International & National Security Law

War Powers Irresolution:

The Obama Administration and the Libyan Intervention

*By Robert J. Delahunty**

The U.S. military intervention in Libya, now in its fourth month, has brought two fundamental and recurrent constitutional questions to the fore. The first is whether the President can initiate a war, admittedly not in national self-defense or for the protection of U.S. persons or property abroad, without prior approval from Congress. The second is whether the provisions of the War Powers Resolution[1] that require disengagement if the President has not obtained congressional sanction within two months of beginning such a war are constitutional.

Both questions have been prominent in public policy debates from the Vietnam War up to the 2008 presidential election and after. Political leaders, legal scholars, and activists in the Democratic Party over four decades have denounced what they see as the pretensions of an "Imperial Presidency" bent on aggression and conquest, and called for the restoration of what they contend are Congress' original powers over war policy.[2] Moreover, before assuming their current offices, the President, the Vice-President, and the Secretary of State had all emphatically stated views on the matter that reflected the dominant opinion within their party. I shall discuss and analyze in Part I the Administration's legal position on the President's war powers. Then in Part II, I will consider the Administration's stance on the War Powers Resolution.

I. The Justice Department's Opinion

On April 1, 2011, the Office of Legal Counsel (OLC) of the Department of Justice issued an opinion defending the legality of President Obama's attack on Libya.[3] OLC's main argument for concluding that the President needed no antecedent declaration of war or other specific congressional authorization was, in substance, that the Libyan intervention would turn out to be a small, short war. Affirming that the President "had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct . . . limited military operations abroad, even without prior specific congressional approval,"[4] OLC "acknowledged one possible constitutionally-based limit on this presidential authority"—"a planned military engagement that constitutes a 'war' within the meaning of the Declaration of War Clause."[5] The purported constitutional distinction turned on "whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring specific congressional approval."[6]

OLC's distinction between small, short wars that the President may begin unilaterally and large, long wars that require prior congressional approval has no foundation in the Constitution's text. The Declaration of War Clause says simply that Congress has the power "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[7] Nothing in the clause explicitly differentiates between "small" and "large" wars. Dr. Samuel Johnson's *English Dictionary,* which provides evidence of how the term would have been understood in the Founding period, defines "war" as "[t]he exercise of violence under sovereign command against withstanders."[8] That definition covers wars both large and small. Further, American and English courts in the Framing period followed the lead of Hugo Grotius[9] in denying that there could be an intermediate legal space between "war" (whether large or small) and "peace."[10] Hostilities authorized and organized by a state could be considered tantamount to "war." Thus, Lord Ellenborough said in 1813 that "Nations may be at war with each other by reciprocal acts of hostility done and suffered."[11]

If the Declare War Clause imports any distinction, it is between *public* and *private,* not *large* and *small*, wars. A "declaration" of war—if needed at all[12]—could affirm that (even pre-existing) hostilities had the legal attributes of a "public," state-sanctioned, war.[13] It served to "prove[] the existence of actual hostilities."[14]

True, State practice near the Founding period also appeared to recognize that some hostilities might not amount to a general war. On October 19, 1739, the British Crown, in what is picturesquely known as the War of Jenkins' Ear, declared war on Spain.[15] The British declaration had been preceded by lower-level hostilities. In March 1739, the Crown had announced that it would "grant Letters of Reprisal, to such of His subjects, whose Ships, or effects, may have been seized on the High Seas by Spanish *garda costas,* or ships, acting by Spanish Commissions."[16] The Crown issued "letters of marque" to merchant vessels in July, and Vice-Admiral Edward Vernon led out nine men-of-war and a sloop against the Spanish shortly afterwards.[17] Some scholars have accordingly argued that the Letters of Marque and Reprisals Clause and the Captures Clause were designed to sweep in smaller wars and to ensure that Congress alone possessed the authority to initiate them. The better view, however, is that these clauses "concern[] the distinction between the public and private waging of war and the right of a sovereign nation to make decisions regarding that distinction."[18] In any event, if the clauses were designed to ensure that Congress alone could initiate small wars, the distinction between large and small wars would turn *against* OLC.

The text and background of the Declare War Clause, therefore, do not support OLC's position. But constitutional text alone is not dispositive. The Supreme Court has read a distinction into the Fourth Amendment between police "stops" (which do not require probable cause) and "searches"

** Associate Professor of Law, University of St. Thomas School of Law, Minneapolis, MN.* *My thanks go to John C. Yoo for his comments on an earlier draft of this essay.*

(which do), although nothing in the Amendment's language hints at this.[19] Likewise, the Declare War Clause might harbor an implicit distinction between large and small wars. But why suppose so?

OLC's answer is that "the 'historical gloss' placed on the Constitution by two centuries of practice" must guide interpretation of the Declare War Clause.[20] U.S. history, OLC argues, is "replete with instances of presidential uses of military force abroad in the absence of prior congressional approval."[21] And that practice "is an important indication of constitutional meaning, because it reflects the two political branches' practical understanding . . . of their respective roles and responsibilities."[22]

This is true, but it proves too much for OLC's purposes. Practice amply demonstrates that Presidents have initiated large as well as small wars without a prior declaration of war (or other congressional authorization).[23] By OLC's own criteria, Presidents have fought a good many large wars without having sought Congress' approval first. Of those large wars, the best known is the Korean War (1950-53). But there are many other cases. President George H.W. Bush launched an invasion of Panama in 1989 that brought down the Noriega regime. From 1899 to 1901, the United States employed 126,468 troops to combat the Philippine Insurrection. In 1900, President McKinley sent 5000 U.S. troops to China to join the forces of other powers in suppressing the Boxer Rebellion. After the First World War, the United States deployed some 14,000 troops into Russia to oppose the Bolsheviks and halt Japan's expansion into Siberia.[24] Moreover, on several occasions in which formal declarations of war had been preceded by limited military engagements, Congress affirmed that a state of war was *already* in existence, indicating that the existence of "war" does not hinge on the scope or duration of the conflict.[25] Thus, while past practice may support the claim that the President may initiate war unilaterally, it does *not* support OLC's further claim that he may do so only when military operations will be brief and on a small scale.

OLC's distinction between "large" and "small" wars does not trace back to constitutional law or practice, but rather to—now largely obsolete—international law.[26] Beginning in the nineteenth century,[27] writers distinguished between "war" strictly so-called and "forcible measures short of war," including reprisals, embargoes, and pacific blockades.[28] Reflecting this distinction, Congress enacted the Hostage Act in 1869, authorizing the President to take measures "not amounting to acts of war" to secure the release of U.S. citizens captured and held abroad. The Court of Claims, dealing in 1886 with French "spoliation claims," considered that a state of persisting reprisals "straining the relations of the state to their utmost tension, daily threatening hostilities of a more serious nature" might still fall "short of war."[29] President (later Chief Justice) William Howard Taft wrote in 1915 that while the President had the constitutional authority to commit the marines into hostilities in Central America, "if troops of the regular army are needed, it seems to take on the color of an act of war."[30] But the distinction between "war" and measures "short of" war was difficult to apply.[31] And the UN Charter and other post-World War Two instruments have swept away the basis for any general distinction in international law between "war" and "forcible measures short of war."[32]

In any case, the U.S. intervention in Libya is by no means a "measure short of war." As President Obama and other NATO leaders have repeatedly insisted, the Allies' overriding war aim is regime change—to bring down Colonel Muammar Gaddafi's government.[33] Further, despite official disclaimers, NATO forces have obviously been seeking to "decapitate" the Libyan regime by targeting Gaddafi and other senior figures in his government.[34] The costs of the operation as of mid-May to the U.S. alone are $750 million—and climbing.[35] The President's original claim to members of Congress that his intervention would be successful in "days, not weeks" has been falsified by events[36]: the President now acknowledges that there is no end in sight.[37] On June 1, 2011, NATO announced the extension of the Libyan campaign for at least a further ninety days, and some reports indicate that NATO may be mulling the introduction of ground troops into Libya. Any candid evaluation of the "scope" of the conflict should also take into account that Libyan-sponsored terrorists may attack Western cities or civilians (as Libya has done in the past). And although the President thought the Libyan operation to be too "small" to require Congress' approval beforehand, he also considered it sufficiently "large" to require a sign-off from the UN Security Council before he went forward.

The President and his senior colleagues have also held inconsistent positions on the question of presidential war powers. In a 2007 interview with *The Boston Globe*, then-candidate Obama stated, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."[38]

Then-candidate Hillary Clinton told the *Globe*, "[T]he Constitution requires Congress to authorize war. I do not believe that the President can take military action—including any kind of strategic bombing—against Iran without congressional authorization."[39]

Vice President Joe Biden stated in 2007 (in the context of a possible U.S. attack on Iran):

> I was chairman of the Judiciary Committee for 17 years . . . I teach separation of powers in constitutional law. This is something I know. So I got together and brought a group of constitutional scholars together to write a piece that I'm gonna deliver to the whole United States Senate, pointing out the president has no constitutional authority to take this nation to war against a country of 70 million people unless we're attacked or unless there is proof that we are about to be attacked. And if he does . . . I will move to impeach him. . . . I would lead an effort to impeach him.[40]

II. The War Powers Resolution

The War Powers Resolution (WPR) was enacted over President Richard Nixon's veto in 1973 by a Democrat-controlled Congress in the depths of Vietnam and Watergate.[41] Since then, the WPR has remained a venerated talisman for anti-war advocates whenever a war looms. Presidents, however, invariably see things Nixon's way. Since Nixon's

veto, "every President has taken the position that [the WPR] is an unconstitutional infringement by the Congress on the President's authority as Commander in Chief."[42]

The WPR states that the President's "constitutional powers . . . as Commander-in-Chief" to introduce U.S. armed forces into actual or threatened hostilities are exercised "only" pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by an attack on the U.S. or its armed forces. It requires the President to "consult" with Congress "in every possible instance" before troops are introduced into hostile situations. Section 4(a) requires the President to report to Congress when (in the absence of a declaration of war) armed forces are deployed (1) into actual or threatened hostilities; (2) "into the territory, airspace or waters of a foreign nation, while equipped for combat . . ."; or (3) in numbers which "substantially enlarge" U.S. armed forces equipped for combat who were already in a foreign nation. The heart of the WPR is section 5(b), which requires the President, within sixty days of filing (or being obligated to file) a report under section 4(a)(1), to "terminate any use of United States Armed Forces" that was subject to the reporting requirement unless Congress in the interval has declared war, enacted a "specific authorization" for the deployment, extended the sixty-day period, or been unable to meet because of an attack on the U.S. The sixty-day period may be extended by an additional thirty days "if the President determines and certifies to the Congress in writing that *unavoidable military necessity requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces*" (emphasis added).

The executive branch has frequently objected to the sixty/ninety-day limit as unconstitutional. In his veto message, President Nixon objected that under this framework, "[n]o overt Congressional action would be required to cut off [the President's] powers—they would disappear automatically unless the Congress extended them." Arguing that this enabled Congress to increase its policy-making role through mere inaction, Nixon maintained that "the proper way for Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking full responsibility of casting a yes or no vote."[43]

In a similar vein, Monroe Leigh, Legal Counsel to the State Department in the Ford Administration, argued that the sixty/ninety-day framework imposed an unconstitutional straitjacket on the President's power:

> The question inevitably arises: If the president has an independent constitutional power to order troop movements in the first place, how can a statute of Congress override or limit the exercise of that power? . . . [I]t seems to me that the specific constitutional issue that is central to the entire superstructure of the [WPR] is whether Congress by mere statute can inhibit the president in the exercise of his independent power as commander-in-chief. Obviously I think it cannot . . . . [A] statute cannot constitutionally limit the President's discretion when to commit and when to withdraw armed forces from hostilities.[44]

These objections do not exhaust the possible constitutional arguments against WPR § 5(b). Critics can also appeal to constitutional structure, which assigns the federal branches very different responsibilities with respect to foreign affairs.[45] Section 5(b) impairs the President's effectiveness in conducting diplomatic negotiations (which the Constitution entrusts solely to the executive) because the ability to make credible threats of force is important to successful diplomacy. In the Libyan situation, for instance, the U.S., its NATO partners, its Russian and Chinese rivals, the Arab League, and Libya itself were and are engaged in strategic interactions premised on certain assumptions about U.S. intentions, resolve, and capabilities. Thus, Britain and France might not have intervened militarily but for the expectation of continuing U.S. involvement; likewise, the Libyan rebels might have surrendered by now but for the hope of more substantial U.S. support. If foreign actors come to expect the U.S. to begin withdrawing its forces after two months unless the President managed to persuade Congress to extend that period, our prospective partners' willingness to co-operate with us would be diminished, while our enemies' resolve to resist us would likely be strengthened.

But the WPR has survived intact despite all efforts to repeal or amend it. President Clinton supported a 1995 effort to eliminate the sixty-day withdrawal provisions, and Senator Majority Leader Dole's 1995 proposal to repeal most of the WPR even became the subject of a hearing. But Congress has consistently declined to act. The continuing vitality of the WPR as statutory law therefore cannot be doubted. Both the Authorization for the Use of Military Force (2001) and the Authorization for the Use of Force Against Iraq Resolution (2002) explicitly referenced it. Indeed, on March 21, 2011, President Obama himself reported to Congress on the start of military operations in Libya "consistent with the War Powers Resolution."

With the expiration of the sixty-day period, therefore, the President faced a seemingly inescapable choice: either discontinue operations in Libya as the WPR requires; or declare the WPR's withdrawal provisions to be unconstitutional. Instead, he did neither.

In his May 20, 2011 letter to Congress, the President wrote:

> On March 21, I reported to the Congress that the United States, pursuant to a request from the Arab League and authorization by the United Nations Security Council, had acted 2 days earlier to prevent a humanitarian catastrophe by deploying U.S. forces to protect the people of Libya from the Qaddafi regime. As you know, over these last 2 months, the U.S. role in this operation to enforce U.N. Security Council Resolution 1973 has become more limited, yet remains important. . . . The initial phase of U.S. military involvement in Libya was conducted under the command of the United States Africa Command. By April 4, however, the United States had transferred responsibility for the military operations in Libya to the North Atlantic Treaty Organization (NATO) and the U.S. involvement has assumed a supporting role in the

coalition's efforts. Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led operation, including intelligence, logistical support, and search and rescue assistance; (2) aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone; and (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition's efforts. While we are no longer in the lead, U.S. support for the NATO-based coalition remains crucial to assuring the success of international efforts to protect civilians from the actions of the Qaddafi regime. . . . Congressional action in support of the mission would underline the U.S. commitment to this remarkable international effort. Such a Resolution is also important in the context of our constitutional framework, as it would demonstrate a unity of purpose among the political branches on this important national security matter. It has always been my view that it is better to take military action, even in limited actions such as this, with Congressional engagement, consultation, and support.[46]

The President's statement does not reflect any willingness to comply with the WPR's withdrawal requirement. It does not actually mention the WPR or in any way acknowledge that the WPR might apply to the Libyan intervention. Instead, it defies that law—though not so as to draw attention to that defiance. Section 5(b) states, in terms that are excruciatingly clear, that if the President wishes to continue a deployment into hostilities after the sixty-day period has run, he must advise Congress that "*unavoidable military necessity requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.*" But rather than claiming that additional time is needed as an "unavoidable military necessity" before the "prompt removal" of our forces, the President explicitly affirmed that our forces will *continue* operations indefinitely ("U.S. support . . . remains crucial"). In speeches and press conferences after May 20, the President remained adamant on the goal of regime change in Libya and saw no discernible end to U.S. military participation in the NATO campaign until after Gaddafi's fall.

Two principled courses of action were open to the President. If he considered the WPR constitutional, he should have ordered U.S. forces to stand down immediately in Libya, as the statute required. (Since there were no U.S. troops on the ground and at risk in Libya, there was no apparent need to wait an additional thirty days.) If he considered the WPR unconstitutional (as his predecessors in office had), he should have laid out his arguments, declined to order a stand-down, and accepted the legal and political consequences of his decision. Instead, in a message that did not contain any legal reasoning, he did neither. He stated that it would be "better" for him to have "Congressional engagement, consultation, and support"—and then did not mention an Act of Congress designed to ensure that Presidents in his position would engage Congress, consult with it, and seek its support.

In his 2007 *Boston Globe* interview, Obama was asked if "the Constitution empower[s] the president to disregard a congressional statute limiting the deployment of troops"? He answered:

> No, the President does not have that power. To date, several Congresses have imposed limitations on the number of US troops deployed in a given situation. As President, I will not assert a constitutional authority to deploy troops in a manner contrary to an express limit imposed by Congress and adopted into law.[47]

In mid-June, just before the end of the WPR's ninety-day period for ceasing operations in Libya, the Administration submitted a report to Congress with less than a paragraph of legal reasoning supporting the continuation of conflict without congressional authorization. Here is that reasoning in full (emphasis added):

> The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, *because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision.* U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile troops, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.[48]

So the WPR does not apply because the U.S. is not engaging in "hostilities" in Libya. Colonel Gaddafi and other targets of U.S. drone attacks would surely be confounded by this assertion. So might the U.S. military personnel who have been drawing combat pay since April for their service in the President's Libyan intervention.[49]

The Administration's attempt to downplay the extent of U.S. military actions in Libya in its mid-June Report to Congress was undercut some two weeks later when the U.S. Air Force confirmed that since NATO's Operation Unified Protection Protector (OUP) took over from the American-led Operation Odyssey Dawn on March 31, the U.S. military has flown hundreds of strike sorties. Previously, Washington had claimed it was mostly providing intelligence, surveillance and reconnaissance (ISR) and tanker support to NATO forces operating over Libya. "U.S. aircraft continue to fly support [ISR and refueling] missions, as well as strike sorties under NATO tasking," AFRICOM [Africa Command] spokeswoman Nicole Dalrymple said in an emailed statement. "As of today, and since March 31, the U.S. has flown a total of 3,475 sorties in support of OUP. Of these, 801 were strike sorties, 132 of which actually dropped ordnance."[50] Consider some of the consequences of the Obama Administration's understanding of "hostilities." Actions like President Nixon's bombing of Cambodia—the very type of operation one might have thought the framers of the

WPR intended to cover—might be excluded (no U.S. ground troops; no exchanges of fire; no serious risks of U.S. casualties or of escalation). The same would seem to be true of actions similar to President Kennedy's Bay of Pigs operation; President Reagan's mining the harbor in Managua, Nicaragua; or the U.S. "no-fly zone" in Iraq, maintained by Presidents George H.W. Bush and Clinton. And what if the US were to impose a naval arms embargo tomorrow on Cuba—would this conduct not constitute "hostilities" under the law?

Future Presidents using advanced or even current types of weaponry against other nations will also not be engaging in "hostilities" in this Administration's judgment. Presidents could engage in major, covert cyber wars—say, destroying Iranian nuclear facilities by using the Stuxnet computer worm—without introducing U.S. ground troops, engaging in active exchanges of fire, risking U.S. casualties, or even causing a significant chance of escalation.[51] They could use extra-terrestrial lasers or unmanned drones to strike at North Korea. They could even drop a nuclear weapon on Caracas if Hugo Chavez refused to relinquish power: again, no "hostilities."

The Administration attempts to argue *both* that the U.S. is not engaging in "hostilities" in Libya *and* that our military participation in the NATO campaign is indispensable for its success. The Report states:

> The United States is providing unique assets and capabilities that other NATO and coalition nations either do not possess or possess in very limited numbers—such as suppression of enemy air defense (SEAD); unmanned aerial systems; aerial refueling; and intelligence, surveillance, and reconnaissance (ISR) support. These unique assets are critical to the successful execution and sustainment of NATO's ability [to conduct military operations in Libya.][52]

How, one might ask, can the U.S. *not* be engaged in the ongoing "hostilities" in Libya, even though we insist that our military efforts are critical to NATO's success? The Administration is trying to talk law out of one side of its mouth, and diplomacy out of the other. The result is incoherence.

Conclusion

The Libyan intervention is rich in ironies. Three former Senators now at the helm in the Executive branch—Obama, Biden, and Clinton—have all discarded, without explanation or apology, their earlier, seemingly well-considered views on the constitutional allocation of the war powers between Congress and the President. The party that enacted the War Powers Resolution and championed it for decades thereafter, now in possession of the White House, blithely disregards it. And the Administration hardly lifts a finger to win congressional authorization for its Libyan adventure, even though it courted the Arab League assiduously and would not have dared to strike a blow at Libya without the Security Council's permission.

What explains these shifts? We are seeing a contradiction emerge between two policy imperatives. One imperative, codified in the WPR, is to oppose making wars that protect U.S. national security and promote U.S. interests. The newer, contrary imperative is to support humanitarian wars that uphold the international human rights of oppressed peoples. These imperatives led, respectively, to opposition to wars in Vietnam and Iraq, and to support for wars in Kosovo and, now, Libya.[53] The WPR is a substantial legal obstacle to pursuing wars of either kind: hence supporters of humanitarian wars can neither wholly accept it nor wholly reject it. Indeed, the WPR is a more serious obstacle to wars of humanitarian intervention, because the political costs to the President of "selling" such wars to Congress within two months are much higher. The public understands the arguments for what may be wars of necessity; it has little appetite for what are clearly wars of choice.

Endnotes

1 50 U.S.C. 1541-48.

2 Thus, in a July 30, 1998 Senate speech, then-Senator Biden argued:

> [T]he "monarchist" view of the war power has become the prevalent view at the other end of Pennsylvania Avenue, and it does not matter whether it is a Democratic President or a Republican President. And the original framework of the war power clause envisioned by the Founding Fathers, I think, has been greatly undermined over the last several decades.

Cong. Rec. 105th Cong. (1998), *available at* http://thomas.loc.gov/cgi-bin/query/F?r105:1:/temp/~r105NnZHOi:e5170.

3 *See Re:* Authority to Use Military Force in Libya, 35 Op. Off. Legal Counsel 1 (2001) [hereinafter OLC Opinion] (written by Caroline D. Krass, Principal Deputy Attorney General).

4 *Id.* at 6.

5 *Id.* at 8.

6 *Id.* at 10.

7 U.S. Const., art. I, § 8, cl. 11.

8 Johnson's English Dictionary, as Improved by Todd, and Abridged by Chalmers 1008 (1835) (entry for "war").

9 *See* Hugo Grotius, On the Law of War and Peace, Book III, ch. 21, secs. 1-2 (1625),

10 For extracts from, and discussion of, those authorities, see William J. Ronan, *English and American Courts and the Definition of War,* 31 Am. J. Int'l L. 642, 642-3 (1937). Other cases recognized a state of partial "suspension of war" when a belligerent licensed trade with the enemy. *See, e.g.*, Coppell v. Hall, 74 U.S. 542, 554 (1868); The Julia, 12 U.S. 181, 193 (1814). But those decisions are not relevant to OLC's position.

11 Hagedorn v. Bell,1 M. & S. 450, 459 (K.B. 1813).

12 In *The Maria Magdelena,* (1779) Hay & M. 247, 165 E.R. 57, a Swedish ship with British goods on board was captured by the Royal Navy while bound from London to France (from which the goods were to be re-shipped to the rebel United States), allegedly before war had been "declared" by Britain on France but after a British "declaration of reprisals" and a French declaration that "actual hostilities with England" existed. The court said:

> Where is the difference, whether a war is proclaimed by a Herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon? The relative state of subjects as to foreign nations is that of their Prince. . . . If learned authorities are to be quoted, Bynkershoek has a whole chapter to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation.

Id. at 252. Eighteenth century wars commonly commenced with the outbreak of actual hostilities, rather than with declarations. *See* William Edward Hall, International Law 319 n.2 (1880) (listing many eighteenth century wars not preceded by declarations, including the 1778 French intervention in

the American Revolutionary War).

13 *See, e.g.*, William Hazlitt & Henry Philip Roche, *A Manual of the Law of Maritime Warfare* 6-7, 9 (1854) (collecting authorities).

14 The Eliza Ann, 1 Dodson 244, 247 (1813), 165 E.R. 1298.

15 *Historical Chronicle: Saturday 23 October*, Gentleman's Mag., Oct. 1739, at 551, *available at* http://www.bodley.ox.ac.uk/cgi-bin/ilej/image1.pl?item=page&seq=4&size=1&id=gm.1739.10.x.9.x.x.551|.

16 Letter from Lord Newcastle (Mar. 2, 1739), *quoted in* Harold W.VC. Temperley, *The Causes of the War of Jenkins' Ear,* 3 Trans. Royal Hist. Soc. 197, 209 (1909).

17 *Historical Chronicle: Tuesday, 31 July*, Gentleman's Mag., July 1739, at 383 & 384.

18 J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers,* 28 Harv. J. L. & Pub. Pol'y 465, 468 (2005).

19 Terry v. Ohio, 392 U.S. 1 (1968).

20 OLC Opinion, *supra* note 3, at 7.

21 *Id.*

22 *Id.*

23 OLC's argument also proves too little, because most past unilateral interventions by far were undertaken, not out of humanitarian concern for foreign civilians, but to protect U.S. lives, property and interests abroad. OLC acknowledges that some of the main precedents on which it relies, including the 2004 intervention in Haiti and the 1992 intervention in Somalia, were motivated by these purposes. In fact, only a handful of past interventions—all of them recent—were "humanitarian" in the sense in which the Libyan intervention is. These are, primarily, Kosovo and Bosnia in the 1990s; and Kosovo, at least, was, constitutionally, a highly contested case. Reliance on the historical record alone cannot sustain a claim that the President has constitutional power unilaterally to deploy military force in humanitarian interventions.

24 *See* Terry Emerson, *War Powers Legislation,* 74 W. Va. L. Rev. 53, 71-2 (1972).

25 Two such occasions were the 1898 Declaration of War on Spain, which was issued after the (suspected) attack on the U.S. Navy's *The Maine,* and the 1846 Declaration of War on Mexico, which was preceded by the battles of Palo Alto and Resaca de la Palma. For the texts of these declarations, see Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv., Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications 81-3 (2011); *see also* Elbert Jay Benton, International Law and Diplomacy of the Spanish-American War 54-5 (2010 reprint of 1908 ed.).

26 *See* Christopher Greenwood, *The Concept of War in Modern International Law,* 36 Int'l L. Q. 283, 301 (1987) (finding "no room for the argument that a State which resorts to force without creating a state of war does not violate the [United Nations] Charter [Art. 2(4)]").

27 *See* Fritz Grob, The Relativity of War and Peace ch. II (1949).

28 *See, e.g.*, John Westlake, International Law Part II at 1 (1907) (distinguishing "war" from forcible measures short of war, such as reprisals, embargoes, and pacific blockades). By the 1930s, scholars were beginning to recognize that these distinctions served mainly to provide cover for aggression. *See* Albert E. Hindmarsh, Force in Peace: Force Short of War in International Relations 7-8, 80-1, 89-96 (1933).

29 Gray, Adm'r v.U.S., 1800 WL 1537, at *19 (Ct. Cl.); *see also* J.H. Toelle, *The Court of Claims: Its Jurisdiction and Principal Decisions Bearing on International law,* 24 Mich. L. Rev. 675, 689-90 (1926) (background of "French spoliations").

30 William Howard Taft, Our Chief Magistrate and His Powers 95 (1915).

31 *See, e.g.*, Kelley (USA) v. Utd. Mexican States, Reports of Int'l Arbitral Awards, vol. IV, p. 608, 609 (Oct. 8, 1930) (declining to decide whether landing of U.S. ground troops at Vera Cruz in 1914 was a "measure[] stopping short of war").

32 Corfu Channel Case, 1948 I.C.J. 4, 34-5 (Apr. 9, 1949).

33 On NATO's war aims and tactics, see David Rieff, *Saints Go Marching In,* Nat'l Int., June 21, 2011, *available at* http://nationalinterest.org/article/saints-go-marching-5442.

34 *See* Josh Rogin, *Exclusive: Top US Admiral Admits We Are Trying to Kill Qaddafi,* Foreign Pol'y, June 24, 2011, *available at* http://thecable.foreignpolicy.com/posts/2011/06/24/exclusive__top__admiral__admits__we__are__trying__to__kill__qaddafi. The killing of a head of state (or other high-ranking government functionary) has been long regarded as an act of war. The assassination in July 1914 by suspected Serbian agents of the Archduke Franz Ferdinand, heir to the Austro-Hungarian throne, precipitated the First World War. Austria-Hungary, defending its harsh ultimatum to Serbia in a Letter of Explanation Transmitted to the Various European Powers (July 23, 1914), stated that "the sentiments of all civilized nations . . . cannot permit regicide to become a weapon that can be employed with impunity in political strife."

35 *Gates Puts Cost of Libya Mission at $750 Million,* N.Y. Times, May 12, 2011, *available at* http://www.nytimes.com/2011/05/13/world/africa/13gates.html?. The Administration subsequently revised that figure downward (to $715.9 million as of June 3), but estimated a cost of about $1.1 billion through September 30. *See* United States Activities in Libya 13-4 (2011) (report submitted to Congress), *available at* http://www.foreignpolicy.com/files/fp_uploaded_documents/110615_United_States_Activities_in_Libya_--_6_15_11.pdf.

36 Jake Tapper, *Obama: U.S. Involvement in Libya Would Last 'Days, Not Weeks,'* ABC News, Mar. 18, 2001, *available at* http://abcnews.go.com/International/libya-crisis-obama-moammar-gaddafi-ultimatum/.

37 In a press conference on May 25, the President said: "[U]ltimately this is going to be a slow, steady process in which we're able to wear down the regime forces and change the political calculations of the Qaddafi regime to the point where they finally realize that they're not going to control this country."Barack Obama, President of the United States, Remarkswith Prime Minister Cameron of the United Kingdom in Joint Press Conference in London, United Kingdom (May 25, 2011).

38 Charlie Savage, *Barack Obama's Q&A,* Boston Globe, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/?page=full.

39 Charlie Savage, *Hillary Clinton Q&A,* Boston Globe, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ClintonQA/?page=full.

40 *Quoted in* Monte Kuligowski, *Per the War Powers Resolution (and His Own Words), Obama Should Be Impeached*, RenewAmerica.com, Apr. 8, 2011, *available at* http://www.renewamerica.com/columns/kuligowski/110408; *see also* Adam Leech, *Biden: Impeachment If Bush Bombs Iran*, Seacoastonline.com, Nov. 29, 2007, *available at* http://www.seacoastonline.com/apps/pbcs.dll/article?/AID=/20071129/NEWS.

41 The War Powers Resolution was one of several "framework" statutes enacted in the 1970s to constrain executive power, chiefly in the national security area. The "framework" has not endured: the statutes have proven to be ineffective, if indeed they have not become dead letters. *See* Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 85-9 (2010). On the War Powers Resolution in particular, see Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 Wm. & Mary L. Rev. 1149, 1151-2 (2001) ("Looking back over this period, it is indisputable that the central component of the War Powers Resolution—the requirement that the President obtain express congressional authorization to conduct such operations—has been virtually meaningless. In fact, it is probably only a slight exaggeration to state that the most significant effect of the War Powers Resolution has been to provide separation of powers scholars with an interesting subject to analyze and debate. Analysis of the actual operation of the Resolution in relation to these various combat operations reveals a consistent pattern of executive side-stepping, legislative acquiescence, and judicial abstention.").

42 Richard F. Grimmett, Cong. Research Serv., War Powers Resolution: Presidential Compliance 3 (2011).

43 President Nixon's Statement Vetoing the War Powers Resolution (Oct. 24, 1973).

44 Monroe Leigh, *A Modest Proposal for Moderating the War Powers Controversy,* 11 Geo. Mason U. L. Rev. 195, 198 (1988/9).

45 For a skillful elaboration of this point, see W. Michael Reisman, *War Powers: The Operational Code of Compliance*, 83 Am. J. Int'l L. 777, 784-5 (1989).

46 *President Obama's Letter About Efforts in Libya,* N.Y. Times, May 20, 2011, *available at* http://www.nytimes.com/2011/05/21/world/Africa/21libya-text.html?.

47 *See Barack Obama's Q&A*, *supra* note 34.

48 Report, *supra* note 31, at 25.

49 "The Defense Department decided in April to pay an extra $225 a month in 'imminent danger pay' to service members who fly planes over Libya or serve on ships within 110 nautical miles of its shores. That means the Pentagon has decided that troops in those places are 'subject to the threat of physical harm or imminent danger because of civil insurrection, civil war, terrorism or wartime conditions.'" *See* David A. Fahrenholdt, *Obama's Negation of 'Hostilities' in Libya Draws Criticism,* Wash. Post, June 20, 2011, *available at* http://www.washingtonpost.com/politics/obamas-negation-of-hostilities-in-libya-draws-criticism/2011/06/20.

50 Dave Majumdart, *AFRICOM: AF, Navy Still Flying Libya Missions,* Air Force Times, June 30, 2011, *available at* http://www.airforcetimes.com/news/2011/06/defense-africom-air-force-navy-flying-libya-missions.

51 The Pentagon has recently concluded that cyber attacks *would* be acts of war. *See* Siobhan Gorman & Julian E. Barnes, *Cyber Combat: Act of War, Wall St. J.*, May 31, 2011, at A1..

52 Report, *supra* note 31, at 12.

53 The growing strength of the second imperative seems explicable if the U.S. is withdrawing from its role as global hegemon, and is increasingly following, rather than trying to lead, the international community.