. President Trump either did not realize the impropriety of firing the FBI director while his campaign and campaign associates were under investigation, or did not care. On May 9, 2017, the president abruptly fired Comey, apparently believing this would end the investigation into the campaign's ties to Russia. Instead, the sudden dismissal set off a chain of events that led to the appointment of the Special Prosecutor, Robert Mueller, to investigate the Trump campaign and its ties to Russia. In addition, James Comey's testimony on June 8 in front of the Senate Intelligence Committee about his interactions, as FBI director, with President Trump increased the pressure on Congress to keep investigating the Trump campaign and may eventually result in serious legal or political problems for the White House. Even if President Trump emerges from all the investigations personally unscathed, the danger to his political agenda will be significant.

President Trump eventually nominated Christopher Wray for the position of FBI director; Wray was confirmed by the Senate on August 1, 2017.

Wray, who previously worked at the Department of Justice during the second Bush administration, assured the Senate during his confirmation hearings that he did not believe the Russia investigation was, as President Trump repeatedly calls it, a “witch hunt.” As noted by commentators after the firing of James Comey, the rule of law requires that the FBI director maintain the highest standards of integrity and adherence to democratic procedures.

TRUMP’S FOREIGN POLICY

It is not possible yet to write definitively about the contours of a Trump foreign policy or counterterrorism approach, although preliminary observations and trends are instructive and pertinent. Occasionally candidate Trump channeled Cicero, saying in essence, *Inter arma enim silent leges*, in times of war, the law falls silent. For example, on the campaign trail, Donald Trump claimed that “to the victor go the spoils” when discussing his idea to extract the oil in Iraq as a method of combating ISIS. The fact that this is forbidden by modern laws of war was not part of his campaign discussions before voters. Presumably, more experienced foreign and military advisors have since explained to President Trump that this is not legal or wise but the extent of their influence on his policies is not clear.

During the presidential election campaign, Donald Trump repeatedly asked his audiences whether they wanted four more years of President Obama’s foreign policy; he warned them that voting for Hillary Clinton would simply prolong the “failed” policies of the Obama era. President Trump’s approach to foreign policy strikes many as a transactional style in that he emphasizes making “deals” with negotiating partners. There is little to no discussion or appeal to upholding normative values like the rule of law or maintaining the strength of traditional alliances, such as North Atlantic Treaty Organization (NATO). For his part, Secretary of State Tillerson is focused, like President Trump, on an “America First” foreign policy, even though the exact policy implications of that slogan are still being hammered out.

In fact, the details of many foreign policy issues and strategies in the Trump administration are still being conceived and articulated months after the inauguration. The State Department and other agencies are not fully staffed as the new administration grows into its responsibilities. The Trump administration is lagging in making appointments to many agencies, perhaps due to the chaotic transition. There is no “Trump Doctrine” yet,

although there are theories about what a Trump foreign policy will entail. For instance, some observers note that Trump appears to model President Nixon's "madman theory" of statecraft in that he speaks loudly and threatens "vaguely unhinged actions" to keep America's adversaries guessing.¹⁵ An example of this is President Trump's threat of "fire and fury" in August in response to North Korean missile launches and provocations. However, it is unclear whether this is a deliberate strategy to fool adversaries or the result of ad hoc policies decisions, tweets, and statements that contradict one another and other announcements by Trump administration officials.

In May, President Trump took his first official trip abroad and visited Saudi Arabia and Israel, in addition to attending NATO and G-7 summits in Europe. The first part of the trip appeared to go well, as President Trump and the Saudis signed a large weapons agreement, despite consternation about civilians killed and injured by Saudi air strikes in Yemen. When he arrived at the new NATO headquarters in Belgium, President Trump was expected to reaffirm America's commitment to Article 5 of the NATO pact which states that an attack against one NATO member will be construed as an attack against all (Article 5 has been invoked only once—on behalf of the USA after 9/11). It was not considered controversial until the Trump administration argued that its foreign policies were based on the concept of "America First," leaving European allies wondering how committed the new administration feels to the long-lasting NATO alliance. President Trump did not, in fact, explicitly reaffirm the US commitment to Article 5 even though reports are that this was in his original speech. Instead, he reiterated his demand that all countries in NATO spend at least 2% of their gross domestic product (GDP) on defense. After the trip was over, his National Security Advisor, H.R. McMaster and Gary Cohn, penned an op-ed in which they state that American alliances will henceforth be based on shared *interests*, not shared values. This transactional approach to the NATO alliance diverges from all other post-war administrations who have viewed the alliance as a bulwark for advancing security and promoting democratic values on the European continent.

In an interview with Rosa Brooks, associate dean at Georgetown University Law Center, I asked about the issue of President Trump's worldview and what this might indicate as far as his approach to national security threats and crises. Dean Brooks, author of *How Everything Became War and the Military Became Everything*, did not see a deliberate strategy or ingenious plan behind the many contradictory statements emanating from President Trump and his administration.¹⁶ Instead, she emphasized the

unpredictable nature of the current administration and warned about the dangers of inflammatory rhetoric. According to her, rhetoric matters because it can have a chilling effect; she cited President Trump's two executive orders on immigration which, even though they are on hold due to litigation, influence foreigners considering travel to the USA to rethink their destination. She also noted that rhetoric matters regarding the risks of a nuclear confrontation where miscalculations can be disastrous because the president alone decides whether to launch nuclear weapons.¹⁷

The point about the launch of nuclear weapons is both interesting theoretically and frightening in its implications for international stability. Due to the nature of the Cold War, the US nuclear arsenal was designed to ensure "rapid response," if it became necessary. Although the Cold War ended over twenty years ago, the US nuclear weapons system still operates on the idea of rapid response and rests on the principle that the president alone decides about launching a nuclear strike—without a committee from Congress or a group of military or national security advisors empowered to overrule him. Recently, with the advent of the Trump presidency, this has led to commentators speculating over whether the Secretary of Defense could refuse a presidential order to launch nuclear missiles. The frightening consensus is that, short of a military mutiny on a scale previously unheard of, the president's order to launch nuclear missiles would be obeyed because the military is extremely disciplined and schooled in the subordination of military control to civilian leaders such as President Trump.

COUNTERTERRORISM IN THE TRUMP ERA

In March 2017, *NBC News* reported that the Pentagon prepared a counterterrorism plan targeting ISIS for President Trump that was characterized by officials as little more than an "intensification" of Obama's slow and steady approach to degrade ISIS. Then, in May 2017, Reuters reported that a draft of a new counterterrorism strategy for the Trump administration was being prepared, to be released in the next few months. According to Reuters, the draft indicated that President Trump will be expecting US allies and partners to do more in the fight against ISIS, al Qaeda, and other militants. That the administration would take a fresh look at US national security strategy is not surprising, given that candidate Trump was extremely critical of the Obama administration's efforts to degrade ISIS. President Trump wants to avoid costly open-ended military commitments while at the same time granting the Pentagon greater authority to use force

against militants in Somalia and Yemen. In fact, parts of those countries have been designated “areas of active hostilities.” It is not clear yet if President Trump’s delegation of authority to the Pentagon merely reflects his management style or if it indicates the White House seeks an arrangement that will limit criticism of Mr. Trump as Commander-in-Chief should military operations go badly. Also unclear is the extent of real differences between the Trump plan to defeat ISIS and the Obama plan.

During an extensive interview with the author, a senior diplomat from a NATO ally described the March 22, 2017, summit on counterterrorism he attended in Washington, DC.¹⁸ Rex Tillerson hosted the summit which included representatives from 68 states and organizations in the global coalition working to defeat ISIS. In his opening remarks, Secretary Tillerson observed that the coalition is dedicated to “victory” against a “global force of evil,” that is, ISIS. He added that “Degradation of ISIS is not the end goal. We must defeat ISIS.” The narrative is reminiscent of the George W. Bush administration when it declared a real war (and not a rhetorical one) against terror after the 9/11 attacks. Taken to an extreme, the war vocabulary and military terminology imply that battlefield solutions are the only appropriate ones. In addition, relying on the war narrative to explain the campaign against ISIS and al Qaeda may be counterproductive in that it implies the military is the most important counterterrorism tool and it insinuates that there will be a definitive end one day, like the world wars. Finally, constantly invoking war terminology may inadvertently legitimize ISIS and al Qaeda fighters as holy warriors instead of treating them as mass murders and criminals. Nevertheless, Tillerson is following the lead of President Trump and his campaign advisors who clearly used military language and war terminology during the election campaign to criticize the Obama administration and its efforts to degrade ISIS.

In his speech to the global coalition working to defeat ISIS, Tillerson explained the three phases that characterize the campaign against ISIS. The USA and coalition members are still in phase one, which is described as the deployment of major military operations to eliminate ISIS and reclaim areas in Iraq and Syria. The second phase will be stabilization and during this phase, there will be infrastructure rebuilding and the return of essential services for affected populations. Tillerson added that the USA is “not in the business of nation-building or reconstruction” and he pointed to the example of east Mosul where efforts to clear rubble and land mines and restore water and electricity are led by local Iraqis, with the aid of the central government. After the stabilization phase is successful, the third phase of

normalization will follow. In this phase, the “development of a rejuvenated civil society in these places will lead to a disenfranchisement of ISIS and the emergence of stability and peace.”

When asked about distinctions between the Obama administration’s approach to counterterrorism and the approach of the Trump administration, the senior diplomat who spoke with me remarked that differences boiled down to an escalation in the use of force by Trump and appeared to be more about Trump’s bellicose style, not substance.¹⁹ For instance, he noted that the USA is now emphasizing that ISIS will be “defeated” instead of the Obama administration’s call to degrade and contain the terrorist organization. The Global Coalition was formed in 2014, during the Obama administration, and indications are that, contrary to candidate Trump’s assertion that he possessed a better strategy for dealing with ISIS, it will continue in much the same manner. The senior diplomat explained that Secretary Tillerson gave an opening speech, retreated, and then K. T. McFarland, who was a deputy national security advisor at the time, took over and led a “very choreographed” discussion about the international effort to defeat ISIS.²⁰

My interview with the diplomat took place shortly after the April missile strike against the Shayrat Air Base in Syria so I asked the diplomat for his perspective on it. He replied that sending Tomahawk missiles into Syria does not constitute a strategy for dealing with the Syrian civil war. In addition, he remarked that President Trump may have been expeditious about ordering a missile strike in Syria because it differentiates him from his predecessor, Barack Obama. The danger, according to the diplomat, is that President Trump will be provoked by Russia or other antagonistic states like North Korea into commanding further displays of force that may be destabilizing for the international community.²¹

WINNING THE WAR OF IDEAS

The senior diplomat described one noticeable change from Obama-era practices regarding counterterrorism and that is countering violent extremism (CVE) programs will be renamed “countering Islamist extremism” in the Trump administration.²² However, the diplomat was unable to articulate any real impact the name change will have on the multinational effort underway to counter the propaganda ISIS spreads on social media to connect with potential recruits for the caliphate.

Since the 9/11 attacks caused many Americans to ask, “why do they hate us,” successive American governments have poured more resources into an

attempt to unravel the factors that lead an individual to engage in political violence. The academic research illustrates that there are several factors which may incline susceptible individuals to extremism and, occasionally, to committing acts of terrorism but there is no one identifiable “pathway” to perpetrating terrorist acts. Nonetheless, the Obama administration tried to identify factors leading to radicalization and methods of intervening before an individual could carry out an attack. At a February 2015 White House summit, for instance, the Obama administration focused on CVE and procedures to support community-led CVE work. These CVE initiatives were not without controversy, but the broader point about the “war of ideas” remains. To be successful in a campaign against terrorist organizations espousing jihadi beliefs, liberal democracies need to sustain the battle of ideas with a counter narrative.²³

Furthermore, the need to express and uphold democratic principles to combat international terrorism was recommended by the 9/11 Commission in its final report, published over a decade ago. “Just as we did in the Cold War, we need to defend our ideals abroad vigorously.”²⁴ However, this aspect of counterterrorism seems to be chronically underfunded and all indications are that the Trump administration will slash more from these budgets. Beyond defending our ideals to the international community, there remains the issue of living up to our ideals. Various terrorism experts advise that democracies should maintain the strength of their democratic institutions and respect for civil liberties and the rule of law. Indefinite detention of terrorism suspects without trial looks hypocritical in light of the US Constitution’s right to a speedy trial and the US military’s support for the Geneva Conventions. Very few of the more than 700 men held as GITMO detainees have been tried since it was established in 2002. These facts, along with the use of “enhanced interrogation” techniques, feature in jihadist propaganda and are used to make the case that the USA does not treat Muslims fairly.

It is unclear what the Trump administration will do in the next four years to articulate and sustain American principles. President Trump has suggested actions that, at the very least, are counterproductive in winning the war of ideas against groups like al Qaeda and ISIS. Two examples follow and illustrate how the words of the American president can be used by jihadists to bolster their contention that the USA is fighting in Muslim lands to steal the wealth of Muslims. Commenting on the war in Iraq, Donald Trump has said several times that the USA should have taken Iraq’s oil. His enunciation of the slogan, “to the victor go the spoils” defeats American

efforts to convince the international community in general, and jihadist groups in particular, that its armed conflict in the greater Middle East is not about oil. Secondly, in July, the *New York Times* reported that President Trump discussed exploiting Afghanistan's huge mineral deposits with Afghan President Ashraf Ghani, despite the practical obstacles to obtaining the minerals and the suspicion exploitation would stroke.²⁵ Winning the war of ideas against jihadi propagandists will require both disciplined messaging from President Trump regarding American intentions in the Muslim world and a fealty to American principles. Thus far, these goals have not been accomplished.

USE OF FORCE AND PRESIDENT TRUMP

The Trump administration is less than one year in office, so describing a template for its use of force against terrorists is, by necessity, preliminary. A brief summary of military activities in Afghanistan, Iraq, Syria, Somalia, and Yemen indicates that President Trump believes in the power of the USA military to achieve "victory" in the war on terror, and his administration is not hesitant about unleashing military force. For example, in April, the president authorized a missile strike on an air base in Syria. On August 21, 2017, President Trump gave a major televised speech presenting his administration's policies for Afghanistan; this is examined in detail in the last chapter. The salient point is that the president, despite his campaign rhetoric and tweets, will be increasing the number of US troops in Afghanistan and our NATO allies have been asked to send more troops. Prior to his announcement about his Afghanistan policy, President Trump delegated more authority to Secretary of Defense Mattis regarding operations in the war on terror. In addition, in April 2017, the USA dropped the largest non-nuclear bomb in its arsenal on Taliban and ISIS caves and tunnels in eastern Afghanistan. The "Mother of All Bombs," or massive ordnance air blast (MOAB), was developed during the second Bush administration to pressure Saddam Hussein in Iraq. The *New York Times* reported in September that ISIS fighters, known for their tenacity, returned to the caves and tunnels that were previously bombed.

The US military and Coalition forces are reducing the amount of territory that ISIS controls in its so-called caliphate in Syria and Iraq, despite heavy resistance from ISIS fighters. ISIS has lost more than 30% of its former territory along with key cities such as Mosul, Tikrit, Raqqah, and Tal Afar. According to Brett McGurk, the Special Presidential Envoy for the

Coalition against ISIS, progress against ISIS accelerated dramatically in the first few months of the Trump administration due to three key factors. The first is President Trump's delegation of essential decision-making to battlefield commanders. The second factor is a tactic termed "annihilation" whereby Coalition ground forces surround ISIS fighters and prevent the foreign fighters from escaping. The final factor is attributed to more burden-sharing among the Coalition members. However, despite the battlefield successes, there are concerns about the increasing numbers of civilian casualties. For instance, several news reports discuss the increase in civilian casualties since President Trump took office in January, amid reminders that, as a candidate, Donald Trump promised to bomb the s**t out of ISIS. The exact cause of rising civilian casualties is difficult to determine; combat is occurring in densely populated cities and sources close to the Pentagon claim ISIS deliberately hides among civilians and even rigs buildings to explode, thereby increasing the death toll.

In Somalia, the Trump administration has increased the number of counterterrorism strikes against the al-Shabaab organization. In May, another Navy SEAL was killed during an operation 40 miles west of Mogadishu against al-Shabaab, the first US military death in Somalia since the infamous Blackhawk Down incident in 1993. According to news reports, President Trump has loosened the rules and standards for the use of force adopted previously in the Obama administration and written down in a Presidential Policy Guidance (PPG) in 2013. By designating certain regions of Somalia as "areas of active hostilities," President Trump has authorized the commanders in the field to make targeting decisions that are not subject to an interagency review process; in addition, civilian protection rules are less strict. This is lawful, according to the White House, due to the passage, 16 years ago, of the Authorization for Use of Military Force Against Terrorist (AUMF) in 2001.

In Yemen, shortly after his inauguration President Trump approved going ahead with a raid that had been planned during the Obama administration. The Yakla raid, which occurred on January 29, 2017, was the first raid of the Trump presidency and resulted in the death of one Navy SEAL and several civilians including the eight year old daughter of Anwar al-Awlaki (Awlaki, an American of Yemeni parents, was an al Qaeda propagandist killed by a drone in 2011 during the Obama administration). The Pentagon stated later that the goal of the Yakla raid was intelligence gathering against al Qaeda in the Arabian Peninsula (AQAP) and President Trump declared it a "success." Critics claim the approval process was insufficient and question whether a raid that results in the death of a

SEAL and several civilians, along with the destruction of a US \$70 million Osprey, can be defined as a success. President Trump has reportedly designated three provinces of Yemen as “areas of active hostilities” which gives commanders in the field greater flexibility to use force and, once again, the civilian protection rules are less strict.

The muscular use of American military might in the war on terror undertaken by President Trump since his inauguration raises troubling questions for the American people. The first is whether the use of force against ISIS and other jihadi fighters, which is undoubtedly killing many of them, will “defeat” terrorism or reap a pyrrhic victory in the war on terror. The fear is that ISIS, like al Qaeda before it, may lose control of its territory only to metastasize and reappear in other places, more virulent and still able to wreak death, destruction, and terror.

Another question regarding the escalation of the use of force during the first months of the Trump administration concerns the American system of government and war powers authorizations. The US Constitution requires the Congress to be involved in decisions to use force offensively; the president may authorize force unilaterally only to repel sudden attacks and defend Americans. Soon after the 9/11 attacks, Congress authorized the use of force against those “nations, organizations, or persons” involved in the attacks (AUMF 2001). Since 2001, this authorization has been contorted so that it covers any non-state jihadi group that the US military engages in combat, even organizations that did not exist on 9/11/01. Now that there is a Republican controlled Congress and a Republican in the White House, can the Trump administration get Congress to pass and then sign into law a new, appropriately tailored authorization for the use of force against the jihadist groups the USA is currently fighting in countries such as Yemen, Somalia, and Syria?

The final question revolves around accountability and secrecy in a democracy. President Trump has stated that he will not “talk about numbers of troops or our plans for further military activities.” Of course, a certain amount of secrecy is necessary to ensure the safety of the troops and the integrity of the mission, but citizens should be able to rely on their government to inform them if military doctrines on the use of force have been altered or expanded. Citizens do not need or expect the details of every troop movement or bomb deployed or wiretapping request but they do need to know enough to hold their democratically elected leaders and military commanders accountable. This requires information about the guidelines for targeting, estimates of civilian casualties, and metrics for assessing success. Scholars have examined the growth of national security

agencies and bureaucrats since the 9/11 attacks and their corresponding impulse to over-classify information to keep it secret. A fully functioning democracy demands “a healthy balance among needs for secrecy, privacy, and publicity – a balance that in the event of uncertainty must always be resolved in favor of the right of the people to know the risks they face and to participate meaningfully in decisions about how to cope with them.”²⁶ The fait accompli war on terror is not restricted by geographical or temporal boundaries, making accountability even more formidable. An illustration of the importance of accountability and transparency occurred in October when four US soldiers were killed in an ambush in Niger; details about what they were doing and why remain opaque. Is the Trump administration willing to be transparent about its use of force in the war on terror?

NOTES

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Conclusion

Abstract Starr-Deelen returns to the theory of “double government” and whether it predicts a security directorate ensures policy continuity between the Obama and Trump administrations. Is there a “deep state”? President Trump’s three travel bans, the first enacted soon after his inauguration, are explored, in addition to the case *International Refugee Assistance Project v. Trump*. Trump’s August speech on Afghanistan strategy and “principled realism” are discussed. The chapter draws attention to several issues surrounding the use of force for counterterrorism and suggests that, when the president acts unilaterally in the ongoing *fait accompli* war, congress and the voters, not a security directorate, should serve as a check on executive branch initiatives.

Keywords Use of force • Executive initiative • Congressional acquiescence • Judicial tolerance • Trumanite network • Security directorate • Counterterrorism • “Principled realism”

The final chapter will examine President Trump’s professed national security policies and strategy for the war against terrorism and how they are being implemented in the first months of his term. The analysis returns to the theories on executive branch power from both *National Security and Double Government* by Michael Glennon and *The National Security Constitution*:

Sharing Power after the Iran-Contra Affair by Harold Koh. There is some tension between the two theories in that, as applied to Donald Trump and his presidency, Koh's theory would suggest that congress will acquiesce and the courts will tolerate any Trump initiatives in national security. Glennon's theory, in contrast, would indicate that despite President Trump's rhetoric, once in the White House, his national security policies will remain very similar to Barack Obama's due to a permanent network of national security managers (the Trumanites or security directorate) who function as an unseen "double" government, thwarting any initiative by the president.

At this point in time in the Trump administration, it is not clear which theory has more predictive value regarding the course and implementation of national security policies. The unorthodox and outspoken nature of Donald Trump and his politics have generated a desire among some foreign policy pundits for a strong security directorate that will constrain him, given the long odds against the Republican-controlled Congress providing any check on the president. Some conservative commentators, extrapolating from the concept of an unelected security directorate that continues in Washington, despite the party affiliation of the man in the White House, warn that the "deep state" is working to frustrate Donald Trump's "Make America Great Again" agenda. Indeed, as Dr. Sebastian Gorka left his position in the White House in August, he suggested as much to friendly media outlets. Michael Glennon, a professor of international law at Tufts University, has augmented and updated his book with analysis about the Trump administration and the national security bureaucracy. Glennon rejects the idea that there is any "deep state" working against President Trump because a "deep state" suggests some form of organized conspiracy and purposefulness.

Moreover, Glennon warns that the security directorate was never intended to be another branch of government; it is not a coequal of Congress, the judiciary, and the executive branch and it would be unwise to allow it to function as such. "To formally charge the bureaucracy with providing a check on the president, Congress, or the courts would represent an entirely new form of government, a system in which institutionalized bureaucratic autocracy displaces democratic accountability."¹ Glennon notes that President Trump and the security directorate need one another for legitimacy and stability.² In addition, the appearance of harmony between the two is essential to maintain the public's confidence in government. After discussing the rift between President Trump and the intelligence community, Glennon puts forth a dark scenario: although some

intelligence officials will leave if asked to engage in some Trump initiatives, like CIA “stepped-up drone strikes, cyberattacks, covert action, immigration bans, and mass surveillance.”³ But many will “do his bidding” because security managers “tend to back policies they see as ratcheting up levels of protection; that’s why such programs are more easily expanded than scaled back.”⁴ The best remedy against this is an engaged and informed electorate that actively holds the Trump administration accountable.

PRESIDENT TRUMP’S TRAVEL BAN

A brief examination of the fate of the three travel bans offers an interesting perspective on the Trump administration and judicial tolerance for executive initiatives. It is noteworthy because it is here that the executive branch has been checked by another branch of government—not what typically occurs, according to Koh’s theory. Of course, it is also possible that this is a brief interruption and the ban, or a modified version of the ban, will eventually be adjudicated by the U.S. Supreme Court and upheld. The background to the dispute is candidate Trump’s pledge in December 2015 to ban all Muslims from entering the USA after a terrorist attack in San Bernadino on December 2 killed 14 people. The perpetrators, Syed Farook and his wife Tashfeen Malik, were killed after the attack in a shoot-out with police. In response to the terrorist attack, the Trump campaign called for a “total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what is going on.” Candidate Trump’s proposed ban on Muslims was widely criticized at the time by both politicians and terrorism scholars, many of whom noted that this was overbroad and would alienate Muslims whose cooperation was crucial for effective counterterrorism.

After he became president, Donald Trump moved swiftly to fulfill his campaign promise regarding Muslims entering the USA. On January 27, 2017, he signed an Executive Order, the first travel ban, which covered people from seven Muslim-majority countries: Iraq, Iran, Libya, Somalia, Syria, Sudan, and Yemen. Several aspects of the executive orders are relevant for this research. The first travel ban referenced the September 11, 2001, terrorist attacks but the order did not include any of the countries from which the hijackers came so it would not have prevented their entries into the USA. More importantly for the purposes of exploring Koh’s pattern, the travel ban was an executive initiative that even George W. Bush, the

president on 9/11 and promoter of the war on terror, did not take in response to that tragedy. In fact, President Bush made a point of emphasizing that the USA was not at war with Islam and visited the Islamic Center in Washington, DC on September 17, 2001, to illustrate this point. President Trump, in contrast, signed an executive order banning Muslims from the seven countries in an aggressive display of executive branch assertiveness.

Ostensibly aimed at securing the USA and its borders, many terrorism experts question the effectiveness of enacting a travel ban for this purpose. As noted above, none of the 9/11 hijackers came from any of the countries listed in the first travel ban. Furthermore, many “lone-wolf” terrorists in the USA were born here, so as American citizens, they would not be affected by any travel ban. There are two issues related to the travel bans. First, there is the legal question: does the president have the authority to enact them? Secondly, there is the political question: even if he has that authority, is it wise public policy to single out people from these six or seven countries when it is unclear how this action strengthens US national security? In fact, some counterterrorism researchers criticized the idea of banning Muslims as furthering the narrative favored by al-Qaeda, and ISIS that the USA is at war with Islam. Prior to the election, two scholars wrote in *Foreign Affairs*, “One might expect ISIS to view his candidacy with apprehension. However, interviews with ISIS supporters and recent defectors suggest just the opposite: jihadists are rooting for a Trump presidency because they believe that he will lead the United States on a path to self-destruction.”⁵ At any rate, these counterterrorism issues could have been thoughtfully examined and debated with members of Congress had the executive branch consulted them in advance. However, the Trump administration was eager to enact the travel ban and did not feel the need to confer with Congress.

The first travel ban, Executive Order 13769, created chaos at numerous airports, sparked vigorous protests, and legal challenges, and was quickly halted by a temporary restraining order. President Trump reacted by promising another travel ban that would endure despite legal challenges. On March 6, 2017, he signed Executive Order 13780, the second travel ban which was similar in many respects to the first, including a provision which reduces the number of refugees admitted into the USA. The second order excluded Iraq from the list of countries (on the advice of the Secretary of Defense) and stated that its purpose was to protect the USA from terrorist activities by foreign nationals admitted to the country. Although candidate Trump called for a Muslim ban after the San Bernadino

attacks, neither of President Trump's travel bans would have prevented the perpetrators from entering the USA because Syed Farook was a US born citizen and his wife, Tashfeen Malik, was a legal permanent resident from Pakistan and Pakistan was not included in either travel ban. Nevertheless, the Trump administration attempted to argue that the travel ban was important for US national security. In addition, even if the travel bans did not effectively address the problem of homegrown "lone-wolf" terrorism, they were popular with the Republican voters who elected Mr. Trump.

The reaction from the Republican led chambers of Congress to the second travel ban was predictable; Speaker Paul Ryan (R-Wisconsin) issued a statement noting that the second Executive Order "advances our shared goal of protecting the homeland." Despite the discontent and anger from immigrant and refugee advocates, he did not schedule any hearings or testimony from experts to explore how well a travel ban would actually protect the homeland. In short, this was the congressional acquiescence Koh identified and wrote about in *The National Security Constitution*.

On May 25, 2017, the US Court of Appeals for the 4th Circuit in *International Refugee Assistance Project v. Trump* upheld an injunction barring enforcement of Executive Order 13780, the second travel ban. Although the Trump administration argued to the court that the purpose of the Executive Order was to protect the USA from terrorist activities by foreign nationals admitted to the USA, a majority of the judges found that the "vague words about national security" could not be separated from the context of the travel ban. That context was rife with "religious intolerance, animus and discrimination" and thus violated the Constitution's prohibition against discriminating against people on the basis of their religious beliefs. A majority of the judges found that reviewing candidate and then President Trump's words regarding Muslims was relevant in evaluating the travel ban as his statements were recent, unambiguous in their discriminatory intent, and he was the primary decision-maker.

Attorney General Jeff Sessions vowed to appeal the decision to the US Supreme Court and in June, the Trump administration filed its appeal. In its appeal, the administration argued that the US Constitution and Acts of Congress confer on the president broad authority to suspend or restrict aliens entering the USA in the interests of national security. This was not the only case filed against the administration's travel ban, and the 4th Circuit was not the only court to rule against the administration, indicating widespread opposition to President Trump's initiative. Despite the opposition to the travel bans, the administration argued that the second travel

ban should go into effect immediately, while the Supreme Court prepared to adjudicate its legality and compatibility with the Constitution. At the end of June, the Supreme Court agreed to hear the case and, with the confirmation of President Trump's nominee, Justice Neil Gorsuch, the court once again had nine justices. The Court allowed a portion of the ban to go into effect, but said the government cannot ban anyone with a "bona fide relationship" to persons or entities in the United States. President Trump claimed this was a "clear victory" for his Muslim ban but the legal wrangling continues. On September 24, the second travel ban expired and President Trump signed Presidential Proclamation 9645, the third version of the travel ban, which adds the countries of Chad, North Korea, and Venezuela and removes Sudan. Like the first and second travel bans, the third ban was challenged in federal court; on October 17, a federal judge in Hawaii issued a temporary restraining order against enforcement of the third ban. A federal court in Maryland then issued another block to the third ban and more litigation is expected.

In his book, Koh examined landmark Supreme Court cases involving executive branch powers such as *United States v. Curtiss-Wright Export Corp.* and *Youngstown Sheet and Tube Co. v. Sawyer*. His conclusion was the "federal courts, through both action and inaction, have adopted an increasingly deferential attitude toward presidential conduct in foreign affairs."⁶ Ultimately, the current Supreme Court, after reviewing the latest version of the travel ban may adopt a deferential attitude toward President Trump's initiative because it is ostensibly designed to promote national security and courts are reluctant to overrule the president in this area. A majority of the Supreme Court may believe that examining candidate Trump's campaign rhetoric about Muslims is not appropriate in adjudicating legal issues or they may find other grounds to uphold the president's travel ban. Nevertheless, the relevant point is that some federal courts have adjudicated the issues and decided not to tolerate President Trump's executive initiative; they have ruled against the administration and put into effect the Founding Fathers' concept of one branch checking another. It remains to be seen if this is an aberration or the start of more judicial review of the administration's foreign relations and national security policies.

Principled Realism

On August 21, 2017 President Trump addressed the nation from the military base at Fort Myer, Virginia with a televised speech detailing the

administration's strategy for the war in Afghanistan. He admitted that, contrary to his campaign rhetoric and original instincts, he was changing his mind about US policy in Afghanistan. Henceforth, US strategy in the region would be guided by what the president termed "principled realism" and he assured his listeners that American military might would no longer be used to "construct democracies in faraway lands." Although the president misstated the number of years America has been fighting in Afghanistan (he said 17 although the number is sixteen years in October 2017), it remains the longest war in US history.

President Trump explained that his administration undertook a comprehensive review of the strategic options in Afghanistan and this led him to three fundamental conclusions. The first was that the USA needs an "honorable and enduring outcome worthy of the tremendous sacrifices that have been made." The second was that the "consequences of a rapid exit are both predictable and unacceptable." He then criticized the withdrawal of USA forces from Iraq in 2011, a withdrawal negotiated during the second Bush administration and implemented during the Obama administration. (President George W. Bush signed the Status of Forces Agreement with Iraq on December 14, 2008, and it established the end of 2011 as the withdrawal date.) According to President Trump, a hasty withdrawal leaves a vacuum which becomes a safe haven for terrorist groups such as ISIS. His third conclusion was that the "security threats we face in Afghanistan and the broader region are immense." He added that he was "given a bad and very complex hand" when he became president in January 2017. These three conclusions dictated that US strategy should change.

Accordingly, US strategy in Afghanistan and South Asia is changing according to President Trump and he assured listeners that it is changing "dramatically." The first change is that the USA will "shift from a time-based approach to one based on conditions." Many commentators approved of this change because it avoids arbitrary deadlines for leaving Afghanistan; allowing conditions on the ground to guide policy is seen as more effective. In addition, the president told Americans that "we will not talk about numbers of troops or our plans for further military activities." Notwithstanding this assertion, in a democracy, the expectation is that citizens have the right to know some details about the number of troops that will be deployed with funds from their taxes and in their name to fight wars. After all, the Afghan government will be informed about the number of US troops on its territory so it would be bizarre to try to keep this information away from the American public.

President Trump then gave the details on what he described as another change; he explained “another fundamental pillar of our new strategy is the integration of all instruments of American power—diplomatic, economic, and military—toward a successful outcome.” The president emphasized repeatedly that his strategy was “new,” a claim disputed by many counterterrorism analysts. Both Presidents Bush and Obama attempted to integrate all aspects of American power so presenting this as a *dramatic* change in strategy strains credulity. Max Boot, for instance, noted that “there was far more continuity than change.”⁷ President Trump emphatically told his audience, “We are not nation-building again. We are killing terrorists.” Implicit in his assertion that the USA will be *killing terrorists* is the acknowledgment that the Trump administration, like the George W. Bush administration, views international terrorism not as “merely” criminal activity but as an actual armed conflict. According to this view, victim states may combat terrorists with drastic measures like the targeted killings of terrorists, the long detention of “unlawful combatants,” and military operations in other states’ territories. However, after sixteen years of combat in Afghanistan, Americans may wonder whether it is possible to kill enough terrorists, without unwittingly creating more, to achieve victory.

As explored in Chap. 1, the other model approaches terrorism as a serious crime, despite the fact that a terrorist act may inflict significant casualties and economic harm, due to the typically sporadic occurrence and low-level intensity. According to this model, failing to treat terrorists as criminals inadvertently rewards them with the status of “warriors,” a designation they seek. “Terrorists like to be considered soldiers at war both because of the legitimacy they believe it brings their cause and for the status they believe it confers on them.”⁸ Advocates of a less militarized approach recommend discrediting the terrorists’ narrative, something that President Trump alluded to when he spoke of “exposing the false allure of their evil ideology.” However, winning the war of ideas against terrorist groups becomes more difficult when civil liberties and the rule of law are curtailed to “defeat” the terrorists in a war. In addition, scholars who favor treating terrorism as a grave crime warn that militarizing the response to terrorism encourages “the very anarchy in which terrorism flourishes.”⁹ They advocate the skillful use of military units against terrorists occasionally, as long as this is done “within a carefully controlled overall judicial” approach to terrorism.¹⁰ President Trump gave no doubt in his August speech that he rejected this model and would be pursuing the “war on terror” approach of George W. Bush.

Another change in US strategy as articulated by President Trump in his August speech concerns Pakistan and India. The president criticized Pakistan for sheltering organizations like the Afghan Taliban and warned Pakistan that it must do more to help the USA. He added, "It is time for Pakistan to demonstrate its commitment to civilization, order and to peace." He then suggested that India could do more to assist the USA with economic assistance and development, although those details are not clear.

Finally, President Trump discussed restrictions on the rules of engagement and noted that he had already lifted restrictions enacted by the Obama administration. He said that "authority for American armed forces to target the terrorists and criminal networks that sow violence and chaos throughout Afghanistan" will be expanded. There was no acknowledgement that this could result in more civilian casualties or discussion over whether such an increase would be justified in the long run. The president indicated that there would be less transparency about non-combatant deaths which is troubling because a well-functioning liberal democracy needs accurate information to hold its leaders accountable. Moreover, as one scholar wrote after the speech, "Civilian casualties engender hatred for America, aid terrorist recruitment, and can radicalize potential lone-wolf terrorists residing in the United States."¹¹

President Trump's speechwriter echoed President Reagan, consciously or unconsciously, when Mr. Trump declared during the speech, "These killers need to know they have nowhere to hide, that no place is beyond the reach of American might and American arms. *Retribution will be fast and powerful*, as we lift restrictions and expand authorities in the field." In January 1981, President Reagan said, "Let terrorists beware that when the rules of international behavior are violated, our policy will be one of *swift and effective retribution*."¹² The Reagan administration, the first administration to attempt a "war" on terrorism, as I detailed in my book, threatened the use of force in counterterrorism to combat international terrorism in the 1980s. However, despite its policy of promising swift and effective retribution for acts of terrorism, the Reagan administration only responded twice in a manner that matched this rhetoric: when the hijackers of the cruise ship *Achille Lauro* were captured in 1985 and when the USA bombed Libya in 1986 in response to Muammar Qaddafi's support for terrorism.¹³ In contrast, President Trump and his version of the war on terror employ both tough rhetoric and assertive military action.

President Trump's Afghanistan speech was generally well received as a serious discussion of the issues and he was praised for conceding that his position on withdrawing from Afghanistan had changed from his campaign promises a few months ago. Some scholars applauded his decision to increase troop levels in Afghanistan, reasoning that a precipitous US withdrawal would strain the government in Kabul and leave a political vacuum for groups such as the Taliban, al-Qaeda, and ISIS to fill. Many observed that the speech left out important details, lacked specifics, and was, in essence, the continuation of the previous administration's strategy. For instance, the president did not explain how his policy of using all instruments of American power will be different from when this was tried in the second Bush and Obama administrations. Nor did he explain how this will be achieved when the State Department budget is being significantly slashed during his administration.

Taken as a whole, the speech is a signal that President Trump, far from being the political maverick with a fresh approach to Afghanistan, will be pursuing the war on terror with the same emphasis and instruments as George W. Bush. Whereas the Obama administration was caught in the *fait accompli* war and unable to extricate the USA from an approach crafted after 9/11, it is more accurate to describe the Trump administration as espousing the war on terror. Candidate Trump may have expressed his desire to withdraw US troops from Afghanistan but President Trump pledged in this speech to continue the war with more troops. In terms of the "Double Government" theory, the August 21 speech is evidence that a president without any military experience or foreign policy expertise is susceptible to arguments from the security directorate of intelligence, military, and national security managers. They will tend to advise the president to continue the same war with the same strategy. It remains to be seen if increased military pressure and relaxed targeting rules will yield a different result.

BEYOND THE FIRST MONTHS OF THE TRUMP ADMINISTRATION

It is far too soon to state definitively how the Trump administration's national security architecture may transform in the next four years, especially due to the uncertain nature of international threats. Many of the positions in the bureaucratic agencies that guide and implement national security strategy remain unfilled. Therefore, the following observations about the Trump administration are tentative. As a preliminary

observation, it is clear that the Trump administration, reflecting candidate Trump on the campaign trail in 2016, is advancing a more muscular use of American hard power. The concept of “soft power,” or the ability to set the agenda in foreign relations because other countries admire and feel attracted to American values, culture, and institutions is not part of the Trump administration’s program. Thus far, in fact, the State Department, an important organization for publicizing and promoting American values, culture, and institutions, has been downgraded and is facing significant budget cuts which, if implemented, will further erode the department’s ability to exercise American soft power.¹⁴

Another notable observation about the new Trump administration is its insouciant attitude on international law; in this respect, it resembles the first term of the George W. Bush administration after the 9/11 attacks. Recall, for instance, when then-President Bush joked that he did not know what people were talking about when they mentioned “international law,” as if it did not exist or constrain states’ actions in pursuing terrorists. President Trump has spoken in favor of water boarding terrorism suspects because he believes it works. The illegality of permitting torture or inhumane or degrading treatment on detainees, codified in both federal law and treaty law, appears not to be an inhibiting factor regarding the Trump administration’s counterterrorism methods. Moreover, officials in favor of “enhanced interrogation methods” working in the Trump administration may be correct in believing there will be no accountability for illegality because officials in the George W. Bush administration were not held accountable for their actions executing the war on terror.

I have written elsewhere about the expansion of executive power that occurred during the war on terror during the administration of George W. Bush. Prior research confirms the lack of real, domestic constraints on the executive branch when the executive is intent on increasing national security powers, regardless of which political party controls the presidency. The Trump administration is in the first year of the first term so caution recommends avoiding precipitously describing how President Trump will expand executive branch powers, other than to note several factors that might impact his presidency. There has not been a large terrorist attack, fortunately, during his first months in office. History indicates that the president asks for, and receives, expanded national security powers in the aftermath of a large attack, such as 9/11. Furthermore, the trend toward militarization of American foreign policy was well underway before President Trump articulated an “America First” foreign policy; this can be

expected to accelerate as the State Department loses funding and military spending increases. The attraction of using the military to project force all over the globe is ever present and perhaps even more tempting to a president, like Donald Trump, who lacks diplomatic experience and dismisses the importance of American soft power.

On April 6, 2017, President Trump ordered the use of force in response to a chemical weapons attack in Syria, despite his earlier and repeated warnings to President Obama to avoid involvement in the Syrian civil war. News agencies reported that many civilians, including 23 children, were killed by a sarin gas attack which was probably the work of the Syrian armed forces, under orders from President Bashar Assad. President Trump said no child should “suffer such horror” and ordered an air strike using 59 Tomahawk missiles against the Shayrat Air Base in Syria. In his announcement, Trump also said, “It is in this vital national security interest of the United States to prevent and deter the spread and use of deadly chemical weapons.” Many critics observed that President Trump’s use of force appeared to contradict previous statements by Trump administration officials indicating that the administration accepted Assad’s continuation as ruler of Syria.

An analysis of the legality of the airstrike on Syria in April requires a discussion of two related questions: (1) does international law permit the proposed use of force, and (2) when does the president have the authority under the US Constitution to use force? The first question involves an examination of the international legal norms regarding the use of force, especially articles 2(4) and 51 of the UN Charter. These articles stipulate that states may not use force unless the UN Security Council has authorized it, or the use of force is done in collective or self-defense after an armed attack. The chemical weapons attack in Syria did not threaten or harm the USA or its citizens as the weapons were aimed at Syrians so this was not an “armed attack” against the USA. Moreover, the UN Security Council did not authorize any use of force in response. President Trump’s use of force in Syria illustrates his insouciant attitude toward international law in that his administration did not even bother to articulate a plausible international legal basis for the airstrikes.

The second question regarding the president’s authority under the Constitution is essentially a matter of domestic legality and begins with the system of checks and balances the Founding Fathers devised as a method of keeping power dispersed. When the US Constitution was written, the framers rejected a system of government in which the power to make war

was placed in the hands of the monarch.¹⁵ Instead, the power to initiate war was intended to be shared by Congress and the president. The distinction between offensive and defensive uses of force is instructive; the president was given the power to repel sudden attacks as a measure of defense, but offensive uses of force require the collective judgment of both the executive and legislative branches of government.¹⁶ The warning in Federalist No. 4 about allowing one person, monarch or chief executive, to initiate wars still resonates: “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans.”¹⁷

Accordingly, the use of force against Syria as punishment for chemical weapons attacks requires the collective judgment of both the Congress and President Trump. Other scholars have argued that a single, unilateral missile strike against Syria is unlikely to be condemned by Congress as illegal. In addition, the current Congress is controlled by the Republican Party, the president’s party, so expecting Congress to check the executive branch regarding the Syrian missile strike is highly unrealistic. The real question for the future is whether the Trump administration, undeterred by and impervious to the Founding Fathers’ history and philosophy, will resort to the use of force again without consulting Congress.

President Trump’s use of force in Syria conforms to the pattern of *executive initiative, congressional acquiescence, and judicial tolerance*, explained in a previous section. President Trump decided on a course of action, sending Tomahawk missiles to bomb Syria, as an executive branch initiative. He did not consult with Congress and appears to have made the decision to use force after viewing disturbing images of sickened children on TV. Two days after ordering the bombing, Trump sent Congress an official notification of his use of force with the usual phrase that it was “consistent with the War Powers Resolution.” President Trump did not allude to the fact that the historical record on the philosophy of the Founding Fathers reveals their intention to circumscribe the executive’s power to take unilateral military actions and the US Constitution reflects this wisdom.¹⁸ The exception, permitting unilateral presidential action to use force, occurs when the president must defend the USA against sudden attacks.¹⁹

Instead, President Trump wrote in his letter to Congress that he “acted in the vital national security and foreign policy interests of the United States, pursuant to my constitutional authority to conduct foreign relations and as

Commander in Chief and Chief Executive.” Most members of the current Congress expressed support for the missile strike on Syria and this behavior conforms with previous missile strikes ordered by other presidents. In fact, the likelihood of the current Congress significantly challenging President Trump on a use of force such as the Syria airstrike is very low because the executive and legislative branches are controlled by the Republican Party. An important element to congressional acquiescence is the lack of political will to challenge executive initiatives in foreign relations; this is particularly evident when the president and the majority in Congress are members of the same political party.

Once, after a presentation detailing the Founding Fathers’ blueprint for a system of government where the legislative and executive branches share powers regarding matters of war and peace, a tenured, outspoken professor from a large university asked me a pointed question. Would national security and foreign policy decisions really be that much better if the members of Congress participated? In other words, do you want 535 secretaries of state helping the president run foreign affairs? It is, indeed, a good question and particularly relevant in the age of nuclear weapons. The substance of foreign policy might not be improved by increased congressional participation but those decisions would better reflect the will of the American people, as expressed by their elected representatives. It was the Founding Fathers’ vision for a republican form of government and it depends on the exercise of collective wisdom from both the legislature and the executive before major expenditures of blood and treasure are spent in an offensive use of military force.

The current situation involves executive initiatives acquiesced to by members of congress who are too mindful of their own presidential aspirations or retaining their seats, followed by implementation by an unelected national security bureaucracy, the Trumanites, as Glennon noted in his book. The judiciary, the third branch, tolerates the executive initiative by dismissing lawsuits under a variety of judicial avoidance doctrines. Finally, all too often, the Trumanite bureaucracy and the policies that it implements are validated by former officials in Washington-based think tanks who tend to be from the same universities with similar worldviews.

While congress may indeed err in making foreign policy decisions, my preference is always for the decision-making procedures thoughtfully designed by the Framers of the Constitution to reflect the will of the American people. Congress remains the best forum for informed public discussion, evaluation, and oversight of options for the use of force. Relying

on the sole judgment of the individual in the Oval Office, supported by his hand-picked advisors, or an unelected security directorate is a recipe for expensive and needless uses of force that cost lives and treasure and inexorably move the country further away from the republic the framers established. Moreover, if our elected officials in Congress are unable or unwilling to discuss, evaluate, and oversee a use of force proposed by the president, the remedy still lies in the system the Founding Fathers designed—with we the people, the voters.

NOTES

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4. *Ibid.*
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