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## US Empire in the Age of Trump

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## US Empire in the Age of Trump

### Abstract

To reflect on the decline of American influence in the geopolitical sphere, its internal fracturing and polarization, atrophying commitment to liberal democratic values and persistent tendency to confront global conflicts with military solutions raises crucial questions about whether American empire is sustainable, and whether it is in fact worth sustaining. First, how is it that a nation founded on liberal principles such as checks and balances, limited powers and individual rights has come to embrace its opposite—that is, virtually unbounded executive authority to stamp out security threats without regard for legal and ethical limitations? Second, what does an executive monopoly on a militarized national security state portend for liberal democratic institutions in an increasingly polarized, fragmented and unstable political climate? In this essay I build on the argument advanced in *The American Warfare State*: I suggest that a constitutional framework built on liberal principles like separation of powers and democratic accountability has failed to reliably limit power or uphold the rule of law—and that evidence of the tilt toward a more authoritarian alternative has been apparent for many decades. Although previous administrations upheld verbal affirmations of liberal democratic norms, neither discourse nor institutional procedures alone guarantee fidelity to human rights and legal imperatives.

### Keywords

Empire, Militarization, Trump, US Foreign Policy

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The 2016 American presidential election has fueled ongoing speculation about the viability of liberal democracy and the post-World War II global order. For more than a half century, Washington has held the moral high ground in its discourse about democratic norms, transparency and human rights. Meanwhile, American statecraft has been governed by a prevailing rationality to maintain economic and political hegemony and shape the global order by exercising hard and soft power throughout the world.<sup>1</sup> However, the US faces increasing challenges making other states comply with its agenda, and it has declined precipitously in its international standing. NATO members are shaken by the US president's reluctance to affirm a pledge of reciprocal defense. US exit from the Paris accords on climate change, rejection of a nuclear pact with Iran, and the president's refusal to condemn (or admit) Russian interference in the 2016 election have ruptured the international system and eroded faith in global stability, democracy and elections throughout the world. Meanwhile, pundits, scholars and others have expressed alarm about the weakening of traditional international alliances, the abuse of ethics in government, lack of fidelity to the rule of law and celebration of authoritarian behavior.

The trends provoke fears that the waning US hegemon is destroying the international system that has kept the world more stable since 1945, while catapulting the plight of racial, ethnic and religious minorities into particularly sharp focus. Yet, while the US has withdrawn from multilateral institutions and endorsed isolationist ("America first") rhetoric, the Pentagon's military footprint remains outstretched in every corner of the globe. The US is still engaged in decades-long wars in Iraq and Afghanistan. Meanwhile, in 2016, the president ordered a cruise missile attack on Syrian government forces without congressional approval or legal justification; continued support for the Saudi-led coalition's war in Yemen that has fueled one of the world's worst humanitarian crises; and issued threats of "fire and fury" against North Korea raising the alarming prospect of nuclear war. Cold War-era arrangements empowering presidents to identify and eliminate threats by deploying the nation's vast military arsenals, its invasive intelligence apparatus and even its nuclear stockpiles have faced little meaningful or sustained challenge from either political party.<sup>2</sup>

While the 2016 election has hastened and highlighted the erosion of liberal democratic norms, this slippage is not simply the result of a particular election, administration, policy or program. Rather, US presidents since World War II have promoted democracy, open markets and free trade by wielding gargantuan military arsenals and undertaking widespread surveillance of ordinary citizens. Many historians and legal scholars argue that the Cold War era gave rise to a permanent "state of executive exception" to the normal constitutional order—thus signifying the nation's sustained deviation from the rule of law, civil liberties and human rights in national

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<sup>1</sup>For example, see Johnson, Chalmers (2001) *Blowback: The Costs and Consequences of American Empire*. 4<sup>th</sup> printing ed. New York, NY: Holt; Bacevich, Andrew (2010) *Washington Rules: America's Path to Permanent War*. New York, NY: Metropolitan Books.

<sup>2</sup> While there are some a few signs of resistance, most of these efforts thus far are largely symbolic. For instance, the US House offered a resolution to cut off support for the Saudi government's war on Yemen, but House leadership stripped the resolution of privileged status (which would have required a floor vote). Meanwhile, the prospect of nuclear exchange with North Korea provoked discussion of resolutions forbidding the president from ordering a nuclear attack without express congressional approval. However, these resolutions may not have majority support.

security realms.<sup>3</sup> What is unprecedented today, then, is not so much the betrayal of liberal norms, but rather the degree to which liberal discourse has yielded to tacit and explicit support for authoritarian tactics and the extent to which liberal democratic principles, institutions and values are simultaneously being abandoned by large parts of the American population.<sup>4</sup>

To reflect on the decline of American influence in the geopolitical sphere, its internal fracturing and polarization, atrophying commitment to liberal democratic values and persistent tendency to confront global conflicts with military solutions raises crucial questions about whether American empire is sustainable, and whether it is in fact worth sustaining.<sup>5</sup> First, how is it that a nation founded on liberal principles such as checks and balances, limited powers and individual rights has come to embrace its opposite—that is, virtually unbounded executive authority to stamp out security threats without regard for legal and ethical limitations? Second, what does an executive monopoly on a militarized national security state portend for liberal democratic institutions in an increasingly polarized, fragmented and unstable political climate?

In *The American Warfare State*, I argue that the nation's unprecedented military mobilization during World War II created new political and economic interests in military spending and war that constitutional framers did not anticipate.<sup>6</sup> I found that, in subsequent decades, large defense budgets were not only a response to heightened national security concerns, but also an integral component of many local and regional economies—particularly in geographically remote areas that lack diverse economies. Meanwhile, the public burdens historically associated with large military establishments

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<sup>3</sup> For several notable examples, see Scheppelle, Kim (2004) “Law in a Time of Emergency: States of Exception and the Temptations of 9/11,” 6 *PA J. Const. L* 1001; Ackerman, Bruce (2010) *The Decline and Fall of the American Republic*. Cambridge, MA: President and Fellows of Harvard College; Ackerman (2004) “The Emergency Constitution,” 113 *Yale Law Journal* 1029; Ely, John Hart (1993) *Constitutional Lessons from Vietnam and Its Aftermath*. Princeton, NJ: Princeton University Press; Fisher, Louis (2004) *Presidential War Power*. 2nd ed. Lawrence, KY: University Press of Kansas; Koh, Harold Hongju (1990) *The National Security Constitution: Sharing Power after the Iran-Contra Affair*. New Haven, CT: Yale University Press; Rudalevige, Andrew (2006) *The New Imperial President: Renewing Presidential Power after Watergate*. Ann Arbor, MI: University of Michigan Press; Schlesinger, Arthur M., Jr. (2004 [1973]) *The Imperial Presidency*. New York: Houghton Mifflin; Owens, John E. (2006), “Presidential Power and Congressional Acquiescence in the ‘War’ on Terrorism: A New Constitutional Equilibrium?” *Politics & Policy* 34: 258–30.

<sup>4</sup> On declining support for liberal democracy, see Hunter, James Davison and Carl Desportes Bowman (2016) *The Vanishing Center of American Democracy: The 2016 Survey on American Political Culture*, Charlottesville, VA: Institute for Advanced Studies in Culture, 18; Brown, Wendy (2003) “Neoliberalism and the End of Liberal Democracy,” *Theory & Event* 7:1; Hibbing, John R. and Elizabeth Theiss-Morse (2002) *Stealth Democracy: America's Beliefs About How Government Should Work*. New York, NY: Cambridge University Press. On explicit US support for authoritarian regimes, see Freedland, Jonathan, “Year One: Trump's Foreign Affairs,” *New York Review of Books*, November 16, 2017. (For instance, President Trump applauded the Philippines President Rodrigo Duterte for an anti-drug campaign that resulted in killings of thousands of minor dealers and users, congratulated the Turkish President Recep Tayyip Erdogan in the midst of a repressive state-led campaign arresting more than 100,000 Turkish citizens, dissolving the judiciary and suppressing the media and commended Egypt's president Abdel Faettah al-Sisi who has locked up tens of thousands of dissidents.

<sup>5</sup> McCoy, Alfred (2017) *In the Shadows of the American Century: The Rise and Decline of US Global Power*. Chicago, IL: Haymarket Books; Bacevich (2010).

<sup>6</sup> Thorpe, Rebecca U. (2014) *The American Warfare State: The Domestic Politics of Military Spending*. Chicago: University of Chicago Press.

and warfare shifted onto a small minority of military volunteers, future generations of taxpayers who will inherit the nation's war debts and foreign populations where US wars take place. These new arrangements encourage legislators to support large defense budgets, while freeing presidents to launch military actions without congressional authorization or democratic deliberation—an outcome that the constitutional framers feared and tried to prevent.

In this essay I build on the argument advanced in *The American Warfare State*: I suggest that a constitutional framework built on liberal principles like separation of powers and democratic accountability has failed to reliably limit power or uphold the rule of law—and that evidence of the tilt toward a more authoritarian alternative has been apparent for many decades. Although previous administrations upheld verbal affirmations of liberal democratic norms, neither discourse nor institutional procedures alone guarantee fidelity to human rights and legal imperatives—at least not without a more robust commitment to these ideals and a political environment where “law is valued as principle rather than tactic.”<sup>7</sup>

To make this case, I document patterns of executive lawlessness in the conduct of national security policy, with a particular emphasis on military interrogations and targeted killings in the George W. Bush and Barack Obama administrations. Though I emphasize twenty-first century practices, these precedents are not new. Rather, since Congress authorized a national security apparatus in 1947 and provided new financial incentives to maintain a permanent military-industrial base, both real and perceived security threats have rationalized the use of force and relaxed moral and legal standards that may otherwise constrain executive conduct. Moreover, the rise of a national security state equipped to kill suspects anywhere in the world and cipher intelligence through extra-legal channels developed democratically and with little coherent resistance. Far from “ambition... counteracting ambition,” the different branches and levels of government have come to perceive mutually overlapping interests in expanding the national security state, swelling executive prerogative, and pursuing foreign policy through martial means.<sup>8</sup>

As a result, an executive monopoly over a heavily militarized, clandestine national security establishment is routinely deployed without regard for human rights, civil liberties or nation-state sovereignty. The consequences today, in an especially fraught and fragile political climate, are two-fold: First, this arrangement allows presidents—however volatile, intemperate, or characteristically unfit—to pursue their military and intelligence policies as they please, while the most violent and degrading consequences are borne by ethnic or religious minorities and foreign populations in countries where US security operations take place. Second, these practices also systematically weaken America's democratic institutions, norms and values, rendering the regime more vulnerable to authoritarian challenges.

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<sup>7</sup> Quoting Brown (2003); also see Hunter, James Davidson, “Liberal Democracy & the Unraveling of the Enlightenment Project,” *The Hedgehog Review*, 19: Fall 2017.

<sup>8</sup> Quoting Madison, James (1787) “Federalist 51” in Rossiter, Clinton, ed. 2003. *The Federalist Papers*. New York, NY: Signet Classics; also see Thorpe (2014); Bacevich (2010).

## Executive Power & Lawlessness

US political institutions are organized against despotism and lawlessness.<sup>9</sup> However, since President Truman referred to the Korean War as a “police action” (using a semantic maneuver to explain the absence of a formal congressional declaration of war), post-World War II presidents have redefined and codified plenary executive war powers as consistent with the normal constitutional order—although administrations have done so to varying degrees and for different purposes.

Since the onset of the Cold War, presidents have conducted hundreds of military operations without authorization or public deliberation, promoted private armies, subverted legitimate and even democratic governments, abrogated principles of national sovereignty and undermined liberties codified in the Bill of Rights. The George W. Bush administration provoked particularly acute concerns about executive overreach after the attacks of September 11, 2001. The Bush administration expanded and legally rationalized many of the policies that were implemented covertly during the Cold War—including a broad cloak of executive secrecy, official military and CIA interrogation policies widely associated with torture, the use of targeted killings overseas, and an expansive legal dragnet of domestic surveillance.<sup>10</sup> Despite his vocal opposition to President Bush’s national security framework, the Obama administration retained many of the same strategies and aggressively expanded others, while repudiating several of the most egregious human rights abuses (e.g., official use of water-boarding (near-drowning) and other policies considered to be torture).<sup>11</sup>

Despite many of the sweeping powers exercised, US presidents never needed to disrupt democratic processes or dissolve political institutions in order to usurp new powers. Rather than acting as a check on executive power, post-World War II Congresses exploited new fiscal and military instruments to simultaneously restrict Soviet power (and later, combat international terrorism), advance the West’s political and economic models, and maintain the nation’s military-industrial and technological base.<sup>12</sup> Congress

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<sup>9</sup> While the American Constitution admits of instances where emergency government might be necessary, US constitutional provisions ensure that states of emergency are limited, defined and operate under the auspices of separation of powers principles. For instance, the Third Amendment prohibits the quartering of soldiers in households but carves out a wartime exception following a formal act of Congress. Article I, Section 9 limits *Congress*’ power to suspend habeas corpus (the right to challenge the basis of imprisonment) only to cases in which rebellion or invasion may require it.

<sup>10</sup> See Pfiffner, James P. (2006) “Constraining Executive Power: George W. Bush and the Constitution.” *Presidential Studies Quarterly* 38:1; Schuerman, William E. (2006) “Survey Article: Emergency Powers and the Rule of Law After 9/11,” *The Journal of Political Philosophy*, 14: 61-84; Owens (2006); Ackerman (2004); Rudalevige (2006). For exemplary accounts of Cold War policy see Blum, William (1995) *Killing Hope: Military and CIA Interventions Since World War II*, Common Courage Press; McCoy, Alfred W. (2006) *A Question of Torture: CIA Interrogation from the Cold War to the War on Terror*, New York: Metropolitan Books; Schlesinger (1973 [2004]). Also see below for further elaboration.

<sup>11</sup> Goldsmith, Jack (2012) *Power and Constraint: The Accountable Presidency After 9/11*, New York: W. W. Norton (arguing that the nation’s expansion of presidential power under George W. Bush traces back over two centuries and is largely codified by legislators, courts and media and the Obama administration).

<sup>12</sup> In every decade since World War II, the weapons industry has generated hundreds of billions of dollars per year, supplied millions of defense-sector jobs and tens of millions of “defense related” jobs. These figures do not include millions of uniformed military personnel or Department of Defense civilian employees stationed at the Pentagon, domestic military bases or overseas. On the importance of military investments for local, regional and even national economies, see Kennedy, David M. (2001), *Freedom*

authorized the National Security Council (NSC) as a White House forum for national security decisions, gave the new Central Intelligence Agency (CIA) untraceable funds to raise its own armies and conduct secret operations overseas, and invested hundreds of billions of dollars in military technologies each year to fuel the nation's military machine.<sup>13</sup> Presidents have capitalized on these resources by exercising virtually unbounded "emergency" powers and redefining their own legal authority, even after each specific threat receded or disappeared—the very outcomes that institutional arrangements were designed to prevent.

## **Military Interrogations & Human Rights**

Although the United States has a long, sordid history of torture, from convict leasing in the Jim Crow South to US war crimes during the military occupation of the Philippines, these brutal practices were not centrally controlled or directly monitored by the top levels of government. After the nation established a large Pentagon footprint to fight the Cold War, military and CIA interrogation techniques widely associated with torture became "centralized, systematized and rationalized."<sup>14</sup> Most notoriously, the Bush administration Department of Justice issued secret memoranda to authorize torture, euphemistically called "enhanced interrogation," against suspected terrorists captured or implicated in the "war on terror."<sup>15</sup> The leaking of the Bush memos and the lurid photographs of the atrocities committed at the Abu Ghraib prison outside of Baghdad drew attention to the government's use of coercive interrogation in Iraq, Afghanistan, Guantanamo Bay, its covert "black sites" operated by the CIA, and the practice of extraordinary rendition, where prisoners are sent to be tortured by governments such as Egypt, Syria and Jordan.<sup>16</sup> Although Abu Ghraib has become a notorious symbol of abuse, intelligence agencies routinely outsource interrogation to foreign nations in order

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*From Fear: The American People in Depression and War.* New York, NY: Oxford; Wright, Gavin (1986). *Old South: New South: Revolutions in the Southern Economy Since the Civil War.* New York, NY: Basic Books; Markuson, Ann, Peter Hall, Scott Campbell, and Sabina Deitrick (1991) *The Rise of the Gunbelt: The Military Remapping of Industrial America.* New York, NY: Oxford University Press; Ledbetter, James (2011), *Unwarranted Influence: Dwight E. Eisenhower and the Military-Industrial Complex.* New Haven, CT: Yale University Press; Katznelson, Ira (2013). *Fear Itself: The New Deal and the Origins of Our Time.* New York, NY: W.W. Norton; Thorpe (2014).

<sup>13</sup> The National Security Act of 1947 established a National Security Council (NSC), created the office of Secretary of Defense to unify the military departments and made the air force a separate service. Two years later, Congress passed the CIA Act of 1949, which exempts the Agency from disclosing its "organization, functions, officials, titles, salaries, or numbers of personnel employed." The Act also authorized a classified black budget for overseas operations.

<sup>14</sup> Quoting Mayerfeld, Jamie (2007), "Playing by Our Own Rules: How US Marginalization of International Human Rights Law Led to Torture," *Harvard Human Rights Journal* 20: 99; also see Blum (1995), McCoy (2006) for a brutal history of CIA and military actions and interrogation practices post-World War II.

<sup>15</sup> Memorandum from Jay Bybee and John Yoo in Office of the Assistant Attorney General to Alberto Gonzalez, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. Section 2340-2340A, August 1, 2002, accessed at: [news.findlaw.com/wp/docs/doj/bybee80102mem.pdf](http://news.findlaw.com/wp/docs/doj/bybee80102mem.pdf)

<sup>16</sup> Mayer, Jane (2008), *The Dark Side: An inside Look at How the War on Terror Turned into a War on American Ideals.* New York, NY: Doubleday (see chapter 6-7 on "outsourcing torture" and black sites); Amnesty International (2006), *Below the Radar: Secret Flights to Torture and "Disappearance,"* accessed at <http://www.amnesty.org/en/library/info/AMR51/051/2006/en>

to obtain information in the war on terrorism. US court precedents weakening evidential standards and constitutional protections against torture have reinforced these practices.<sup>17</sup>

To simultaneously condemn torture and legitimize current practices as consistent with existing law, the Bush documents redefined policies commonly considered torture and devised semantic exemptions from national and international legal frameworks. The sanitized language of “enhanced” interrogation provided a legal black hole for near-drowning (water-boarding), sleep deprivation, stress positions, attack dogs, forced nudity, sexual humiliations, extreme temperatures and hypothermia, despite instances of permanent injury or death.<sup>18</sup> To evade a series of US anti-torture statutes, the administration claimed that these practices are legally defensible as long as the victim’s suffering is not the interrogators’ “specific intent,” suggesting that interrogators may not be culpable unless their actions are demonstrably sadistic.<sup>19</sup> The administration circumvented international law prohibiting the abuse of “prisoners of war” under the Geneva Conventions by reclassifying prisoners as “enemy combatants.”<sup>20</sup> The Office of Legal Council also argued that aliens abroad are not guaranteed rights and privileges in the Fifth and Eight Amendments of the US Constitution, which prohibit the deprivation of liberty without due process, compelled self-incrimination, and cruel and unusual punishment, respectively.<sup>21</sup> Meanwhile, the administration maintained that the president’s power as commander-in-chief of the armed forces admits of no constitutional limitation aside from funding restrictions that legislators might impose.<sup>22</sup>

Although the Obama administration retreated from this view of plenary presidential power and outlawed torture techniques, the president found alternative legal rationales to conduct overseas military operations unilaterally. President Obama announced an open-ended war against the Islamic State (ISIS) in September 2014, but

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<sup>17</sup> These practices also blur legal distinction between terrorism and criminal justice cases. See Condon, Jenny-Brooke (2008) “Extraterritorial Interrogation: The Porous Border Between Torture and U.S. Criminal Trials,” 60 *Rutgers Law Review* 647-704.

<sup>18</sup> These abuses are well documented by Amnesty international, as well as legal and human rights scholars. For the critical accounts grounded in positive and natural law, see Waldron, Jeremy (2005) “Torture and Positive Law: Jurisprudence for the White House,” 105 *Columbia Law Review* 1681-1750; Mayerfeld, Jamie (2016) *The Promise of Human Rights: Constitutional Government, Democratic Legitimacy, and International Law*. Philadelphia, PA: University of Pennsylvania Press; Scheppele (2004). For empirical documentation, see Owens (2006); Pfiffer (2005); Levinson 2006 ed.; American Civil Liberties Union (2006), *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad*, accessed at [http://www.aclu.org/safefree/torture/torture\\_report.pdf](http://www.aclu.org/safefree/torture/torture_report.pdf). For a defense of (non-lethal) torture techniques in the war on terrorism, see Dershowitz, Alan (2002) *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, New Haven: Yale University Press.

<sup>19</sup> Bybee-Yoo Memorandum 2002; for a detailed account also see, Mayerfeld (2016).

<sup>20</sup> For meticulous treatment on the US violation of international law, see Paust, Jordan (2005) “Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees,” 48 *Columbia Journal of Transnational Law* 811; for a contrasting argument, see Paulsen, Michael Stokes (2009) “The Constitutional Power to Interpret International Law,” 118 *Yale Law Journal* 1762 (arguing for the supremacy of the US Constitution, national sovereignty and the president’s emergency powers as limiting factors in the application of international law).

<sup>21</sup> See Waldron (2005); Mayerfeld (2007, 2016); Condon (2008).

<sup>22</sup> This view of plenary executive war powers is commonly associated with John Yoo, the Deputy Assistant Director of the Office of Legal Council during the George W. Bush administration. See Yoo, John (2005) *The Powers of War & Peace: The Constitution and Foreign Affairs After 9/11*. Chicago, IL: University of Chicago Press; Yoo, John (1999) “The Misuse of History in the War Powers Debate,” 70 *U. Colorado L. Rev.* 1169-1222.



failed to obtain congressional approval for his military campaign within the next 60 days as required by the 1973 War Powers Resolution. While he claimed to act “consistently with the War Powers Resolution,” he asserted that the Authorizations for Military Force (AUMFs) that Congress passed in 2001 against al-Qaeda and 2002 against Saddam Hussein also authorized the new war against ISIS—even though ISIS and its predecessor, al-Qaeda in Iraq, did not exist at the time of the authorization. According to one estimation, the Obama administration dropped at least 26,171 bombs in seven majority-Muslim nations in 2016 alone—many of which fell outside of any legally recognized US battlefield.<sup>23</sup>

The Trump administration has expanded Obama’s readiness to initiate bombing campaigns, air strikes and ground raids outside of formal US war zones in order to accomplish the president’s foreign policy objectives, while also resurrecting the view of plenary executive power most notoriously implemented by the Bush administration. While Trump also promised to bring back torture during his presidential campaign, simply continuing the practice of extraordinary rendition—where suspects are transported to countries with weak due process laws for interrogation and imprisonment—provides a less visible alternative.<sup>24</sup> According to the Senate Intelligence Report on CIA interrogation programs, President Clinton first approved extraordinary rendition for Bosnian terror suspects who were tortured in Egyptians prisons where they were transferred.<sup>25</sup> The Bush administration expanded the practice, routinely transporting suspects from CIA black sites in places such as Pakistan and Morocco. Barack Obama also sent detainees to third world countries for imprisonment, although there is no public evidence that abusive interrogation methods were employed. President Trump will likely reinforce this trend, as indicated by his commitment to work with countries like Russia—a nation guilty of notorious war crimes in Syria and Chechnya—in order to interrogate captives associated with terrorist networks.

Presidential scholar Edward Corwin ominously forecasted the Orwellian maneuver to legally codify an unlimited scope of action in 1947, reflecting that, “[The] inherent [presidential] power theory logically guarantees the *constitutional adequacy of the war power by equating it with the actual power of the nation in waging war*. It makes the full power of the nation constitutionally available.”<sup>26</sup> Most legislators refuse to challenge the executive’s national security policies, and few Americans are directly affected.

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<sup>23</sup> See Benjamin, Medea, “American dropped 26,171 bombs in 2016,” *The Guardian*, January 9, 2017, accessed at <https://www.theguardian.com/commentisfree/2017/jan/09/america-dropped-26171-bombs-2016-obama-legacy>

<sup>24</sup> Landay, Jonathan and Mark Hosenball, “Trump May Reinstate Secret Black Site Prisons,” *Reuters*, January 25, 2017, accessed at <https://www.reuters.com/article/us-usa-trump-prisons/trump-may-reinstate-secret-cia-black-site-prisons-u-s-officials-idUSKBN15922L>

<sup>25</sup> Report of the Senate Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Interrogation Program, S. Report 113-288, Washington, DC: Government Printing Office, December 9, 2014.

<sup>26</sup> Corwin, Edward (1947) *Total War & the Constitution*. New York, NY: Knopf, 37 (italics in original).

## Targeted Killings

Rather than dismantling President Bush's controversial national security framework, Barack Obama scaled back highly visible wars in Iraq and Afghanistan while extending the aerial battlefield further into Syria, Pakistan, Yemen, Somalia and Libya. In doing so, he expanded the more clandestine counterterrorism tactic of eliminating individual suspects through targeted assassinations.

Targeted killings refer to “the intentional slaying of a specific individual or group of individuals...with explicit governmental approval.”<sup>27</sup> The White House and NSC formulate a list for kill/capture raids or strikes from unmanned aerial vehicles (UAVs), which are executed by CIA or Joint Special Operations Command (JSOC) forces from remote locations based on classified intelligence information. These raids and strikes take place outside of any sphere of judicial protection or military chain of command.<sup>28</sup> While unmanned aerial vehicles (drones) were combat-ready during the Vietnam War and crucial to the US interventions in 1995 Balkans crisis and 1999 Kosovo War, drone technologies transformed the nature of warfare during the war on terrorism.

In 2004, President Bush initiated a CIA-operated drone campaign in the Federally Administered Tribal Areas of Pakistan, which culminated in 46 drone strikes directed at killing “high-value” targets. By the end of 2013, the Obama administration launched an additional 360 strikes in Pakistan alone.<sup>29</sup> All told, President Obama signed off on 563 aerial strikes outside of recognized battlefields—10 times more than his predecessor did.<sup>30</sup> To situate these actions with a legal framework, the Obama administration claimed that the 2001 Authorization for Use of Military Force implicitly permits military strikes aimed to kill terrorist targets, regardless of their physical location or actual involvement in the 9/11 attacks. Obama's Attorney General Eric Holder and State Department legal advisor Harold Koh defended a “kill list” that included the American citizen and Islamic cleric Anwar al-Awlaki as constitutionally permissible, despite laws of warfare prohibiting the intentional killing of religious officials.<sup>31</sup>

In 2017, the Trump administration dismantled the few rules and regulations governing drone strikes and ground raids outside of US war zones that the Obama administration established. First, the administration expanded license to conduct targeted killings by elite military forces and the CIA to include foot soldiers without any special training. Second, the regime lifted vetting procedures for drone assaults and ground

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<sup>27</sup> Buckley, Ahmed (2012) “Smiting Spell: The Legality of Targeted Killings in the War Against Terrorism,” *Journal of East Asia and International Law* 5: 39.

<sup>28</sup> Alson, Philip (2011) “The CIA and Targeted Killings Beyond Borders,” 2 *Harvard Natl Sec Journal* 283.

<sup>29</sup> See Bill Roggio and Alexander Mayer's database, accessed at <http://www.longwarjournal.org/pakistan-strikes.php>; also see Gregory, Derek (2011) “From a View to Kill: Drones and Late Modern War,” *Theory, Culture & Society* 28:188; Shaw, Ian Graham Ronald and Majed Akhter (2012) “The Unbearable Humanness of Drone Warfare in FATA, Pakistan,” *Antipode* 44: 1492

<sup>30</sup> The figures do not include air strikes in Syria, Iraq, Libya and Afghanistan. See Purkiss, Jessica and Jack Serle, “Obama's Covert Drone War in Numbers: Ten Times More Strikes Than Bush,” *The Bureau of Investigative Journalism*, January 17, 2017, accessed at <https://www.thebureauinvestigates.com/stories/2017-01-17/obamas-covert-drone-war-in-numbers-ten-times-more-strikes-than-bush>.

<sup>31</sup> Shaw (2012, 1505).

raids.<sup>32</sup> Under these new criteria, the US has dramatically increased the use of drones in Somalia and Yemen, while continuing to conduct drone attacks in Pakistan—all regions outside of official US battlefields.

Meanwhile, after two years of US support for Saudi Arabia’s blockade and bombing campaign in Yemen, extreme food and fuel shortages, a cholera epidemic and massive displacement have developed into what UNICEF, the World Food Program, and the World Health Organization have called one of the worst humanitarian crises in the world.<sup>33</sup> Meanwhile, the Saudi’s blockade prevents the delivery of fuel, food and humanitarian relief. Although the US House of Representatives voted to say that it has not authorized war in Yemen, the House did not withdraw funding or do anything to end the conflict.<sup>34</sup> Instead, the Trump administration continues to aid Saudi bombers while the number of aerial assaults in Yemen shot up at least 250 percent.<sup>35</sup> At the same time, the administration relaxed restrictions on the military’s use of force against Shabaab fighters in Somalia, while also expanding its targeting to include the Islamic State. According to the Council of Foreign Relations, the Trump administration has already surpassed his predecessor in the use of drone warfare outside of official battlefields, averaging one attack or raid every 1.25 days (compared to one attack every 5.4 days under Obama).<sup>36</sup>

The absence of a legal regime or formal disclosure mechanisms for targeted killings meet the criteria defined by Kim Scheppelle and Giorgio Agamben as a “state of exception.”<sup>37</sup> In this formulation, judicial protections of law are suspended and the sovereign assumes plenary authority to preserve the community in the face of existential threat. Clandestine drone warfare outside of formal warzones operates on the margins of international and national law, while simultaneously expanding the geographic space of war. Geographer Derek Gregory labels this phenomenon “the everywhere war,” characterizing a global war that is “infinitely extendible,” including not only the Afghanistan-Pakistan region where terrorist networks seek safe haven, but also U.S.-Mexican border threatened with “insurgent” drug cartels and traffickers.<sup>38</sup>

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<sup>32</sup> “Trump Looking to Loosen Obama Era Limits on Drone Strikes,” *Al Jazeera News*, September 22, 2017, accessed at <http://www.aljazeera.com/news/2017/09/loosen-obama-limits-drone-strikes-170922141205178.html>

<sup>33</sup> “When Food is Used as a Weapon” CBS News Report, November 19, 2017, accessed at <https://www.cbsnews.com/news/when-food-is-used-as-a-weapon/>

<sup>34</sup> H. Res. 599, Passed House on November 13, 2017 (stating that “Congress has not enacted specific legislation authorizing the use of military force against parties participating in the Yemeni civil war that are not otherwise subject to the Authorization of Use of Military Force (PL 107-40) or the Authorization of Use of Military Force in Iraq (PL 107-243)”).

<sup>35</sup> See reporting by Alexandra Gutowski, *The Long War Journal*, November 17, 2017, accessed at <https://www.longwarjournal.org/archives/2017/11/details-remain-vague-after-four-more-us-strikes-against-aqap-in-yemen.php>

<sup>36</sup> Zenko, Micah, “The (Not-So) Peaceful Transition of Power: Trump’s Drone Strikes Outpace Obama’s,” *The Council of Foreign Relations*, March 2, 2017, accessed at <https://www.cfr.org/blog/not-so-peaceful-transition-power-trumps-drone-strikes-outpace-obama>

<sup>37</sup> Scheppelle (2004); Agamben, Giorgio (2005) *State of Exception*, Chicago: University of Chicago Press; for the original formulation, see Carl Schmitt (1985 [1922]), *Political Theology: Four Chapters on the Concept of Sovereignty*. George Schwab trans., Cambridge, MA: MIT Press. (“Sovereign is he who decides on the exception.”)

<sup>38</sup> Gregory, Derek (2011) “The Everywhere War,” *The Geographic Journal* 177: 242.

Although drone strikes are marketed as “surgical, sensitive and scrupulous,” the strategy also perpetuates patterns of insurgencies and counter-insurgencies with civilian populations caught in the crossfire.<sup>39</sup> While available evidence suggests that drones increase the precision of military strikes and limit risks to civilian populations (compared to missiles and bombing campaigns), the potential for human error and the willingness to risk to innocent lives in order to eliminate high-level military targets puts civilians in considerable lethal jeopardy. Desensitizing language (“collateral damage”) and the Obama-era policy of counting all military-age males in combat zones as potential military targets dampen formally recognized risks to civilian populations and the official number of civilian deaths even more.

Despite legal and ethical objections, drone warfare is highly tempting from both a military and political perspective. Drones are cheaper to buy, maintain and operate than most military aircraft. Since pilotless aircraft are operated at remote distances far from an actual battlefield, they also reduce American casualties, troop counts and the risks for US military personnel. At the same time, these technologies further insulate Americans from the conduct of war. People are less invested in what the government does when they are not asked to sacrifice and American lives are not put in harms way. More than one in every ten Americans risked their lives during World War II, and nearly half a million Americans lost their lives. However, given the elimination of the draft, use of private military and security contractors and advances in military technologies, fewer than one in every thousand Americans fought in Iraq or Afghanistan. The intensification of drone strikes shrink these numbers even more. As fewer Americans are asked to sacrifice their lives or livelihoods in order to wage war, citizens increasingly disengage from foreign policy or even take notice of US military activities.<sup>40</sup>

## Conclusion

In the late eighteenth century, the architects of the US Constitution questioned whether popular sovereignty was sustainable if the people pursued nothing but their interests or refused to serve a common good. The republican experiment that resulted was premised on trust that individuals would embrace the value of popular sovereignty, uphold (at least) thin understandings of civic virtue, accept standards for public deliberation and judgment such as empiricism, logic and truth and hold the separate branches of government accountable based on these criteria. If citizens or their political leaders abandon the institutions and values on which the regime is premised then political authority and legitimacy are vulnerable to collapse.

While our current political moment is particularly precarious, the drift toward consolidated power and lawlessness has deep roots in the national security architecture authorized in 1947 and reinforced after September 11, 2001. Kim Scheppele, Bruce

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<sup>39</sup> Quoting Gregory (2011, 239).

<sup>40</sup> Mueller, John (1973) *War, Presidents and Public Opinion*. New York, NY: John Wiley and Sons; Mueller, John (2005) “The Iraq Syndrome.” *Foreign Affairs* 84:44–45; Grose, Christian R., and Bruce I. Oppenheimer (2007) “The Iraq War, Partisanship, and Candidate Attributes: Variation in Partisan Swing in the 2006 U.S. House Elections.” *Legislative Studies Quarterly* 32:531–57; Kriner, Douglas L. and Francis X. Shen (2010) *The Casualty Gap: The Causes and Consequences of American Wartime Inequalities*. New York, NY: Oxford University Press.

Ackerman, Ira Katzenelson and other excellent scholars identify the Cold War and attacks of September 11, 2001 as catalysts fomenting an era of permanent emergency and suspension of normal practice, which undermine separation of powers, international law, and human rights. Unlike its European allies, the US sought refuge in expansive executive powers and a sprawling military umbrella in order to meet the new perils of communism and international terrorism. The response signifies not only nation's divergent reaction to centralized authority in wake of Nazism and horrors of fascism, but also reflects Americans' widely shared interests in perpetuating a national security state, regardless of the destabilizing consequences.<sup>41</sup>

Our political institutions failed to prevent a consolidation of executive power over matters of war and defense because members of Congress and a majority of voters perceive shared benefits from these arrangements. More broadly, this outcome reveals that governmental forms are not inherently self-regulating—that is, institutional arrangements do not guarantee that interests will clash (upholding checks and balances) or that they will cede to reason, law or the common good (promoting stability and compromise). Rather, unforeseen geopolitical, economic, and social changes promote new interests and alliances that wreak havoc with self-regulating interests and competitive branches.<sup>42</sup> In the case of the national security apparatus, the resulting distortion—executive authority to stamp out security threats without regard for legal and ethical limitations—reflects the durability of governmental forms void of broader commitment to the goals they were meant to achieve. Meanwhile, the nation's domestic politics are ironically driven by the rancorous partisan and “plebiscitary” goals that the framers loathed and sought to avoid.<sup>43</sup> Moreover, presidents never needed to co-opt power by dissolving Congress and courts or obstructing democratic processes. Rather than jealously guarding defense resources and preventing the executive from monopolizing force, legislators freely delegate resources and authority for presidents to achieve their goals militarily. These arrangements facilitate new forms of lawlessness that both modern and classical thinkers equated with elected despotism.

This failure of liberal democratic institutions should not be understood as an isolated incident, but as a symptom of a larger failure to implement structural remedies to social, political and, ultimately, human, problems. Unlike fascist regimes and military dictatorships, the American government maintained its formal constitutional arrangements throughout the Cold War, after the attacks of September 11, 2001, and (as of this writing) in the Trump era. However, while the US Constitution has nimbly adjusted to accommodate extensive reinterpretations without appearing to fail, new

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<sup>41</sup> See Thorpe (2014); Bacevich (2010).

<sup>42</sup> Most prominently, see Mills, C. Wright (1956 [2000]) *The Power Elite*. New York: Oxford University Press.

<sup>43</sup> See Madison, Federalist 10 in Rossiter (2003) (on the “turbulence,” “contention” and “violence” of pure democracy); Skowronek, Stephen (1997) *The Politics Presidents Make: Leadership From John Adams to Bill Clinton*. Revised ed. Cambridge, MA: Belknap Press (describing the changing bastion of support for the presidency); also see Wilentz, Sean (2005) *The Rise of American Democracy: Jefferson to Lincoln*. New York, NY: W.W. Norton (on the rise of American democracy); Wood, Gordon (1993) *The Radicalism of the American Revolution*. New York, NY: First Vintage Books, 369 (on the rejection of elite virtue and embrace of popular democracy in the early years of the republic); Lee, Frances (2016) *Insecure Majorities: Congress and the Perpetual Campaign*. Chicago, IL: University of Chicago Press (on partisan competition for power).

political pressures empower presidents to purge suspected enemies by operating outside of the law for an indefinite duration—an outcome that a liberal regime of checks and balances was meant to prevent. The US has coherently maintained its democratic institutions while “extending American power as if the country [was] still engaged in total warfare”<sup>44</sup> because most Americans perceive benefits from the security umbrella that the military establishment provides—regardless of illiberal, inhumane and otherwise intolerable costs borne elsewhere.

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<sup>44</sup> Katznelson (2013, 409). (“Acting with wide discretion...specialized, often insular agencies built military might, oversaw the multiplication of atomic weapons, pursued intelligence, and practiced covert action, all in the name of liberal democracy. Premised on the assumption that the United States was freedom’s indispensable guardian, these organizations extended American power as if the country were still engaged in total warfare.”)