Panel III:

Kosovo, Libya and Presidential War Powers for Multilateral Humanitarian Interventions

Moderator: William Treanor
Testimony by Legal Adviser Harold Hongju Koh
U.S. Department of State
on
Libya and War Powers
Before the
Senate Foreign Relations Committee
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Thank you, Mr. Chairman, Ranking Member Lugar, and members of the Committee, for this opportunity to testify before you on Libya and war powers. By so doing, I continue nearly four decades of dialogue between Congress and Legal Advisers of the State Department, since the War Powers Resolution was enacted, regarding the Executive Branch's legal position on war powers.¹

We believe that the President is acting lawfully in Libya, consistent with both the Constitution and the War Powers Resolution, as well as with international law.² Our position is carefully limited to the facts of the present operation, supported by history, and respectful of both the letter of the Resolution and the spirit of consultation and collaboration that underlies it. We recognize that our approach has been a matter of important public debate, and that reasonable


² For explanation of the lawfulness of our Libya actions under international law, see Koh, supra note 1.
minds can disagree. But surely none of us believes that the best result is for Qadhafi to wait
NATO out, leaving the Libyan people again exposed to his brutality. Given that, we ask that you
swiftly approve Senate Joint Resolution 20, the bipartisan measure recently introduced by eleven
Senators, including three members of this Committee.\(^3\) The best way to show a united front to
Qadhafi, our NATO allies, and the Libyan people is for Congress now to authorize under that
Joint Resolution continued, constrained operations in Libya to enforce United Nations Security

As Secretary Clinton testified in March, the United States’ engagement in Libya followed
the Administration’s strategy of “using the combined assets of diplomacy, development, and
defense to protect our interests and advance our values.”\(^4\) Faced with brutal attacks and explicit
threats of further imminent attacks by Muammar Qadhafi against his own people,\(^5\) the United
States and its international partners acted with unprecedented speed to secure a mandate, under

\(^3\) S.J. Res. 20 (introduced by Senators Kerry, McCain, Levin, Kyl, Durbin, Feinstein, Graham, Lieberman, Blunt, Cardin, and Kirk).

\(^4\) Hearing on FY2012 State Department Budget Before the Subcomm. on State, Foreign Operations, and Related

\(^5\) Qadhafi’s actions demonstrate his ongoing intent to suppress the democratic movement against him by lawlessly
attacking Libyan civilians. On February 22, 2011, Qadhafi pledged on Libyan National Television to lead “millions
to purge Libya inch by inch, house by house, household by household, alley by alley, and individual by individual
until I purify this land.” He called his opponents “rats,” and said they would be executed. On March 17, 2011, in
another televised address, Qadhafi promised, “We will come house by house, room by room . . . We will find you
in your closets. And we will have no mercy and no pity.” Qadhafi’s widespread and systematic attacks against the
civilian population led the United Nations Security Council, in Resolution 1970, to refer the situation in Libya to the
Prosecutor of the International Criminal Court. The U.N. Human Rights Council’s Commission of Inquiry into
Libya subsequently concluded that since February, “[human rights] violations and crimes have been committed in
large part by the Government of Libya in accordance with the command and control system established by Colonel
Qadhafi through the different military, para-military, security and popular forces that he has employed in pursuit of a
systematic and widespread policy of repression against opponents of his regime and of his leadership.” At this
moment, Qadhafi’s forces continue to fire indiscriminately at residential areas with shells and rockets. Defecting
Qadhafi forces have recounted orders “to show no mercy” to prisoners, and some recent reports indicate that the
Qadhafi regime has been using rape as a tool of war. See Secretary of State Hillary Rodham Clinton, Press
Statement, Sexual Violence in Libya, the Middle East and North Africa (June 16, 2011).
http://www.state.gov/secretary/m/2011/06/166369.htm. For all of these reasons, President Obama declared on
March 26, “[W]hen someone like Qadhafi threatens a bloodbath that could destabilize an entire region; and when
the international community is prepared to come together to save thousands of lives—then it’s in our national
interest to act. And, it’s our responsibility. This is one of those times.”
Resolution 1973, to mobilize a broad coalition to protect civilians against attack by an advancing army and to establish a no-fly zone. In so doing, President Obama helped prevent an imminent massacre in Benghazi, protected critical U.S. interests in the region, and sent a strong message to the people not just of Libya—but of the entire Middle East and North Africa—that America stands with them at this historic moment of transition.

From the start, the Administration made clear its commitment to acting consistently with both the Constitution and the War Powers Resolution. The President submitted a report to Congress, consistent with the War Powers Resolution, within 48 hours of the commencement of operations in Libya. He framed our military mission narrowly, directing, among other things, that no ground troops would be deployed (except for necessary personnel recovery missions), and that U.S. armed forces would transition responsibility for leading and conducting the mission to an integrated NATO command. On April 4, 2011, U.S. forces did just that, shifting to a constrained and supporting role in a multinational civilian protection mission—in an action involving no U.S. ground presence or, to this point, U.S. casualties—authorized by a carefully tailored U.N. Security Council Resolution. As the War Powers Resolution contemplates, the Administration has consulted extensively with Congress about these operations, participating in more than ten hearings, thirty briefings, and dozens of additional exchanges since March 1—an interbranch dialogue that my testimony today continues.

This background underscores the limits to our legal claims. Throughout the Libya episode, the President has never claimed the authority to take the nation to war without Congressional authorization, to violate the War Powers Resolution or any other statute, to violate international law, to use force abroad when doing so would not serve important national interests, or to refuse to consult with Congress on important war powers issues. The
Administration recognizes that Congress has powers to regulate and terminate uses of force, and that the War Powers Resolution plays an important role in promoting interbranch dialogue and deliberation on these critical matters. The President has expressed his strong desire for Congressional support, and we have been working actively with Congress to ensure enactment of appropriate legislation.

Together with our NATO and Arab partners, we have made great progress in protecting Libya's civilian population, and we have isolated Qadhafi and set the stage for his departure. Although since early April we have confined our military involvement in Libya to a supporting role, the limited military assistance that we provide has been critical to the success of the mission, as has our political and diplomatic leadership. If the United States were to drop out of, or curtail its contributions to, this mission, it could not only compromise our international relationships and alliances and threaten regional instability, but also permit an emboldened and vengeful Qadhafi to return to attacking the very civilians whom our intervention has protected.

Where, against this background, does the War Powers Resolution fit in? The legal debate has focused on the Resolution's 60-day clock, which directs the President—absent express Congressional authorization (or the applicability of other limited exceptions) and following an initial 48-hour reporting period—to remove United States Armed Forces within 60 days from "hostilities" or "situations where imminent involvement in hostilities is clearly indicated by the circumstances." But as virtually every lawyer recognizes, the operative term, "hostilities," is an ambiguous standard, which is nowhere defined in the statute. Nor has this standard ever been defined by the courts or by Congress in any subsequent war powers legislation. Indeed, the legislative history of the Resolution makes clear there was no fixed view on exactly what the
term "hostilities" would encompass. Members of Congress understood that the term was vague, but specifically declined to give it more concrete meaning, in part to avoid unduly hampering future Presidents by making the Resolution a "one size fits all" straitjacket that would operate mechanically, without regard to particular circumstances.

From the start, lawyers and legislators have disagreed about the meaning of this term and the scope of the Resolution’s 60-day pullout rule. Application of these provisions often generates difficult issues of interpretation that must be addressed in light of a long history of military actions abroad, without guidance from the courts, involving a Resolution passed by a Congress that could not have envisioned many of the operations in which the United States has since become engaged. Because the War Powers Resolution represented a broad compromise between competing views on the proper division of constitutional authorities, the question whether a particular set of facts constitutes "hostilities" for purposes of the Resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions.

Both branches have recognized that different situations may call for different responses, and that

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6 When the Resolution was first considered, one of its principal sponsors, Senator Jacob K. Javits, stated that "[t]he bill . . . seeks to proceed in the kind of language which accepts a whole body of experience and precedent without endeavoring specifically to define it." War Powers Legislation: Hearings on S. 731, S.J. Res. 18, and S.J. Res. 59 Before the Comm. on Foreign Relations, 92d Cong. 28 (1971); see also id. (statement of Professor Henry Steel Commager) (agreeing with Senator Javits that "there is peril in trying to be too exact in definitions," as "[s]omething must be left to the judgment, the intelligence, the wisdom, of those in command of the Congress, and of the President as well"). Asked at a House of Representatives hearing whether the term "hostilities" was problematic because of "the susceptibility of it to different interpretations," making this "a very fuzzy area," Senator Javits acknowledged the vagueness of the term but suggested that it was a necessary feature of the legislation: "There is no question about that, but that decision would be for the President to make. No one is trying to demure the President of authority." War Powers: Hearings Before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs, 93d Cong. 22 (1973). We recognize that the House report suggested that "[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope," but the report provided no clear direction on what either term was understood to mean. H.R. Rep. No. 93-287, at 7 (1973); see also Lowry v. Reagan, 676 F. Supp. 333, 340 n.53 (1997) (finding that "fixed legal standards were deliberately omitted from this statutory scheme," as "the very absence of a definitional section in the [War Powers] Resolution [was] coupled with debate suggesting that determinations of 'hostilities' were intended to be political decisions made by the President and Congress").
an overly mechanical reading of the statute could lead to unintended automatic cutoffs of military involvement in cases where more flexibility is required.

In the nearly forty years since the Resolution’s enactment, successive Administrations have thus started from the premise that the term “hostilities” is “definable in a meaningful way only in the context of an actual set of facts.”7 And successive Congresses and Presidents have opted for a process through which the political branches have worked together to flesh out the law’s meaning over time. By adopting this approach, the two branches have sought to avoid construing the statute mechanically, divorced from the realities that face them.

In this case, leaders of the current Congress have stressed this very concern in indicating that they do not believe that U.S. military operations in Libya amount to the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day pullout provision.8 The historical practice supports this view. In 1975, Congress expressly invited the Executive Branch to provide its best understanding of the term “hostilities.” My predecessor Monroe Leigh and Defense Department General Counsel Martin Hoffmann responded that, as a general matter, the Executive Branch understands the term “to mean a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces.”9 On the other hand, as Leigh

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7 1975 Leigh-Hoffmann Letter, supra note 1, at 38.

8 Both before and after May 20, 2011, the 60th day following the President’s initial letter to Congress on operations in Libya, few Members of Congress asserted that our participation in the NATO mission would trigger or had triggered the War Powers Resolution’s pullout provision. House Speaker Boehner stated on June 1, 2011, that “[t]he limited nature of this engagement allows the President to go forward,” as “the President has the authority he needs.” Senate Majority Leader Reid stated on June 17, 2011, that “[t]he War Powers Act has no application to what’s going on in Libya.” Senate Foreign Relations Committee Chairman Kerry stated on June 21, 2011, that “I do not think our limited involvement rises to the level of hostilities defined by the War Powers Resolution,” and on June 23, 2011, that “[w]e have not introduced our armed forces into hostilities. No American is being shot at. No American troop is at risk of being shot down today. That is not what we’re doing. We are refueling. We are supporting NATO.” Since May 20, the basic facts regarding the limited nature of our mission in Libya have not materially changed.

and Hoffmann suggested, the term should not necessarily be read to include situations where the nature of the mission is limited (i.e., situations that do not “involve the full military engagements with which the Resolution is primarily concerned”\(^\text{10}\)); where the exposure of U.S. forces is limited (e.g., situations involving “sporadic military or paramilitary attacks on our armed forces stationed abroad,” in which the overall threat faced by our military is low\(^\text{11}\)); and where the risk of escalation is therefore limited. Subsequently, the Executive Branch has reiterated the distinction between full military encounters and more constrained operations, stating that “intermittent military engagements” do not require withdrawal of forces under the Resolution’s 60-day rule.\(^\text{12}\) In the thirty-six years since Leigh and Hoffmann provided their analysis, the Executive Branch has repeatedly articulated and applied these foundational understandings. The President was thus operating within this longstanding tradition of Executive Branch interpretation when he relied on these understandings in his legal explanation to Congress on June 15, 2011.

In light of this historical practice, a combination of four factors present in Libya suggests that the current situation does not constitute the kind of “hostilities” envisioned by the War Powers Resolution’s 60-day automatic pullout provision.

First, the mission is limited: By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led multinational civilian protection operation, which is implementing a U.N. Security Council Resolution tailored to that limited purpose. This is a very

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\(^\text{11}\) *Id.*; see also Letter from Assistant Secretary of State J. Edward Fox to Chairman Dante B. Fascell (Mar. 30, 1988) (stating that “hostilities” determination must be “based on all the facts and circumstances as they would relate to the threat to U.S. forces at the time” (emphasis added)).

unusual set of circumstances, not found in any of the historic situations in which the "hostilities" question was previously debated, from the deployment of U.S. armed forces to Lebanon, Grenada, and El Salvador in the early 1980s, to the fighting with Iran in the Persian Gulf in the late 1980s, to the use of ground troops in Somalia in 1993. Of course, NATO forces as a whole are more deeply engaged in Libya than are U.S. forces, but the War Powers Resolution’s 60-day pullout provision was designed to address the activities of the latter.13

Second, the exposure of our armed forces is limited: To date, our operations have not involved U.S. casualties or a threat of significant U.S. casualties. Nor do our current operations involve active exchanges of fire with hostile forces, and members of our military have not been involved in significant armed confrontations or sustained confrontations of any kind with hostile forces.14 Prior administrations have not found the 60-day rule to apply even in situations where

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13 A definitional section of the War Powers Resolution, 8(c), gives rise to a duty of Congressional notification, but not termination, upon the “assignment” of U.S. forces to command, coordinate, participate in the movement of, or accompany foreign forces that are themselves in hostilities. Section 8(c) is textually linked (through the term “introduction of United States Armed Forces”) not to the “hostilities” language in section 4 that triggers the automatic pullout provision in section 5(b), but rather, to a different clause later down in that section that triggers a reporting requirement. According to the Senate report, the purpose of section 8(c) was “to prevent secret, unauthorized military support activities [such as the secret assignment of U.S. military ‘advisers’ to South Vietnam and Laos] and to prevent a repetition of many of the most controversial and regrettable actions in Indochina,” S. REP. NO. 93-220, at 24 (1973)—actions that scarcely resemble NATO operations such as this one. Indeed, absurd results could ensue if section 8(c) were read to trigger the 60-day clock, as that could require termination of the “assignment” of even a single member of the U.S. military to assist a foreign government force, unless Congress passed legislation to authorize that one-person assignment. Moreover, section 8(c) must be read together with the immediately preceding section of the Resolution, 8(b). By grandfathering in pre-existing “high-level military commands,” section 8(b) not only shows that Congress knew how to reference NATO operations when it wanted to, but also suggests that Congress recognized that NATO operations are generally less likely to raise the kinds of policy concerns that animated the Resolution. If anything, the international framework of cooperation within which this military mission is taking place creates a far greater risk that by withdrawing prematurely from Libya, as opposed to staying the course, we would generate the very foreign policy problems that the War Powers Resolution was meant to counteract: for example, international condemnation and strained relationships with key allies.

14 The fact that the Defense Department has decided to provide extra “danger pay” to those U.S. service members who fly planes over Libya or serve on ships within 110 nautical miles of Libya’s shores does not mean that those service members are in “hostilities” for purposes of the War Powers Resolution. Similar danger pay is given to U.S. forces in Burundi, Greece, Haiti, Indonesia, Jordan, Montenegro, Saudi Arabia, Turkey, and dozens of other countries in which no one is seriously contending that “hostilities” are occurring under the War Powers Resolution.
significant fighting plainly did occur, as in Lebanon and Grenada in 1983 and Somalia in 1993.15

By highlighting this point, we in no way advocate a legal theory that is indifferent to the loss of
non-American lives. But here, there can be little doubt that the greatest threat to Libyan civilians
comes not from NATO or the United States military, but from Qadhafi. The Congress that
adopted the War Powers Resolution was principally concerned with the safety of U.S. forces,16
and with the risk that the President would entangle them in an overseas conflict from which they
could not readily be extricated. In this instance, the absence of U.S. ground troops, among other
features of the Libya operation, significantly reduces both the risk to U.S. forces and the
likelihood of a protracted entanglement that Congress may find itself practically powerless to
end.17

15 In Lebanon, the Reagan Administration argued that U.S. armed forces were not in “hostilities,” though there were
roughly 1,600 U.S. marines equipped for combat on a daily basis and roughly 2,000 more on ships and bases nearby;
U.S. marine positions were attacked repeatedly; and four marines were killed and several dozen wounded in those
RESPECT TO THE USE OF FORCE 85, 96-99 (Jeremy R. Azrael & Emily A. Payin eds., 1996). In Grenada, the
Administration did not acknowledge that “hostilities” had begun under the War Powers Resolution after 1,900
members of the U.S. armed forces had landed on the island, leading to combat that claimed the lives of nearly
twenty Americans and wounded nearly 100 more. See Grimmett, supra, at 15; Ben Bradlee, Jr., A Chronology on
Grenada, BOSTON GLOBE, Nov. 6, 1983. In Somalia, 25,000 troops were initially dispatched by the President,
without Congressional authorization and without reference to the War Powers Resolution, as part of Operation
Restore Hope. See Grimmett, supra, at 27. By May 1993, several thousand U.S. forces remained in the country or
on ships offshore, including a Quick Reaction Force of some 1,300 marines. During the summer and into the fall of
that year, ground combat led to the deaths of more than two dozen U.S. soldiers. JOHN L. HIRSCH & ROBERT B.
OAKLEY, SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING 112, 124-

16 The text of the statute supports this widely held understanding, by linking the pullout provision to the
“introduction” of United States Armed Forces “into hostilities,” suggesting that its primary focus is on the dangers
confronted by members of our own military when deployed abroad into threatening circumstances. Section 5(c), by
contrast, refers to United States Armed Forces who are “engaged in hostilities.”

considered and enacted as the Vietnam war was coming to an end, was intended to prevent another situation in
which a President could gradually build up American involvement in a foreign war without congressional
knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level
it was powerless to stop.”).
Third, the risk of escalation is limited: U.S. military operations have not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or expanding geographical scope. Contrast this with the 1991 Desert Storm operation, which although also authorized by a United Nations Security Council Resolution, presented “over 400,000 [U.S.] troops in the area—the same order of magnitude as Vietnam at its peak—together with concomitant numbers of ships, planes, and tanks.”18 Prior administrations have found an absence of “hostilities” under the War Powers Resolution in situations ranging from Lebanon to Central America to Somalia to the Persian Gulf tanker controversy, although members of the United States Armed Forces were repeatedly engaged by the other side’s forces and sustained casualties in volatile geopolitical circumstances, in some cases running a greater risk of possible escalation than here.19

Fourth and finally, the military means we are using are limited: This situation does not present the kind of “full military engagement[] with which the [War Powers] Resolution is primarily concerned.”20 The violence that U.S. armed forces have directly inflicted or facilitated after the handoff to NATO has been modest in terms of its frequency, intensity, and severity. The air-to-ground strikes conducted by the United States in Libya are a far cry from the bombing campaign waged in Kosovo in 1999, which involved much more extensive and aggressive aerial


19 For example, in the Persian Gulf in 1987-88, the Reagan Administration found the War Powers Resolution’s pullout provision inapplicable to a reflagging program that was conducted in the shadow of the Iran-Iraq war; that was preceded by an accidental attack on a U.S. Navy ship that killed 37 crewmen; and that led to repeated instances of active combat with Iranian forces. See Grimmett, supra note 15, at 16-18.

strike operations led by U.S. armed forces. The U.S. contribution to NATO is likewise far smaller than it was in the Balkans in the mid-1990s, where U.S. forces contributed the vast majority of aircraft and air strike sorties to an operation that lasted over two and a half years, featured repeated violations of the no-fly zone and episodic firefights with Serb aircraft and gunners, and paved the way for approximately 20,000 U.S. ground troops. Here, by contrast, the bulk of U.S. contributions to the NATO effort has been providing intelligence capabilities and refueling assets. A very significant majority of the overall sorties are being flown by our coalition partners, and the overwhelming majority of strike sorties are being flown by our partners. American strikes have been confined, on an as-needed basis, to the suppression of enemy air defenses to enforce the no-fly zone, and to limited strikes by Predator unmanned aerial vehicles against discrete targets in support of the civilian protection mission; since the handoff to NATO, the total number of U.S. munitions dropped has been a tiny fraction of the number dropped in Kosovo. All NATO targets, moreover, have been clearly linked to the Qadhafi regime’s systematic attacks on the Libyan population and populated areas, with target sets engaged only when strictly necessary and with maximal precision.

Had any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn. But the unusual confluence of these four

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21 In Kosovo, the NATO alliance set broader goals for its military mission and conducted a 78-day bombing campaign that involved more than 14,000 strike sorties, in which the United States provided two-thirds of the aircraft and delivered over 23,000 weapons. The NATO bombing campaign coincided with intensified fighting on the ground, and NATO forces, led by U.S. forces, “flew mission after mission into antiaircraft fire and in the face of over 700 missiles fired by Yugoslav air defense forces.” Hearing Before the S. Armed Servs. Comm., 106th Cong. (1999) (statement of Gen. Wesley Clark, Admiral James Ellis, Jr. & Lt. Gen. Michael Short).

factors, in an operation that was expressly designed to be limited—limited in mission, exposure of U.S. troops, risk of escalation, and military means employed—led the President to conclude that the Libya operation did not fall within the War Powers Resolution’s automatic 60-day pullout rule.

Nor is this action inconsistent with the spirit of the Resolution. Having studied this legislation for many years, I can confidently say that we are far from the core case that most Members of Congress had in mind in 1973. The Congress that passed the Resolution in that year had just been through a long, major, and searing war in Vietnam, with hundreds of thousands of boots on the ground, secret bombing campaigns, international condemnation, massive casualties, and no clear way out. In Libya, by contrast, we have been acting transparently and in close consultation with Congress for a brief period; with no casualties or ground troops; with international approval; and at the express request of and in cooperation with NATO, the Arab League, the Gulf Cooperation Council, and Libya’s own Transitional National Council. We should not read into the 1973 Congress’s adoption of what many have called a “No More Vietnams” resolution an intent to require the premature termination, nearly forty years later, of limited military force in support of an international coalition to prevent the resumption of atrocities in Libya. Given the limited risk of escalation, exchanges of fire, and U.S. casualties, we do not believe that the 1973 Congress intended that its Resolution be given such a rigid construction—absent a clear Congressional stance—to stop the President from directing supporting actions in a NATO-led, Security Council-authorized operation, for the narrow purpose of preventing the slaughter of innocent civilians.23

23 As President Obama noted in his June 22, 2011 speech on Afghanistan: “When innocents are being slaughtered and global security endangered, we don’t have to choose between standing idly by or acting on our own. Instead, we must rally international action, which we’re doing in Libya, where we do not have a single soldier on the ground,
Nor are we in a "war" for purposes of Article I of the Constitution. As the Office of Legal Counsel concluded in its April 1, 2011 opinion, under longstanding precedent the President had the constitutional authority to direct the use of force in Libya, for two main reasons. First, he could reasonably determine that U.S. operations in Libya would serve important national interests in preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. Second, the military operations that the President anticipated ordering were not sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific Congressional approval under the Declaration of War Clause. Although time has passed, the nature and scope of our operations have not evolved in a manner that would alter that conclusion. To the contrary, since the transfer to NATO command, the U.S. role in the mission has become even more limited.

Reasonable minds may read the Constitution and the War Powers Resolution differently—as they have for decades. Scholars will certainly go on debating this issue. But that should not distract those of us in government from the most urgent question now facing us, which is not one of law but of policy: Will Congress provide its support for NATO's mission in Libya at this pivotal juncture, ensuring that Qadhafi does not regain the upper hand against the people of Libya? The President has repeatedly stated that it is better to take military action, even in limited scenarios such as this, with strong Congressional engagement and support. However we construe the War Powers Resolution, we can all agree that it serves only Qadhafi's interest for the United States to withdraw from this NATO operation before it is finished.

but are supporting allies in protecting the Libyan people and giving them the chance to determine their own destiny."

That is why, in closing, we ask all of you to take quick and decisive action to approve S.J. Res. 20, the bipartisan resolution introduced by Senators Kerry, McCain, Durbin, Cardin, and seven others to provide express Congressional authorization for continued, constrained operations in Libya to enforce U.N. Security Council Resolution 1973. Only by so doing, can this body affirm that the United States government is united in its commitment to support the NATO alliance, the safety and stability of this pivotal region, and the aspirations of the Libyan people for political reform and self-government.

Thank you. I look forward to answering your questions.
AUTHORITY TO USE MILITARY FORCE IN LIBYA

The President had the constitutional authority to direct the use of military force in Libya because he could reasonably determine that such use of force was in the national interest.

Prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

April 1, 2011

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This memorandum memorializes advice this Office provided to you, prior to the commencement of recent United States military operations in Libya, regarding the President’s legal authority to conduct such operations. For the reasons explained below, we concluded that the President had the constitutional authority to direct the use of force in Libya because he could reasonably determine that such use of force was in the national interest. We also advised that prior congressional approval was not constitutionally required to use military force in the limited operations under consideration.

I.

In mid-February 2011, amid widespread popular demonstrations seeking governmental reform in the neighboring countries of Tunisia and Egypt, as well as elsewhere in the Middle East and North Africa, protests began in Libya against the autocratic government of Colonel Muammar Qadhafi, who has ruled Libya since taking power in a 1969 coup. Qadhafi moved swiftly in an attempt to end the protests using military force. Some Libyan government officials and elements of the Libyan military left the Qadhafi regime, and by early March, Qadhafi had lost control over much of the eastern part of the country, including the city of Benghazi. The Libyan government’s operations against its opponents reportedly included strafing of protesters and shelling, bombing, and other violence deliberately targeting civilians. Many refugees fled to Egypt and other neighboring countries to escape the violence, creating a serious crisis in the region.

The Libyan government's violence against civilians continued, and even escalated, despite condemnation by the UNSC and strong expressions of disapproval from other regional and international bodies. *See, e.g.*, African Union, Communique of the 265th Meeting of the Peace and Security Council, PSC/PR/COMM.2(CCLXV) (Mar. 10, 2011) (describing the “prevailing situation in Libya” as “pos[ing] a serious threat to peace and security in that country and in the region as a whole” and “[r]eiterat[ing] AU’s strong and unequivocal condemnation of the indiscriminate use of force and lethal weapons”); News Release, Organization of the Islamic Conference, OIC General Secretariat Condemns Strongly the Excessive Use of Force Against Civilians in the Libyan Jamahiriya (Feb. 22, 2011), available at http://www.oic-oci.org/topic_detail.asp?tid=4947&x_key= (reporting that “the General Secretariat of the Organization of the Islamic Conference (OIC) voiced its strong condemnation of the excessive use of force against civilians in the Arab Libyan Jamahiriya”). On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution “strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms,” “call[ed] on Muammar Gadhafi to desist from further violence,” and “urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.” S. Res. 85, 112th Cong. §§ 2, 3, 7 (as passed by Senate, Mar. 1, 2011). On March 12, the Council of the League of Arab States similarly called on the UNSC “to take the necessary measures to impose immediately a no-fly zone on Libyan military aviation” and “to establish safe areas in places exposed to shelling as a precautionary measure that allows the protection of the Libyan people and foreign nationals residing in Libya, while respecting the sovereignty and territorial integrity of neighboring States.” League of Arab States, The Outcome of the Council of the League of Arab States Meeting at the Ministerial Level in Its Extraordinary Session on the Implications of the Current Events in Libya and the Arab Position, Res. No. 7360, ¶ 1 (Mar. 12, 2011).

By March 17, 2011, Qadhafi’s forces were preparing to retake the city of Benghazi. Pledging that his forces would begin an assault on the city that night and show “no mercy and no pity” to those who would not give up resistance, Qadhafi stated in a radio address: “We will come house by house, room by room. It’s over. The issue has been decided.” *See* Dan Bilefsky & Mark Landler, *Military Action Against Qaddafi Is Backed by U.N.*, N.Y. Times, Mar. 18, 2011, at A1. Qadhafi, President Obama later noted, “compared [his people] to rats, and threatened to go door to door to inflict punishment . . . We knew that if we . . . waited one more day, Benghazi, a city nearly the size of Charlotte, could suffer a massacre that would have reverberated across the region and stained the conscience of the world.” Press Release, Office of the Press Secretary, The White House, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011) (“Obama March 28, 2011 Address”), available at http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya.

Later the same day, the UNSC addressed the situation in Libya again by adopting, by a vote of 10-0 (with five members abstaining), Resolution 1973, which imposed a no-fly zone and authorized the use of military force to protect civilians. *See* S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011); Press Release, Security Council, Security Council Approves ‘No-Fly Zone’ Over Libya, Authorizing ‘All Necessary Measures’ to Protect Civilians, by Vote of 10 in Favour with 5 Abstentions, U.N. Press Release SC/10200 (Mar. 17, 2011). In this resolution,
the UNSC determined that the “situation” in Libya “continues to constitute a threat to international peace and security” and “demand[ed] the immediate establishment of a cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.” S.C. Res. 1973. Resolution 1973 authorized member states, acting individually or through regional organizations, “to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.” Id. ¶ 4. The resolution also specifically authorized member states to enforce “a ban on all [unauthorized] flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians” and to take “all measures commensurate to the specific circumstances” to inspect vessels on the high seas suspected of violating the arms embargo imposed on Libya by Resolution 1970. Id. ¶¶ 6-8, 13.

In remarks on March 18, 2011, President Obama stated that, to avoid military intervention to enforce Resolution 1973, Qadhafi needed to: implement an immediate ceasefire, including by ending all attacks on civilians; halt his troops’ advance on Benghazi; pull his troops back from three other cities; and establish water, electricity, and gas supplies to all areas. Press Release, Office of the Press Secretary, The White House, Remarks by the President on the Situation in Libya (Mar. 18, 2011) (“Obama March 18, 2011 Remarks”), available at http://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya. The President also identified several national interests supporting United States involvement in the planned operations:

Now, here is why this matters to us. Left unchecked, we have every reason to believe that Qadafi would commit atrocities against his people. Many thousands could die. A humanitarian crisis would ensue. The entire region could be destabilized, endangering many of our allies and partners. The calls of the Libyan people for help would go unanswered. The democratic values that we stand for would be over-run. Moreover, the words of the international community would be rendered hollow.

Id. President Obama further noted the broader context of the Libyan uprising, describing it as “just one more chapter in the change that is unfolding across the Middle East and North Africa.” Id.

Despite a statement from Libya’s Foreign Minister that Libya would honor the requested ceasefire, the Libyan government continued to conduct offensive operations, including attacks on civilians and civilian-populated areas. See Press Release, Office of the Press Secretary, The White House, Letter from the President Regarding Commencement of Operations in Libya: Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 21, 2011) (“Obama March 21, 2011 Report to Congress”), available at http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya. In response, on March 19, 2011, the United States, with the support of a number of its coalition partners, launched airstrikes against Libyan targets to enforce Resolution 1973. Consistent with the reporting provisions of the War Powers Resolution, 50 U.S.C. § 1543(a) (2006), President Obama provided a report to Congress less than forty-eight hours later, on March 21, 2011. The President explained:
At approximately 3:00 p.m. Eastern Daylight Time, on March 19, 2011, at my direction, U.S. military forces commenced operations to assist an international effort authorized by the United Nations (U.N.) Security Council and undertaken with the support of European allies and Arab partners, to prevent a humanitarian catastrophe and address the threat posed to international peace and security by the crisis in Libya. As part of the multilateral response authorized under U.N. Security Council Resolution 1973, U.S. military forces, under the command of Commander, U.S. Africa Command, began a series of strikes against air defense systems and military airfields for the purposes of preparing a no-fly zone. These strikes will be limited in their nature, duration, and scope. Their purpose is to support an international coalition as it takes all necessary measures to enforce the terms of U.N. Security Council Resolution 1973. These limited U.S. actions will set the stage for further action by other coalition partners.

Obama March 21, 2011 Report to Congress. The report then described the background to the strikes, including UNSC Resolution 1973, the demand for a ceasefire, and Qadhafi’s continued attacks.

The March 21 report also identified the risks to regional and international peace and security that, in the President’s judgment, had justified military intervention:

Qadhafi’s continued attacks and threats against civilians and civilian populated areas are of grave concern to neighboring Arab nations and, as expressly stated in U.N. Security Council Resolution 1973, constitute a threat to the region and to international peace and security. His illegitimate use of force not only is causing the deaths of substantial numbers of civilians among his own people, but also is forcing many others to flee to neighboring countries, thereby destabilizing the peace and security of the region. Left unaddressed, the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States. Qadhafi’s defiance of the Arab League, as well as the broader international community ... represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region. Qadhafi has forfeited his responsibility to protect his own citizens and created a serious need for immediate humanitarian assistance and protection, with any delay only putting more civilians at risk.

Id. Emphasizing that “[t]he United States has not deployed ground forces into Libya,” the President explained that “United States forces are conducting a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster” and
thus had targeted only "the Qadhafi regime’s air defense systems, command and control structures, and other capabilities of Qadhafi’s armed forces used to attack civilians and civilian populated areas." "Id. The President also indicated that "[w]e will seek a rapid, but responsible, transition of operations to coalition, regional, or international organizations that are postured to continue activities as may be necessary to realize the objectives of U.N. Security Council Resolutions 1970 and 1973." "Id. As authority for the military operations in Libya, President Obama invoked his "constitutional authority to conduct U.S. foreign relations" and his authority "as Commander in Chief and Chief Executive." "Id.


On March 28, 2011, President Obama addressed the nation regarding the situation in Libya. The President stated that the coalition had succeeded in averting a massacre in Libya and that the United States was now transferring "the lead in enforcing the no-fly zone and protecting civilians on the ground . . . to our allies and partners." Obama March 28, 2011 Address. In future coalition operations in Libya, the President continued, "the United States will play a supporting role—including intelligence, logistical support, search and rescue assistance, and capabilities to jam regime communications." "Id. The President also reiterated the national interests supporting military action by the United States. "[G]iven the costs and risks of intervention," he explained, "we must always measure our interests against the need for action." "Id. But, "[i]n this particular country—Libya—at this particular moment, we were faced with the prospect of violence on a horrific scale," and "[w]e had a unique ability to stop that violence." "Id. Failure to prevent a slaughter would have disregarded America’s "important strategic interest in preventing Qaddafi from overrunning those who oppose him":

A massacre would have driven thousands of additional refugees across Libya’s borders, putting enormous strains on the peaceful—yet fragile—transitions in Egypt and Tunisia. The democratic impulses that are dawning across the region would be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power. The writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security. So while I will never minimize the costs involved in military action, I am
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convinced that a failure to act in Libya would have carried a far greater price for America.

Id. As of March 31, 2011, the United States had transferred responsibility for all ongoing coalition military operations in Libya to the North Atlantic Treaty Alliance ("NATO").

II.

The President explained in his March 21, 2011 report to Congress that the use of military force in Libya serves important U.S. interests in preventing instability in the Middle East and preserving the credibility and effectiveness of the United Nations Security Council. The President also stated that he intended the anticipated United States military operations in Libya to be limited in nature, scope, and duration. The goal of action by the United States was to "set the stage" for further action by coalition partners in implementing UNSC Resolution 1973, particularly through destruction of Libyan military assets that could either threaten coalition aircraft policing the UNSC-declared no-fly zone or engage in attacks on civilians and civilian-populated areas. In addition, no U.S. ground forces would be deployed, except possibly for any search and rescue missions, and the risk of substantial casualties for U.S. forces would be low. As we advised you prior to the commencement of military operations, we believe that, under these circumstances, the President had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct such limited military operations abroad, even without prior specific congressional approval.

A.

Earlier opinions of this Office and other historical precedents establish the framework for our analysis. As we explained in 1992, Attorneys General and this Office "have concluded that the President has the power to commit United States troops abroad," as well as to "take military action," "for the purpose of protecting important national interests," even without specific prior authorization from Congress. Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 9 (1992) ("Military Forces in Somalia"). This independent authority of the President, which exists at least insofar as Congress has not specifically restricted it, see Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 n.4, 178 (1994) ("Haiti Deployment"), derives from the President's "unique responsibility," as Commander in Chief and Chief Executive, for "foreign and military affairs," as well as national security. Sale v. Haitian Centers Council, Inc., 509 U.S. 155, 188 (1993); U.S. Const. art. II, § 1, cl. 1, § 2, cl. 2.

The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to "declare War," "raise and support Armies," and "provide and maintain a Navy," as well as general authority over the appropriations on which any military operation necessarily depends. U.S. Const. art. I, § 8, cl. 1, 11-14. Yet, under "the historical gloss on the 'executive Power' vested in Article II of the Constitution," the President bears the "'vast share of responsibility for the conduct of our foreign relations,'" Am. Ins. Ass’n v. Garamendi, 539 U.S. 396, 414 (2003) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)), and accordingly holds "independent authority in the areas of foreign policy and national security."” Id. at 429 (quoting Haig v. Agee, 453 U.S. 280, 291 (1981)); see also, e.g., Youngstown Sheet & Tube Co., 343 U.S.
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at 635-36 n.2 (Jackson, J., concurring) (noting President’s constitutional power to “act in external affairs without congressional authority”). Moreover, the President as Commander in Chief “superintend[s] the military,” Loving v. United States, 517 U.S. 748, 772 (1996), and “is authorized to direct the movements of the naval and military forces placed by law at his command.” Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850); see also Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. O.L.C. 182, 184 (1996). The President also holds “the implicit advantage . . . over the legislature under our constitutional scheme in situations calling for immediate action,” given that imminent national security threats and rapidly evolving military and diplomatic circumstances may require a swift response by the United States without the opportunity for congressional deliberation and action. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) (“Presidential Power”); see also Haig, 453 U.S. at 292 (noting “‘the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature’” (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)). Accordingly, as Attorney General (later Justice) Robert Jackson observed over half a century ago, “the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests.” Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 62 (1941).

This understanding of the President’s constitutional authority reflects not only the express assignment of powers and responsibilities to the President and Congress in the Constitution, but also, as noted, the “historical gloss” placed on the Constitution by two centuries of practice. Garamendi, 539 U.S. at 414. “Our history,” this Office observed in 1980, “is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.” Presidential Power, 4A Op. O.L.C. at 187; see generally Richard F. Grimmett, Cong. Res. Serv., R41677, Instances of Use of United States Armed Forces Abroad, 1798-2010 (2011). Since then, instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia (1999), without specific prior authorizing legislation. See Grimmett, supra, at 13-31. This historical practice is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense, and because “[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention.” Haig, 453 U.S. at 292. In this context, the “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of broad constitutional power.’” Haiti Deployment, 18 Op. O.L.C. at 178 (quoting Presidential Power, 4A Op. O.L.C. at 187); see also Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 330-31 (1995) (“Proposed Bosnia Deployment”) (noting that “[t]he scope and limits” of Congress’s power to declare war “are not well defined by constitutional text, case law, or statute,” but the relationship between that power and the President’s authority as Commander in Chief and Chief Executive has been instead “clarified by 200 years of practice”).
Indeed, Congress itself has implicitly recognized this presidential authority. The War Powers Resolution ("WPR"), 50 U.S.C. §§ 1541-1548 (2006), a statute Congress described as intended "to fulfill the intent of the framers of the Constitution of the United States," id. § 1541(a), provides that, in the absence of a declaration of war, the President must report to Congress within 48 hours of taking certain actions, including introduction of U.S. forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." Id. § 1543(a). The Resolution further provides that the President generally must terminate such use of force within 60 days (or 90 days for military necessity) unless Congress extends this deadline, declares war, or "enact[s] a specific authorization." Id. § 1544(b). As this Office has explained, although the WPR does not itself provide affirmative statutory authority for military operations, see id. § 1547(d)(2), the Resolution's "structure...recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces" into hostilities or circumstances presenting an imminent risk of hostilities. Haiti Deployment, 18 Op. O.L.C. at 175; see also Proposed Bosnia Deployment, 19 Op. O.L.C. at 334. That structure—requiring a report within 48 hours after the start of hostilities and their termination within 60 days after that—"makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress." Haiti Deployment, 18 Op. O.L.C. at 175-76; see also Proposed Bosnia Deployment, 19 Op. O.L.C. at 334-35.\footnote{A policy statement in the WPR states that "[t]he constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." 50 U.S.C. § 1541(c). But this policy statement "is not to be viewed as limiting presidential action in any substantive manner." Presidential Power, 4A Op. O.L.C. at 190. The conference committee report accompanying the WPR made clear that "[s]ubsequent sections of the [Resolution] are not dependent upon the language of" the policy statement. H.R. Rep. No. 93-547, at 8 (1973). Moreover, in a later, operative provision, the Resolution makes clear that nothing in it "is intended to alter the constitutional authority...of the President." 50 U.S.C. § 1547(d). As demonstrated by U.S. military interventions in Somalia, Haiti, Bosnia, and Kosovo, among many other examples, "the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories specifically marked out by the Resolution." Proposed Bosnia Deployment, 19 Op. O.L.C. at 335; see also Haiti Deployment, 18 Op. O.L.C. at 176 & n.3.}
for “major, prolonged conflicts such as the wars in Vietnam and Korea,” not more limited engagements. *Id.* at 176.

Applying this fact-specific analysis, we concluded in 1994 that a planned deployment of up to 20,000 United States troops to Haiti to oust military leaders and reinstall Haiti’s legitimate government was not a “war” requiring advance congressional approval. *Id.* at 174 n.1, 178-79 & n.10; see also Address to the Nation on Haiti, 30 Weekly Comp. Pres. Doc. 1799 (Sept. 18, 1994); Maureen Taft-Morales & Clare Ribando Seelke, Cong. Research Serv., RL32294, *Haiti: Developments and U.S. Policy Since 1991 and Current Congressional Concerns* 4 (2008).

“In deciding whether prior Congressional authorization for the Haitian deployment was constitutionally necessary,” we observed, “the President was entitled to take into account the anticipated nature, scope, and duration of the planned deployment, and in particular the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment.” *Haiti Deployment*, 18 Op. O.L.C. at 179. Similarly, a year later we concluded that a proposed deployment of approximately 20,000 ground troops to enforce a peace agreement in Bosnia and Herzegovina also was not a “war,” even though this deployment involved some “risk that the United States [would] incur (and inflict) casualties.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333. For more than two years preceding this deployment, the United States had undertaken air operations over Bosnia to enforce a UNSC-declared “no-fly zone,” protect United Nations peacekeeping forces, and secure “safe areas” for civilians, including one two-week operation in which NATO attacked hundreds of targets and the United States alone flew over 2300 sorties—all based on the President’s “constitutinal authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive,” without a declaration of war or other specific prior approval from Congress. *Letter to Congressional Leaders Reporting on the Deployment of United States Aircraft to Bosnia-Herzegovina*, 1995 Pub. Papers of William J. Clinton 1279, 1280 (Sept. 1, 1995); see also, e.g., *Letter to Congressional Leaders on Bosnia*, 30 Weekly Comp. Pres. Doc. 2431, 2431 (Nov. 22, 1994); *Letter to Congressional Leaders on Bosnia-Herzegovina*, 30 Weekly Comp. Pres. Doc. 1699, 1700 (Aug. 22, 1994); *Letter to Congressional Leaders on Protection of United Nations Personnel in Bosnia-Herzegovina*, 30 Weekly Comp. Pres. Doc. 793, 793 (Apr. 12, 1994); *Letter to Congressional Leaders Reporting on NATO Action in Bosnia*, 30 Weekly Comp. Pres. Doc. 406, 406 (Mar. 1, 1994); *Letter to Congressional Leaders on the Conflict in the Former Yugoslavia*, 30 Weekly Comp. Pres. Doc. 324, 325 (Feb. 17, 1994); *Letter to Congressional Leaders Reporting on the No-Fly Zone Over Bosnia*, 29 Weekly Comp. Pres. Doc. 586, 586 (Apr. 13, 1993); *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 328-29; *Deliberate Force: A Case Study in Effective Air Campaigning* 334, 341-44 (Col. Robert C. Owen, ed., 2000), available at http://purl.access.gpo.gov/GPO/LPS20446. This Office acknowledged that “deployment of 20,000 troops *on the ground* is an essentially different, and more problematic, type of intervention,” than air or naval operations because of the increased risk of United States casualties and the far greater difficulty of withdrawing United States ground forces. But we nonetheless concluded that the anticipated risks were not sufficient to make the deployment a “‘war’ in any sense of the word.” *Proposed Bosnia Deployment*, 19 Op. O.L.C. at 333-34.
Under the framework of these precedents, the President’s legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President’s action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in “nature, scope, and duration” to constitute a “war” requiring prior specific congressional approval under the Declaration of War Clause.

In prior opinions, this Office has identified a variety of national interests that, alone or in combination, may justify use of military force by the President. In 2004, for example, we found adequate legal authority for the deployment of U.S. forces to Haiti based on national interests in protecting the lives and property of Americans in the country, preserving “regional stability,” and maintaining the credibility of United Nations Security Council mandates. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jack L. Goldsmith III, Assistant Attorney General, Office of Legal Counsel, Re: Deployment of United States Armed Forces to Haiti at 3-4 (Mar. 17, 2004) (“2004 Haiti Opinion”), available at http://www.justice.gov/oic/ opinions.htm. In 1995, we similarly concluded that the President’s authority to deploy approximately 20,000 ground troops to Bosnia, for purposes of enforcing a peace agreement ending the civil war there, rested on national interests in completing a “pattern of inter-allied cooperation and assistance” established by prior U.S. participation in NATO air and naval support for peacekeeping efforts, “preserving peace in the region and forestalling the threat of a wider conflict,” and maintaining the credibility of the UNSC. Proposed Bosnian Deployment, 19 Op. O.L.C. at 352-33. And in 1992, we explained the President’s authority to deploy troops in Somalia in terms of national interests in providing security for American civilians and military personnel involved in UNSC-supported humanitarian relief efforts and (once again) enforcing UNSC mandates. Military Forces in Somalia; 16 Op. O.L.C. at 10-12.\footnote{As these examples make clear, defense of the United States to repel a direct and immediate military attack is by no means the only basis on which the President may use military force without congressional authorization. Accordingly, the absence of an immediate self-defense interest does not mean that the President lacked authority for the military operations in Libya.}

In our view, the combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the UNSC’s credibility and effectiveness—provided a sufficient basis for the President’s exercise of his constitutional authority to order the use of military force.\footnote{Although President Obama has expressed opposition to Qadhafi’s continued leadership of Libya, we understand that regime change is not an objective of the coalition’s military operations. See Obama March 28, 2011 Address (“Of course, there is no question that Libya—and the world—would be better off with Qadhafi out of power. I . . . will actively pursue [that goal] through non-military means. But broadening our military mission to include regime change would be a mistake.”). We therefore do not consider any national interests relating to regime change in assessing the President’s legal authority to order military operations in Libya.} First, the United States has a strong national security and foreign policy interest in security and stability in the Middle East that was threatened by Qadhafi’s actions in Libya. As noted, we recognized similar regional stability interests as justifications for presidential military actions in Haiti and Bosnia. With respect to Haiti, we found “an obvious interest in maintaining peace and stability,” “[g]iven the
proximity of Haiti to the United States,” and particularly considering that “past instances of unrest in Haiti have led to the mass emigration of refugees attempting to reach the United States.” 2004 Haiti Opinion at 3. In the case of Bosnia, we noted (quoting prior statements by President Clinton justifying military action) the longstanding commitment of the United States to the “principle that the security and stability of Europe is of fundamental interest to the United States,” and we identified, as justification for the military action, the President’s determination that “[i]f the war in the former Yugoslavia resumes, ‘there is a very real risk that it could spread beyond Bosnia, and involve Europe’s new democracies as well as our NATO allies.’” Proposed Bosnia Deployment, 19 Op. O.L.C. at 333. In addition, in another important precedent, President Clinton justified extensive airstrikes in the Federal Republic of Yugoslavia (“FRY”) in 1999—military action later ratified by Congress but initially conducted without specific authorization, see Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000)—based on concerns about the threat to regional security created by that government’s repressive treatment of the ethnic Albanian population in Kosovo. “The FRY government’s violence,” President Clinton explained, “creates a conflict with no natural boundaries, pushing refugees across borders and potentially drawing in neighboring countries. The Kosovo region is a tinderbox that could ignite a wider European war with dangerous consequences to the United States.” Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 Weekly Comp. Pres. Doc. 527, 527 (Mar. 26, 1999).

As his statements make clear, President Obama determined in this case that the Libyan government’s actions posed similar risks to regional peace and security. Much as violence in Bosnia and Kosovo in the 1990s risked creating large refugee movements, destabilizing neighboring countries, and inviting wider conflict, here the Libyan government’s “illegitimate use of force... was forcing many [civilians] to flee to neighboring countries, thereby destabilizing the peace and security of the region.” Obama March 21, 2011 Report to Congress. “Left unaddressed,” the President noted in his report to Congress, “the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States.” Id. Without outside intervention, Libya’s civilian population faced a “humanitarian catastrophe,” id.; as the President put it on another occasion, “innocent people” in Libya were “being brutalized” and Qadhaifi “threaten[ed] a bloodbath that could destabilize an entire region.” Press Release, Office of the Press Secretary, The White House, Weekly Address: President Obama Says the Mission in Libya is Succeeding (Mar. 26, 2011), available at http://www.whitehouse.gov/the-press-office/2011/03/26/weekly-address-president-obama-says-mission-libya-succeeding. The risk of regional destabilization in this case was also recognized by the UNSC, which determined in Resolution 1973 that the “situation” in Libya “constitute[d] a threat to international peace and security.” S.C. Res. 1973. As this Office has previously observed, “[t]he President is entitled to rely on” such UNSC findings “in making his determination that the interests of the United States justify providing the military assistance that [the UNSC resolution] calls for.” Military Forces in Somalia, 16 Op. O.L.C. at 12.4

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4 We note, however, that, at least for purposes of domestic law, a Security Council resolution is “not required as a precondition for Presidential action.” Military Forces in Somalia, 16 Op. O.L.C. at 7. Rather, as we explained in 2004, “in exercising his authority as Commander in Chief and Chief Executive, the President [may] choose to take” the UNSC resolution into account “in evaluating the foreign policy and national security interests of the United States that are at stake.” 2004 Haiti Opinion at 4.
Qadhafi’s actions not only endangered regional stability by increasing refugee flows and creating a humanitarian crisis, but, if unchecked, also could have encouraged the repression of other democratic uprisings that were part of a larger movement in the Middle East, thereby further undermining United States foreign policy goals in the region. Against the background of widespread popular unrest in the region, events in Libya formed “just one more chapter in the change that is unfolding across the Middle East and North Africa.” Obama March 18, 2011 Remarks. Qadhafi’s campaign of violence against his own country’s citizens thus might have set an example for others in the region, causing “[t]he democratic impulses that are dawning across the region [to] be eclipsed by the darkest form of dictatorship, as repressive leaders concluded that violence is the best strategy to cling to power.” Obama March 28, 2011 Address. At a minimum, a massacre in Libya could have imperiled transitions to democratic government underway in neighboring Egypt and Tunisia by driving “thousands of additional refugees across Libya’s borders.” Id. Based on these factors, we believe the President could reasonably find a significant national security interest in preventing Libyan instability from spreading elsewhere in this critical region.

The second important national interest implicated here, which reinforces the first, is the longstanding U.S. commitment to maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security. Since at least the Korean War, the United States government has recognized that “[t]he continued existence of the United Nations as an effective international organization is a paramount United States interest.” Military Forces in Somalia, 16 Op. O.L.C. at 11 (quoting Authority of the President to Repel the Attack in Korea, 23 Dep’t St. Bull. 173, 177 (1950)). Accordingly, although of course the President is not required to direct the use of military force simply because the UNSC has authorized it, this Office has recognized that “maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest” on which the President may rely in determining that U.S. interests justify the use of military force. Proposed Bosnia Deployment, 19 Op. O.L.C. at 333 (quoting Military Forces in Somalia, 16 Op. O.L.C. at 11). Here, the UNSC’s credibility and effectiveness as an instrument of global peace and stability were at stake in Libya once the UNSC took action to impose a no-fly zone and ensure the safety of civilians—particularly after Qadhafi’s forces ignored the UNSC’s call for a cease fire and for the cessation of attacks on civilians. As President Obama noted, without military action to stop Qadhafi’s repression, “[t]he writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security.” Obama March 28, 2011 Address; see also Obama March 21, 2011 Report to Congress (“Qadhafi’s defiance of the Arab League, as well as the broader international community . . . represents a lawless challenge to the authority of the Security Council and its efforts to preserve stability in the region.”). We think the President could legitimately find that military action by the United States to assist the international coalition in giving effect to UNSC Resolution 1973 was needed to secure “a substantial national foreign policy objective.” Military Forces in Somalia, 16 Op. O.L.C. at 12.

We conclude, therefore, that the use of military force in Libya was supported by sufficiently important national interests to fall within the President’s constitutional power. At the same time, turning to the second element of the analysis, we do not believe that
anticipated United States operations in Libya amounted to a “war” in the constitutional sense necessitating congressional approval under the Declaration of War Clause. This inquiry, as noted, is highly fact-specific and turns on no single factor. See Proposed Bosnia Deployment, 19 Op. O.L.C. at 334 (reaching conclusion based on specific “circumstances”); Haiti Deployment, 18 Op. O.L.C. at 178 (same). Here, considering all the relevant circumstances, we believe applicable historical precedents demonstrate that the limited military operations the President anticipated directing were not a “war” for constitutional purposes.

As in the case of the no-fly zone patrols and periodic airstrikes in Bosnia before the deployment of ground troops in 1995 and the NATO bombing campaign in connection with the Kosovo conflict in 1999—two military campaigns initiated without a prior declaration of war or other specific congressional authorization—President Obama determined that the use of force in Libya by the United States would be limited to airstrikes and associated support missions; the President made clear that “[t]he United States is not going to deploy ground troops in Libya.” Obama March 18, 2011 Remarks. The planned operations thus avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces—two factors that this Office has identified as “arguably” indicating “a greater need for approval [from Congress] at the outset,” to avoid creating a situation in which “Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed.” Proposed Bosnia Deployment, 19 Op. O.L.C. at 333. Furthermore, also as in prior operations conducted without a declaration of war or other specific authorizing legislation, the anticipated operations here served a “limited mission” and did not “aim at the conquest or occupation of territory.” Id. at 332. President Obama directed United States forces to “conduct[] a limited and well-defined mission in support of international efforts to protect civilians and prevent a humanitarian disaster”; American airstrikes accordingly were to be “limited in their nature, duration, and scope.” Obama March 21, 2011 Report to Congress. As the President explained, “we are not going to use force to go beyond [this] well-defined goal.” Obama March 18, 2011 Remarks. And although it might not be true here that “the risk of sustained military conflict was negligible,” the anticipated operations also did not involve a “preparatory bombardment” in anticipation of a ground invasion—a form of military operation we distinguished from the deployment (without preparatory bombing) of 20,000 U.S. troops to Haiti in concluding that the latter operation did not require advance congressional approval. Haiti Deployment, 18 Op. O.L.C. at 176, 179. Considering the historical practice of even intensive military action—such as the 17-day-long 1995 campaign of NATO airstrikes in Bosnia and some two months of bombing in Yugoslavia in 1999—without specific prior congressional approval, as well as the limited means, objectives, and intended duration of the anticipated operations in Libya, we do not think the “anticipated nature, scope, and duration” of the use of force by the United States in Libya rose to the level of a “war” in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress.
Accordingly, we conclude that President Obama could rely on his constitutional power to safeguard the national interest by directing the anticipated military operations in Libya—which were limited in their nature, scope, and duration—without prior congressional authorization.

/s/

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The War Powers Outside the Courts†

WILLIAM MICHAEL TREANOR*

1. THE PROBLEMS

Few areas of constitutional law have produced as much heated debate as the war powers area, heat produced in no small part by the passionate belief that this is a subject of incalculable consequence. But, stunningly and ironically, there is little connection between the issues that scholars debate and the constitutional issues involving war that government officials and political leaders confront.

War powers scholarship continues to be haunted by the War in Vietnam, and the dominant question continues to be whether Congress must approve large-scale, sustained military action. But this is not the central issue now (if ever it truly was, since President Johnson could always point to the Gulf of Tonkin Resolution†). This is not to say that there is no political actor who still articulates the view that the Executive can unilaterally initiate major conflict and sustain that conflict in the absence of congressional authorization of some form. The First President Bush, for example, made claims to that effect before and after the Gulf War.² But he ultimately went to Congress for authorization.³ The debate about whether Congress must authorize large-scale military conflict in the absence of some emergency is one in which champions of the pro-Congress have prevailed as a practical matter. As defenders of executive branch actions justify military action taken or prepare justification for actions under consideration, they either rely on congressional authorization of some type or argue that there is some exception warranting departure from the general principle that Congress must authorize conflict. Thus, to the extent that I can deduce internal deliberations from reading newspapers, as the current administration prepared for war against Iraq, it was not ready to do so simply on the grounds that there is a general executive power to start and wage war without congressional authorization. But Administration lawyers did conclude that war against Hussein could be started in 2002 when the President's constitutional powers were combined with the congressional authorization of the Gulf War in 1991.⁴ Although the Administration eventually

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1. For a good discussion, see JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 15–23 (1993).


decided to seek express congressional authorization, its apparent consideration of the 1991 statute as justification highlights an issue that does have enormous bite: How focused must congressional consideration be for it to constitute authorization? Is it necessary that Congress explicitly authorize a particular conflict for it to be constitutional?

I don't mean: Must Congress authorize major conflict by formally declaring war? The issue of whether Congress must formally declare war for large-scale conflict to be constitutional—like the broader issue of whether Congress must authorize sustained conflict—appears to be of great significance for many scholars. I should add that it is hard for me to see that this is actually a difficult issue. Formal declarations of war were increasingly rare at the time of the founding, as Hamilton observed in the Federalist 25, and after 1798 Congress clearly approved the Quasi-War against France without a formal declaration of war. Background understanding and early practice thus make clear that the framers—in granting Congress the power to "declare war"—were using the term in a non-technical way and did not intend that formal declarations of war were the only mechanism by which Congress could initiate major conflict. Of greater relevance for my point here, the argument that Congress must formally declare war to initiate major conflict is not one that engages with a current controversy. The United States has repeatedly engaged in military conflict since the Second World War without once formally declaring war, and there is no political constituency clamoring for a different practice under which a declaration of war would be necessary.

In contrast, the issue that is of great moment is whether congressional authorization must be explicit and addressed to a particular controversy. As I noted above, my sense is that the current administration considered going to war against Iraq in 2002 on the basis of the 1991 congressional authorization of the Gulf War. During the Clinton administration, the Office of Legal Counsel justified the planned invasion of Haiti in 1994 on the basis of implied authorization found in an appropriations bill, and in 2000 provided a similar justification for the intervention in Kosovo. So, the Executive has controversially taken the position that Congress's authorization need not be explicit.

Leading scholars have recognized that there can be disagreement about when Congress has authorized military action in a way that is constitutionally sufficient. There is, for example, an ongoing debate about whether the Tonkin Gulf Resolution was sufficient justification for the War in Vietnam or whether the War Powers Resolution should be understood to authorize sixty days of military action before the Executive needs further approval from Congress. But there has been little thinking about the broader question of how one determines as a matter of law when Congress has signed off on military action and, as the Kosovo and Haiti opinions indicate, this is an opinion of great moment.

A connected issue of similar import is: In what situations is congressional approval unnecessary? Even champions of a pro-Congress understanding of the Constitution,

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8. See Authorization for Continuing Hostilities in Kosovo, 2000 OLC LEXIS 16 (hereinafter Kosovo).
such as Ely, recognize that there are some situations in which the President can move in advance of congressional authorization—such as when the nation is under attack or to rescue U.S. citizens abroad. The critical question—and one that has received little attention—is: What are the contours of this category? How do we determine when the Executive can proceed unilaterally? This is, again, a fundamental issue. In the Clinton and first Bush administration, military actions such as Somalia, Haiti, and Bosnia were justified by the Department of Justice on the grounds that the deployment of troops did not amount to "war" in the constitutional sense. Under the test employed by then-Assistant Attorney General Dellinger, the nature, scope, and duration of the conflict must be assessed. If they do not arise to a certain level, the conflict is not "war," and thus Congress need not approve it. In Somalia, then-Assistant Attorney General Flanigan took the position that the President did not need congressional approval when he deployed troops to protect both U.S. citizens and non-U.S. citizens. In contrast, the War Powers Resolution suggests the President can act unilaterally only when the United States, its territories, possessions, or troops are under attack. The gap between the Department of Justice position and the War Powers Resolution is vast. The President's ability to act alone is, under one approach, great; under the other, it is reserved for a particular type of emergency.

Beyond its failure to focus on the issues of primary practical consequence today, a basic failing of most current scholarship on the war powers is that it has not adequately addressed either the question of constitutional role or how political actors should engage in constitutional discourse. Classically, legal scholars have focused either on how courts should interpret the Constitution or on how scholars should interpret it. In recent years, scholars such as Mark Tushnet have pushed to "take the Constitution away from the courts." I think the case that Tushnet has made is compelling, but we need now to focus more on how political actors should engage in constitutional interpretation. The war powers is an extraordinarily rich area for consideration of this question both because the courts have historically retreated from the area and because there is a significant body of OLC opinions that provides evidence of how one set of political actors has interpreted the Constitution. At the same time, there is a difficult area to think through. How does the presence of a body of executive branch precedent (i.e., the opinions of the Office of Legal Counsel) affect the constitutional interpretations of executive branch actors? Should they interpret the Constitution differently than members of Congress? More broadly, are members of the different branches of government entitled to interpret the Constitution differently precisely because the Constitution in the war powers area contemplates, to use Corwin's phrase, an "invitation to struggle" in which they represent branches of government with different institutional interests. It is also difficult to work through political actors'
constitutional obligations precisely because the area is so difficult. As the next section will suggest, there are a range of legitimate interpretations to constitutional questions in the war powers area, such as the two I am focusing on here. (What constitutes congressional authorization? When is congressional authorization unnecessary?) What should a political actor do when there are a range of appropriate interpretations? Should she try to be principled? What does it mean to be principled and what would a principled approach be? Should she, instead, be opportunistic because the constitutional system—like the adversary system—works best when players pursue self-interest, rather than trying to take an Olympian view? These are hard issues that have received relatively little exploration.

Finally, I have found much of the scholarship in this area wanting because it typically treats the question of the proper role of Executive and Congress in the war powers area as an easy one. Scholars disagree about what the proper role is, but, even as they disagree, they treat the position they hold as clearly correct. But, for reasons that will be outlined below, this is not an area that admits of easy answers.

The rest of this paper represents an attempt to start exploring these issues. In the next section, I sketch out why normal methodologies of constitutional interpretation fail to give us concrete answers to my two questions of what constitutes congressional authorization and when authorization is unnecessary. In the final section, I offer an initial foray into why principled decision making is important here and how a political actor might engage in such decision making.

II. LIMITS OF TRADITIONAL METHODOLOGIES

When I write a law review article, I typically get a certain number of letters from people who disagree with me. But the only time I have ever gotten truly angry letters was when I wrote about the original understanding of the war powers clause. What upset people was not my thesis about why the framers gave the power to declare war to Congress, but, rather, the simple fact that, in my view, one could legitimately disagree about what the war clause of the Constitution means. There is a substantial body of scholarly opinion that insists that the constitutional framework is perfectly straightforward, that Congress has to authorize conflicts, and that there is no ground for dispute. As John Hart Ely writes on the first page of his war powers book: “The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant all wars, big or small, ‘declared’ in so many words or not—most weren’t, even then—had to be legislatively authorized.” The record is much more ambiguous, and the ambiguity bears on my questions of what constitutes congressional authorization and when it is not necessary.

Start with text. The Constitution vests in Congress the power “To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and War.” The President is “Commander in Chief of the Army and Navy of the United States” and he possesses, as well, whatever power can be derived from the vesting clause of Article II section 1. There are a number of legitimate ways to read

15. See Treanor, supra note 6.
16. Ely, supra note 1, at 3.
17. U.S. Const. art I, § 8, cl. 11.
these texts, and they have different implications for the way my two questions are resolved.

Article I's grant of power to Congress can, as a textual matter, plausibly be read as mandating that Congress must authorize any conflict for it to be constitutional. Under this approach, while Congress is specifically given only the power to start the biggest conflicts (formally declared wars) and the smallest (the limited operations conducted by those operating with letters of marque and reprisal), these grants should be read almost poetically to stand for the proposition that Congress has to approve the biggest conflicts, the smallest conflicts, and everything in-between. Article I, section 8, clause 11 is thus best understood as constitutional synecdoche. (For those with vague memories of the term from long-past high school English classes: The part stands for the whole.) "To declare War [and] grant letters of Marque and Reprisals" is the lawyer's equivalent of "Lend me your ears" and "All hands on deck." Although the synecdoche analogy is original with this essay, the basic point is Ely's.19

While the Ely approach to the text would mandate that only congressionally approved conflicts are constitutional, precisely because the text does not speak to the full range of military operation, it does not provide clear guidance as to what form approval must take. In other words, under Ely's reading, Congress can sanction conflict by declaring war, by issuing letters of marque and reprisal, and in other ways that are not spelled out. Thus, this textual approach does not resolve one of my two questions—the question of how one can tell when Congress has authorized conflict. In addition, it does not actually resolve my other question. While this textual approach indicates that the only way the nation can go to war is with congressional authorization, advocates of this view countenance departures from their own textual reading (typically without acknowledging that this is a problem). Thus, as noted, Ely recognizes that there are some emergency situations in which the President can act unilaterally.

Or Article I can be read more literally, in the way that, for example, then-Assistant Attorney General Dellinger did in his OLC opinions. Congress has the power to start war—this is how "declare War" is read, under this approach—and it has the power to issue letters of marque and reprisal. But there are conflicts that fall in between—conflicts that are not "war" in the constitutional sense because of their limited "nature, scope, and duration."20 Congress does not have to authorize these conflicts for them to be constitutional. This reading of the text does not resolve how Congress authorizes the conflicts it constitutionally must authorize for them to be legitimate. Under the Dellinger approach, while a formal declaration of war is not the only way for Congress to initiate conflict, the textual reading does not answer the question how, other than through declarations of war and grants of the letter of marque and reprisal, Congress starts war. In practice, the Dellinger approach—with its pro-Executive tilt—led to finding authorization where congressional authorization was not explicit (as in Haiti).

Alternatively, Article I can be read very literally, in the way that Eugene Rostow, for example, did.21 Congress has the power to declare war. It has the power to issue letters

20. See Haiti, supra note 7, at 179.
of marque and reprisal. And that's it. This approach offers a precise answer to my questions. Congress can authorize conflict in precisely two ways—formally declaring war; issuing letters of marque and reprisal. The President cannot do either of these things. Otherwise, he has a free hand.

With respect to the resolution of my two questions, the issue of which of these readings one embraces is critical. But it is far from obvious which of these readings one should embrace. None is baseless, and none is so strong as to command consent.

For a committed textualist, the Rostow reading has a certain power: *declare war* was a term with significance in international law at the time of the framers, and the founders, he contends, should be understood as intending to incorporate that meaning. Unless one is committed to an acontextual textualism, however, one would find this approach wanting, however, because it is at odds with the originalist evidence. That evidence indicates that the founders intended that the President not be able to lead the nation into war unilaterally. As James Wilson observed, "This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large." Although they are legitimately subject to competing interpretations, the records of the Philadelphia convention also support the conclusion that the founders believed that wars should not start without congressional approval. While the pure textualist might embrace Rostow's reading, then, the reading opens up a door that would allow the Executive to subvert the original understanding fairly completely.

Ely's reading—like Rostow's—has a plausible textual basis: For Ely, the constitutional text means that wars could only be started with congressional authorization. "Declare" meant "start." But like Rostow's reading, Ely's also bumps up against originalist evidence. The debates in Philadelphia indicate that the framers understood the declare war clause to leave to the Executive the power to meet emergencies. When Madison and Gerry proposed that the Committee on Detail's "make war" be changed to "declare," they observed that they would "leave[c] to the Executive the power to repel sudden attacks." Ely's reading of the text does not leave room for military action not authorized by Congress in advance, yet it was clear that the founders intended that—at least "to repel sudden attacks"—unilateral presidential action was permissible. Ely realizes that there were some situations in which the founders countenanced unilateral action, but he does not explain how this can be reconciled with his approach to the text. I should add that Ely's reading is much more satisfactory than Rostow's. Rostow offers a reading of the text that is at odds with the fundamental purpose of the founders, their belief that the President should not have the general power to take the nation into war unilaterally. Ely's reading is much closer to

*Other Means*, 84 CALIF. L. REV. 167, 244 (1996).

22. 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836).


24. I recognize that my views here are controversial. John Yoo has, for example, argued that a Rostow-type reading is consistent with the original understanding. For reasons outlined in my article, "Fame, the Founding, and the Power to Declare War," I disagree. Proof on the matter is beyond the scope of this essay, and I refer my readers to my earlier work.

25. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 23, at 318.
the founders' vision, but its weakness is that he does not offer a reading of the text that is consistent with his understanding of the Constitution. Moreover, he does not have a compelling explanation of why his vision of the category in which unilateral presidential action is permissible—response to emergencies—is the correct one.

Which leaves us with Dellinger's reading. Again, it has attractions. Implicitly, he, like Ely, equates "declare" with "start," and that is a textualist reading that squares with originalist evidence. At the same time, by stressing the word "war"—and by interpreting "war" to cover a limited category of conflicts—he avoids the problem that confronts Ely, because Dellinger's textualist reading recognizes, as Ely's does not, that there were some conflicts that did not have to be authorized by Congress in advance. But the problem is that the accent on the word "war" does not capture the types of conflicts that did not have to be authorized. Madison and Gerry were concerned about the need for immediate action, not about exempting limited conflicts. While it may be that the framers would not have understood the word "war" to extend to certain very small scale military conflicts, it is hard to argue that a military action of the scale contemplated in Haiti was not "war," as they understood the term. The strengths and weaknesses of Dellinger's approach mirror the strengths and weaknesses of Ely's approach: Dellinger offers a more capacious view than Ely of the category of situations in which unilateral presidential action is appropriate, but, like Ely, his justification for the contours of that category is not wholly convincing.

Now, aficionados of the textualist turn in modern constitutional jurisprudence may expect me to offer at this point a tour de force textualist reading that is both absolutely novel and that squares perfectly with the originalist understanding. There is, however, no such reading.

This is an admission that highlights the gap between lawyerly practice and historical reality. The lawyer reads constitutional text (or statutory text) in a way that makes sense of it. She does not say, there is a gap between the original understanding and the words the framers chose. Champions of constitutional textualism, such as Akhil Amar, have come to push the approach farther and to ascribe to the founders a sensitivity to words that any poet would envy and an anticipation of future possibility that no seer could even dream of possessing. The framers, however, were not always that careful about what they wrote. Sometimes, of course, they were quite careful. They worried, for example, about representation and spent a great deal of time crafting the result. But other times they weren't so careful. We may, for example, try to reconstruct the original meaning of the contract clause and there is substantial scholarly literature on the topic, but it is hard to figure out what the framers actually intended since the one time they discussed it at the convention they voted it down. Nonetheless, the clause somehow was included in the Committee of Style's draft and nobody seems to have noticed in the hurry to approve the document and adjourn.

If one were to do a chart tracking how closely the framers focused on the various clauses of the Constitution, the declare war clause would appear near the contract clause. As I was drafting this essay, I read Madison's report of the principal debate on the war powers clause aloud. It took me one minute and thirty-five seconds. Moreover,

the people recorded as speaking were by and large not in favor of the clause as adopted—either because they preferred the Committee’s proposal of “make” war, or because they thought that the power to declare war should be vested in the President. “Declare” war hardly represents the product of close deliberation that reflects deeply held beliefs. It seems like the formulation was more one adopted because Madison and Gerry were dissatisfied with “make,” rather than because they were positively attracted to “declare” and had a clear understanding of what they meant by the term.

This was not a first order issue for them. As a result, they fashioned a text that neither fully captured their intentions nor resolved the types of issues that have become pressing to us. Thus, none of the textual readings is fully satisfactory.

Similarly, the originalist evidence is not dispositive of the two issues that I am highlighting here—the issue of when congressional authorization is necessary and of what constitutes such authorization. As I have noted, with respect to the issue of when authorization is necessary, Madison and Gerry thought the Executive should have the power to repel sudden attacks, and there is no other discussion on point. How do we interpret this brief comment? If Gerry’s and Madison’s comment reflects the view that the Executive has some power to deal with emergencies while Congress convenes and determines how to act, what are the contours of that power? Is it limited to the specific case mentioned in the debates, of “repel[ling] sudden attacks”? Would it also extend to the protection of U.S. citizens abroad, as in Somalia? Non-U.S. citizens—also in Somalia? How about a pre-emptive strike responding to what the President believes (but Congress does not) is a threat of sudden attack? Does the Executive have other powers beyond the power to address emergencies that allow him to put troops in harm’s way? Was it, for example, permissible for President Clinton to deploy troops in Bosnia for peace-keeping purposes, even though there was a risk that they would have to engage in combat?27 Could he permissibly send troops into Haiti at the request of the legitimate national government and at a time in which the risk to troops seemed minimal?28 The historical record is far too thin to permit us to answer these questions.

While the originalist evidence does not support the Rostow view that there was a general executive power to initiate conflict without congressional approval, the contours of the exception suggested by Madison and Gerry are highly debatable, and both the Ely and Dellinger views have a plausible originalist basis.

A similar point can be made about the originalist view on what the appropriate forms for Congress to authorize conflict were. If one rejects Rostow’s reading of the text on the grounds that it is at odds with the generally expressed view that wars should not start without congressional sanction, then one can conclude that the founders anticipated that there were mechanisms other than declarations of war and grants of letters of marque and reprisal for commencing hostilities. But there is no clear understanding of what those alternate mechanisms would be. Again, this open issue is critical in terms of current practice. For example, in 2000, Congress both rejected a concurrent resolution authorizing military operations in Kosovo and, at a time in which the War Powers Resolution provided that an appropriations statute did not constitute authorization for military action, nonetheless enacted a statute specifically funding military operations in Kosovo. Did the Executive, operating against this backdrop,

27. See Bosnia, supra note 10.
28. See Haiti, supra note 7, at 189.
have congressional authorization for its operations in Kosovo, as it concluded it did because of the appropriations statute. Given the founders' limited focus on the question of congressional authorization, these are not the type of issues on which the original understanding is clear.

Other interpretive guides are similarly unsatisfactory. English precedent is unhelpful. The founders were rejecting the English model, under which the Executive was charged with deciding when to start conflict (although one can debate how completely they were rejecting that model). One therefore cannot map previous practice onto the original understanding.

Separation of powers principles are also unhelpful to working out the types of issues that are the subject of current controversy. The founders vested different powers in the different branches, as noted above, but it is precisely the contours of these powers or the trumps when the powers conflict that are unclear. Judicial precedent is also particularly unhelpful because the courts have largely avoided the area.

Nor does evolving tradition yield answers. While one can trace a general expansion of executive power in the war powers area—and this is certainly the case in the years since the Second World War—that expansion has been highly (if episodically) contested by Congress. Thus, this is not the type of situation in which one can say that we the people have evolved to a new consensus that alters the constitutional framework.

In sum, the methodologies which one normally relies on do not yield clear answers to the questions of what constitutes congressional authorization and when it is not necessary. In the next section, I discuss how political actors should respond to this uncertainty.

III. PRINCIPLED DECISION MAKING

Evaluation of the constitutional jurisprudence of a judge properly proceeds along two tracks. First, we should look at what her fundamental constitutional commitments are and how they are linked to her constitutional jurisprudence. For example, she may be committed to majoritarian rule and embrace originalism (or a textualism that tracks original usage) as a result. Or she may be fundamentally committed to liberty or equality, and she may construe the Constitution as embodying that commitment. Analyzing a judge's work in this way, we can assess whether her commitments are normatively appealing to us, whether they are our commitments. Second, we should look at whether particular stances she takes in specific cases or when she addresses particular constitutional questions are consistent with her overall constitutional jurisprudence. Here, we are assessing whether her decisions reflect adherence to the rule of law or whether they are driven, instead, by a desire for a particular outcome. When we find that a judge resolves a particular controversy in a way that is inconsistent with her overall jurisprudence, that is a telling criticism. And so, for example, when scholars contend that Justice Scalia's decisions in Printz and Lucas fail to accord with his textualist methodology, that is offered as a sharp critique.

We do not apply the same standards when we review the constitutional jurisprudence of political actors. We don't expect the same consistency. Scholars will

29. See Kosovo, supra note 8.
still occasionally point out divergences—I recently read, for example, a work that
criticized Senator Biden for having made inconsistent statements about evolving
constitutional meaning during the Bork and Thomas confirmation hearings—but we
rarely try to make sense of political actors’ views in the same way that we try to make
sense of judges’ views, and, when inconsistencies are found, the point generally made
is that the politician is a politician and that this is what politicians do.

If we are to take the Constitution outside of courts seriously, however, this dual
standard is inappropriate. If political actors are to be treated, as they should be, as
constitutional actors whose interpretive role is as significant as the interpretive role of
courts, their constitutional acts should be measured against precisely the same
standards we use when assessing judicial acts. We should ask: What normative vision
does the constitutional actor adopt? Is a particular action consistent with that vision or
is she disregarding her overall vision to achieve a particular outcome? If political
actors cannot satisfy the same standards of consistency that we apply to judges, then
their constitutional commitments are not truly their constitutional commitments. They
are policy views dressed as constitutional commitments.

What does this mean to the political actor confronting a war powers question, such
as when congressional authorization is not necessary or what constitutes congressional
authorization? As I have previously suggested, there are a range of principled stances
that one could take in resolving these problems. In deciding which to follow, the
political actor should seek to adopt one of these stances on the basis of principle, rather
than out of a desire to further a particular policy outcome in a particular case.

Principle in part means that the individual should take a consistent approach to
costitutional interpretation. The war powers area is one in which, famously, right and
left are attacked for abandoning their normal methodologies. People on the left, like
Ely, are criticized for embracing originalism here; people on the right, such as Meese,
are criticized for rejecting it in this context. This criticism is significantly overstated. I
believe that Ely’s writing here can be squared with his writings in other contexts.
Similarly, as I suggest in the last section, the questions of what the original
understanding was and how the text should be read are more complicated than
generally thought, particularly as they apply to the questions of congressional
authorization on which I am focusing here. Nonetheless, principled decision making
means that one should not embrace an approach in the war powers context that is at
odds with the approach to constitutional interpretation one takes elsewhere. For
example, one should not embrace the strict textualism that Rostow favored with respect
to the war powers without being willing to apply it consistently to other questions of
constitutional meaning. Consistent embrace of an overall methodology means that the
reading of the particular constitutional clause—such as the declare war clause—reflects
rule of law concerns, rather than a particular policy vision. It also allows the citizen to
decide if she finds that methodology normatively attractive. For me, for example, the
Rostow approach is flawed, not because it is internally inconsistent, but because I see
no good reason to privilege a strict reading of text when that reading leads to a result
inconsistent with original purpose.

The Ely and Dellinger views, in contrast, do not suffer from this weakness. Whereas
Rostow privileges text over original understanding, Ely’s and Dellinger’s views reflect
what I find to be a more appealing attempt to make sense of both original meaning and
text in a situation in which these two determinants of constitutional interpretation do
not perfectly align, in which the contours of original meaning are very unclear, and in
which the other determinants of constitutional meaning (such as tradition and judicial
precedent) shed little light. Because they are sensitive to the full range of constitutional determinants in a way that I find appropriate, both the Ely and Dellinger views are attractive to me as a way to think about constitutional commitments in the war powers area. They are satisfactory in the way that a judge’s interpretive methodology is satisfactory. Neither is clearly right, but it is because this is not a reason that admits of clearly right answers.

So, how would one choose between them in trying to decide when congressional authorization is necessary and what constitutes congressional authorization? I should say at the outset that policy views about a particular controversy are not an appropriate basis for choosing between the two views. This is not simply because I believe that commitment to the rule of law dictates that principled decision making should govern constitutional interpretation outside of courts; it is also because an outcome-driven approach to constitutional interpretation can also quickly backfire. There is a tendency to assume that the right is more war-like than the left, but history teaches that neither the right nor the left is consistently more activist or more opposed to military action than those on the other end of the political spectrum. If one were to list the major military conflicts and potential conflicts of the past century or so—starting with the Spanish American War and running through the First World War, the Second World War, Korea, Vietnam, Grenada, Panama, Iraq, Somalia, Haiti, Bosnia, Rwanda, Kosovo, Afghanistan, and Iraq—there is no clear right/left split on the appropriateness of military action by the United States. Sometimes the left is more aggressive; sometimes, the right is more strongly in favor of military action. Any attempt of a party or faction to adopt a constitutional vision of the proper role of the President and Congress in order to advance a particular policy end in a particular controversy is thus short-sighted.

If, however, history shows that right and left do not take consistent views on the question of how aggressive the nation’s military policy should be, it also shows that the Executive and Congress do take fairly consistent views. With the exception of the Spanish American War—where Grover Cleveland and, less clearly, William McKinley were more reluctant to intervene than Congress—the Executive has been consistently more war-like than Congress over the past hundred years. In my article, I suggested that this reflects the different reputational consequences of war for members of Congress and for the President. The founders were aware of this. As Madison wrote in his Helvidius letter:

In no part of the constitution is more wisdom to be found than in the clause which confines the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers: the trust and the temptation would be too great for any one man; not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. . . . It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.58

Presidents will get the lion’s share of the credit for a successful war and the lion’s share of the blame for tragic consequences of inaction. After length of tenure in office and whether they were assassinated, the number of years in which the nation was at war during a Presidency is the variable weighing most heavily in favor of a President’s historical reputation. While they will also get most of the blame for losing a war, the nation’s overall record in war—the fact that, with the exception of Vietnam, we have either prevailed or, in the case of the War of 1812, more or less tied—means that Presidents have an incentive to lead the nation into war. Members of Congress do not have a similar reputational reason to favor conflict.

When we are filling in gaps in the constitutional structure—and, when we determine what constitutes congressional authorization or when authorization is not necessary, that is what we are doing—this is precisely the type of large structural concern that should weigh heavily. In choosing between the Ely and Dellinger models, we should think about whether it makes most sense to interpret the Constitution in a way that accords the President greater freedom of action or one that restrains him by interpreting the Constitution in a way that gives Congress a greater role. Looking at the past, I don’t think there is an easy answer to this question.

In this area of indeterminacy, a dialogic model of constitutional interpretation has particular force. Partisans of a strong presidency—a la Dellinger—have a solidly grounded position, and it affords an appropriate basis for executive action. But critics of that view—a la Ely—also have a soundly grounded position, and it, too, affords an appropriate basis for governmental action; it is the language by which champions of Congress can challenge executive action and seek to rein in the Executive.

Ultimately, the discourse may lead to an evolution of our constitutional traditions. One view or the other may so consistently prevail so that an answer is provided in an area in which the original understanding and text (and separation of powers doctrine and judicial precedent) do not lead to a clear answer.

Or, as is more likely the case, the dispute will continue. And this is a significant difference between constitutional making inside the courts and outside the courts. Within the courts, it is more likely that one view will prevail. There is a clear arbitrator: Constitution making outside the courts is more free-form, more unsettled, since it does not have one decision maker at the apex in the way that the Supreme Court is a decision maker.

At the same time, there can be a real thickness to the constitutional discourse among political actors, in the same way that judicial decision making is the product of a thick discourse. Political actors can and should look at precisely the same types of concerns that motivate courts: the text, founders’ vision, history, institutional concerns. The war powers area offers a model for thinking about constitution making outside the courts, and it suggests that constitution making outside the courts is properly not that different from constitution making inside the courts.
Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications

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March 17, 2011
Summary

From the Washington Administration to the present, Congress and the President have enacted 11 separate formal declarations of war against foreign nations in five different wars. Each declaration has been preceded by a presidential request either in writing or in person before a joint session of Congress. The reasons cited in justification for the requests have included armed attacks on United States territory or its citizens and threats to United States rights or interests as a sovereign nation.

Congress and the President have also enacted authorizations for the use of force rather than formal declarations of war. Such measures have generally authorized the use of force against either a named country or unnamed hostile nations in a given region. In most cases, the President has requested the authority, but Congress has sometimes given the President less than what he asked for. Not all authorizations for the use of force have resulted in actual combat. Both declarations and authorizations require the signature of the President in order to become law.

In contrast to an authorization, a declaration of war in itself creates a state of war under international law and legitimates the killing of enemy combatants, the seizure of enemy property, and the apprehension of enemy aliens. While a formal declaration was once deemed a necessary legal prerequisite to war and was thought to terminate diplomatic and commercial relations and most treaties between the combatants, declarations have fallen into disuse since World War II. The laws of war, such as the Hague and Geneva Conventions, apply to circumstances of armed conflict whether or not a formal declaration or authorization was issued.

With respect to domestic law, a declaration of war automatically triggers many standby statutory authorities conferring special powers on the President with respect to the military, foreign trade, transportation, communications, manufacturing, alien enemies, etc. In contrast, no standby authorities appear to be triggered automatically by an authorization for the use of force, although the executive branch has argued, with varying success, that the authorization to use force in response to the terrorist attacks of 2001 provided a statutory exception to certain statutory prohibitions.

Most statutory standby authorities do not expressly require a declaration of war to be actualized but can be triggered by a declaration of national emergency or simply by the existence of a state of war; however, courts have sometimes construed the word “war” in a statute as implying a formal declaration, leading Congress to enact clarifying amendments in two cases. Declarations of war and authorizations for the use of force waive the time limitations otherwise applicable to the use of force imposed by the War Powers Resolution.

This report provides historical background on the enactment of declarations of war and authorizations for the use of force and analyzes their legal effects under international and domestic law. It also sets forth their texts in two appendices. The report includes an extensive listing and summary of statutes that are triggered by a declaration of war, a declaration of national emergency, and/or the existence of a state of war. The report concludes with a summary of the congressional procedures applicable to the enactment of a declaration of war or authorization for the use of force and to measures under the War Powers Resolution. The report will be updated as circumstances warrant.
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Congressional Research Service
Introduction

Article I, § 8, of the Constitution vests in Congress the power “to declare War.” Pursuant to that power, Congress has enacted 11 declarations of war during the course of American history relating to five different wars, the most recent being those that were adopted during World War II. In addition, Congress has adopted a number of authorizations for the use of military force, the most recent being the joint resolution enacted on October 16, 2002, authorizing the use of military force against Iraq. To buttress the nation’s ability to prosecute a war or armed conflict, Congress has also enacted numerous statutes which confer authority on the President or the executive branch and are activated by the enactment of a declaration of war, the existence of a state of war, or the promulgation of a declaration of national emergency.

This report examines a number of topics related to declarations of war and authorizations for the use of military force by the United States. It (1) provides historical background on each of the declarations of war and on several major authorizations for the use of force that have been enacted; (2) analyzes the implications of declarations of war and authorizations for the use of force under both international law and domestic law; (3) lists and summarizes the more than 250 standby statutory authorities that can come into effect pursuant to a declaration of war, the existence of a state of war, and/or a declaration of national emergency; (4) describes the procedures in Congress governing the consideration of declarations of war and authorizations for the use of force, including the procedures under the War Powers Resolution; and (5) sets forth in two appendices the texts of all of the declarations of war and the major authorizations for the use of force that have been enacted. The report does not address the issue of the constitutionality of Presidential uses of military force absent a declaration of war or authorization for the use of force. The report will be updated as circumstances warrant.

Previous Declarations of War

From the Washington Administration to the present, there have been 11 separate formal declarations of war against foreign nations enacted by Congress and the President, encompassing five different wars—the War of 1812 with Great Britain, the War with Mexico in 1846, the War with Spain in 1898, the First World War, and the Second World War. In each case the enactment of a formal declaration of war has been preceded by a presidential request to Congress for such an action, either in writing or in person before a joint session of Congress. In each such message requesting a war declaration, the President has cited what he deemed compelling reasons for doing so. These reasons have included armed attacks on United States territory or its citizens, and attacks on or direct threats to United States rights or interests as a sovereign nation. In the nineteenth century all declarations of war were passed by the Congress in the form of a bill. In the twentieth century all declarations of war were passed by the Congress in the form of a joint resolution. In every instance the measures were adopted by majority vote in both the House and the Senate and were signed into law by the President. The last formal declaration of war was enacted on June 5, 1942, against Rumania during World War II.

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1 See Table 1 for presidential and congressional actions taken regarding all formal declarations of war by the United States. See Appendix A for the texts of these declarations.
2 It is beyond the scope of this report to detail the often complex circumstances underlying the nature, motivations, and timing of presidential requests for war declarations. Those matters have been the subject of important debates among (continued...)
The circumstances of President McKinley's request for a declaration of war against Spain in 1898 stand in singular contrast to all the others. McKinley's request for a declaration of war on April 25, 1898, was approved by a voice vote of both Houses of Congress on that date. His request was made after Spain had rejected a U.S. ultimatum that Spain relinquish its sovereignty over Cuba and permit Cuba to become an independent state. This ultimatum was supported by a joint resolution of Congress, signed into law on April 20, 1898, that among other things, declared Cuba to be independent, demanded that Spain withdraw its military forces from the island, and directed and authorized the President to use the U.S. Army, Navy and militia of the various states to achieve these ends. The war with Spain in 1898, in short, was not principally based on attacks on the United States but on a U.S. effort to end the Cuban insurrection against Spain, bring about Cuban independence, and restore a stable government and order on the island—outcomes that were believed by the United States to advance its interests.4

In the twentieth century, without exception, presidential requests for formal declarations of war by Congress were based on findings by the President that U.S. territory or sovereign rights had been attacked or threatened by a foreign nation. Although President Wilson had tried to maintain U.S. neutrality after the outbreak of the First World War, he regarded the German decision on February 1, 1917, to engage in unrestricted submarine warfare against all naval vessels in the war zone, including those of neutral states, to be an unacceptable assault on U.S. sovereign rights which the German Government had previously pledged to respect. Wilson's request to Congress for a declaration of war against Germany on April 2, 1917, stated that war had been "thrust upon the United States" by Germany's actions. Congress passed a joint resolution declaring war which the President signed on April 6, 1917. Wilson delayed requesting a war declaration against Austria-Hungary until December 4, 1917. He did so then because that state, a German ally in the war, had become an active instrument of Germany against the United States. Congress quickly passed a joint resolution declaring war which the President signed on December 7, 1917.5

President Franklin D. Roosevelt requested a declaration of war against Japan on December 8, 1941, because of direct military attacks by that nation against U.S. territory, military personnel and citizens in Hawaii and other outposts in the Pacific area. The House and the Senate passed the requested declaration and the President signed it into law that same day. After Germany and Italy each declared war on the United States on December 11, 1941, President Roosevelt asked Congress to respond in kind by recognizing that a state of war existed between the United States

(...continued)


Congressional Research Service
and those two nations, Congress passed separate joint resolutions declaring war on both nations which the President signed on December 11, 1941. On June 2, 1942, President Roosevelt asked that Congress declare war on Bulgaria, Hungary and Rumania, nations that were under the domination of Germany, were engaged in active military actions against the United States, and had themselves declared war on the United States. Congress passed separate joint resolutions declaring war on each of these nations. The President signed these resolutions on June 5, 1942.

There is a striking similarity of language in the eight declarations of war passed by the Congress in the twentieth century. They all declare that a "state of war" exists between the United States and the other nation. With the one exception of the declaration of war against Austria-Hungary on December 7, 1917, the other seven declarations characterize the state of war as having been "thrust upon the United States" by the other nation. All eight of these twentieth century declarations of war state in identical language that the President is—

authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against [the 'Government' of the particular nation]; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

The complete texts of the 11 declarations of war are set forth in Appendix A.

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### Table I. Key Dates And Actions Related To Formal U.S. Declarations Of War

<table>
<thead>
<tr>
<th>Year</th>
<th>Date</th>
<th>Event</th>
<th>Reference</th>
</tr>
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<tbody>
<tr>
<td>1941</td>
<td>December 8, 1941</td>
<td>Roosevelt asked December 8, 1941. Senate passed on December 8, 1941 (82-0). House passed on December 8, 1941 (388-1). President signed on December 8, 1941. Act of Dec. 8, 1941, ch. 561, 55 Stat. 795. Terminated by Treaty of Peace with Japan, which entered into force Apr. 28, 1952. 3 UST 3169, TIAS 2490.</td>
<td></td>
</tr>
</tbody>
</table>
MEMORANDUM FOR DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

From: John C. Yoo
Deputy Assistant Attorney General

Re: Authorization for Use of Military Force Against Iraq Resolution of 2002

This memorandum confirms the views of the Office of Legal Counsel, expressed to you last week, on H. J. Res. 114, the Authorization for Use of Military Force Against Iraq Resolution of 2002. This resolution authorizes the President to use the United States Armed Forces, "as he determines to be necessary and appropriate," either to "defend the national security of the United States against the continuing threat posed by Iraq," or to "enforce all relevant United Nations Security Council resolutions regarding Iraq." H. J. Res. 114, § 3(a).

We have no constitutional objection to Congress expressing its support for the use of military force against Iraq. Indeed, the Office of Legal Counsel was an active participant in the drafting of and negotiations over H. J. Res. 114. We have long maintained, however, that resolutions such as H. J. Res. 114 are legally unnecessary. See, e.g., Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 175-76 (1994) ("the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress"); Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 335 (1995) ("the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances"). As Chief Executive and Commander in Chief of the Armed Forces of the United States, the President possesses ample authority under the Constitution to direct the use of military force in defense of the national security of the United States, as we explain in Section I of this memorandum, and as H. J. Res. 114 itself acknowledges when it states that "the President has authority under the Constitution to take

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action in order to deter and prevent acts of international terrorism against the United States." Moreover, as we detail in Section II, Congress has previously authorized the use of force against Iraq.

It has been our understanding that the President sought this resolution not out of need for legal authority, but in order to demonstrate, to the United Nations and to the current regime in Iraq, that the American people, as represented by both their President and their representatives in both Houses of Congress, fully support taking all action necessary and appropriate to enforce all relevant United Nations Security Council resolutions involving Iraq and to defend the United States against Iraq, including the use of force if necessary. We recognize that, notwithstanding the President’s pre-existing constitutional and statutory authorities to use force, there are significant non-legal reasons for the President and Congress jointly to state their renewed commitment, particularly in light of the terrorist attacks of September 11, 2001, to use force if necessary to deal with the threat posed by Iraq to the national security of the United States and to international peace and security in the Persian Gulf region.

Accordingly, last week we recommended to you and to the White House that the President take steps to ensure that his decision to approve H. J. Res. 114 would not be construed in the future as an indication that this resolution was legally necessary. Specifically, we recommended that the President’s signing statement include an explicit reservation stating that his signing of the resolution did not reflect any change in his position, and the long-standing position of the Executive Branch, that the President already possesses ample legal authority under the Constitution to order the use of force against Iraq. We further recommended that the President’s signing statement expressly state that his signing of H. J. Res. 114 also did not change the established position of the Executive Branch that the War Powers Resolution cannot, consistent with the Constitution, restrict the President’s authority as Chief Executive and Commander in Chief to order the use of military force. See, e.g., Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 1 Pub. Papers of George Bush 40 (1991) ("my request for congressional support did not, and my signing [Pub. L. No. 102-1] does not, constitute any change in the long-standing positions of the executive branch on either the President’s constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution").

I.

As we have explained on numerous occasions, the President has authority under the Constitution to initiate the use of military force to defend the national security of the United States. Article II expressly vests in the President, and not in Congress, the full "executive Power" of the United States. U.S. Const. art. II, § 1, cl. 1. Article II also provides that the President "shall be Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 2, cl. 1. The Framers understood the Commander in Chief Clause as investing the President with the fullest range of power understood at the time of the ratification of the Constitution as belonging to the military commander. Taken together, these two provisions constitute a substantive grant of broad war power to the President.
In addition, the structure of the Constitution demonstrates that any power traditionally understood as pertaining to the executive—which includes the conduct of warfare and the defense of the nation—is vested in the President unless expressly assigned in the Constitution to Congress. Article II, Section 1 makes this clear by stating that the "executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. That sweeping grant vests in the President an unenumerated "executive Power" and contrasts with the specific enumeration of the powers granted to Congress by the Constitution. See U.S. Const. art. I, § 1 (vesting in Congress "[a]ll legislative Powers herein granted") (emphasis added). The implications of constitutional text and structure are confirmed by the practical consideration that national security decisions require the unity in purpose and energy in action that characterize the Presidency rather than Congress. Indeed, the textual provisions in Article II, combined with considerations of constitutional structure and the fundamental principles of the separation of powers, forbid Congress from interfering with the President's exercise of his core constitutionally assigned duties, absent those "exceptions and qualifications . . . expressed" in the Constitution. *Myers v. United States*, 272 U.S. 52, 139 (1926) (quotations omitted).

There is no expression in the Constitution of any requirement that the President seek authorization from Congress prior to using military force. There is certainly nothing in the text of the Constitution that explicitly requires Congress to consent before the President may exercise his authority as Chief Executive and Commander in Chief to command U.S. military forces. By contrast, Article II expressly states that the President must obtain the advice and consent of the Senate before entering into treaties or appointing ambassadors. U.S. Const. art. II, § 2, cl. 2. Similarly, Article I, Section 10 expressly denies states the power to "engage" in war without congressional authorization, except in case of actual invasion or imminent danger. U.S. Const. art. I, § 10, cl. 3. Moreover, founding documents prior to the U.S. Constitution, such as the South Carolina Constitution of 1778, explicitly prohibited the Executive from commencing war or concluding peace without legislative approval. S.C. Const. art. XXVI (1776), reprinted in Francis N. Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* at 3247 (1909). See also Articles of Confederation, art. IX, § 6, 1 Stat. 4, 8 (1778) ("The United States, in Congress assembled, shall never engage in a war . . . unless nine States assent to the same."). The framers of the Constitution thus well knew how to constrain the President's power to exercise his authority as Commander in Chief to engage U.S. Armed Forces in hostilities, and decided not to do so.

All three branches have recognized the President's broad constitutional power as the Chief Executive and Commander in Chief to initiate hostilities and to use military force to protect the nation. The Executive Branch, for example, has long interpreted the Commander in Chief power "as extending to the dispatch of armed forces . . . for the purpose of protecting American interests." *Training of British Flying Students in the United States*, 40 Op. Att'y Gen. 58, 62 (1941); see also *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C., 6 (1992) (President's role as Commander in Chief and Chief Executive vests him with constitutional authority to order U.S. forces abroad to further national interests). The Supreme Court has likewise held that a major object of the Commander in Chief Clause is "to vest in the President the supreme command over all the military forces, — such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeny*, 157 U.S. 281, 284 (1895). As Commander in Chief, the President "is authorized to
direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy." *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850).  

Congress itself recently recognized the President's constitutional authority to use military force when it enacted Pub. L. No. 107-40 by overwhelming margins shortly after the terrorist attacks of September 11, 2001. That law expressly states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States," and H. J. Res. 114 explicitly reaffirms that conclusion. Moreover, Congress has acquiesced in the unilateral use of force by Presidents during the course of numerous armed conflicts. During the previous Administration, for example, our Office concluded that Congress had approved of President Clinton's unilateral decision to use military force in Kosovo, when it enacted Pub. L. No. 106-31, 113 Stat. 57 (May 21, 1999), to provide emergency supplemental appropriations for continued military operations there. *See Authorization for Continuing Hostilities in Kosovo*, 2000 WL 33716980 (O.L.C.).


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459 (1999). In none of these interventions did Congress interfere with or regulate the President’s exercise of his Commander-in-Chief powers.

Because the President possesses broad constitutional authority as Chief Executive and Commander in Chief to direct the use of military force against Iraq, congressional authorization is legally unnecessary. Congress has the power to “provide for the common Defence,” to “raise and support Armies,” to “provide and maintain a Navy,” and to appropriate funds to support the military, U.S. Const. art. I, §§ 8-9, to be sure, but it is the President who enjoys the constitutional status of Commander in Chief. As such, the President has full constitutional authority to use all of the military resources provided to him by Congress. Indeed, within the past half century, Presidents have unilaterally initiated military actions in Korea, Vietnam, Grenada, Lebanon, Panama, Somalia, and Kosovo, without congressional authorization.3

The Constitution does vest in Congress, and not the President, the power to “declare War.” U.S. Const. art. I, § 8, cl. 11. The Constitution nowhere states, however, that Congress has the additional power to “make” or “engage” or “levy” war. By contrast, Article I, Section 10 addresses the power of states to “engage” in war, U.S. Const. art. I, § 10, cl. 3, while Article III describes the offense of treason as the act of “levying war” against the United States, U.S. Const. art. III, § 3, cl. 1. Thus, the constitutional text itself demonstrates that the power to “declare” war was a narrower power than that of engaging, making, or levying war. By placing the power to declare war in Congress, the Constitution did nothing to divest the President of the traditional power of the Commander in Chief and Chief Executive to decide to use force. Congress’s ability to restrain the President from using military force arises out of its control over military resources, and not out of its power to declare war.4

The Founders did not contemplate that a declaration of war would be legally necessary for the President to use military force. To the contrary, the Founders were intimately familiar with the extensive British practice of engaging in undeclared wars throughout the preceding century. That is not to say that the power to declare war had no meaning whatsoever at the time of the Founding. Rather, Congress’s Article I power to declare a legal state of war, and to notify

3 The normative role of historical practice in constitutional law, and especially with regard to separation of powers, is well settled. As the Supreme Court has repeatedly recognized, governmental practice plays a highly significant role in establishing the contours of the constitutional separation of powers: “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) (quoted in Dames & Moore v. Regan, 453 U.S. 654, 686 (1981)). Moreover, the role of practice is heightened in dealing with issues affecting foreign affairs and national security. As the Supreme Court has noted, “the decisions of the Court in this area [of foreign affairs] have been rare, episodic, and afford little precedential value for subsequent cases.” Dames & Moore, 453 U.S. at 661. In particular, the difficulty the courts experience in addressing “the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive” with respect to foreign affairs and national security makes the judiciary “acutely aware of the necessity to rest [judicial] decision[s] on the narrowest possible ground capable of deciding the case.” Id. at 660-61. Historical practice and the ongoing tradition of Executive Branch constitutional interpretation therefore play an especially important role in this area.

4 As James Madison explained during the critical state ratification convention in Virginia, “the sword is in the hands of the British King; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist.” 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 393 (1836).
other nations of that status, once had an important effect under the law of nations. And even
today, the power to declare war continues to trigger significant domestic statutory powers, such
as those established under the Alien Enemy Act of 1798, 50 U.S.C. § 21, and federal surveillance
laws, 50 U.S.C. §§ 1811, 1829, 1844. Declarations of war have significant constitutional
ramifications as well. See U.S. Const. art. I, § 10, cl. 3 (prohibiting states from “lay[ing] any
Duty of Tonnage, keep[ing] Troops, or Ships of War” without congressional consent only “in
time of Peace”); U.S. Const. amend. III (permitting the quartering of soldiers in private homes
“in time of war . . . in a manner to be prescribed by law”); U.S. Const. amend. V (permitting
criminal trials without grand jury indictment in cases “arising . . . in the Militia, when in actual
service in time of War or public danger”). The power to declare war has seldom been used,
however. Although Presidents have deployed the U.S. Armed Forces, by conservative estimates,
more than a hundred times in our nation’s history, Congress has issued formal declarations in
only five wars. This long practice of U.S. engagement in military hostilities without a
declaration of war demonstrates that the political branches have interpreted the Constitution just
as the Founders did.

II.

In addition to his powers under the Constitution, the President already enjoys statutory
authorization to use force against Iraq. On January 14, 1991, shortly before the United States
3, the “Authorization for Use of Military Force Against Iraq Resolution.” Subsection 2(a)
authorizes the President “to use United States Armed Forces pursuant to United Nations Security
Council Resolution 678 (1990) in order to achieve implementation of Security Council
Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.” U.N. Security Council
Resolution 678, in turn, authorizes member states “to use all necessary means to uphold and
implement resolution 660 (1990) and all subsequent relevant resolutions and to restore
international peace and security in the area.” The other resolutions listed in Pub. L. No. 102-1
relate to Iraq’s military invasion of Kuwait on August 2, 1990 and are identical to the resolutions
“recall[ed] and reaffirm[ed]” in Resolution 678.

By authorizing the use of U.S. Armed Forces “pursuant to” Resolution 678, Pub. L. No.
102-1 sanctions not only the employment of the methods approved in that resolution — that is,
“all necessary means” — but also the objectives outlined therein — namely, “to uphold and
implement . . . all subsequent relevant resolutions and to restore international peace and security
to the area.” S.C. Res. 678 (emphasis added). Two of the most important “subsequent relevant
resolutions” respecting “international peace and security” in the Persian Gulf region are U.N.
Security Council Resolution 687, which requires, inter alia, the inspection and destruction of

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5 See, e.g., Congressional Research Service, Library of Congress, Instances of Use of United States Armed
6 See Act of June 18, 1812, 2 Stat. 755 (1812) (War of 1812); Act of May 13, 1846, 9 Stat. 9 (Mexican-
American War); Act of Apr. 25, 1898, 30 Stat. 364 (Spanish-American War); Joint Resolution of Apr. 6, 1917, 40
Stat. 1 (World War I: Germany); Joint Resolution of Dec. 7, 1917, 40 Stat. 429 (World War I: Austria-Hungary);
Joint Resolution of Dec. 8, 1941, 55 Stat. 795 (World War II: Japan); Joint Resolution of Dec. 11, 1941, 55 Stat. 796
(World War II: Germany); Joint Resolution of Dec. 11, 1941, 55 Stat. 797 (World War II: Italy); Joint Resolution of
June 5, 1942, 56 Stat. 307 (World War II: Bulgaria); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II:
Hungary); Joint Resolution of June 5, 1942, 56 Stat. 307 (World War II: Rumania).
Iraq's program to develop weapons of mass destruction, and U.N. Security Council Resolution 688, which demands that Iraq halt the repression of its civilian population. Should the President determine that the use of force is necessary to implement either resolution, such force would find statutory authorization in Pub. L. No. 102-1.


of William Jefferson Clinton 2195, 2196 (1998). Congress has acquiesced in each of these uses of force.

In addition, Pub. L. No. 105-235, a Joint Resolution finding that Iraq "is in unacceptable and material breach of its international obligations," and "urging" President Clinton "to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance," arguably expresses Congress's support for the President to direct military action against Iraq. Pub. L. No. 105-235, 112 Stat. 1538, 1538, 1541 (1998). The resolution contains multiple "whereas" clauses detailing almost two dozen Security Council findings of Iraqi violations of its WMD obligations and concluding that "Iraq's continuing weapons of mass destruction programs threaten vital United States interests and international peace and security." 112 Stat. 1540. Although the Joint Resolution does not specifically authorize the use of force, and cautions that any action taken must comply with the Constitution and relevant laws, insofar as the President determines that directing military action against Iraq is "appropriate . . . to bring Iraq into compliance with its international obligations," and consistent with the Constitution and relevant U.S. law, Congress has expressed its support for such action. 112 Stat. 1541.

Military action against Iraq might also be authorized, under certain circumstances, pursuant to Pub. L. No. 107-40, the "Authorization for Use of Military Force" enacted shortly after the terrorist attacks of September 11, 2001. Pub. L. No. 107-40 authorizes the President to use "all necessary and appropriate force" against those nations, organizations or persons whom "he determines planned, authorized, committed, or aided the [September 11] terrorist attacks . . . or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224 (emphasis added). Were the President to order military action against Iraq because, in his judgment, Iraq provided assistance to the perpetrators of the September 11 attacks, he also would be acting with prior statutory authorization pursuant to Pub. L. No. 107-40.
Additional Reading for:
Kosovo, Libya, and Presidential War Powers for Multilateral Humanitarian Interventions

Bruce Ackerman and Oona Hathaway, Obama's Illegal War, Foreign Policy, June 1, 2011.

Bruce Ackerman and Oona Hathaway, The Constitutional Clock is Ticking on Obama's War, Foreign Policy, April 6, 2011.

Jay S. Bybee, OLC Memo, Authority of the President under Domestic and International Law to Use Military Force Against Iraq, October 23, 2002 (see Section II-A).


Executive Power in Wartime

By ROBERT F. TURNER

The scope of executive power has become a key and controversial matter since September 11, 2001. It is central, for instance, to assessing the legality of warrantless wiretaps by the National Security Agency of communications between America and suspected terrorists abroad, and the propriety of NSA exploitation of phone-company records to identify numbers that have frequently communicated with phones tied to suspected foreign terrorists.

In several recent books, bright scholars have explored the subject and come to a wide variety of conclusions. Each author brings a certain amount of baggage to the topic, as do I after working in this specialized realm for more than three decades — in academe; as national security adviser to a member of the Senate Foreign Relations Committee; and in several executive-branch positions, including acting assistant secretary of state for legislative affairs.

I was delighted to see that the Berkeley law professor John Yoo has taken an almost identical approach to the one I’ve used in my work — and reached many of the same conclusions — in his excellent The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11. He examines the writings of the legal scholars and political theorists whom the founding fathers read, and identifies lessons they derived from the American Revolution and the Articles of Confederation. Then he scrutinizes the Constitutional Convention, The Federalist Papers, and the Constitution-ratification debates in the states.

Yoo explains that the framers of our Constitution viewed foreign affairs as a component of the “executive Power” vested in the president by Article II, Section 1. Writers like Locke, Montesquieu, and Blackstone recognized that large deliberative assemblies lacked the institutional competence to manage what Locke described as "war, peace, leagues, and alliances." The framers reaffirmed those theories from personal experience, as the Continental Congress proved unable to act with unity of plan, secrecy, or speed and dispatch during the American Revolution.

In April 1790, Thomas Jefferson explained that the transaction of business with foreign nations was "executive altogether," and therefore — because "the executive Power" was expressly vested in the president — it was the prerogative of the president, save for the exceptions vested in the Senate, which were to be "construed strictly." Those exceptions included such things as the power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." President Washington, Chief Justice John Jay, and Rep. James Madison endorsed this view, agreeing that the Senate had, in Washington's words, "no right to interfere" in this business save, again, for those narrowly construed exceptions.

Despite his bitter disagreement with Jefferson on many other issues, drawing on this same clause three years later, Alexander Hamilton remarked that "as the participation of the Senate in the making of Treaties, and the power of the Legislature to declare war, are exceptions out of the general 'Executive Power' vested in the President, they are to be construed strictly — and ought to be extended no further than is essential to their execution."
But even the best books on this intricate subject tend to be pocked with errors. In a single paragraph, Yoo asserts that President Truman sent troops into Korea in 1950 without seeking Congressional approval, and that President Johnson never obtained "unambiguous Congressional authorization" for Vietnam. In reality, once-top-secret State Department records reveal that Truman repeatedly sought to address a joint session of Congress and had Secretary of State Dean Acheson draft a resolution of authorization. But in repeated consultation, he was told by Tom Connally, chairman of the Senate Foreign Relations Committee; Scott Lucas, the majority leader; and other Congressional leaders that he had adequate authority under the Constitution and the Charter of the United Nations, and that he should stay away from Congress and make his presentation as a fireside chat rather than as a Congressional address. Truman acquiesced to the will of Congress.

And one of the many myths of the Vietnam War was that Congress never clearly authorized it. On the contrary, initially Congress was far more committed than was Johnson to using force to stop communist aggression in Southeast Asia — a policy first established during the Eisenhower administration when the Southeast Asian Collective Defense Treaty was ratified with the consent of an almost unanimous Senate. In August 1964, a 99.6-percent majority in Congress enacted the Southeast Asia Resolution authorizing the president to use armed force to assist South Vietnam, Laos, and Cambodia in defending their freedom. During the floor debate, Sen. J. William Fulbright, chairman of the Foreign Relations Committee, explained that Congress was authorizing the president to use such force as could lead to "war"; and Congress more than tripled Johnson's appropriations request on its own initiative. The authorization for war in Vietnam and Cambodia fully satisfied the requirements of Section 2(c)(2) of the War Powers Resolution, and for years Congress fueled the war by appropriating tens of billions of dollars by more than 90-percent majorities in each chamber.

Steeped in post-Vietnam conventional wisdom is Nancy V. Baker, an associate professor of government at New Mexico State University. In General Ashcroft: Attorney at War, she appears unaware of early interpretations of the "executive power" clause, contending in her "Presidential Action and Separation of Powers" chapter that "neither the 'take care clause' nor the 'commander in chief clause' of the Constitution provides the unequivocal authority for expanded presidential power that Ashcroft asserted." Many pages later, she writes: "In addition to this misreading of history, Ashcroft's comparison of Article I, dealing with Congress, and Article II, dealing with the presidency, also is flawed. He characterized Article II as a 'comprehensive grant of all executive authority to the president, subject only to specified exceptions and qualifications.'"

If that was a misreading on Ashcroft's part, what, then, do we make of Senator Fulbright's 1959 declaration in a speech at Cornell Law School? "The pre-eminent responsibility of the president for the formulation and conduct of American foreign policy is clear and unalterable," Fulbright said. "He has, as Alexander Hamilton defined it, all powers in international affairs 'which the Constitution does not vest elsewhere in clear terms.'"

Professor Baker's befuddled theory of "shared powers" over foreign affairs reflects a modern trend pioneered by Professor (now Dean) Harold Hongju Koh, of Yale Law School, in his prize-winning 1990 book, The National Security Constitution: Sharing Power After the Iran-Contra Affair, which Baker cites in her footnotes. The concept's fallacy may most easily be demonstrated by examining the original. Koh writes that "our National Security Constitution rests upon a simple notion: that generally speaking, the foreign-affairs power of the United States is a power shared among the three branches of the national government." He explains:

"This structural vision of a foreign-affairs power shared through balanced institutional participation has inspired the National Security Constitution since the beginning of the Republic,
receiving its most cogent expression in Justice Robert Jackson's famous 1952 concurring opinion in Youngstown. Yet throughout our constitutional history, what I call the Youngstown vision has done battle with a radically different constitutional paradigm. This counterimage of unchecked executive discretion has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in United States v. Curtiss-Wright Export Corp. As construed by proponents of executive power, the Curtiss-Wright vision rejects two of Youngstown's central tenets, that the National Security Constitution requires congressional concurrence in most decisions on foreign affairs and that the courts must play an important role ... in foreign affairs."

I find Koh's vision seriously flawed. He is confusing two very different cases — Curtiss-Wright, which had to do with unauthorized gun sales to Bolivia but really concerned the president's power to deal with foreign affairs, and Youngstown Sheet & Tube Co. v. Sawyer, a domestic case examining presidential power to seize private property within the United States. Truman had issued an executive order for his secretary of commerce to seize and run most of the nation's steel mills, which the president feared a United Steelworkers strike would close down, disrupting America's Korean War effort.

That is not to say that the president, Congress, and the judiciary don't each have powers related to the business of war and foreign affairs; and many initiatives do require the participation of more than one branch. But the distinctive roles of each branch are not interchangeable, or "shared." The Senate, for instance, may not negotiate treaties. (The Supreme Court noted in Curtiss-Wright that "into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.") And Congress may not conduct military operations or run foreign-intelligence operations. Nor can the president raise armies or appropriate money from the treasury.

The Koh paradigm is founded upon the assumption that Congress, not the president, was intended to have the "dominant role" in foreign affairs; although he acknowledges that, from the beginning, Washington and his successors actually filled that role. Indeed, Koh does not seriously explore the understanding shared by Washington, Jefferson, John Marshall, and all three authors of The Federalist Papers that the president's executive power included general control over foreign affairs. The Supreme Court noted in Curtiss-Wright that "federal power over external affairs" was "in origin and essential character different from that over internal affairs," and recognized "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress."

Koh would have us ignore that most-often-cited of all Supreme Court foreign-affairs precedents and embrace instead the concurring opinion of a single justice in a domestic-affairs case.

Even a cursory reading of Youngstown reveals that the court is not even discussing the president's power to make or carry out foreign policy or to control the operations of war. Rather, Youngstown concerns whether the president, "exclusively responsible" for the "conduct of diplomatic and foreign affairs" (as Justice Jackson, citing Curtiss-Wright, had described it in the majority opinion in Johnson v. Eisentrager just two years earlier) had the power to seize private property within the United States without the "due process of law" required by the Fifth Amendment. The answer was no.

Indeed, Jackson noted in Youngstown that the president's "conduct of foreign affairs" was "largely uncontrolled, and often even is unknown" by the other branches. He added, "I should indulge the widest latitude of interpretation to sustain his exclusive function to command the
The absurdity of the idea that Justice Jackson intended to overturn or modify Curtiss-Wright in any way is refuted by the second footnote in his opinion, where he cites Curtiss-Wright but reasons: "That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories." Twenty-seven years later, four members of the court concurring in Goldwater v. Carter — dismissing a Congressional challenge to President Carter's unilateral termination of America's mutual-security treaty with Taiwan — rejected Youngstown as a relevant precedent in favor of Curtiss-Wright. They reasoned that the former was a "domestic" case while, "as in Curtiss-Wright," the effect of the Taiwan-treaty decision, "as far as we can tell, is 'entirely external to the United States, and [falls] within the category of foreign affairs." Curtiss-Wright has been cited scores of times as precedent by the Supreme Court since Youngstown was decided in 1952, including at least once during each of the past three years. Just last year, in Pasquantino v. United States, it was cited for the proposition that the executive branch is "the sole organ of the federal government in the field of international relations."

Koh attempts to strengthen his theory that Jackson's Youngstown concurrence somehow replaced Curtiss-Wright as the proper foreign-affairs paradigm by mentioning four early-19th-century Supreme Court cases in which the Marshall Court did recognize Congressional authority over foreign-affairs issues. But each of those involved one of the narrow "exceptions" expressly vested in Congress in Article I, Section 8.

Unfortunately, Baker built her Ashcroft book's argument on Koh's very shaky foundation.

I first met Bruce Ackerman, a professor of law and political science at Yale, at a Washington-area conference nearly two decades ago, and his intelligence and talents were evident. Yet, for a variety of reasons, his most recent book, Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism, was the most disappointing of these recent three.

He frequently denounces Republican presidents for such outrageous "unilateralist pretensions" as George H.W. Bush's claim of an inherent power to send troops into combat with only the approval of the U.N. Security Council. Never mind that when the U.N. Charter and U.N. Participation Act were approved in 1945, the relevant House and Senate committee reports unanimously declared that the charter authorized the president to send troops into harm's way without further Congressional approval, and a Senate amendment to require specific statutory authorization for such deployments received only nine votes.

He casts as Orwellian a presidential "power grab," and a "sucker punch" to Congress George W. Bush's declaration that "if you want to keep the peace, you've got to have the authorization to use force." One can only wonder what he thinks about presidents like Washington and Jefferson, who were both fond of the Roman maxim, si vis pacem, para bellum ("if you want peace, prepare for war").

But the problems in Ackerman's book run much deeper.

Perhaps not surprisingly, like Koh, he finds it appropriate for Congress to alter the Constitution by mere statute rather than the more-cumbersome amendment process set forth in Article V.

That may be a bit unfair to Koh, who recognizes at least that statutes are a "subordinate"
component of what he calls the National Security Constitution. Yet Koh argues that "framework" legislation — laws that "Congress enacts and the president signs" — "reinforces and elaborates the Constitutional foundation of power sharing" concerning foreign policy. He offers the War Powers Resolution of 1973 as an example of this kind of law, giving such statutes "greater normative weight than self-serving justifications that one branch may offer, without another branch's endorsement, to defend its own actions as Constitutional." Could he be unaware that the War Powers Resolution was passed over Nixon's veto, that every president since Nixon had refused to accept its constitutionality, and that key Congressional leaders like George Mitchell, the former Senate majority leader, have also conceded its unconstitutionality?

Ackerman's view of the relationship between statutes and the Constitution is far more alarming. His central theme is that during the early days of a national emergency caused by a major terrorist attack, the government "should be granted extraordinary powers needed to prevent a devastating second strike," and that Congress should authorize the president to declare an emergency "for a week or two while Congress is considering the matter." All that is quite reasonable, but Ackerman goes further:

"Emergency powers should then lapse unless a majority of both houses votes to continue them — but even this vote has a temporary limit and is valid for only two months. The president must then return to Congress for reauthorization, and this time, a supermajority of 60 percent is required; after two months more, the majority will be set at 70 percent; and then 80 percent for every subsequent two-month extension."

Fortunately, I believe, the American people would never be so foolish as to amend their Constitution to empower a 21-percent Congressional minority to leave the nation exposed to future September 11's, perhaps involving biological or nuclear weapons. When I got to Chapter Four, I discovered that Ackerman had the same thought. He acknowledges that "there is no realistic chance that something as controversial as the emergency Constitution would ever be enacted as a formal [constitutional] amendment." But that's no impediment to his plan, as he argues that "Congress already has the Constitutional authority to enact a framework statute that incorporates all the crucial elements of my proposal."

If one Congress may by mere statute modify the American constitutional system to require an 80-percent supermajority before its successors can enact legislation designed to protect the people against terrorist attacks, presumably it may also raise the margin to 98 percent or reduce it to 5 percent. And, depending upon the political attitudes of legislators — and how susceptible they might be to the demands of a frightened public for protection after another few terrorist attacks — presumably they could enact a "framework statute" that would empower a few key members to suspend habeas corpus and perhaps the more troublesome provisions of the Bill of Rights. To anyone who cares about civil liberties, such thinking is as frightening as it is absurd.

Never mind that Congress passed a joint resolution authorizing the use of armed force against those terrorists involved in the September 11 attacks, and that both NATO and the U.N. Security Council passed resolutions recognizing that "armed attacks" had occurred. Ackerman repeatedly mocks the idea that America is engaged in a war against terrorism. He tells us that World War II and the Spanish-American War were genuine wars, not mentioning that, in a single day, the attacks of September 11 claimed more than seven times as many American soldiers as were killed in combat during the second of those wars.

Like many bright people unfamiliar with the Law of Armed Conflict, Ackerman can't understand why the Supreme Court, to use his words, "handed the president a very substantial victory" in denying detainees in the current conflict the normal rights to which Americans are accustomed in
our criminal-justice system. He apparently doesn't know that the 1949 Geneva Convention Relative to the Treatment of Prisoners of War permits detaining enemy combatants without trial, a day in court, or access to legal counsel for the duration of an armed conflict. More than 400,000 German and Italian POW's were held in camps spread across the United States during World War II without access to our courts or lawyers. And, pursuant to Article 84 of the convention, if a POW is to be tried for criminal misconduct, it should be before a military court.

The nation has faced some serious constitutional dilemmas since September 11. To its credit, our government has, as of this writing, kept us from being comparably attacked again. But there have been mistakes — in some cases serious mistakes, like the torture and abuse of some detainees. All the more important, then, that Americans have access to solid scholarship that will help them understand the separation of constitutional powers related to war and foreign affairs. Sadly, of these volumes, only Yoo's will contribute to that understanding.

Robert F. Turner cofounded the Center for National Security Law at the University of Virginia School of Law in 1981 and is a former three-term chairman of the American Bar Association's Standing Committee on Law and National Security.

BOOKS DISCUSSED IN THIS ESSAY

Before the Next Attack: Preserving Civil Liberties in an Age of Terrorism, by Bruce Ackerman (Yale University Press, 2006)

General Ashcroft: Attorney at War, by Nancy V. Baker (University Press of Kansas, 2006)


http://chronicle.com/article/Executive-Power-in-Wartime/22803