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Beyond Humanity: How to Control America's Use of Force

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- American debate about war has long been limited to how war is fought rather than whether and for how long it should be fought. This is a critical omission.
- Some critics of torture and other abuses in the conduct of recent American wars hoped their efforts would discourage the United States from going to war altogether. Yet it is clear, two decades into the "war on terror," that their strategy has failed and might even have prolonged U.S. wars in the greater Middle East and elsewhere.
- Political leaders and policy reformers should devote new attention to controlling the use of force, in particular by hewing to the rules for starting and continuing war as set forth by the Constitution, Congress, and international law.

Since September 11, 2001, American policy in matters of war has abandoned the restraints in the U.S. Constitution and international law, with grievous results not merely for wrongful victims of war (such as the abused captives in Guantánamo Bay or civilians killed in drone strikes) but also for those whom the laws governing how war is conducted were never devised to protect. In focusing exclusively on harms to abused captives and civilians killed as "collateral damage," American debate has ignored a wider set of wrongs. These include the death and injury of fighters themselves on both sides, including long-term post-traumatic stress; the fate of populations under increasing surveillance and constant threat of force; and the enormous costs of an "endless war" footing that whole societies must bear. In the American case, these costs come to trillions of dollars.

With rare exceptions, debate has focused in the honorable but wrong place: on making the conduct of war less brutal and more plausibly legal.[1] In the later years of George

[1] For further elaboration, see my forthcoming *Humane: How America Invented a New Form of War*. Farrar Straus and Giroux. 2021.

W. Bush's administration, the United States sought to make his war on terror more humane while lending it greater legitimacy; the harshest treatments of detainees, notably those fairly considered torture, were eliminated. The ironic result was that the war on terror endured. Endless war was elaborated during the presidency of Barack Obama, with its pivot away from heavy-footprint interventions to light– and no-footprint operations involving armed drones, standoff missiles, and special forces. Surprisingly, the same pattern has continued under President Donald Trump. His rhetoric of brutality and his contradictory promises to bring troops home notwithstanding, Trump has adopted no dramatically new methods while intensifying many of the conflicts he inherited.

The most chilling dynamic was that the focus on how captives were treated during the Bush years raised complications that the Obama administration escaped by choosing to take no prisoners and kill from above. A concern for humane treatment perversely drove a commitment not to end war but to make it less offensive and less visible. If any public debate driven by advocacy groups, critical journalists, and legal observers crystallized around these choices, it usually concerned whether too many civilians were dying—not whether the enterprise itself was strategic, lawful, or ethical. The government and its critics agreed to dispute the manner of the war, not its endurance or spread.

Under the last three administrations, American policymaking has been consumed so exclusively by a debate about *how* to fight that it has missed the more important considerations as to *whether*, *where*, and *how long* to fight. The quest to make war humane—the principal concern of critics of the early war on terror—has made it neither effective, legal, nor right, even as it has insulated this 19–year war from close scrutiny as to its fundamental purpose.

Politicians have come to blows over torture, not war; activists raise consciousness of civilian casualties, not of costs to whole societies; and the public takes its leaders' word that wars are just and necessary so long as they are conducted humanely. "I believe the United States of America must remain a standard-bearer in the conduct of war," Obama remarked, to great acclaim, when he accepted the Nobel Peace Prize in late 2009 after less than a year in office.

Recent events show, however, that more and more Americans understand that the greater "humanity" of America's wars is not the best framework for evaluating their legitimacy. In law and policy, controlling the decision to use force in the first place is more fateful than how precisely force is used once unleashed. No amount of attention to the rules of detention and targeting that have consumed American lawyers and policymakers is too much. But the American pattern since September 11th has been to conduct a partial referendum on endless war as if a tiny minority of those most outrageously affected by excess—captive soldiers and innocent civilians—were the only stakeholders.

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Beyond the rules of conduct in war, there is another body of law—along with the more important constraints of morality and policy—that governs whether force is initiated and continued. Whether war starts and is sustained is a decision that affects far more people, and therefore deserves far more attention, than

what happens in the course of it. If American policy reincorporated its historic emphasis on limiting the use of force, it would ultimately supersede the struggle to moderate the conduct of hostilities by preventing most war from having to be waged at all.
This Quincy Brief lays out how the United States arrived in a condition of endless if comparatively humane war. It then turns to recommendations to change the focus of policy and the institutions that make war.

How We Got Here

In the past 30 years, American civil society groups, whether founded before or after September 11, 2001, have prioritized limiting crimes committed in the course of waging war rather than stopping the initiation and continuation of war. But efforts to make U.S. wars humane, while sometimes effective on their own terms, have failed to restrain war itself. At best, they leave unaddressed the more profound problem of the existence of war. At worst, they help to prolong U.S. wars to the point that they become endless.

The emphasis of these groups was a choice that occurred in recent history.

The U.S. Constitution assigns Congress the legal authority to initiate and continue war. The president exercises only limited emergency powers in war and peace, alongside his role as commander-in-chief of the armed forces. International law imposes rigorous constraints on the use of force across borders. Americans were instrumental in incorporating these constraints into the United Nations Charter, drawn up at San Francisco in the summer of 1945. Absent Security Council authorization, the Charter requires that force be used only in self-defense, meaning in response to an ongoing armed attack or an imminent threat of attack.

At the end of World War II, it was obvious that what needed control, first and foremost, was the resort to force. Adolf Hitler and his senior officials were not stigmatized primarily for their atrocities; the principal crime for which Nazis were tried and punished was starting wars. The United Nations Charter is premised on the need to avoid "the scourge of war"; it does not mention the need to humanize the conduct of war. "Once the evil of war has been precipitated, nothing remains but the fragile effort … to limit the cruelty by which it is conducted," observed Herbert Wechsler, among the great American legal scholars of the time, in explaining why the International Military Tribunal at Nuremberg slighted the issue of atrocities during war. "Of these two challenges, who will deny that the larger offense is the unjustified initiation of a war?"[2]

America did not, however, adhere to its own priorities in 1945 during the Cold War; shockingly, it failed to revert to them at the Cold War's end, too.[3] Often with understandable horror at civilian death tolls in civil wars abroad, the "problem from hell" in the 1990s was said to be war crimes rather than war itself. Reversing its stance from 1945, the U.S. foreign policy establishment settled upon the solution of waging more war, sometimes in the name of humanitarian protection.

In the later Cold War years, civil society groups such as Human Rights Watch began monitoring conflicts for compliance with applicable standards of international humanitarian law governing the conduct of hostilities. By design, such groups did not comment on the justice or propriety of going to war, except sometimes to endorse great-power intervention on humanitarian premises. This position was in sharp contrast to the antiwar politics that spiked in the late 1960s. But the focus on war itself waned with the end of the Vietnam War in 1973 and has since proven intermittent and peripheral. After September 11, 2001, groups such as the Center for Civilians in Conflict, founded in 2003, were more successful in gaining the attention of elite opinion makers than were sporadic bursts of antiwar protest, such as the demonstrations prompted by the invasion of Iraq the same year. Civil society professionalism was often taken to imply the rejection of concern with the initiation or continuation of war.

The same pattern obtained among those educating as among those mobilizing. Curricula in universities, law schools, and policy schools reflected an assumption

2 Wechsler, Herbert. "The Issues of the Nuremberg Trial." *Political Science Quarterly* 62 (1947): 17.
3 Moyn, Samuel, and Stephen Wertheim. "The Infinity War." *Washington Post.* December 13, 2019.

that the correct focus for training idealists for lives of professional reform was on disasters that occurred once war began. In international relations, the initiation and continuation of war were no longer the central issue they had been in the middle of the twentieth century. A post–Vietnam "peace studies" framework went into academic decline. Associated with an antiwar movement that was unpopular among experts and useless for professional credentialing, the peace studies discipline was replaced by fields such as humanitarian and human rights studies, which typically bracketed questions concerning why states go to war and how to prevent and end war. As a result, the ethics and law of war's initiation and continuation were slighted, even when interventions were not considered necessary and just.

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During President Bill Clinton's presidency, erosions of domestic and international constraints in the course of small wars appear in retrospect to form a pattern in the making. In interventions in Somalia and Kosovo and in early attempts to pursue al–Qaeda, the United States treated domestic and international rules with pronounced legerdemain, with the support of the national security community. Events after September 11th took American military deployments to an extraordinary new level. Strikingly, neither civil society nor educational priorities shifted. The concern with how war is conducted remained the focus not only after 1989 but also after 2001, as great powers increased their uses of cross-border force.

The major debates that swirled around post–2001 American wars concerned methods and tactics, especially those (such as torture) that rightly ought to be considered beyond the bounds of acceptable conduct. When the Bush administration launched its war on terror, and after the Iraq invasion proved so destructive, critics of the Bush administration had a choice: Would they oppose merely the excesses of wars they fundamentally accepted or felt they could not challenge, or would they take on the wars themselves? Almost all opted for the former approach.

There were three groups that, while admirably opposed on principle to torture and other detention-related excesses in the Bush years, simultaneously chose not to engage the war on terror itself. Fatalists saw no practical hope in opposing that war or war in general, even if they might wish political circumstances allowed them to oppose war and make an impact. For them, the available improvement was war's humanization. As an example, the Center for Constitutional Rights shifted for several years to an exclusive concern with how the war on terror was fought. A storied set of lawyers who (quite unlike mainstream international human rights organizations) had brought litigation to test the legality of American wars in the 1980s and 1990s, the center decided that attempts to constrain American war were hopeless.[4]

A second group was more optimistic about the prospects for containing American force but resolved to so do indirectly—sometimes in atonement for failing to oppose hostilities as they began. Their strategy was to stigmatize America's inhumane conduct as a more consensual but roundabout approach to stigmatizing American war. The choice of this group was fraught, for it reflected a gambit that shaming atrocity might undermine war-making while avoiding any association with more extreme or fringe challenges to American military policy. However honorable, this strategic choice failed, succeeding only in removing a bug in what proved an enduring program.

The third and largest group across party lines embraced the need for and propriety of the war, if waged more humanely. Many liberal internationalist foreign policy

[4] For details and a broader rereading of ethical and strategic choices in the early war on terror, see Moyn, *Humane*, chap. 7.

experts were able to join forces with hawkish patriots such as the late Senator John McCain, who abhorred the mistreatment of prisoners but saw ongoing traditions of American war as just, necessary, and wise. Alas, not only rule-of-law conservatives but also most liberal opinion makers and politicians formed a consensus, as Obama came to power, that American war needed simply to be liberated from its most grievous excesses. They did not address the paradox that their efforts to make the war more humane might help expand it in scope and extend it in time. For some in this group, making war sustainable might have been the point.

It is a common assumption that the worst mistake made in these years was a failure to oppose the Iraq war as it loomed in 2002–3. But a long year later, in 2004–5, as the occupation of Iraq went south, another catastrophic decision was made. The three groups converged on the choice to indict only the inhumanity of American war and thereby helped to normalize the war itself.

The convergence during the later Bush years and entrenched in the Obama administration was for a "humane" form of ongoing war that made its continuation even less subject to constitutional and international limits than it had been previously. The Bush-era abuses, such as detainee mistreatment at Guantánamo, torture and other excesses at CIA black sites, and secret "renditions" to cooperating nations, drew massive and understandable attention. But the probable illegality of the Afghan intervention in 2001, the unquestionable illegality of the Iraq intervention in 2003, and self-serving interpretations of domestic and international constraints with regard to drone strikes and the wars in Libya and Syria were comparable transgressions that drew no comparable opprobrium.[5] This disparity also enabled a shift, begun in the final Bush years and massively expanded under Obama, to avoid the complications of treating captives humanely by instead killing targets from the sky or with small teams of special forces. Starting in the Bush years and climaxing under Obama, a syndrome took hold: the embrace of constraints on *how* to use force served to abet, excuse, or legitimate the erosion of constraints on whether to initiate or continue the use of force.

In domestic law, the two Authorizations for the Use of Military Force resolutions Congress passed in the aftermath of September 11th have been stretched

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to cover two decades of global interventions. The controversial War Powers Resolution, passed in the wake of the Vietnam War, has been interpreted to remove virtually all constraints, most notably during the NATO intervention in Libya the Obama administration conducted.[6] The Bush and Obama presidencies saw confirmation of a carte blanche approach to presidential authority to intervene abroad, with no legal limits imposed by the president's lawyers in a series of permission slips issued by the Office of Legal Counsel. Under the independent constraints of international law, those same lawyers, like those at the State Department, developed new doctrines to justify using force in the face of looming but speculative threats. These were deeply at odds with the United Nations Charter

[5] The Afghan intervention, while broadly consensual internationally, skirted the rule that intervening in a state to engage nonstate threats requires attributing the activities of nonstate actors to the state in question. The Iraq intervention escalated United Nations Security Council resolutions into authority for military invasion and regime change, an interpretation rejected by a vast majority of observers. The Libyan intervention converted international authorization to protect civilians into a warrant for regime change. The attacks on the Islamic State on Syrian territory saw the invention of a new doctrine according to which states "unwilling or unable" to control threats emanating from their territories are subject to lawful force.

[6] See, e.g., Ackerman, Bruce. "Legal Acrobatics, Illegal War." *New York Times*. June 20, 2011.

framework. Obama's lawyers agreed with Bush's more notorious doctrines: that an "imminent" danger of armed attack either was unnecessary to justify war-making or could come in chronologically "elongated" form.[7] This finding was like interpreting a rule demanding caution to allow the riskiest behavior, reversing the meaning of the rule the better to disregard it.

No other power in our time, compared with the United States, has so extensively perverted the once-constraining notion of self-defense into a license to make war. Not only has the price been high for Americans as well as non–Americans; U.S. actions also set precedents for other powers to use and abuse. Russia, in particular, has cited American flexibility with respect to international rules back to the 1990s in justifying its own adventurism abroad, notably its intervention in Crimea in 2014.[8]

How to Control Force

The United States should reorient its policies and institutions to control the use of force. To accomplish this, it is crucial to pursue an interlocking series of policy innovations. None will work alone, and all depend on a newly configured relationship between policy experts and civil society—and, even more, a restless electorate that voted for restraints on force in 2008 and 2016 only to see war become endless instead. Such reform would revive the best American traditions and would be consistent with fundamental international aspirations. It would also lend substance to Trump's generally hollow insistence, in his State of the Union address in 2019, that "great nations do not fight endless wars," and to the rhetoric of Joe Biden, his Democratic opponent this year, in his main foreign policy statement as a candidate. "It is past time to end the forever wars," the former vice-president wrote this spring.[9]

The most immediate and obvious proposals involve strengthening the hand of institutions that can check presidential war-making, above all Congress. Such measures should work in tandem with the reinvigoration of currently ineffective international legal and institutional checks on any country's power to wage war, as well as the reorientation of civil society to stress the problem of war-making in its initiation and continuation, not merely in its manner.

Those who seek to end endless war (however humanely fought) must address the dynamic that modern war—and perhaps modern governance as a whole—favors executive self-assertion and incentivizes deference by other branches of government. But there is nothing to stop Congress from reclaiming its constitutional responsibility to declare war—which, in any case, it exercises through its spending powers. (In December 2019, Congress passed its most recent National Defense Authorization Act with near unanimity, allocating around $750 billion to the military.)

In spite of current legislative compliance, our moment looks more and more propitious, intellectually and politically, to increase pressure on elected officials to return to the Founders' original assignment of war-making powers to Congress (limiting the executive to commanding forces whose missions are legislatively authorized, other than in emergency circumstances). "Originalist" scholars once insisted that presidentialism was written into our constitutional order, making restraint solely the project of "living constitutionalists." Today, conservatives as much as progressives are concerned by an executive branch run amok and have shown that the imperial presidency has evolved far beyond the institution's original design.[10]

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7 See, e.g., Goldsmith, Jack L. "Obama Has Officially Adopted Bush's Iraq Doctrine." *Time*. April 6, 2016.

8 The brazen annexation that followed could draw on no such precedent. Putin, Vladimir. "Address by the President of the Russian Federation." March 18, 2014.

9 Biden, Joseph R., Jr. "Why America Must Lead Again." *Foreign Affairs*. March/April 2020.

10 Prakash, Saikrishna. *The Living Presidency: An Originalist Argument against Its Ever–Expanding Powers*. Harvard University Press. 2020.

There have been growing signs for years that more and more members of Congress wish to assert constitutional limits or restore the relevance of the War Powers Resolution. Under President Trump, in the face of U.S. participation in the bloody proxy war in Yemen begun under Obama, both houses of Congress approved a

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resolution in April 2019 halting U.S. participation in the war. The resolution was not veto-proof and was indeed vetoed, but it was a major development, as the first War Powers Resolution passed by both houses in Congress that was intended to remove forces already engaged in hostilities. The U.S. assassination in January 2020 of Qassem Soleimani, Iran's top military commander, also led a number of former officials in the Obama administration, in spite of its record, to insist on the need for limits on executive war-making power.[11]

The Vietnam-era War Powers Resolution should also be strengthened. Almost from the day it was passed, there have been proposals to revise this instrument, which proved faulty in practice even before it was entirely skirted on later occasions.[12] To make it work effectively, Congress should amend it to shorten the clock that can tick on intervention before Congress's support is required—perhaps to two weeks, from the current sixty days—and more narrowly define "hostilities" to foreclose claims that there are some forms of intervention (such as airstrikes, as in Libya in 2011) that presidents can lawfully undertake on their own.

The judiciary may have a role to play, especially in tandem with a more activist Congress that alters standing rules that have historically undermined recourse to the courts. A string of congressional and civil society suits to enforce the War Powers Resolution, notably in the 1980s, have generally come to grief over the dubious judge-made doctrines.[13] Most recently, Capt. Nathan Smith, an Army intelligence officer stationed in Kuwait at the time, brought suit against Obama in May 2016, arguing that the war against the Islamic State was illegal because the president acted without congressional authorization. All such suits have failed—in Capt. Smith's case without even an opinion at the appellate stage.[14] Though one should not expect any grand change in the outcomes of cases of this kind, the more suspicious attitude of some judges toward the current president in other areas suggests that lawsuits such as Capt. Smith's are worth a try. More than this, they raise awareness of vital questions even when they fail. They were, indeed, important parts of the now-lost political legacy of the antiwar movement of the Vietnam era. This legacy is worth reviving.

Aside from a growing consensus around Congressional responsibility, legal scholar Oona Hathaway has suggested the creation of an Office of Legal Counsel within Congress that, like the executive branch's version, would allow its members an independent view of its constitutional responsibilities and international law alike.[15] The point of this reform would be to generate legal advice separately from the president's own staff, breaking the monopoly in government that the executive currently enjoys on the legality of its own actions. A duel

11 Pomper, Stephen. "The Soleimani Strike and the Case for War Powers Reform." *Just Security.* March 11, 2020.

12 See Ely, John Hart. *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath.* Princeton University Press. 1993; "Policy Roundtable: The War Powers Resolution." *Texas National Security Review.* November 14, 2019.

13 See, most notably, Dellums v. Bush, 752 F. Supp. 1141 (1990), in which 54 members of Congress came close to overcoming standing and political question limitations, only to be blocked on grounds that their suit was premature. As experts have widely recognized, the judge-made political question doctrine in this context has left no check on the transformation of the executive into precisely the kind of unconstrained power the American Founders found worrisome.

14 Smith v. Trump, D.C. Circuit Court of Appeals. July 10, 2018.

15 Hathaway, Oona. "National Security Lawyering in the Post–War Era: Can Law Restrain Power?" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530588. Hathaway also suggests giving Congressional committees a mechanism to request legal explanations from the executive branch and standing to sue in the courts.

during a crisis between legal offices in the executive and legislative branches—even if only a minority of lawmakers opposed the president's intervention on policy grounds—could provide leverage

that does not now exist. And it would create a paper trail of disputes over limits, compared with the stream of permission slips for expanding and extending war that the president's Office of Legal Counsel has generated in recent decades. Crucially, alternative interpreters might do better with the international law constraints that have also been liquidated by the president's staff.

The Trump era has led to the widespread recognition that the president should not be above the law. But above the law is exactly where prior administrations have left the institution when it comes to his most momentous power that the Constitution allocates—the power over war and peace. Today, any president can go to war without legislative authorization, and have his staff rationalize it as legal even so.

Conclusion

The current presidential campaign and next presidential administration present a unique opportunity in our lifetimes to supplement a proper concern for how America fights wars with the greater priority to control whether wars begin in the first place and how long they last.

As the political campaigns that preceded the last two presidencies illustrated, America's wars without end have fed a reservoir of exasperation and fatigue among voters that continues to grow.[16] Those who fail to prioritize reform in this area face the prospect of electoral loss, and for the good reason that war itself, not only the way it is waged, rightly remains a touchstone of political legitimacy in the twenty-first century.

[16] Moyn, Samuel, and Stephen Wertheim. "The Long Road to Trump's War." *New York Times*. April 10, 2017.