

TRUMP’S IMPERIAL PRESIDENCY: “HE WHO SAVES HIS COUNTRY DOES NOT VIOLATE ANY LAW”

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I. INTRODUCTION

Initially coined by Arthur M. Schlesinger Jr. in his landmark book of the same title, the term “Imperial Presidency” has been part of the American political and legal lexicon for over half a century. In using that term, Schlesinger was warning about the appropriation by modern Presidencies of “powers reserved by the Constitution and by long historical practice to Congress”¹ which could lead to a serious challenge to the American system of checks and balances. Already in 1973, he cautioned that the American President had become “the most absolute monarch (with the possible exception of Mao Tse-tung of China) among the great powers of the world.”²

His book, published just a year before Richard Nixon left the White House in disgrace, tackled the presidency at a moment in American history when discourse on the President’s powers was at a record high. It was argued that “there could hardly be a more timely subject for illumination by a historian.”³

Unfortunately, the term continues to permeate academic circles because the threat Schlesinger highlighted—namely, the potentially dangerous nature of a powerful and unchecked executive branch—has grown. And during the second Trump presidency, it has evolved into its most alarming iteration, culminating in an administration which—in the President’s words—believes that “[h]e who saves his Country does not violate any Law.”⁴

1. Arthur M. Schlesinger, Jr., *The Imperial Presidency* Foreword to the 1973 Edition (Mariner Books 2004).

2. *Id.*

3. Harold A. Larrabee, *The Imperial Presidency by Arthur M. Schlesinger, Jr.*, 47 New England Quarterly 1, 1:132, (Mar. 1974), available at: <https://www.jstor.org/stable/364334>.

4. Donald J. Trump [@POTUS], [Instagram post], (Feb. 15, 2025), <https://www.instagram.com/p/DGHLjAnRXFP/> (“He who saves his Country does not violate any Law.”).

Whilst it was once argued that the Nixon era was the ultimate moment to examine the phenomenon of the imperial presidency, today is an even more appropriate time for that analysis. Since Schlesinger's publication, the theory he discussed has been further developed by successive presidencies, which keep pushing the bounds of the powers granted to the executive.⁵ To simplify that progression, this note argues that it can be broken down into distinct eras.

Schlesinger documents historical precedents for the imperial presidency in what this note calls the "zero era" and then explains how the Nixon Presidency and the War in Vietnam characterized the first era of the imperial presidency. The second era began after September 11, 2001, a period during which every president, from George W. Bush to Joe Biden, utilized Authorizations for Use of Military Force to wage largely unchecked military expeditions. Most recently, the Presidency of Donald Trump has ushered in a third era of imperial presidency, in which the executive branch has declared itself fundamentally unhindered by domestic and international law.

This paper examines that third era, specifically through the lens of Trump's campaign against Venezuelan civilian watercraft,⁶ arguing that in this operation, his administration ceased to respect restrictions by which previous presidencies, even imperial ones, believed themselves to be bound. Part I explains the theory of the Imperial Presidency and discusses the earlier eras of the phenomenon. Part II discusses how the Trump administration developed rhetoric surrounding Venezuelan drug cartels to justify military strikes against civilian watercraft. Part III examines and debates legal and political justifications offered by the current regime in support of its actions. Part IV shows why the arguments offered by the Trump administration

5. See generally Ryan C. Hendrickson, *Obama at War*, University Press of Kentucky, 22-23, (2015), available at: <https://www.jstor.org/stable/j.ctt14tqd3g.4> (documenting five cases of U.S. military action during Obama's presidency); see also Gene Healy, *The Imperial Presidency and the War on Terror*, Cato Pol'y Rep., Mar./Apr. 2006 ("Since the start of the war on terror, the (George W.) Bush administration has singlemindedly [sic] advanced the view that, in time of war, the president is the law, and no statute, no constitutional barrier, no coordinate branch of the U.S. government can stand in the president's way when, by his lights, he is acting to preserve national security.").

6. This note could likely expand its argument by looking at the 2026 conflict in Iran; the author holds that the Iranian conflict underscores everything written here. However, the author also believes that by focusing on a single conflict, he can better highlight the processes through which the second Trump presidency created a third era of Imperial Presidency. If those processes were repeated in the decision to attack Iran, the author believes they likely confirm these arguments.

are indicative of it being an imperial presidency. Part V concludes with a short discussion of what can be done to prevent the latest Imperial Presidency from permanently harming the country.

II. THE HISTORY OF THE IMPERIAL PRESIDENCY

A. *The Zero Era (The American Revolution Through Vietnam)*

While it was Vietnam and the Nixon administration that inspired Schlesinger to write about the phenomenon of the “imperial presidency,” he did not believe that the concentration of power in the hands of the executive was a sudden revelation or one that occurred in a vacuum. He admitted “that Watergate and the Vietnam War were not isolated aberrations but the long-building climaxes of rampant presidential power that had been set in the direction of abuse soon after the office commenced its operations in 1789.”⁷

Thus, in writing his book, Schlesinger examined hundreds of years of precedent, exploring how history contributed to the development of the modern imperial president. He looked at the Pacificus-Helvetius debate, the Locke-Jefferson doctrine, and other conversations to inform his perspective. Analyzing the whole text of his book would make this note a dissertation, yet it is worth noting a few of Schlesinger’s key claims. For example, regarding the Founding Fathers’ rejections of imperial presidency, he argued that,

The Founders were determined to deny the American President what Blackstone had assigned to the British King—the sole prerogative of making war and peace.” Even Hamilton, the most consistent advocate of executive centralization, proposed in the Convention that the Senate “have the sole power of declaring war” with the executive to “have the direction of war when authorized or begun.”⁸

Looking beyond the founding, Schlesinger examines the ebbs and flows of Presidential power in foreign policy, starting with Lincoln’s actions during the Civil War, Congress’s subsequent pushback against the Executive, and the gradual, steady increases in Presidential authority throughout the Second World War and the Korean War.

7. Louis W. Koenig, *Reassessing the “Imperial Presidency”*, 34 *Proceedings of the Academy of Political Science* 2, 31-32, (1981), available at: <https://www.jstor.org/stable/1173789>.

8. Schlesinger, Jr., *supra* note 2, at 3.

Examining Lincoln's grasping of power to protect the unity of the nation—a high point of Presidential authority—other authors have also noted that his grasp of power was along the lines of what one would expect from a tyrant. Dennis J. Hutchinson, for example, starts his piece, “Lincoln the ‘Dictator’” by stating that “[t]he godfather of despotism” is a charge that “has haunted Abraham Lincoln from the advent of the Civil War to the wake of his bicentennial.”⁹

But Schlesinger notes that Lincoln showed that, in an “indisputable crisis, temporary despotism was compatible with abiding democracy.”¹⁰ He adds that, “it cannot be forgotten that Lincoln’s assertion of the war power took place in the context of domestic rebellion and under the color of a most desperate national emergency,” and that Lincoln “never pretended to the nation that these were merely the routine powers of the Presidency.”¹¹

Lastly, he comments that nor did Lincoln “suppose that national policy was his personal prerogative, to be decided without consultation or constraint.”¹² This final note is significant, given the almost casual regularity with which modern presidents have claimed national security as a justification for unilateral executive action.

Moving on to Schlesinger’s look at the Second World War, a section he calls “[t]he Presidency Resurgent,” we see that, initially, at the outbreak of WWII, the White House was severely constrained by Congress.¹³ But by the end of the war, Presidential power reached a new peak.

Immediately before the start of WWII, a pair of landmark judicial decisions—*U.S. v. Curtiss-Wright Corporation et al.*, and *U.S. v. Belmont*—provided some guidance on executive authority. *Curtiss-Wright* famously quotes Justice Marshall’s 1800 speech, stating, “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”¹⁴ The Court ultimately held that a delegation of legislative power to the President could be

9. Dennis J. Hutchinson, *Lincoln the Dictator*, 55 S. D. L. REV. 284, 285 (2010).

10. Schlesinger, Jr., *supra* note 2, at 65.

11. *Id.* at 65-66.

12. *Id.* at 66.

13. See *Id.* at 100, (noting that prior to WWII, when the President sought the repeal of the arms embargo because he thought war to be imminent, the request was rejected with one Senator going so far as to offer a sharp rebuke, stating, “[w]e are not going to have a war . . . Germany isn’t ready for it . . . I have my own sources of information”).

14. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936).

sustained on the ground that the subject matter was related to foreign policy.

Schlesinger highlights the impact of the ruling, saying “[t]he Court thus did in foreign policy what it had been reluctant to do in domestic policy: it affirmed the existence of an inherent, independent and superior presidential power, not derived from the Constitution and not requiring legislation as the basis for its exercise.”¹⁵

Meanwhile, in *Belmont*, an admittedly lesser-known case, the Court addressed “international compacts” unilaterally made by the President and distinguished them from treaties requiring Senate consultation. In the decision, Justice Sutherland argued that “[a] treaty signifies ‘a compact made between two or more independent nations with a view to the public welfare.’ But an international compact, as this was, is not always a treaty which requires the participation of the Senate.”¹⁶ Schlesinger says that *Belmont* was a potent decision, laying the groundwork for the concept of executive agreements as legal instruments while not establishing their limits.¹⁷

World War II, the most significant crisis to face the United States since the Civil War, predictably saw other signs of increasing Presidential power, such as Roosevelt’s flat statement to Congress that, should they not repeal it, he would refuse to enforce a provision of the Emergency Price Control Act.¹⁸ Yet, Roosevelt often restrained himself and notably acquiesced to Congress when it initially refused to go to war.

However, especially when compared with WWII, the Korean War would be a watershed moment. Schlesinger points out the most significant glaring deviation, stating:

The most visible sign of growing presidential imperialism was the transfer of the power to go to war from Congress to the executive. Ten years after Roosevelt told France that only Congress could make military commitments, President

15. Schlesinger, Jr., *supra* note 2, at 102-03.

16. *United States v. Belmont*, 301 U.S. 324, 330 (1937).

17. See Schlesinger, Jr., *supra* note 2, at 103-04, (“While he could have argued that the executive agreement under consideration derived its force from the presidential power to recognize foreign governments, Sutherland did not thus limit the range of his approval. Instead he blessed the executive agreement in general as an instrument legal in power and not clearly limited in applicability.”).

18. See Schlesinger, Jr. *supra* note 2, at 116 (“Even if his thesis was not put to test—and Roosevelt, being Roosevelt, no doubt knew he had the votes before he made the challenge—it was still an extraordinary assertion of presidential power.”).

Harry S. Truman . . . sent American forces to war on his own.¹⁹

One analysis of the chain of events that led to the Korean War notes that, “[t]he flaccid congressional response to Truman’s violation of the Constitution was an omen of how subsequent Congresses would fail to defend the war power that the founders explicitly entrusted to the legislative branch.”²⁰

Schlesinger points out that the decision to avoid Congressional approval for the invasion of Korea was well-informed, made only after deliberations within the Executive Branch. Secretary of State Dean Acheson—advising Truman—argued that, historically, Presidents had unilaterally sent American forces into combat 87 times, that “[t]he President, as Commander in Chief of the Armed Forces of the United States, has complete control over the use thereof,” that there was a “traditional power of the President to use the armed forces of the United States without consulting Congress,” and that this had often been done in “the broad interests of American foreign policy.”²¹

During the Korean War, there was some resistance against unilateral Presidential action, most visible in *Youngstown Sheet & Tube Company v. Sawyer*. There, SCOTUS struck down Truman’s attempt at averting a workers’ strike by seizing domestic steel mills. The case is best known in legal circles for Justice Jackson’s concurrence, which established a three-zone system for categorizing the quality of a President’s authority on a given subject and stated that when a President “takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.”²²

In *Youngstown*—despite the Truman administration’s attempts at framing it otherwise—the Court decided the issue at hand was a domestic one and ignored arguments attempting to frame Truman’s efforts “as an exercise of the President’s military power as Commander in Chief.”²³ Yet, it has also been argued that, as a 6-3 decision, “it was ominous that three justices were willing to ratify the president’s outrageous action. The incident itself confirmed that potential abuses

19. Schlesinger, Jr., *supra* note 2, at preface.

20. Ted Galen Carpenter, *Congress Missed Its Chance to Strangle the Imperial Presidency in Its Cradle*, Cato Inst. (Aug. 11, 2018), <https://www.cato.org/commentary/congress-missed-its-chance-strangle-imperial-presidency-its-cradle>.

21. Schlesinger, Jr., *supra* note 2, at 132-33.

22. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, concurring).

23. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (Jackson, concurring).

of power by an imperial presidency would not be confined to foreign affairs.”²⁴

Ultimately, at the end of the Korean War, the American presidency reached a new level of supremacy in foreign policy, unilaterally entering military conflicts, actively avoiding congressional authorization, and issuing executive agreements that bound the nation in foreign policy without requiring Senate consultation. This set the stage for Vietnam.

B. *The First Era*

1. *Johnson and Vietnam*

Lyndon Johnson took over the Presidency not only amid the chaos of John F. Kennedy’s assassination but also during national anti-Communist fervor. Kennedy had dispatched advisory teams across the world, but with fewer than 100 American casualties, and ostensibly with Congressional acquiescence, few members of the public realized what was happening overseas.²⁵ That began to change as Johnson sent 22,000 troops into the Dominican Republic, ostensibly to rescue Americans, but actually to implement a policy of preventing Communist expansion into the Western Hemisphere.²⁶ And then quickly afterward came Johnson’s decision to send American troops into Vietnam.

Schlesinger points out that there were no serious precedents for Johnson’s decision to commit combat troops to Vietnam. Roosevelt’s Atlantic policy in 1941 had not sent Americans into combat; Truman’s decision in Korea used a UN resolution which conferred international legality; Kennedy’s secret actions in response to the Cuban missile crisis were due to an immediate threat to national security; and even Johnson’s own decision to send troops into the Dominican Republic at least used a pretext of an alleged imminent threat to American lives.²⁷

24. Ted Galen Carpenter, *Congress Missed Its Chance to Strangle the Imperial Presidency in Its Cradle*, Cato Inst. (Aug. 11, 2018), <https://www.cato.org/commentary/congress-missed-its-chance-strangle-imperial-presidency-its-cradle>.

25. See Schlesinger, Jr., *supra* note 2, at 177 (noting the dispatch of approximately 16,000 military advisors under Kennedy and stating that “there were few American deaths—fewer than 100 during the Kennedy Presidency—and Congress agreed with the policy anyway; so American involvement in actual fighting drew little notice”).

26. Schlesinger, Jr., *supra* note 2, at 178. (“Johnson’s real reason, as he soon revealed, was that ‘we don’t propose to sit here in our rocking chair with our hands folded and let the Communists set up any government in the Western Hemisphere.’”).

27. *Id.* at 179.

As for the Tonkin Gulf Resolution—the joint Congressional resolution authorizing President Johnson to use military force in Vietnam without a declaration of war—questions about its basis in misinformation or possible deception notwithstanding,²⁸ it undeniably granted Johnson almost unprecedented power.

The Resolution ambiguously stated that Congress approved and supported “the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”²⁹ The vagueness left much open to executive interpretation. Professor Christopher McKnight Nichols noted that the Resolution’s “open-ended structure... set the ball in motion for arguably the worst intervention in U.S. military and diplomatic history,” while Professor Matthew Jagel argued that it “was not only signed under a shade (and false pretense), but it abrogated congressional oversight of war in Vietnam to the executive. The result was eight years of devastation for the United States and former French Indochina.”³⁰

A minor counterpoint that Schlesinger and others gloss over is that Congress “became especially upset” because Johnson got the “Resolution passed on information that was later proved to be highly misleading,” and that Congress ultimately repealed that resolution.³¹ However, the damage was admittedly done. In addition to signaling a new era of Presidential power to commit troops into combat arbitrarily, the decision to proactively invade Vietnam showed a new era in American foreign policy because it altered the understanding of the President’s power to respond to attacks.

In 1787, when the Founding Fathers reserved for the President the power to repel sudden attacks, ‘the world was

28. See Andrew Glass, *Congress Asked to Back Vietnam Strikes, Aug. 6, 1964*, POLITICO, (Aug. 6, 2010), available at: <https://www.politico.com/story/2010/08/congress-asked-to-back-vietnam-strikes-aug-6-1964-040723> (“Some historians have accused Johnson of misleading the public in a bid to gain support for his policies on Vietnam. Recently released classified testimony casts doubt on reports that the Vietnamese actually fired on the U.S. vessels. Privately, Johnson had voiced his own qualms. He told George Ball, the undersecretary of state who opposed escalating the war, “Those sailors out there may have been shooting at flying fish.””).

29. *Gulf of Tonkin Resolution*, Pub. L. No. 88-408, 78 Stat. 384 (1964).

30. *The 10 Best and 10 Worst U.S. Foreign Policy Decisions: Gulf of Tonkin Resolution*, Council on Foreign Rel. (2026), <https://www.cfr.org/ten-best-ten-worst-us-foreign-policy-decisions/gulf-of-tonkin-resolution/>.

31. Thomas E. Cronin, *A Resurgent Congress and the Imperial Presidency*, 95 POL. SCI. Q. 209, 212 (1980).

a far larger place, and the framers probably had in mind attacks upon the United States,” but the decision to commit troops to Vietnam meant “warfare anywhere on earth could, if the President so judged, constitute an attack on the United States and thereby authorize him to wage ‘defensive’ war without congressional consent.”³²

2. *Nixon and Cambodia*³³

After Richard Nixon became President, he took the logic of Johnson’s administration and pushed it further, claiming that his role as Commander in Chief gave him the right to invade Cambodia under the pretext of protecting the lives of American service members.³⁴ Nixon paid lip service to Congress, assuring “the American people that this President is going to bend over backward to consult the Senate and consult the House whenever he feels it can be done without jeopardizing the lives of American men,” but then adding a caveat, that “when it is a question of the lives of American men or the attitudes of people in the Senate, I am coming down hard on the side of defending the lives of American men.”³⁵

Ultimately, with the help of then Assistant Attorney General William Rehnquist, Nixon, . . . equipped himself with so expansive a theory of the power of the Commander in Chief and so elastic a theory of defensive war that he could freely, on his own initiative, without a national emergency, without reference to Congress, as a routine employment of unilateral executive authority, go to war against any country containing any troops that might in any conceivable circumstance be used in an attack on American forces.³⁶

Following Johnson in another alarming fashion, Nixon often dismissed and ignored the opinions of counselors. One of Johnson’s advisors, for example, had been warned at one point that “disagreement really bothers this President. He is going to do what you

32. Schlesinger, Jr., *supra* note 2, at 184.

33. In order to focus on foreign policy, this paper largely skips over issues such as Nixon’s domestic surveillance policies, attempted misuse of the Central Intelligence Agency, and Watergate.

34. Schlesinger, Jr., *supra* note 2, at 187-88 (stating that Nixon, in announcing the invasion of Cambodia, said “[t]he legal justification . . . is the right of the President of the United States under the Constitution to protect the lives of American men”).

35. *Id.* at 189.

36. *Id.* at 192.

dislike anyway; so let's not upset him by having an argument in front of him."³⁷

Nixon was similar, essentially cutting the State Department out of policy discussions in favor of direction from then-Assistant for National Security Affairs Henry Kissinger. Concerning Cambodia, "sprung his unilateral decision on [his advisors] as well as on the world."³⁸ "Nixon, instead of exposing himself to the chastening influence of debate, organized the executive branch and the White House in order to shield himself as far as humanly possible from direct question or challenge—i.e., from reality."³⁹

Lastly, outside the realm of foreign policy, a look at Nixon's imperialist tendencies would be incomplete without mentioning the Watergate scandal. Dr. Philip Kurland—a consultant to the Senate Judiciary Committee at the time and one of the legal scholars who reviewed the Watergate tapes before saying that the transcripts supported impeachment⁴⁰—reflected on the lesson to be learned from Watergate. He stated that "We can readily say that the evils revealed were the failure of our system of checks and balances to inhibit the imperial presidency and the abuse of governmental institutions for the personal gratification of the President."⁴¹

C. *The Second Era (Post-9/11 and the Global War on Terror)*

1. *George W. Bush and Iraq*⁴²

By the late 1990s, it appeared that the imperial presidency might be coming to an end. In the introduction to Schlesinger's 2004 edition, he noted that "President Bill Clinton was on the ropes, facing a special prosecutor and impeachment. The presidency appeared a stricken institution in grave trouble."⁴³ Then came the most violent and devastating terrorist attack in American history, a day which set the

37. *Id.* at 185.

38. *Id.* at 190.

39. *Id.* at 222.

40. David Binder, *Philip B. Kurland, 74, Scholar Who Ruled on Nixon Tapes*, NY TIMES (Apr. 18, 1996), <https://www.nytimes.com/1996/04/18/us/philip-b-kurland-74-scholar-who-ruled-on-nixon-tapes.html>.

41. Philip B. Kurland, *The Imperial Mandate*, 6 STUDENT LAWYER 45, 46 (1978).

42. Throughout this note, references to President Bush are to President George W. Bush, the 43rd President of the United States, not his father, George H.W. Bush, the 41st President.

43. Schlesinger, Jr., *supra* note 2, at preface.

United States upon a warpath from which it would not exit for decades: September 11th, 2001.

Schlesinger argued that “[t]he impact of 9/11 and of the overhanging terrorist threat gives more power than ever to the Imperial Presidency and places the separation of powers ordained by the Constitution under unprecedented, and at times unbearable, strain.”⁴⁴ The next twenty years of warfare proved him right.

Admittedly, comparisons between Johnson/Nixon and Bush/Obama are imperfect. The most notable difference is that, after 9/11, Congress passed the 2001⁴⁵ and 2002⁴⁶ Authorizations for the Use of Military Force (AUMF). Thus, whereas Johnson and Nixon largely acted unilaterally and cared little for Congressional authorization of their invasions, the post-9/11 presidencies at least had the guise of legislative approval. Despite this fundamental difference, two points remain.

First, like Johnson and Nixon, Bush also attempted to present his invasion under the guise of protecting American lives: “assertions that Iraq possessed WMD and had active ties to terrorist groups, including Al Qaeda, formed the core of the Administration’s case for invading Iraq.”⁴⁷

Second, while the White House secured Congressional approval to invade Iraq through the 2002 AUMF,⁴⁸ it quickly came to see the AUMFs as “an open invitation to indefinite hostilities.”⁴⁹ During the Bush administration, this reality was evident after the leak of Deputy Assistant Attorney General John Yoo’s “Memorandum Regarding the Torture and Military Interrogation of Alien Unlawful Combatants Held Outside the United States,” commonly referred to as the “Torture Memos.”

The Torture Memos presented arguments like those made—and rejected—in Youngstown. They postulated that, in any actions related to an ongoing conflict, the President’s authority as Commander-in-

44. *Id.*

45. S.J.Res. 23, 107th Cong. (2001), Pub. L. No. 107-40, 115 Stat. 224 (2001).

46. S.J.Res. 46, 107th Cong. (2002), Pub. L. No. 107-243, 116 Stat. 1498 (2002).

47. Kenneth Katzman, Iraq: Former Regime Weapons Programs and Outstanding U.N. Issues, (CRS Report No. RL32379, 2009).

48. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.J.Res.114, 107th Cong., 2002.

49. Haylee Richter, *Congress’s Role in Foreign Policy*, (SP2025.W74.LAW.522A.01 National Security Law, Professor Kathleen Clark, Feb. 6, 2025) (Thank you to Ms. Richter for her permission to use this quote.).

Chief enables them to take otherwise impermissible actions. Yoo stated,

...the President enjoys complete discretion in the exercise of his Commander-In-Chief authority in conducting operations against hostile forces ... In light of the President's complete authority over the conduct of war, in the absence of a clear statement from Congress otherwise, we will not read a criminal statute as infringing on the President's ultimate authority in these areas.⁵⁰

At one point, Yoo went even further. Speaking before the Senate Subcommittee on the Constitution in April 2002, he "expressed the administration's view: 'The President has the constitutional authority to introduce the U.S. Armed Forces into hostilities when appropriate, with or without specific congressional authorization.'"⁵¹

2. *Obama and the Global War on Terror*

Many Americans anticipated that the Obama White House would reverse course on the use of AUMFs and seek more Congressional guidance on foreign wars. This expectation was supported by statements delivered by Obama while a Senator, such as

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 ... In instances of self-defense, the president would be within his constitutional authority to act before advising Congress or seeking its consent ... history has shown us time and again, however, that military action is most successful when it is authorized and supported by the legislative branch.⁵²

However, Obama largely persisted on the path set by his forerunner. "Upon entering the White House, President Obama inherited the legacy of the George W. Bush administration and his

50. Memorandum from John Yoo, Deputy Assistant Attorney General, Department of Justice Office of Legal Counsel, to William J. Haynes II, General Counsel of the Department of Defense, *Regarding Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, (Mar. 14, 2003).

51. Gene Healy, *The Imperial Presidency and the War on Terror*, CATO Institute, (Mar./Apr. 2006), available at: <https://www.cato.org/policy-report/march/april-2006/imperial-presidency-war-terror#>.

52. Ryan C. Hendrickson, *Obama at War*, University Press of Kentucky, 22-23, (2015), available at: <https://www.jstor.org/stable/j.ctt14tqd3g.4>.

predecessors, who essentially claimed unilateral war powers for the commander in chief.”⁵³

Obama continued the wars in Afghanistan and Iraq and used the AUMFs to conduct military operations in additional countries. When asked about “the president’s argument [] for expanding the U.S. air campaign into Syria without congressional approval,” the White House responded to by stating that the “President may rely on the 2001 AUMF as statutory authority for the military airstrike operations he is directing against ISIL.”⁵⁴

The Obama White House also went further, entering conflicts unrelated to the Global War on Terror and thus not under the scope of the AUMFs. Among others, military operations were conducted against Somali pirates,⁵⁵ Joseph Kony and the Lord’s Resistance Army,⁵⁶ and most notably, Muammar Gaddafi’s regime in Libya. The lattermost operation, launched to enforce UN Security Council Resolution 1973,⁵⁷ began on March 19, 2011, and over the course of seven months, resulted in “some 7,725 [] air sorties with 397 different strikes as well as 145 predator drone attacks.”⁵⁸

The White House would offer a myriad of reasons for why its actions in Libya were legal, why the conflict was not a war, why it was merely a limited war, and why the War Powers Resolution authorized the attack.

Initially, Obama said that the attack was “authorized by the War Powers Resolution as an ‘emergency,’ defined as an imminent threat of a humanitarian catastrophe,” however, “[t]hreats to the lives of foreign nationals are not mentioned in the law as authorizing the use of force

53. Ryan C. Hendrickson, *Obama at War*, University Press of Kentucky, 24, (2015), available at: <https://www.jstor.org/stable/j.ctt14tqd3g.4>.

54. See Daniel R. DePetrus, A New AUMF: What Is the Obama Administration Afraid of?, HUFFINGTON POST, (Dec. 6, 2017), available at: https://www.huffpost.com/entry/a-new-aumf-what-is-the-ob_b_5815812.

55. Andrew J. Shapiro, *Remarks to the Atlantic Council*, (Oct. 26, 2012), Washington, DC, available at: <https://2009-2017.state.gov/t/pm/rls/rm/199927.htm>.

56. Press Release, The White House Office of the Press Secretary, *Fact Sheet: Mitigating and Eliminating the Threat to Civilians Posed by the Lord’s Resistance Army*, (The White House, Washington, DC), Apr. 23, 2012, available at: <https://obamawhitehouse.archives.gov/the-press-office/2012/04/23/fact-sheet-mitigating-and-eliminating-threat-civilians-posed-lord-s-resi>.

57. S.C. Res. 1973, U.N. SCOR, 6498th meeting, U.N. Doc. S/RES/1973 (2011).

58. Ryan C. Hendrickson, *Obama at War*, University Press of Kentucky, 61, (2015), available at: <https://www.jstor.org/stable/j.ctt14tqd3g.4>.

by the president.”⁵⁹ The Office of Legal Counsel would go on to say that “practice and precedent indicated that the president could undertake limited wars at his discretion. Neither the Constitution nor the War Powers Resolution was relevant since the war in Libya was legally speaking, not a ‘war.’”⁶⁰ And, the State Department “would argue that the conflict ‘was a limited war: limited in mission, exposure of U.S. troops, risk of escalation, and military means employed’ and hence, not subject to the strictures of the War Powers Resolution or the Constitution.”⁶¹

The numerous attempted justifications for the conflict should have raised suspicions in Congress, but “Congress did little concretely to stop the attacks. In particular, Congress did nothing to cut funding for the war,” and even after “the War Power Resolution’s 60-day limit on the use of force in Libya expired. Nothing much happened.”⁶² As the conflict continued, there was slightly more resistance, but ultimately, “although many resolutions were advanced, none can be viewed as a substantial limitation on the president’s ability to conduct the war in Libya.”⁶³

Thus, despite having been a post-Bush beacon of hope, Obama arguably continued the tradition of the Imperial President, refusing to back away from invoking the AUMFs and entering yet another conflict with little to no legislative oversight.

III. THE SETUP: RHETORIC, THREATS, AND “LEGAL” DESIGNATIONS

A. *Trump’s Campaign Promises*

Even before the start of Donald Trump’s second term in the White House, the future President made clear his intent to utilize the drug trade as a reason to take drastic action. On the campaign trail, candidate Trump made it evident that he believed the threat posed by

59. John Samples, Congress Surrenders the War Powers: Libya, the United Nations, and the Constitution, Cato Institute, 15 (2011), available at: <http://www.jstor.com/stable/resrep04877>.

60. John Samples, Congress Surrenders the War Powers: Libya, the United Nations, and the Constitution, Cato Institute, 14 (2011), available at: <http://www.jstor.com/stable/resrep04877>.

61. John Samples, Congress Surrenders the War Powers: Libya, the United Nations, and the Constitution, Cato Institute, 15 (2011), available at: <http://www.jstor.com/stable/resrep04877>.

62. Samples, *supra* note 60, at 16.

63. Hendrickson, *supra* note 59, at 61.

the fentanyl trade justified not only economic action against the nations from which the drug originated,⁶⁴ but also waging war and killing those whose drugs allegedly threaten American lives.⁶⁵

Upon taking office, Trump immediately sought to make good on his campaign promises. In less than a year, he intimidated the Canadian government, inducing it to label Mexican drug cartels as terrorist organizations.⁶⁶ He threatened the use of military force across the Mexican border⁶⁷ and drew rebuke from the Mexican government for his inflammatory language.⁶⁸

64. See Donald J. Trump, Truth Social, (Nov. 25, 2024), available at: <https://truthsocial.com/@realDonaldTrump/posts/113546215051155542> (“[T]housands of people are pouring through Mexico and Canada, bringing Crime and Drugs at levels never seen before . . . as one of my many first Executive Orders, I will sign all necessary documents to charge Mexico and Canada a 25% Tariff on ALL products coming into the United States . . . This Tariff will remain in effect until such time as Drugs, in particular Fentanyl, and all Illegal Aliens stop this Invasion of our Country!”); see also, Warwick J. McKibbin, *Trump’s threatened tariffs projected to damage economies of US, Canada, Mexico, and China*, Peterson Institute for International Economics, (Jan. 17, 2025), available at: <https://www.piie.com/blogs/realtime-economics/2025/trumps-threatened-tariffs-projected-damage-economies-us-canada-mexico> (“President-elect Donald J. Trump has made unusual threats to impose tariffs against Mexico, Canada, and China, not in response to economic disputes but rather to conflicts over illegal immigration and flow of drugs, especially fentanyl.”).

65. See Brooke Singman, *Trump Vows to Deploy Special Forces, Military Assets to “Inflict Maximum Damage” on Cartels*, Fox News (June 1, 2023), <https://www.foxnews.com/politics/trump-vows-deploy-special-forces-military-assets-inflict-maximum-damage-cartels>stating (Quoting Trump as saying, “The drug cartels are waging war on America—and it’s now time for America to wage war on the cartels . . . When I am back in the White House, the drug kingpins and vicious traffickers will never sleep soundly again.”); see also, Dustin Jones and Devin Speak, *Trump Campaign Calls for Executing Drug Dealers, Smugglers and Traffickers*, NPR (May 10, 2023), <https://www.npr.org/2023/05/10/1152847242/trump-campaign-execute-drug-dealers-smugglers-traffickers-death-row> (noting that during Trump’s campaign he stated “[w]e’re going to be asking everyone who sells drugs, gets caught selling drugs, to receive the death penalty for their heinous acts,” and that his platform included promises to “[i]mpose a Total Naval Embargo on Cartels” and to “[o]rder DOD to to Inflict Maximum Damage on Cartel Leadership and Operations”).

66. Catharine Tunney, *Ottawa designates cartels and street gangs as terrorist groups, fulfilling promise to Trump*, Canadian Broadcasting Corporation, (Feb 20, 2025), available at: <https://www.cbc.ca/news/politics/mexican-cartels-terrorists-list-1.7463758>.

67. Raquel Coronell Uribe, *Trump says he would be ‘OK’ launching strikes in Mexico to fight drug smuggling*, NBC, (Nov. 17, 2025), available at: <https://www.nbcnews.com/politics/white-house/trump-says-ok-launching-us-strikes-mexico-drug-smuggling-rcna244484>.

68. Greg Wehner, *Mexico’s president firmly refuses Trump’s proposal for US military strikes against cartels*, Fox News, (Nov. 18, 2025), available at:

Although roughly four out of five people caught smuggling fentanyl into the US at the southern border are US citizens—not migrants—Trump pointed fingers at undocumented immigrants,⁶⁹ and then used that rhetoric to not just justify, but to praise raids by the Department of Immigration and Customs Enforcement (ICE) that tackled a young mother, tear-gassed a residential neighborhood, and smashed in car windows.⁷⁰

On its face, his campaign often appeared to be simple rhetoric and saber-rattling intended to energize voters. However, after taking office, Trump continued to use many of these claims to sell his foreign policy goals as grounded in national security. And, to many, the most questionable and disturbing actions in the field have been the executive's use of lethal military force off the coast of Venezuela.

B. *The Strikes and the Rhetoric*

The Trump administration's strikes began on September 2, 2025, and—as of the date of this writing—the Trump administration and U.S. military have disclosed 57 strikes, killing at least 180 people.⁷¹ At the time this note was first drafted—late December 2025—there had been only 21 known strikes, with just 83 deaths.⁷²

To ostensibly provide legal justification for the attacks, the administration took multiple steps.

On January 20, 2025, Trump announced Executive Order 14157, designating certain drug cartels as foreign terrorist organizations.⁷³ In furtherance of 14157, on February 6, 2025, Secretary of State Rubio

<https://www.foxnews.com/politics/mexicos-president-firmly-refuses-trumps-proposal-us-military-strikes-against-cartels>.

69. Melissa Cruz, *US Citizens—Not Migrants—Smuggle the Majority of Fentanyl Into the United States*, American Immigration Council, (Jul. 22, 2025), available at: <https://www.americanimmigrationcouncil.org/blog/who-smuggles-fentanyl-into-united-states-citizens-migrants/>.

70. Zoe Hussain and Kenneth Garger, *Trump defends ICE raids, declares 'they haven't gone far enough' in first '60 Minutes' interview since suing CBS*, NY POST, (Nov. 2, 2025), available at: <https://nypost.com/2025/11/02/us-news/trump-defends-ice-raids-declares-they-havent-gone-far-enough-in-first-60-minutes-interview-since-suing-cbs/>.

71. Aamer Madhani, *A List of U.S. Military Strikes Against Alleged Drug-Carrying Vessels*, MILITARY TIMES (Last updated: Apr. 20, 2026), <https://www.militarytimes.com/news/your-military/2025/11/06/a-list-of-us-military-strikes-against-alleged-drug-carrying-vessels/>.

72. Ben Finley, Konstantin Toropin, & Regina Garcia Cano, *A timeline of the US military's buildup near Venezuela and attacks on alleged drug boats*, Associated Press (Nov. 17, 2025).

73. Exec. Order No. 14,157, 90 Fed. Reg. 8439 (Jan. 29, 2025).

determined “that eight entities meet the criteria for being designated as both Foreign Terrorist Organizations (FTOs) and Specially Designated Global Terrorists (SDGTs).”⁷⁴

Among the eight cartels Rubio designated was Tren de Aragua (TdA), which the State Department described as having:

originated in Venezuela with cells in Colombia, Peru, and Chile, with further reports of sporadic presence in Ecuador, Bolivia, and Brazil. This brutal criminal group has conducted kidnappings, extorted businesses, bribed public officials, authorized its members to attack and kill U.S. law enforcement, and assassinated a Venezuelan opposition figure.⁷⁵

Building upon the designation of organizations like TdA as FTOs, the Trump administration argued in a confidential memo to Congress that

these groups are now transnational and conduct ongoing attacks throughout the Western Hemisphere as organized cartels . . . Therefore, the President determined these cartels are non-state armed groups, designated them as terrorist organizations, and determined that their actions constitute an armed attack against the United States.⁷⁶

Maybe even more importantly, the same confidential memo argued that,

based upon the cumulative effects of these hostile acts against the citizens and interests of the United States and friendly foreign nations, the President determined that the United States *is in a non-international armed conflict with these designated terrorist organizations*.

The President directed the Department of War *to conduct operations against them pursuant to the law of armed conflict*. The United States has now reached a critical point where *we must*

74. Liana W. Rosen and Clare Ribando Seelke, *Designating Cartels and Other Criminal Organizations as Foreign Terrorists: Recent Developments*, (CRS Report No. IN11205, 2025).

75. Press Release, Office of the Spokesperson, *Fact Sheet: Designation of International Cartels* (United States State Department, Washington, DC), Feb. 20, 2025, available at: <https://www.state.gov/designation-of-international-cartels/>.

76. Charlie Savage and Eric Schmitt, *Trump ‘Determined’ the U.S. Is Now in a War With Drug Cartels, Congress Is Told*, NY TIMES, (Oct. 2, 2025), available at: <https://www.nytimes.com/2025/10/02/us/politics/trump-drug-cartels-war.html>.

*use force in self-defense and defense of others against the ongoing attacks by these designated terrorist organizations.*⁷⁷ (Emphasis added.)

As discussed in the subsequent section, key parts of this section of the memo are the claim of an ongoing armed conflict, the invocation of the law of armed conflict (LOAC), and the claim of a need for self-defense.

IV. THE ADMINISTRATION'S PLAN OF ATTACK

To justify striking Venezuelan watercraft, the administration took a specific series of steps.

- 1) It designated civilian criminal groups as non-state armed groups and foreign terrorist organizations.⁷⁸
- 2) It claimed that those groups were guilty of armed attacks⁷⁹ that the Alien Enemies Act supported such a finding, and that the US was in a non-international armed conflict.⁸⁰
- 3) It argued that these determinations amounted to a situation in which LOAC applies and where, under international law, the US could use force in self-defense.⁸¹
- 4) It appears to have proactively silenced internal warnings about legal questions,⁸² allowing it to publicly claim that legal counsel approved actions.⁸³

77. White House Memorandum to Congress, available at: <https://www.justsecurity.org/wp-content/uploads/2025/10/50-usc-1543-notice-to-congress-durg-cartels.pdf>.

78. Liana W. Rosen and Clare Ribando Seelke, *Designating Cartels and Other Criminal Organizations as Foreign Terrorists: Recent Developments*, (CRS Report No. IN11205, 2025).

79. Charlie Savage and Eric Schmitt, *Trump 'Determined' the U.S. Is Now in a War With Drug Cartels, Congress Is Told*, NY TIMES, (Oct. 2, 2025), available at: <https://www.nytimes.com/2025/10/02/us/politics/trump-drug-cartels-war.html>.

80. *Id.*

81. White House Memorandum to Congress, available at: <https://www.justsecurity.org/wp-content/uploads/2025/10/50-usc-1543-notice-to-congress-durg-cartels.pdf>.

82. Lesley Wexler and Anthony Ghiotto, *Let's Kill All the Lawyers: The Friday Night Massacre of Judge Advocates General*, JUSTIA: VERDICT, (Mar. 4, 2025), available at: <https://verdict.justia.com/2025/03/04/lets-kill-all-the-lawyers-the-friday-night-massacre-of-judge-advocates-general>.

83. Ellen Nakashima, Dan Lamothe, John Hudson, and Noah Robertson, *U.S. troops not liable in boat strikes, classified Justice Dept. memo says*, WASHINGTON POST, (Nov. 12, 2025), available at: <https://www.washingtonpost.com/national-security/2025/11/12/trump-drug-boat-venezuela-legal/>.

This section will look at each of those arguments, address the support the administration and its various departments have provided, and examine counterarguments.

A. *Semantics: Designating Criminals as Terrorists*

The designation of civilian criminal groups, namely drug cartels, as foreign terrorist organizations and non-state armed groups was supposed to be an essential step for the White House. It has been argued that “[d]esignating these groups as terrorists makes new legal and policy tools available that could be the key to stopping transnational criminal organizations’ ambitions for global expansion.”⁸⁴ The new designation gives the government domestic authority

...to prosecute individuals who aid or work for these organizations, even if these individuals are based outside U.S. borders. The types of charges available are also different, including conspiracy, harboring terrorist organizations and, in extreme cases for narco-states, the label of state sponsor of terrorism. The United States can prosecute, sentence, and potentially imprison individuals domestically as well.⁸⁵

Calling a criminal group a “terrorist organization” also likely makes military action more palpable to voters and politicians. This may be why, when the legality of the administration’s actions off the coast of Venezuela has been questioned, responses are peppered with the phrase “terrorist.” For example, after recently being asked about the legality of his alleged order to leave no survivors in one of the strikes—an issue discussed later in this note—Secretary Hegseth used the word “terrorist” four times in his social media response; the only words used more frequently were “and,” “the,” as well as “to.”⁸⁶

84. Stavan Singh and David Luckey, *Targeting Cartels as Terrorists Puts New Tools in Play*, RAND Corporation, (Apr. 10, 2025), available at: <https://www.rand.org/pubs/commentary/2025/04/targeting-cartels-as-terrorists-puts-new-tools-in-play.html>.

85. *Id.*

86. Pete Hegseth, [@secwar]. X, Nov. 28, 2025, 20:42, <https://x.com/secwar/status/1994552598142038358>.

Admittedly, every President in recent history has justified military action under the guise of terrorism: both Obama⁸⁷ and Trump (in his first administration)⁸⁸ struck against ISIL in Syria, Biden “conducted counterterrorism operations in 78 countries,”⁸⁹ and during Trump’s current tenure in office, he struck ISIS operatives in Somalia.⁹⁰

It has been further noted by academics and think tanks alike that an argument for identifying cartels as terrorist groups “echoes the argument the Bush administration made when declaring war against al-Qaeda after the September 11, 2001, terrorist attacks.”⁹¹

However, the analogy is suspect at best; while “cartels indeed use terror tactics to achieve their economic ends, their conflation with ideologically motivated terrorist organizations like ISIS or Al Qaeda is an unfair one . . . conflating those acts of criminal terror with the ideological terrorism that resulted in 9/11 or the construction of a terror state strains credulity.”⁹² The US designated al-Qaida as a Foreign Terrorist Organization in 1999, a year after the group’s strikes on US embassies in Kenya and Tanzania, and two years before the attacks in 2001.⁹³

87. See Tanya Somanader, *President Obama Delivers a Statement on Airstrikes in Syria*, The White House, (Sep. 23, 2014), available at: <https://obamawhitehouse.archives.gov/blog/2014/09/23/president-obama-delivers-statement-airstrikes-syria> (“Last night, President Obama ordered American armed forces to begin targeted airstrikes against ISIL targets in Syria.”).

88. See *Remarks by President Trump on the Situation in Northern Syria*, the White House, (Oct. 23, 2019), available at: <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-situation-northern-syria/> (“American forces defeated 100 percent of the ISIS caliphate [in Syria] during the last two years.”).

89. Stephanie Savell, *United States Counterterrorism Operations Under the Biden Administration*, Brown University: “Costs of War Project,” (Nov. 1, 2023), available at: <https://costsofwar.watson.brown.edu/paper/united-states-counterterrorism-operations-under-biden-administration-2021-2023>.

90. *Trump says he ordered precision military air strikes on ISIS leaders in Somalia*, CBS, (Feb. 1, 2025), available at: <https://www.cbsnews.com/news/trump-air-strikes-isis-leaders-in-somalia/>. (“The U.S. military conducted coordinated airstrikes against ISIS operatives in Somalia, the first attacks in the African nation during President Trump’s second term.”).

91. *Trump Declares ‘Armed Conflict’ Against Cartels*, Council on Foreign Relations, (Oct. 3, 2025), available at: <https://www.cfr.org/article/trump-declares-armed-conflict-against-cartels>.

92. Brandon P. Buck, *The Cognitive Shift: How the Terrorist Label May Lead to Another Forever War*, CATO Institute, (Mar. 19, 2025), available at: <https://www.cato.org/blog/cognitive-shift-how-terrorist-label-may-lead-another-forever-war>.

93. Clayton Thomas and Abigail G. Martin, *Al Qaeda: Background, Current Status, and U.S. Policy*, (CRS Report No. IF11854, 2024).

Here, the administration is not reacting to specific strikes against US citizens, assets, or servicemembers; instead—as is discussed later—the alleged “attacks” are simply the act of drug smuggling. Further, after 9/11, “Congress debated and authorized military force in [the case of 9/11],”⁹⁴ but here there has been no such dialogue. This underscores why “legal experts have highlighted differences between the threat posed by al-Qaeda compared to that of drug smuggling organizations.”⁹⁵

One such legal expert is Matt Waxman, George W. Bush’s first Deputy Assistant Secretary of Defense for Detainee Affairs, adjunct senior fellow for Law and Foreign Policy at the Council of Foreign Relations, and a professor of law at Columbia University. He stated:

When it comes to Al-Qaeda, we’re talking about an organization that over a long period of time waged violence directly against the United States at a level of magnitude and sophistication previously really only achievable by states . . . Al-Qaeda declared war against the United States . . . it had attacked American warships, embassies, the military headquarters, the financial capital of the United States and the world . . . [looking at cartels,] we’re talking about an organization whose primary ambition is to make money and to do so in some brutally violent ways . . . but I don’t think it rises to the kind of violence that [gives] rise to a right of armed self-defense.⁹⁶

Calling this cartel a foreign terrorist organization was admittedly a savvy political strategy. However, politics and semantics aside, the lack of a Congressional authorization like the post-9/11 AUMF means that an FTO designation from the White House only changes the way that these criminals can be prosecuted in a court of law; it does not make them legal military targets anywhere they are found.

94. *Trump Declares ‘Armed Conflict’ Against Cartels*, *Council on Foreign Relations*, (Oct. 3, 2025), available at: <https://www.cfr.org/article/trump-declares-armed-conflict-against-cartels>.

95. *Id.*

96. James M. Lindsay, “The Legality of Trump’s Drug-Boat Strikes, With Matthew Waxman,” *The President’s Inbox: Council on Foreign Relations*, (Sep. 30, 2025), available at: <https://www.cfr.org/podcasts/tpi/legality-trumps-drug-boat-strikes-matthew-waxman>.

B. *The Alien Enemies Act: Circular Logic Posing as Legal Argument*

A second way the Trump administration attempts to justify strikes against drug smugglers is by invoking the Alien Enemies Act of 1798 (AEA) and using it to say that, because the AEA applies, there is an armed conflict. However, as this section explains, for the AEA to apply, there must be evidence of an ongoing war, invasion, or predatory incursion.

In Executive Order 14157, Trump called for his Attorney General and Secretary of Homeland Security, in consultation with the Secretary of State, [T]o make operational preparations regarding the implementation of any decision I make to invoke the Alien Enemies Act... in relation to the existence of any qualifying invasion or predatory incursion against the territory of the United States by a qualifying actor, and to prepare such facilities as necessary to expedite the removal of those who may be designated under this order.⁹⁷

Abbreviated, the AEA provides that:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government . . . [members] of the hostile nation or government . . . who shall be within the United States and not actually naturalized. . . The President is authorized in any such event... to establish any other regulations which are found necessary in the premises and for the public safety.⁹⁸

Thus, Executive Order 14157 suggests that members of cartels designated as FTOs are participants in a “invasion or predatory incursion,” and “subjects of [a] hostile nation or government.” If that were the case, the administration could more easily claim involvement in an armed conflict. The administration attempted to bolster that argument in the previously mentioned confidential memorandum to Congress, where it argued that the cartel—now arbitrarily declared to be a terrorist organization—is engaged in ongoing warfare and thus subject to LOAC.

97. Exec. Order No. 14,157, 90 Fed. Reg. 8439 (Jan. 29, 2025).

98. Alien Enemies Act, 50 U.S.C. §§ 21-24 (2025).

This interpretation has faced an uphill battle in court and in academic circles. The recent use of the AEA to deport immigrants has been rejected, with “Judges in New York, Colorado and Texas [ruling] against Trump’s use of the law to deport Venezuelans.”⁹⁹

However, more pertinent to the use of the AEA to justify warfare and qualify cartels as legitimate military targets is a key ruling by the Fifth Circuit Court of Appeals, which saw the case on remand from the Supreme Court. The three-judge panel examined the case and found three issues subject to judicial review: the proper interpretation of the AEA, the constitutionality of the AEA, and whether the “Petitioners are Venezuelan citizens 14 years of age or older... members of TdA... within the United States, and... not actually naturalized or lawful permanent residents of the United States.”¹⁰⁰

The Circuit admitted that the AEA’s constitutionality was not in question, and that the case had not reached a point at which a decision was to be made on the Petitioners’ status. Thus, the only issue was the interpretation of the AEA.

In its analysis, the Circuit Court states that—the Petitioners’ insistence to the contrary notwithstanding—that it would “accept all Presidential fact-findings about what events have occurred—including who is directing them.”¹⁰¹ However, it continued, saying that “to defer to findings of fact, there must be findings of fact,” and that,

The AEA specifies that the “*President [must] make[] public proclamation of the event*” giving rise to his invocation of the AEA. The statute does not identify what, at a minimum, must be included in the proclamation. We conclude that proclaiming, without more, that an “invasion” or “predatory incursion” has occurred will not suffice. (Emphasis added.)

The Circuit then said that the Petitioners would likely succeed in arguing that no declared war or invasion existed.¹⁰² However, its answer to the question of whether the Petitioners were part of a “predatory incursion” was more nuanced.

99. Sofia Ferreira Santos, *What is the 1798 law that Trump used to deport migrants?*, BBC, (Sep. 3, 2025), available at: <https://www.bbc.com/news/articles/cy871w21d3vo>; see also Katherine Yon Ebright, *The Alien Enemies Act, Explained*, Brennan Ctr. for Just. (Oct. 9, 2024), <https://www.brennancenter.org/our-work/research-reports/alien-enemies-act-explained> (last updated May 1, 2025).

100. *W.M.M. et. al. v. Donald Trump, et. al.*, No. 25-10534, p. 8 (5th Cir. Sep. 2, 2025), available at: <https://s3.documentcloud.org/documents/26081114/ca5-aea.pdf>.

101. *Id.* at 11.

102. *Id.* at 22.

Amongst its other findings, the Circuit declared that encouraging residents and citizens to enter the country illegally was “not the modern-day equivalent of sending an armed, organized force” and that while “drug-trafficking is being used as a weapon . . . it is not within even an updated meaning of invasion or predatory incursion.”¹⁰³ On that issue, it concluded that “the findings [did] not support that an invasion or a predatory incursion [had] occurred.”¹⁰⁴

Thus, the Circuit’s decision that, because no declared war exists, no invasion has occurred, and no predatory incursion has taken place, the administration is undermined in its attempt to argue that the language of the AEA demonstrates some form of present conflict that would justify lethal force against civilian targets.

In short, the administration appears to have used circular logic stemming from its unilateral declaration of the AEA’s applicability. It attempted to establish a conflict by arguing that because the administration decided the AEA applies, there was a conflict, and if there was a conflict, the AEA must apply. The Circuit appears to have rightfully rejected the argument.

C. *Claiming Rights Under International Law*

A separate approach taken by the Trump Administration, one which touches upon how international law authorizes military action, is a claim that drug smuggling operations trigger a right to self-defense. The confidential memorandum the White House sent to Congress shows the logic used by the administration:

For decades the response to the flow of illicit narcotics into the United States has primarily relied on the use of law enforcement authorities. These efforts have been unsuccessful . . .

The cartels... illegally and directly cause the deaths of tens of thousands of American citizens each year . . . The President determined that their actions constitute an armed attack against the United States . . . based upon the cumulative effects of these hostile acts . . .

... the President determined that the United States is in a non-international armed conflict with these designated terrorist organizations . . . [and] directed the Department of War to conduct operations against them pursuant to the law

103. *Id.* at 32-33.

104. *Id.*

of armed conflict . . . we must use force in self-defense and defense or others against the ongoing attacks by these designated terrorist organizations.¹⁰⁵

As explained below, given that no armed attack has occurred, this tacit attempt to invoke international law and a nation's right to self-defense fails. Further, even if it could be argued that a state of armed conflict exists, the administration's action would still violate international law.

1. *Self-Defense Despite No Armed Attack*

The issue of the legality of lethal military force in place of law enforcement activity raises a question about the general circumstances under which nations can use deadly force for self-defense.

Here, to justify a reversal of a "decades-long policy adopted by all previous administrations that relied on law enforcement to patrol coastlines, seize shipments, and detain alleged criminals,"¹⁰⁶ the Trump administration created a three-step argument:

- 1) It said the Department of Homeland Security and the Drug Enforcement Agency are incapable of protecting the nation.¹⁰⁷
- 2) It implied that because law enforcement is incapable of stopping would-be smugglers, the smuggling operations "constitute an armed attack."¹⁰⁸

105. White House Memorandum to Congress, available at: <https://www.justsecurity.org/wp-content/uploads/2025/10/50-usc-1543-notice-to-congress-durg-cartels.pdf>.

106. Ara Friedman, *The Trump Administration and Venezuela: Michael Shifter analyzes maritime strikes and possible regime change*, Georgetown School of Foreign Service, (Nov. 14, 2025), available at: <https://sfs.georgetown.edu/news/the-trump-administration-and-venezuela-michael-shifter-analyzes-maritime-strikes-and-possible-regime-change/>.

107. See White House Memorandum to Congress, available at: <https://www.justsecurity.org/wp-content/uploads/2025/10/50-usc-1543-notice-to-congress-durg-cartels.pdf> ("For decades the response to the flow of illicit narcotics into the United States has primarily relied on the use of law enforcement authorities. These efforts have been unsuccessful.").

108. See White House Memorandum to Congress, available at: <https://www.justsecurity.org/wp-content/uploads/2025/10/50-usc-1543-notice-to-congress-durg-cartels.pdf> ("[T]he President determined that [smuggling operations] constitute an armed attack against the United States.").

3) It argues that if it is under an armed attack, it can justify the use of lethal force.¹⁰⁹

On its face, this logic appears flawed. A useful parallel is a domestic setting. In societies with a right to due process,¹¹⁰ if a police department fails to stop gangs from selling deadly drugs, its officers are not granted the right to execute suspected street dealers.

Admittedly, *jus ad bellum* principles, specifically Article 51 of the UN Charter, establish the right of a nation to use force if it is the victim of an attack:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council.¹¹¹ (Emphasis added.)

However, as was pointed out in the domestic analogy to a police officer and a drug dealer, a government agent authorized to use deadly force cannot use said force simply because a criminal is trafficking drugs; they must pose an immediate lethal threat to the officer or others. Art. 51 of the UN Charter creates a parallel in which a nation's "inherent right of individual or collective self-defence" is triggered only by "armed attack."¹¹²

While the UN Charter does not define "armed attack," multiple relevant definitions are available.

First, even domestically, the previously mentioned decision by the Fifth Circuit clearly stated that the smuggling of drugs in this situation

109. See White House Memorandum to Congress, available at: <https://www.justsecurity.org/wp-content/uploads/2025/10/50-usc-1543-notice-to-congress-durg-cartels.pdf> ("[T]he Sep. 2, 2025, strike] resulted in . . . the death of approximately 3 unlawful combatants . . . U.S. forces remain postured to carry out military operations as necessary to prevent further deaths or injury to American citizens by eliminating the threat posed by these designated terrorist organizations.").

110. While nations may have differing definitions of "due process," Articles 6 through 11 of the Universal Declaration of Human Rights set a workable standard, stating that all people have rights such as the right to a fair trial, the right to seek justice for violations of one's rights, and the right to be presumed innocent until proven guilty.

111. U.N. Charter art. 51.

112. *Id.*

does not rise to “an updated meaning of invasion or predatory incursion.”¹¹³

Second, in *Nicaragua v. United States* (1986), the ICJ decided that even the provision of arms to the opposition in another State does not constitute an armed attack on that State.¹¹⁴ If providing lethal weapons—which a party knows will be used in hostilities and combat—does not constitute an armed attack, it seems far-fetched to claim that smuggling drugs can constitute armed attack.

Third, the “ICJ’s decision in *Armed Activities on the Territory of the Congo (DRC v. Uganda)* (2005) makes clear that self-defense against non-state actors is permissible only if those actors have launched an ‘armed attack’ of sufficient gravity and the territorial state is demonstrably unwilling or unable to prevent it.”¹¹⁵

Thus, the administration’s claims of “armed attack” fail, and if no state of conflict exists, the applicable body of international law is human rights law. The relevant document is the International Covenant on Civil and Political Rights (ICCPR), “an early United Nations treaty which ‘guarantees a broad spectrum of civil and political rights’” which the US ratified in 1992.¹¹⁶

ICCPR Article 6 (1) states that “[n]o one shall be arbitrarily deprived of his life”¹¹⁷ and creates “a prohibition that generally proscribes extra-judicial killings, at least outside the context of an

113. *W.M.M. et. al. v. Donald Trump, et. al.*, No. 25-10534, p. 33, (5th Cir. Sep. 2, 2025), available at: <https://s3.documentcloud.org/documents/26081114/ca5-aea.pdf>.

114. *Military and Paramilitary Activities in and Against Nicaragua*, Judgment, 1986 I.C.J. Rep. 14, ¶ 230 (June 27) (“[T]he Court is unable to consider that in customary international law, the provision of arms to the opposition in another State constitutes an armed attack on that State. Even at a time when the arms flow was at its peak, and again assuming the participation of the Nicaraguan Government, that would not constitute such armed attack.”).

115. *Q&A with William Burke-White: Understanding the Legal Ramifications of U.S. Strikes Against Venezuela*, Univ. of Pennsylvania: Perry World House, (Nov. 11, 2025), available at: <https://perryworldhouse.upenn.edu/news-and-insight/perry-world-house-qa-with-william-burke-white-understanding-the-legal-ramifications-of-u-s-strikes-against-venezuela/>.

116. Kristina Ash, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT’L HUM. RTS. 1 (2005). Available at: <http://scholarlycommons.law.northwestern.edu/njihr/vol3/iss1/7>.

117. International Covenant on Civil and Political Rights, art. 6(1), Dec. 19, 1966, 999 U.N.T.S. 171.

armed conflict and apart from cases where lethal force is necessary to prevent imminent violence against others.”¹¹⁸

Because the US does not appear justified in claiming to need to use lethal force to prevent imminent violence, the strikes against Venezuelan watercraft appear to be a violation of international law.

2. *En Arguendo: What if Armed Conflict Did Actually Exist?*

En arguendo, if a state of conflict exists, then the applicable body of international law is LOAC, and the administration would admittedly be in a slightly more tenable legal position.

[Under LOAC] . . . enemy forces . . . are not considered civilians . . . international law affords the State the right to try to destroy the non-State party’s military objects and to use lethal force against members of the organized enemy armed force on the basis of their status as such members . . . it would even allow killing them when they are at home, or when they are in the United States, as long as the expected incidental loss of civilian life was not disproportionate to the expected direct and concrete military value of killing the enemy fighters.¹¹⁹

Jus ad bellum—the law regulating when a nation can resort to armed force—“requires that force used in self-defence against the threat or occurrence of an armed attack must be proportionate to that attack and to the aim of averting or stopping the attack.”¹²⁰ And, even in an armed conflict, the use of force must comply with *jus in bello* principles, such as proportionality and military necessity.¹²¹

118. Marty Lederman, *The Many Ways in Which the September 2 Caribbean Strike was Unlawful... and the Grave Line the Military Has Crossed*, Just Security, (Sep. 10, 2025), available at: <https://www.justsecurity.org/120296/many-ways-caribbean-strike-unlawful/>.

119. Marty Lederman, *Legal Flaws in the Trump Administration’s Notice to Congress on “Armed Conflict” with Drug Cartels*, Just Security, (Oct. 3, 2025), available at: <https://www.justsecurity.org/121844/trump-notice-drug-cartels/>.

120. Emanuela-Chiara Gillard, *Proportionality in the Conduct of Hostilities the Incidental Harm Side of the Assessment*, Royal Institute of International Affairs, para. 14, (Dec. 2018), available at: <https://www.chathamhouse.org/sites/default/files/publications/research/2018-12-10-proportionality-conduct-hostilities-incident-harm-gillard-final.pdf>.

121. *Fundamental principles of IHL*, Int’l Committee of the Red Cross, last accessed: Nov. 13, 2025, available at: https://casebook.icrc.org/a_to_z/glossary/fundamental-principles-ihl.

Here, again *en arguendo*, even if the US was correct in its assessment that these watercraft posed an actual and immediate threat to American lives, “Proportionality limits the overall scale, scope, and duration of a defensive response to what is required to neutralize the attack itself, not to punish or deter more broadly.”¹²² Similarly, “[u]nder the rule of military necessity, codified in the Hague Regulations of 1907 and reflected in customary law, only the degree of force needed to secure a concrete and direct military objective is permitted.”¹²³

The US admitted that its forces could have interdicted Venezuelan boats instead of destroying them. Secretary of State Rubio stated that the decision to kill the sailors was “to send a deterrent message to traffickers. ‘Instead of interdicting it, on the president’s orders, we blew it up — and it’ll happen again,’ he told reporters.”¹²⁴ In effect, Rubio admitted that despite the US having “had non-forcible alternatives, including maritime interdiction and cooperation under existing counter-narcotics treaties”¹²⁵ lethal force was unnecessarily used, violating the rule of military necessity.

Additionally, allegations that Secretary of Defense Hegseth issued an oral command for the Navy to leave no survivors are especially troubling. Such an order would violate an international prohibition established in the world’s first codification of the rules of combat, the 1863 Lieber Code, promulgated by President Abraham Lincoln during America’s Civil War.

Article 71 of the Lieber Code stated that, “Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death.”¹²⁶ The Lieber Code has been echoed in modern times by

122. *Q&A with William Burke-White: Understanding the Legal Ramifications of U.S. Strikes Against Venezuela*, Univ. of Pennsylvania: Perry World House, (Nov. 11, 2025), available at: <https://perryworldhouse.upenn.edu/news-and-insight/perry-world-house-qa-with-william-burke-white-understanding-the-legal-ramifications-of-u-s-strikes-against-venezuela/>.

123. *Id.*

124. John Hudson, Samantha Schmidt, and Alex Horton, *Trump ordered strike on suspected drug boat to send a message, Rubio says*, Washington Post, (Sep. 3, 2025), available at: <https://www.washingtonpost.com/world/2025/09/03/us-strikes-venezuela-alleged-drug-boat/>.

125. *Q&A with William Burke-White: Understanding the Legal Ramifications of U.S. Strikes Against Venezuela*, Univ. of Pennsylvania: Perry World House, (Nov. 11, 2025), available at: <https://perryworldhouse.upenn.edu/news-and-insight/perry-world-house-qa-with-william-burke-white-understanding-the-legal-ramifications-of-u-s-strikes-against-venezuela/>.

126. *Instructions for the Government of Armies of the United States in the Field*, Gen. Orders No. 100, U.S. War Dep’t, Adjutant Gen.’s Office, art. 71 (Apr. 24, 1863).

U.S. Department of Defense manuals,¹²⁷ the Geneva Conventions, and other longstanding international maritime laws which universally and unequivocally prohibit naval forces from killing incapacitated survivors of an attack on a maritime vessel.¹²⁸

In conclusion, “the magnitude of the response—airstrikes that killed dozens of individuals—was disproportionate to any alleged threat posed by drug smuggling.”¹²⁹ As such, even if this was an armed conflict, at best, the administration pushed to violate the principles of proportionality and military distinction.

At worst, it explicitly authorized war crimes.

D. “It’s Legal If I Tell My Lawyers It Is”

The Trump administration’s legal team has apparently greenlit all the heretofore-mentioned actions. In a classified opinion, the Justice Department’s Office of Legal Counsel stated that “personnel taking part in military strikes on alleged drug-trafficking boats in Latin America would not be exposed to future prosecution.”¹³⁰

Even after a working group of former military lawyers accused him of a war crime for having ordered that strikes leave no survivors,¹³¹

127. See *Law of War Manual*, U.S. Dep’t of Defense, § 5.9.4, (Jun. 2015), available at: https://ogc.osd.mil/Portals/99/departments_of_defense_law_of_war_manual.pdf (“Persons who have been rendered unconscious or otherwise incapacitated by wounds, sickness, or shipwreck, such that they are no longer capable of fighting, are *hors de combat* . . . Persons who have been incapacitated by wounds, sickness, or shipwreck are in a helpless state, and it would be dishonorable and inhumane to make them the object of attack.”); see also, Dep’t of the Navy, U.S. Marine Corps & U.S. Coast Guard, *The Commander’s Handbook on the Law of Naval Operations*, at 8.2.3, (Mar. 2022).

128. *Statement of the “Former JAGs Working Group” on Media Reports of Pentagon “No Quarter” Orders in Caribbean Boat Strikes*, (Nov. 29, 2025), available at: <https://www.justsecurity.org/wp-content/uploads/2025/11/former-jag-working-group-no-quarter-statement.pdf>.

129. *Q&A with William Burke-White: Understanding the Legal Ramifications of U.S. Strikes Against Venezuela*, Univ. of Pennsylvania: Perry World House, (Nov. 11, 2025), available at: <https://perryworldhouse.upenn.edu/news-and-insight/perry-world-house-qa-with-william-burke-white-understanding-the-legal-ramifications-of-u-s-strikes-against-venezuela/>.

130. Ellen Nakashima, Dan Lamothe, John Hudson, and Noah Robertson, *U.S. troops not liable in boat strikes, classified Justice Dept. memo says*, WASHINGTON POST, (Nov. 12, 2025), available at: <https://www.washingtonpost.com/national-security/2025/11/12/trump-drug-boat-venezuela-legal/>.

131. See Alex Horton and Ellen Nakashima, *Hegseth order on first Caribbean boat strike, officials say: Kill them all*, WASHINGTON POST, (Nov. 28, 2025), available at: <https://www.washingtonpost.com/national-security/2025/11/28/hegseth-kill-them->

Secretary Hegseth stated: “Our current operations in the Caribbean are lawful under both U.S. and international law, with all actions in compliance with the law of armed conflict—and approved by the best military and civilian lawyers, up and down the chain of command.”¹³²

Speaking on the issue, Congressman Seth Moulton, a veteran and member of the House Armed Services Committee, went so far as to state that “killing survivors is blatantly illegal . . . Mark my words: It may take some time, but Americans will be prosecuted for this, either as a war crime or outright murder.”¹³³ Moulton’s statements were echoed by other members of Congress such as Rep. Eugene Vindman who “warned Hegseth that he will be ‘held accountable for illegal orders you give,’” and Rep. Ted Lieu who said “‘nothing’ in the classified legal memo or military law being used to justify the operation ‘authorizes a second kinetic strike against defenseless survivors.’”¹³⁴

Thus, a variety of concerns have arisen about the legal structures within the Trump administration, as well as questions regarding the quality of counsel it receives. These concerns predate the strikes but continued after the administration began attacking civilian watercraft.

1. *Proactively Eliminating Internal Legal Processes*

Before the strikes began, the second Trump administration raised alarms in the legal community when Secretary Hegseth released a statement “requesting nominations for the Judge Advocates General

all-survivors-boat-strike/ (“Defense Secretary Pete Hegseth gave a spoken directive, according to two people with direct knowledge of the operation. ‘The order was to kill everybody’”); see also, *Statement of the “Former JAGs Working Group” on Media Reports of Pentagon “No Quarter” Orders in Caribbean Boat Strikes*, (Nov. 29, 2025), available at: <https://www.justsecurity.org/wp-content/uploads/2025/11/former-jag-working-group-no-quarter-statement.pdf> (“The Former JAGs Working Group unanimously considers both the giving and the execution of these orders, if true, to constitute war crimes, murder, or both.”).

132. *Hegseth responds to report that boat survivors were killed as a result of his orders to military*, ABC News, (Nov. 28, 2025), available at: <https://abcnews.go.com/Politics/hegseth-declines-comment-report-boat-survivors-killed-result/story?id=127951385>.

133. Rep. Seth Moulton (@sethmoulton), X (Nov. 28, 2025, 20:20), <https://x.com/sethmoulton/status/1994540890929729996>.

134. Ryan King, *Hegseth Dismisses Report He Demanded No Survivors Be Left in Drug Boat Strike: “Biden Coddled Terrorists, We Kill Them”*, N.Y. POST (Nov. 28, 2025), <https://nypost.com/2025/11/28/us-news/hegseth-dismisses-report-he-demanded-no-survivors-be-left-in-drug-boat-strike/>.

for the Army, Navy and Air Force.”¹³⁵ Major General Charles J. Dunlap, Jr. (Ret.), the former deputy Judge Advocate General of the United States Air Force, a professor at Duke School of Law, and the Executive Director of the Center on Law, Ethics and National Security, immediately responded to the call for nominations.

Dunlap, historically a notable conservative, said that requesting nominations to replace the Army, Navy, and Air Force’s top lawyers was,

[U]nprecedented . . . [and] frankly, very disturbing as it implies the existing senior military lawyers are about to be fired, en masse. I say “unprecedented” because these are military legal officers who, unlike politically appointed civilian legal officials elsewhere in government, are never expected to be replaced on a change of Administrations. Since military lawyers are nonpartisan, no turnover is—or should be—expected in an organization like the armed forces that aims to be politically neutral.¹³⁶

These concerns fell on deaf ears, and two days later, Secretary Hegseth—who “has a history of hostility toward military lawyers and the legal restraints they impose on the use of military”¹³⁷—did exactly that about which Dunlap was concerned: he fired the top lawyers in the US military’s three key branches.

Writing about the removal of those officers, former Secretary of the Air Force Frank Kendall responded that he could not imagine any reason for removing them other than replacing them “with someone more loyal to Mr. Trump and Defense Secretary Pete Hegseth—and therefore more willing to interpret the law consistent with their desires.”¹³⁸ He went on to explain that, from his perspective, the

135. Press Release, Peter Hegseth, *Secretary of Defense Pete Hegseth Statement on General Officer Nominations* (Department of Defense, Washington, DC), Feb. 21, 2025, <https://www.war.gov/News/Releases/Release/Article/4074482/secretary-of-defense-pete-hegseth-statement-on-general-officer-nominations/>.

136. Charlie Dunlap, *Is independent, nonpartisan legal advice from military lawyers on the chopping block?*, (Feb. 22, 2025), available at: <https://sites.duke.edu/lawfire/2025/02/22/is-independent-nonpartisan-legal-advice-from-military-lawyers-on-the-chopping-block/>.

137. Sarah Fitzpatrick & Missy Ryan, *The Pentagon’s Lawyers Are Now Under Review*, ATLANTIC (Mar. 2026), <https://www.theatlantic.com/national-security/2026/03/hegseth-comes-lawyers/686351/>.

138. Frank Kendall, *America Has a Rogue President*, NY TIMES, (Feb. 24, 2025), available at: <https://www.nytimes.com/2025/02/24/opinion/trump-hegseth-cq-brown-pentagon-firings-jag.html>.

administration's decision was based on an "utter lack of respect for legal constraints."¹³⁹

Mr. Trump has been clear about his views. Among many examples, he recently wrote, "He who saves his country does not violate any law." It is clear from Mr. Hegseth's confirmation hearing, public appearances, writings, and support for convicted war criminals that he also does not believe JAG officers should constrain war fighters—or presumably the president and secretary of defense.¹⁴⁰

The administration's attack on the JAG Corps continued evolving in March 2026, when Hegseth "ordered an overhaul of the military's civilian and uniformed legal offices, raising fears among current and former members of the judge advocate general corps that he will gut legal oversight of the administration's actions."¹⁴¹

2. *Denying/Ignoring Legal Dissent*

Separate from the administration's efforts to eliminate legal objections from within its ranks by simply firing personnel, it tries to minimize potentially questionable legal decisions through obfuscation or simply ignoring concerns raised about its actions. These attempts are evident in two ways: the administration's counterarguments to legal questions, which are largely flat denials lacking detail; and its active disregard for legal guidance in favor of advice aligned with its objectives.

A recent example of the former is Colonel Paul Meagher, the senior military lawyer for U.S. Southern Command (the military command overseeing operations near Venezuela), who allegedly "disagreed with the Trump administration's position that the operations are lawful."¹⁴² Meagher was reported to have "specifically expressed concern that strikes . . . could amount to extrajudicial killings

139. *Id.*

140. *Id.*; see also, Maggie Haberman, Charlie Savage, and Jonathan Swan, *Trump Suggests No Laws Are Broken if He's "Saving His Country,"* NY TIMES (Feb. 15, 2025), <https://www.nytimes.com/2025/02/15/us/politics/trump-saves-country-quote.html> (quoting Donald Trump's social media account.).

141. Patrick Tucker, *Hegseth Orders "Ruthless" Review of JAG Offices; Some See Attempt to Evade Accountability,* DEF. ONE (Mar. 2026), <https://www.defenseone.com/policy/2026/03/hegseth-orders-ruthless-review-jag-offices-some-see-attempt-evade-accountability/412076/>.

142. Gordon Lubold, Courtney Kube and Dan De Luce, *Top military lawyer raised legal concerns about boat strikes,* NBC News, (Nov. 19, 2025), available at: <https://www.nbcnews.com/politics/national-security/top-military-lawyer-raised-legal-concerns-boat-strikes-rcna243694>.

... and therefore legally expose service members involved in the operations.”¹⁴³

Despite Meagher’s reports, Chief Pentagon spokesman Sean Parnell flatly denied that “any Pentagon lawyers, including SOUTHCOM lawyers, with knowledge of these operations have raised concerns . . . Our current operations in the Caribbean are lawful under both U.S. and international law, with all actions in complete compliance with the law of armed conflict.”¹⁴⁴

Similarly, after the allegations against Secretary Hegseth’s war crimes broke, Democrats on the Senate Judiciary Committee sent a letter to the Justice Department, noting that the United States Code of Military Justice (UCMJ),

“prohibits the premeditated and unlawful killing of a human being” but that it also requires obeying orders, “putting our service members in the impossible position of risking criminal prosecution for carrying out an unlawful order to kill civilians or risking prosecution for disobeying superior orders.”¹⁴⁵

Hegseth’s response did not provide any legal justifications, simply denying the claims and arguing that “[o]ur current operations in the Caribbean are lawful under both U.S. and international law, with all actions in compliance with the law of armed conflict—and approved by the best military and civilian lawyers, up and down the chain of command.”¹⁴⁶

One last example is when Lt. Gen. Joe Berger

[W]as asked for his advice about the legality of using Texas National Guard soldiers for immigration enforcement. Berger told Army chief of staff Gen. Randy George that he was skeptical . . . [and was then] told by the department’s acting general counsel, Charlie Young, to stop meddling.¹⁴⁷

143. *Id.*

144. *Id.*

145. Rebecca Beitsch, *DOJ argues US military personnel cannot be prosecuted for drug boat strikes*, THE HILL, (Nov. 13, 2025), available at: <https://thehill.com/homenews/5603976-doj-opinion-caribbean-strikes/>.

146. Pete Hegseth, [@secwar](https://x.com/secwar/status/1994552598142038358), X, Nov. 28, 2025, 20:42, <https://x.com/secwar/status/1994552598142038358>.

147. Natasha Bertrand, *How the Pentagon sidelined lawyers while testing the legal limits of military action*, CNN, (Oct. 15, 2025), available at: <https://www.cnn.com/2025/10/15/politics/pentagon-lawyers-sidelined-jags>.

A month later, he was fired, and Secretary Hegseth told reporters it was because he and another dismissed JAG lawyer were seen as potential “roadblocks to orders that are given by a commander-in-chief.”¹⁴⁸

V. DEFINING THE ELEMENTS OF TRUMP’S IMPERIAL PRESIDENCY

While the previous section documents the ways the Trump administration has justified its attacks on Venezuelan watercraft, the following section examines how those actions, individually and collectively, resemble the Imperial Presidencies discussed in Sections 1.2 and 1.3.

Admittedly, there are differences; there is no comparing a conflict like Vietnam to isolated strikes against small watercraft with fewer than a dozen passengers. The worthy comparison is not of the conflicts themselves, but rather of the different administrations’ approaches and how they attempted to maneuver around the traditional checks and balances that the Founding Fathers established to ensure that the office of the President does not amass too much power.

A. *Claiming Self-Defense without Evidence*

A common theme in both the First- and Second-Era Imperial Presidencies was a tendency for administrations to justify overseas military campaigns under the guise of self-defense. Johnson sent troops into the Dominican Republic under the guise of a mission to protect American lives¹⁴⁹ and then used the alleged Tonkin Gulf incident to invade Vietnam;¹⁵⁰ Nixon invaded Cambodia to allegedly save

148. *Id.*

149. Schlesinger, Jr., *supra* note 2, at 178 (“Johnson’s real reason, as he soon revealed, was that ‘we don’t propose to sit here in our rocking chair with our hands folded and let the Communists set up any government in the Western Hemisphere.’”).

150. See Andrew Glass, *Congress Asked to Back Vietnam Strikes, Aug. 6, 1964*, POLITICO, (Aug. 6, 2010), available at: <https://www.politico.com/story/2010/08/congress-asked-to-back-vietnam-strikes-aug-6-1964-040723> (“Some historians have accused Johnson of misleading the public in a bid to gain support for his policies on Vietnam. Recently released classified testimony casts doubt on reports that the Vietnamese actually fired on the U.S. vessels. Privately, Johnson had voiced his own qualms. He told George Ball, the undersecretary of state who opposed escalating the war, ‘Those sailors out there may have been shooting at flying fish.’”).

American service members;¹⁵¹ and Bush justified invading Iraq to the public by linking Saddam Hussein's regime to the 9/11 attacks.¹⁵²

Trump has attempted to do the same. He labeled drug cartels as foreign terrorist organizations to create better-sounding rhetoric, invoked the AEA (a rarely used, nearly 200-year-old piece of legislation from the Quasi-War with France) to claim that those now-terrorist organizations were involved in an armed conflict with America, and invoked LOAC despite it being inapplicable.

B. *Committing Troops Without Oversight*

While the Tonkin Gulf Resolution was questionable in its origins, and while there are misgivings about whether Johnson intentionally misled the public and Congress on whether American forces were attacked,¹⁵³ it is unquestionable that, in passing the Resolution, Congress gave Johnson a green light to invade Vietnam. Similarly, there is no question that the 2001 and 2002 AUMFs gave Bush and Obama some degree of Congressional acquiescence for not just the wars in Iraq and Afghanistan, but the countless tangential campaigns related to the Global War on Terror.

However, of all the military campaigns waged by the Imperial Presidencies referred to in this note, the decision-making that went into Trump's attacks against Venezuelan watercraft has almost certainly received the least amount of oversight and input from outside the executive branch. To justify his commitment of troops to the strikes, Trump simply made a series of unilateral decisions: the FTO designations, the invocation of the AEA, the decision to commit troops, and the decision to use lethal force all originated from the White House and Pentagon.

The only other Imperial President to come close to this level of unilateral decision-making would likely be Nixon.

151. Schlesinger, Jr., *supra* note 2, at 187-188 (stating that Nixon, in announcing the invasion of Cambodia, said "[t]he legal justification . . . is the right of the President of the United States under the Constitution to protect the lives of American men").

152. See Carroll Doherty and Jocelyn Kiley, *A Look Back at How Fear and False Beliefs Bolstered U.S. Public Support for War in Iraq*, Pew Research Center, (Mar. 14, 2023), available at: <https://www.pewresearch.org/politics/2023/03/14/a-look-back-at-how-fear-and-false-beliefs-bolstered-u-s-public-support-for-war-in-iraq/> (stating that Bush administration officials repeatedly linked Saddam Hussein's regime to terrorists and terrorism).

153. See Andrew Glass, *Congress Asked to Back Vietnam Strikes, Aug. 6, 1964*, POLITICO, (Aug. 6, 2010), available at: <https://www.politico.com/story/2010/08/congress-asked-to-back-vietnam-strikes-aug-6-1964-040723>.

C. Ignoring and Punishing Dissent

Schlesinger documents how Nixon¹⁵⁴ and Johnson¹⁵⁵ ignored challenges and dissent from their advisors. Obama, to a lesser degree, appeared to have done the same; he had a reputation for “relying too heavily on a very small group of advisers,”¹⁵⁶ and even people at the top of his team said they often felt alienated and that there was “a sense in the White House that ‘Barack Obama’s theory of government is he is the government.’”¹⁵⁷ Meanwhile, if anything, Bush had a reputation for being too easily manipulated by his cabinet¹⁵⁸

This is an area in which Trump has surpassed his fellow Imperial Presidents. Where others dismissed or disregarded those with whom they disagreed, Trump goes further. He shames, attacks, and threatens those who refuse to tell him what he wants.

This is potentially the most disconcerting development in the Imperial Presidency because, historically, leaders who surround themselves with yes-men have been dangerous contributors to world history. Regimes with an individual military “strongman” or civilian “boss”—both typically surrounded by sycophants—lose 73% and 56% of wars they initiated, respectively, while democracies only lose only 28% of initiated conflicts.¹⁵⁹

154. Schlesinger, Jr., *supra* note 2, at 222.

155. *Id.* at 185.

156. See David Rothkopf, *Obama’s Cabinet: From a Team of Rivals to the Usual Suspects*, WASHINGTON POST, (Jan. 11, 2013), available at: <https://wapo.st/3M5CsdT> (“Since his first days in office, Obama has been criticized for relying too heavily on a very small group of advisers, almost all in the White House, and for being largely disconnected from his Cabinet . . . much of the real heavy lifting on foreign policy was done in the small circle that convened with the president for his morning security briefings.”).

157. David Rothkopf, *Managing the Oval Office*, NY TIMES, (Jan. 19, 2013), available at: <https://www.nytimes.com/2013/01/20/opinion/sunday/managing-the-oval-office.html>.

158. See Julian Borger, *George Bush Sr book reveals a more dangerous Dick Cheney than anyone knew*, THE GUARDIAN, (Nov. 5, 2019), available at: <https://www.theguardian.com/us-news/2015/nov/05/george-bush-sr-book-reveals-a-more-dangerous-dick-cheney-than-anyone-knew> (“There is no doubt that Cheney and Rumsfeld were given more license and authority than almost all their predecessors once the ‘war on terror’ began. Cheney was certainly the most powerful vice-president of modern times, with a large and assertive staff, something that Bush Sr draws particular attention to.”).

159. Jessica L. P. Weeks, *Dictators at War and Peace*, 60-62 (Cornell Univ. Press, 2014).

During the Gulf War, Saddam Hussein learned a hard lesson about filling his senior ranks with toadies,¹⁶⁰ Putin is learning a dire daily lesson as his troops return from Ukraine in body bags,¹⁶¹ and Stalin's purges of the Soviet Red Army during the 1937-38 "Great Terror" have been blamed for the Red Army's failures in the first years of the Nazi invasion.¹⁶² Perhaps most famously, Hitler did not do himself any favors by savagely rebuking his own Commander in Chief of the High Command, General Wilhelm Keitel, regarding concerns about the invasion of the Soviet Union.¹⁶³

In short? Leaders who surround themselves with "yes men" rarely receive sound advice, and armies led by those who oppress respectful dissent are seldom victorious. Trump, likely more so than any President in American history, has been guilty of this offense.

After disagreeing with the President "on a host of issues," Secretary of Defense James Mattis resigned because of Trump's pullout from Syria.¹⁶⁴ He told Trump, "Because you have the right to have a secretary of defense whose views are better aligned on these and other

160. See Johanna McGeary, *Inside Saddam's Head*, TIME, (Mar. 31, 2003), available at: <https://time.com/archive/6668465/inside-saddams-head/> ("As Gulf War II approached, Iraq's leader was surrounded by the same clique of toadies who advised him in 1990 . . . The members of the inner circle all staked their fortunes long ago on Saddam's policies, even if it meant that when he went, they would go too. None of them would risk their life to tell Saddam the truth.")

161. Robert Reich, *Dictators like Putin surround themselves with liars and propaganda. That leads to very bad decisions*, THE GUARDIAN, (Apr. 1, 2022), available at: <https://www.theguardian.com/commentisfree/2022/apr/01/vladimir-putin-ukraine-truth-deniers-bad-decisions> ("Putin's strict isolation during the pandemic and willingness to publicly castigate advisers have contributed to him getting incomplete or overly optimistic reports about the progress of Russian forces.")

162. See generally, Alexei Zakharov & Konstantin Sonin, *The Anatomy of the Great Terror: A Quantitative Analysis of the 1937-38 Purges in the Red Army*, Becker Friedman Inst. for Econ., Working Paper No. 2024-154, (Dec. 9, 2024) (Providing "systematic evidence that the Great Terror directly impacted the disastrous Red Army performance in the first years of the German invasion.")

163. Samuel W. Mitcham Jr. and Gene Mueller, *Hitler's Commanders*, 6-7, (Scarborough House, 2012) ("Hitler decided to invade the Soviet Union. Keitel was alarmed and voiced his objections directly to Hitler . . . [and later] wrote a memorandum outlining his objections. Hitler rebuked the field marshal savagely. Shocked and upset, Keitel suggested that Hitler replace him and appoint an OKW chief whose strategic judgment was more amenable . . . Hitler rejected Keitel's request . . . and sharply criticized him. He shouted that he, the Fuehrer, would decide when to replace his chief of OKW.")

164. Connor O'Brien and Bryan Bender, *Mattis breaks with Trump in resignation letter*, POLITICO, (Dec. 20, 2018), available at: <https://www.politico.com/story/2018/12/20/mattis-to-retire-in-february-trump-says-1072150>.

subjects, I believe it is right for me to step down from my position.”¹⁶⁵ After initially praising Mattis, Trump would up saying Mattis had actually been fired and would later repeatedly attack him publicly, at one point calling him “the world’s most overrated general.”¹⁶⁶

Perhaps Trump’s most frightening overtures, reminiscent of behavior typical of tyrants and despots, have been his repeated calls for the death of dissenters. He allegedly agreed with protestors calling for the hanging of his former Vice President¹⁶⁷ and said his former Chairman of the Joint Chiefs of Staff, General Mark Milley, would have been executed “in times gone by.”¹⁶⁸ When Congresspeople recorded a message to servicemembers, saying they must not carry out illegal orders,¹⁶⁹ Trump responded three times in a little over an hour, calling the Congresspeople traitors who should be put on trial,¹⁷⁰ saying they

165. *Id.*

166. Leo Shane III, *Trump blasts Mattis as ‘the world’s most overrated general’*, MILITARY TIMES, (Oct. 17, 2019), available at: <https://www.militarytimes.com/news/pentagon-congress/2019/10/17/trump-blasts-mattis-as-the-worlds-most-overrated-general/>.

167. See Maggie Haberman and Luke Broadwater, *Trump Said to Have Reacted Approvingly to Jan. 6 Chants About Hanging Pence*, NY TIMES, (May 25, 2022), available at: <https://www.nytimes.com/2022/05/25/us/politics/trump-pence-jan-6.html?partner=slack&smid=sl-share> (“Shortly after hundreds of rioters at the Capitol started chanting ‘Hang Mike Pence!’ on Jan. 6, 2021, the White House chief of staff, Mark Meadows . . . told colleagues that President Donald J. Trump was complaining that the vice president was being whisked to safety. Mr. Meadows, according to an account provided to the House committee investigating Jan. 6, then told the colleagues that Mr. Trump had said something to the effect of, maybe Mr. Pence should be hanged.”).

168. See Matt Berg, *GOP candidates bash Trump over Milley ‘death’ comment*, POLITICO, (Sep. 28, 2023), available at: <https://www.politico.com/news/2023/09/28/gop-candidates-bash-trump-milley-comment-00118900> (“Trump laid into Joint Chiefs Gen. Mark Milley on Truth Social . . . referring to a phone call Milley took after the Jan. 6 riots to reassure Chinese officials that the United States wasn’t under threat of an attack . . . [Trump posted] ‘This is an act so egregious that, in times gone by, the punishment would have been DEATH!’”).

169. Elissa Slotkin, [@SenatorSlotkin, X, Nov. 18, 2025, 08:30 AM, <https://x.com/SenatorSlotkin/status/1990774492356902948>] (“We want to speak directly to members of the Military and the Intelligence Community. The American people need you to stand up for our laws and our Constitution. Don’t give up the ship.”).

170. Donald J. Trump, [@realDonaldTrump, Truth Social, Nov. 20, 2025, 09:08 AM, <https://truthsocial.com/@realDonaldTrump/posts/115582417825161974>] (“truthsocial.com/@WashingtonExa. It’s called SEDITIOUS BEHAVIOR AT THE HIGHEST LEVEL. Each one of these traitors to our Country should be ARRESTED AND PUT ON TRIAL. Their words cannot be allowed to stand - We won’t have a Country anymore!!! An example MUST BE SET. President DJT”).

should be jailed,¹⁷¹ and finally saying their actions were “SEDITIONARY BEHAVIOR, punishable by DEATH!”¹⁷²

VI. CAN THE PRESIDENCY BE SAVED?

At the time of this writing, it is easy to look at the future of the American Presidency—and potentially the American democracy—with pessimism. As a lawyer and a Soldier, I am alarmed by the degradation of the rule of law and the misuse of my beloved military, both domestically and overseas. Considering the troubles a nation faces during populist surges, during which citizens are often willing to hand power to leaders ready to abuse it, I fear this may only be the tip of the iceberg.

Contrariwise, I still believe the American presidency can be salvaged. But to do so, lawyers, politicians, and the body politic must recognize the looming existential threat, take a stand against imperialistic grabs for power, and remain vigilant in using the checks and balances embedded in our Constitution at the nation's founding.

Congress must take a more active stance against ill-considered and costly military adventures. Two of the costliest and most pointless wars in our nation's history were under Imperial Presidents: Vietnam and the 2003 invasion of Iraq. Both were shoved through Congress by powerful executives whose reasons for pushing a nation into conflict were, at best, weak and, at worst, self-serving. Congress mustn't allow such campaigns to continue, especially during a period of global upheaval when near-peer enemies seek ways to undermine America's leadership in the international political economy.

Fortunately, at the time of this writing, it appears that Congress is taking notice of the dangers of unpredictable and unsupervised actions that potentially violate domestic and international law; Republican-led panels in both the House and Senate have recently called for an investigation into the allegations that Secretary Hegseth committed a

171. Donald J. Trump, [@realDonaldTrump], Truth Social, Nov. 20, 2025, 09:17 AM, <https://truthsocial.com/@realDonaldTrump/posts/115582451169685243> (“This is really bad, and Dangerous to our Country. Their words cannot be allowed to stand. SEDITIONARY BEHAVIOR FROM TRAITORS!!! LOCK THEM UP??? President DJT”).

172. Donald J. Trump, [@realDonaldTrump], Truth Social, Nov. 20, 2025, 10:21 AM, <https://truthsocial.com/@realDonaldTrump/posts/115582703277798715> (“SEDITIONARY BEHAVIOR, punishable by DEATH!”).

war crime by ordering the execution of drowning sailors after the September 2, 2025, strike against Venezuelan watercraft.¹⁷³

To further ensure that Imperial Presidents are restrained from pushing the nation into armed conflict, the 2001 and 2002 AUMFs must be repealed. As was noted earlier, these authorizations are “open invitations to indefinite hostilities”¹⁷⁴ and place unchecked power in the hands of a single individual. After September 11, 2001, they were a necessity for a nation devastated by an unprovoked attack and desperate for justice. Nearly a quarter of a century later, there is no reason that emergency authorizations should remain in place. Members of Congress have repeatedly attempted to repeal both AUMFs¹⁷⁵, including legislation co-introduced by then-Senator J.D. Vance,¹⁷⁶ but the efforts failed. The current administration demonstrates why new attempts are necessary.

Lastly, I would also call for a new form of bravery from the men and women whose lives have been dedicated to wearing uniforms and protecting an oath to our Constitution. Most retired senior military members do not involve themselves in politics, and almost all refuse to comment on the political machinations of those under whom they previously served. For most of American history, this has been an honorable and sensible tradition, building on an ideal that uniformed service is apolitical and free of partisan influence.

However, the third era of Imperial Presidency discussed in this note—especially the section on how the current administration has gutted the senior ranks of military lawyers in favor of those less likely to speak out—suggests that, if an exception is not made soon, the noble tradition of an apolitical military may become a thing of the past.

Recently, two groups—six members of Congress who served in the military and the intelligence community,¹⁷⁷ and a group of former

173. Victoria Bisset, Alex Horton, Ellen Nakashima and Noah Robertson, *Congressional committees to scrutinize U.S. killing of boat strike survivors*, WASHINGTON POST, (Nov. 29, 2025), available at: <https://www.washingtonpost.com/national-security/2025/11/29/hegseth-caribbean-strikes-kill-order-reaction/>.

174. Haylee Richter, *Congress’s Role in Foreign Policy*, (SP2025.W74.LAW.522A.01 National Security Law, Professor Kathleen Clark, Feb. 6, 2025) (Thank you to Ms. Richter for her permission to use this quote).

175. *See generally*, H.R.932, 118th Cong. (2023); *see also*, S. 316, 118th Cong. (2023).

176. *Senators Continue Efforts to Return War Powers to Congress, Introduce the End Endless Wars Act*, Sen. Rand Paul (June 8, 2023), available at: <https://www.paul.senate.gov/senators-continue-efforts-to-return-war-powers-to-congress-introduce-the-end-endless-wars-act/>.

177. Elissa Slotkin, [@SenatorSlotkin]. X, Nov. 18, 2025, 08:30 AM.

military JAG officers¹⁷⁸—have taken stands on the issuance of illegal orders that violate domestic and international law. Their example needs to become precedent, and service members who swore an oath to the Constitution need to be willing to speak out when they know that document is being violated.

In closing, the situation in which our nation finds itself—facing down a new permutation of Imperial Presidency—is not without hope. America survived the First Era of the Imperial Presidency, and the body politic took back control and kept future Presidents in check for decades. Even after the Second Era, we saw two presidencies—Trump (45) and Biden—successfully subjected to criticism and dissent. Those examples provide hope that, if the questionable practices discussed in this note are addressed and resisted, America can—and will—recover from the third era of the Imperial President.

178. *Statement of the “Former JAGs Working Group” on Media Reports of Pentagon “No Quarter” Orders in Caribbean Boat Strikes*, (Nov. 29, 2025), available at: <https://www.justsecurity.org/wp-content/uploads/2025/11/former-jag-working-group-no-quarter-statement.pdf>.