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CONSTITUTIONALITY OF U.S. PARTICIPATION IN THE UNITED NATIONS-AUTHORIZED WAR IN LIBYA

*Jordan J. Paust**

INTRODUCTION

In March 2011, President Barack Obama decided that the United States would participate with other members of North Atlantic Treaty Organization (“NATO”) in the use of military force in Libya authorized by the United Nations (“UN”) Security Council in Resolution 1973, which “[a]uthorizes Member States . . . to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in” Libya.¹ The Security Council has authority to authorize enforcement measures under Articles 39 and 42 of the UN Charter in response to “any threat to the peace, breach of the peace, or act of aggression.”² With respect to Libya, the Security Council decided that attacks on and continued threats to civilians and civilian-populated areas in Libya “continue[d] to constitute a threat to international peace and security,”³ and the Council decided to authorize all necessary measures of protective force, including creation of a no-fly zone.⁴ The Security Council’s decision to

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¹ S.C. Res. 1973, ¶4, U.N. Doc. S/RES/1973 (Mar. 17, 2011).

² U.N. Charter art. 39 (“The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”); *id.* art. 42 (“[The Security Council] may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include . . . blockade, and other operations by air, sea, or land forces of Members of the United Nations.”).

³ S.C. Res. 1973, *supra* note 1, pmbl.

⁴ *Id.* ¶¶ 6–8. Eventually, it was reasonably needed to provide support for regime change in Libya in order to effectively protect civilians who were under a series of armed attacks and serious threats of imminent future attacks by the Qaddafi regime. Regarding such measures, see *infra* note 10. In addition to the UN Security Council authorization to use all necessary measures of protective force, which covered the subsequent need for regime change, during later stages of the Libyan armed conflict there was a change in the international legal status of the Libyan rebel-insurgents to belligerents, and they consented to and welcomed U.S. and NATO uses of force. See Stefan Talmon, *Recognition of the Libyan National Transitional Council*, ASIL INSIGHTS (June 16, 2011), <http://www.asil.org/insights110616.cfm> (describing the Libyan National Transitional Council (“NTC”) as belligerents). Still later, the NTC gained recognition as the legitimate representative of the Libyan people and its consent provided additional independent legitimacy for use of force to support regime change, to provide self-determination assistance to the Libyan people, and to participate in collective self-defense against continuous armed attacks by remnants of the Qaddafi regime. See William Wan & William Booth, *Libyan Rebels Given Full U.S. Recognition*, WASH. POST, July 16, 2011, at A9. Gaining

authorize the use of force as an enforcement measure was binding on members of the UN under Articles 25⁵ and 48⁶ of the UN Charter, but because it authorized the use of force and did not require members to engage in such enforcement measures, each member had some discretion whether to join.⁷

On March 19, 2011, military forces of the United States, Great Britain, and France, in conjunction with NATO, initiated Operation Odyssey Dawn and began to destroy numerous military assets of the government of Libya under Muammar Qaddafi.⁸ Within the first few months, the United States used more than one hundred missiles as well as fighter aircraft and drones to target Qaddafi's tanks, military vehicles, aircraft, anti-aircraft emplacements, artillery, command centers, and other military targets.⁹ Thereafter, the United

recognition in July 2011 by thirty-two countries (including the United States), the NTC became "the legitimate governing authority in Libya." Fourth Meeting of the Libya Contact Group Chair's Statement, July 15, 2011, Istanbul, para. 4, http://www.mfa.gov.tr/fourth-meeting-of-the-libya-contact-group-chair_s-statement_15-july-2011_istanbul.en.mfa; see also Wan & Booth, *supra*; Talmon, *supra*. On the legitimacy of self-determination assistance in certain contexts, see, for example, Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533, 547-48 (2002). With respect to recognition of the National Transitional Council of Libya ("NTCL") and Security Council encouragement of the NTCL to implement its plans, for example, to protect Libya's population, restore governmental services, prevent violations of human rights, and ensure an inclusive political process involving free elections, see S.C. Res. 2009, ¶¶ 5, 7, U.N. Doc. S/RES/2009 (Sept. 16, 2011) (referring to the NTCL as "the Libyan authorities").

⁵ U.N. Charter art. 25 ("The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.").

⁶ U.N. Charter art. 48(1) ("The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.").

⁷ S.C. Res. 1973, *supra* note 1 (authorizing, requesting, and calling upon the Member States to participate, rather than requiring them).

⁸ Mark Townsend, *Operation Odyssey Dawn Commences To End Gaddafi Onslaught on Benghazi*, GUARDIAN (Mar. 19, 2011, 7:29 PM), <http://www.guardian.co.uk/world/2011/mar/19/operation-odyssey-dawn-tomahawks-libya>.

⁹ See, e.g., Elizabeth Bumiller & David D. Kirkpatrick, *Airstrikes Pound Libyan Forces*, N.Y. TIMES, Mar. 24, 2011, at A15; John F. Burns, *NATO Begins Helicopter Attacks in Hopes of Ending the Stalemate with Qaddafi*, N.Y. TIMES, June 5, 2011, at A18; *Military Releases Details on Libyan Air Strikes*, N.Y. TIMES, June 21, 2011, at A8; *NATO Planes Hit Tripoli in the Heaviest Strikes Yet*, N.Y. TIMES, May 24, 2011, at A8; Charlie Savage & Mark Landler, *White House Defends Continuing U.S. Role in Libya Operation*, N.Y. TIMES, June 16, 2011, at A16; Charlie Savage & Thom Shanker, *As NATO Claims Progress in Libya, a U.S. Deadline Is Put to the Test*, N.Y. TIMES, May 21, 2011, at A9 (describing predator drones striking government armed forces in Libya); Charlie Savage & Thom Shanker, *Scores of U.S. Strikes in Libya Followed Handoff to NATO*, N.Y. TIMES, June 21, 2011, at A8; Eric Schmitt, *U.S. Gives Its Air Power Expansive Role in Libya*, N.Y. TIMES, Mar. 29, 2011, at A13; Thom Shanker, *Pentagon Says It Has Kept Up Some Strikes on Libya*, N.Y. TIMES, Apr. 14, 2011, at A8; Harold Hongju Koh, Statement Regarding Use of Force in Libya (Mar. 26, 2011) ("U.S. forces have targeted the Qaddafi regime's air defense systems, command and control structures, and other capabilities of Qaddafi's armed forces used to attack civilians and civilian populated areas."), in John R.

States continued to attack targets in Libya and also provided direct support for continued use of armed force by other countries and NATO that migrated from protection of civilians to include support for rebel forces that led to rebel control of Tripoli and regime change some seven months after Operation Odyssey Dawn began.¹⁰ Clearly, the United States had been directly involved in a massive use of armed force that is classifiable under international law as an international armed conflict or war¹¹ that had been initiated as a UN Security Council enforcement action.

Although the U.S. use of armed force and direct participation with other countries and NATO with respect to their use of armed force against military targets in Libya was authorized by and in compliance with the Security Council resolution and was permissible under international law, was President Obama's use of armed force and direct participation in use of armed force by other countries and NATO in Libya also permissible under our Constitution

Crook, *Contemporary Practice of the United States Relating to International Law*, 105 AM. J. INT'L L. 568, 605 (2011).

¹⁰ See, e.g., Jim Garamone, *Situation Fluid, but Gadhafi Regime Nears End, Obama Says*, AM. FORCES PRESS SERVICE, Aug. 22, 2011, available at <http://www.defense.gov/news/newsarticle.aspx?id=65104> ("More than 5,300 American sorties have been flown as part of Operation Unified Protector; 1,210 were strike sorties and 101 were Predator unmanned aerial vehicle strikes. The targets included air defenses, arms caches and ground forces."); Eric Schmitt & Steven Lee Myers, *Sharper Surveillance and NATO Coordination Helped Rebels Race to Capital*, N.Y. TIMES, Aug. 22, 2011, at A1 (adding that the U.S. provided intensified aerial surveillance in and around Tripoli during the rebel takeover of Tripoli, coordination existed between NATO and the rebels, and "[t]hrough Saturday, NATO had flown 7,459 strike missions . . . attacking thousands of targets"); Thom Shanker & Eric Schmitt, *Seeing Limits of 'New' War*, N.Y. TIMES, Oct. 22, 2011, at A1 (stating that a U.S. predator drone "helped to guide a French warplane to attack Colonel Qaddafi's convoy"); Larry Shaughnessy, *U.S. Has Nearly Doubled Air Attacks on Libya in Past 12 Days*, CNN (Aug. 22, 2011), http://articles.cnn.com/2011-08-22/politics/us.libya.costs_1_attacks-civilians-libyan-mission (stating that "[t]here was an average of 1.7 strike sorties a day from April 1 to August 10, compared with 3.1 strike sorties in the past 12 days," and that attacks by predator drones have more than doubled). The General in command of NATO's air operation in Libya has stated that NATO forces left the anti-Qaddafi forces ("AGF") alone because: "[w]e saw when . . . [they] entered towns, they liberated the town and the people. They did not indiscriminately attack civilians and in fact, kept the civilians away from any of the fighting between the AGF and [pro-Qaddafi forces]." E-mail from Lieutenant General Ralph J. Jodice II to author (Apr. 20, 2012) (on file with author).

¹¹ See JORDAN J. PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 643–44, 646, 653, 661–62 (3d ed. 2007) (explaining that the existence of *de facto* hostilities, for example, between governmental forces of two or more states, nations, or belligerents constitutes an international armed conflict whether a state of war is formally recognized); U.S. DEP'T OF ARMY, *FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE* 7 (1956) ("Instances of armed conflict without declaration of war may include . . . the exercise of armed force pursuant to a recommendation, decision, or call by the United Nations, in the exercise of the inherent right of individual or collective self-defense against armed attack, or in the performance of enforcement measures through a regional arrangement, or otherwise, in conformity with appropriate provisions of the United Nations Charter.").

without special congressional approval? Despite significant disagreement¹² and a surprising, ultimately unpersuasive, and potentially problematic main justification offered by the Obama Administration,¹³ the President's conduct was constitutionally permissible.

I. THE WAR POWERS RESOLUTION IS NOT A LIMITATION OF PRESIDENTIAL POWER TO IMPLEMENT UN SECURITY COUNCIL RESOLUTIONS

Some have complained that the U.S. participation in enforcement of the Security Council measures that had involved the U.S. use of armed force against the armed forces of Libya for more than ninety days violated the War Powers Resolution (“WPR”),¹⁴ but even a quick read of the congressional resolution demonstrates that this is not correct. First, Section 2(c) of the WPR (which sets forth its “Purpose and Policy”) merely speaks to the powers of the President as Commander-in-Chief,¹⁵ which are based in Article II, Section 2 of

¹² See, e.g., Donna Cassata, *House Rejects Effort To Prohibit Funds for Libya*, ASSOCIATED PRESS, July 8, 2011, available at <http://www.post-gazette.com/pg/11189/1158957-82-0.stm>; Editorial, *Obama's Hostility to the Truth*, WASH. TIMES (July 6, 2011), <http://www.washingtontimes.com/news/2011/jul/5/obamas-hostility-to-the-truth> (also noting Senate approval of a resolution stating that U.S. actions in Libya “constitute hostilities within the meaning of the War Powers Resolution”) (internal quotation marks omitted); Editorial, *War by Any Other Name*, WASH. POST, June 18, 2011, at A14; David Fahrenthold, *Obama's Reasoning on Libya Criticized*, WASH. POST, June 21, 2011, at A8; David Lightman & William Douglas, *Libya Puts the House and Senate Poles Apart*, HOUS. CHRON., July 6, 2011, at A4; Charlie Savage, *Libya Effort Is Called Violation of War Act*, N.Y. TIMES, May 26, 2011, at A8; Savage & Landler, *supra* note 9 (noting that ten congresspersons filed a lawsuit opposing the constitutionality of U.S. participation in the armed conflict in Libya); Charlie Savage & David D. Sanger, *Vote in Congress Reveals Dissent on Role in Libya*, N.Y. TIMES, June 28, 2011, at A10; Jonathan Schell, *Let's Call a War a War*, L.A. TIMES, June 21, 2011, at A13; Bruce Ackerman, *Obama's Unconstitutional War*, FOREIGN POL'Y (Mar. 24, 2011), http://www.foreignpolicy.com/articles/2011/03/24/obama_s_unconstitutional_war; *infra* notes 54, 57.

¹³ See *infra* Part II.

¹⁴ War Powers Resolution, Pub. L. 93-148, 87 Stat. 555 (codified at 50 U.S.C. §§ 1541–1548 (1973)). Concerning this complaint, see, for example, *supra* note 12. The sixty plus thirty day limitation in the WPR is triggered by applicability of Section 4(a)(1), which reads: “In the absence of a declaration of war, in any case in which United States Armed Forces are introduced . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” War Powers Resolution, Pub. L. 93-148, § 4(a)(1) (codified at 50 U.S.C. § 1543(a)(1)). Surprisingly, the Obama Administration focused basically on this part of the WPR, and not on Sections 2(c) and 8(d)(1), to make the ultimately unacceptable claim that U.S. military actions in Libya did not amount to participation in “hostilities.” See *infra* Part II.

¹⁵ War Powers Resolution, Pub. L. 93-148, § 2(c) (codified at 50 U.S.C. § 1541(c)); see also Thomas Franck, *After the Fall: The New Procedural Framework for Congressional Control over the War Power*, 71 AM. J. INT'L L. 605, 625–27 (1977) (stating that Section 2(c) of the WPR's focus on commander-in-chief powers does not cover all relevant presidential powers); Bennett C. Rushkoff, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330, 1335 & n.31, 1352 (1984); Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 113 (1989) (noting that Section 2(c)'s “list fails to include instances in which the armed forces are used to protect or to rescue Americans from attack” as well as other permissible forms of military force, but “congressional

the Constitution, and does not address the constitutionally based powers of the President as the Executive under Article II, Section 1 of the Constitution. Additionally, Section 2 of the War Powers Resolution does not address the constitutionally based duty and concomitant authority of the President under Article II, Section 3 to “take Care that the Laws be faithfully executed.”¹⁶ As the Executive with the power and authority to execute laws and with the unavoidable constitutional mandate that he “shall take Care that the Laws be faithfully executed,” and given the fact that treaties of the United States (such as the UN Charter) are supreme federal laws,¹⁷ it is evident that President Obama has constitutionally based authority to faithfully execute U.S. competencies created under the UN Charter and that this authority is independent of the President’s authority as Commander-in-Chief. Therefore, exercise of the President’s authority under Sections 1 and 3 of Article II of the Constitution is outside the limiting reach of the WPR.

leaders appear to agree that this section is not a complete listing”); *infra* notes 27–28; Abraham D. Sofaer, Legal Adviser to the Sec’y of State, The War Powers Resolution, Statement Before the Senate Foreign Relations Committee (Sept. 15, 1988), in DEP’T ST. BULL., Nov. 1988, at 36, 37 (“The list of circumstances in section 2(c) is clearly incomplete . . . [and] fails to include several types of situations in which the United States would clearly have the right under international law to use force and in which Presidents have used the armed forces without specific statutory authorization.”).

In 1860, Justice Nelson recognized that the President’s executive power includes the power “to interpose” the Navy to protect U.S. nationals abroad who had been under attack and that “this power may be most conveniently executed, whether by negotiation or by force,” in a context when the United States was not actually at war and had used military force “against an irresponsible and marauding community” in the town of San Juan del Norte (Greytown), Nicaragua after an attack on a U.S. diplomat and other U.S. nationals. *Durand v. Hollins*, 8 F. Cas. 111, 112 (Nelson, Circuit Justice, C.C.S.D.N.Y. 1860) (No. 4,186). However, with respect to war and presidential conduct that was recognizably lawful under the laws of war if engaged in during war, Justice Nelson dissented later in a case partly because, in his view, only Congress could determine whether a particular war existed and Congress had not done so. *The Prize Cases*, 67 U.S. (2 Black) 635, 686 (“[T]here was no existing war.”), 688 (stating that “this power is lodged in Congress” and war under the Constitution “must be recognized or declared by the war-making power of the Government”), 690 (“[C]ivil war . . . can exist only by an act of Congress.”), 693 (“Congress alone can determine whether war exists or should be declared.”) (1863) (Nelson, J., dissenting); *see also infra* note 29.

¹⁶ U.S. CONST. art. II, § 3.

¹⁷ *See, e.g.*, U.S. CONST. art. III, § 2, art. VI, cl. 2; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987). Concerning the authority of Security Council resolutions, *see*, for example, *United States v. Toscanino*, 500 F.2d 267, 277–78 (2d Cir. 1974); *United States v. Steinberg*, 478 F. Supp. 29, 33 (N.D. Ill. 1979) (“The United Nations Charter . . . is a part of the supreme law of this land. . . . This country has a continuing obligation to observe . . . all of its undertakings under this treaty, including support of the resolutions adopted by the Security Council.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. g, n.3 (“[B]inding resolutions such as those of the Security Council pursuant to Chapter VII of the United Nations Charter, which have the effect of law The United States has recognized the binding character of such resolutions.”); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 103 cmt. c, n.2 (noting that declaratory resolutions can reflect law). In this instance, the 2011 Security Council Resolution was later in time with respect to any inconsistent limitations in the WPR. *See infra* note 24.

Second, in any event, the WPR contains its own set of express limitations. One of these is found in Section 8(b), which allows members of the armed forces of the United States “to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established” previously “and pursuant to the United Nations Charter or any treaty ratified by the United States prior to” creation of the WPR.¹⁸ NATO is a relevant treaty-based organization that was created prior to the WPR, although whether its high-level military command was previously established for purposes of interpretation of the WPR or is established merely on the starting date for each specific operation is uncertain.¹⁹

Another set of limitations is contained in Section 8(d)(1), which assures in pertinent part that “[n]othing in this joint resolution—is intended to alter the constitutional authority of . . . the President, or the provisions of existing treaties.”²⁰ As mentioned, the President’s constitutional authority includes the executive power and authority to execute laws as well as the concomitant duty and authority faithfully to execute the laws, and such laws include treaties of the United States. Execute is nearly the very name of the Executive and, in any event, execute is encompassed within its meaning. By express terms, the WPR was not meant to alter the constitutional authority of the President.²¹ Moreover, a mere federal statute or joint resolution could not obviate constitutionally based presidential power.

Additionally, as expressly declared in Section 8(d)(1), the WPR does not alter the provisions of existing treaties²² and, therefore, was not intended to alter provisions of the UN Charter or the North Atlantic Treaty and their continuing reach. With respect to treaty law, in this instance the President chose on behalf of the United States to accept and execute the authorization

¹⁸ War Powers Resolution, Pub. L. 93-148, § 8(b) (codified at 50 U.S.C. § 1547(b)). It has been suggested that this provision appears to exclude operations conducted in connection with “the U.N. Military Staff Committee, which the [UN] Charter established to assist the Security Council.” George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435, 482 (1994); *id.* (“Moreover, section 8(d)(1) . . . would seem to exclude from WPR coverage any actions of the President pursuant to the Charter.”).

¹⁹ War Powers Resolution § 8(b) (codified at 50 U.S.C. § 1547(b)); *see also infra* notes 38–39.

²⁰ War Powers Resolution § 8(d)(1) (codified at 50 U.S.C. § 1547(d)(1)).

²¹ *Id.* (“Nothing in this chapter . . . is intended to alter the constitutional authority of . . . the President.”).

²² *Id.* (“Nothing in this chapter . . . is intended to alter . . . the provisions of existing treaties.”). Importantly, Congress must express a clear and unequivocal intent to override a prior treaty in relevant legislation or the prior treaty will prevail as law of the United States. *See infra* text accompanying note 59. Clearly, the WPR expresses no clear and unequivocal intent to override any treaty of the United States.

contained in UN Security Council Resolution 1973 to engage in enforcement measures in Libya. In doing so, the President faithfully executed provisions of the UN Charter,²³ including an authoritative outcome of that treaty's continued functioning—the 2011 Security Council resolution and its legal authorization to use military force.²⁴ Faithfully executing the treaty is part of the President's constitutionally unavoidable duty that is expressed in mandatory "shall" language.²⁵ More generally, the President's mandatory duty to comply with and to faithfully execute treaties of the United States was of fundamental concern to the Founders and Framers,²⁶ and it is this constitutionally based duty to execute international law (customary and treaty-based) that actually enhances presidential competence to do so²⁷ and, with respect to Security

²³ See *supra* notes 2, 5, 6.

²⁴ See S.C. Res. 1973, *supra* note 1. The 2011 Security Council resolution also happens to be later in time than the WPR and would prevail in any event under the last in time rule in case of a clash. Concerning the application of the last in time rule in case of an unavoidable clash between federal legislation and a treaty of the United States, see, for example, JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 99–102 (2d ed. 2003). Section 8(a)(1) of the WPR is inapplicable for at least two reasons: (1) the WPR is prior in time and under the last in time rule it cannot prevail to the extent it is inconsistent with the Security Council resolution; and (2) by its terms, Section 8(a)(1) merely states that authority "shall not be inferred" from any treaty, but the authority contained in Security Council Resolution 1973 is express and need not be inferred. War Powers Resolution § 8(a)(1) (codified at 50 U.S.C. 1547(a)(1)). Moreover, Section 8(d)(1) of the WPR assures that the WPR does not alter the continuing reach of the UN Charter or the North Atlantic Treaty. *Id.* § 8(d)(1) (codified at 50 U.S.C. § 1547(d)(1)). Congress could have passed legislation to limit U.S. participation in the war in Libya in terms of its extent, objects, operations, persons and things affected, places, and time. See, e.g., Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 382–88 (2007); *infra* text accompanying notes 74–75. However, in this instance, the full Congress chose not to do so. See Cassata, *supra* note 12; David A. Fahrenthold, *In the House, a Challenge on Libya*, WASH. POST, June 2, 2011, at A2; Lightman & Douglas, *supra* note 12; Jennifer Steinhauer, *House Rebukes Obama for Continuing Libyan Mission Without Its Consent*, N.Y. TIMES, June 4, 2011, at A4.

²⁵ U.S. CONST. art. II, § 3 ("[H]e shall take Care that the Laws be faithfully executed.")

²⁶ See generally PAUST, *supra* note 24, at 169–71; Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT'L L. & POL'Y 205, 240–45 (2008).

²⁷ See, e.g., *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8–9 (1936) (stating that the President executes extradition treaties with respect to extraditable individuals and the President's power "is not confided . . . in the absence of treaty or legislative provision"); *Sanitary Dist. v. United States*, 266 U.S. 405, 425–26 (1925); *Francis v. Francis*, 203 U.S. 233, 240, 242 (1906) (quoting *Stockton v. Williams*, 1 Doug. 546, 558, 564 (Mich. 1843)); *Dooley v. United States*, 182 U.S. 222, 231 (1901) (stating that the executive authority in occupied territory is "regulated and limited" as well as "derived directly from the laws of war . . . the law of nations"); *Cunningham v. Neagle (In re Neagle)*, 135 U.S. 1, 64 (1890) (stating in dictum that President's constitutionally based duty to take care that the laws are faithfully executed includes the duty to enforce "treaties of the United States according to their express terms" and implicitly includes authority to assure compliance with all "obligations growing out of . . . our international relations"); *Chew Heong v. United States*, 112 U.S. 536, 563 (1884) (Field, J., dissenting) ("[T]reaties must continue to operate as part of our municipal law, and be obeyed by the people, applied by the judiciary and executed by the President."); *In re The Nuestra Senora de Regla*, 108 U.S. 92, 102 (1882) ("It is objected, however, that the executive

Council enforcement measures,²⁸ to use armed force in Libya without special congressional authorization. Similarly, the President can, on behalf of the United States, choose to exercise the right under Article 51 of the UN Charter to engage in measures of self-defense “if an armed attack occurs” on our country or on our embassies, military personnel, or other nationals abroad.²⁹

department of the government had no power, in the absence of express legislative authority, to make such a submission. It was the duty of the United States, under the law of nations The executive department had the right to bring the suit.”); *The Prize Cases*, 67 U.S. (2 Black) 635, 665–66, 671 (1863); *Lessee of Pollard’s Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 415 (1840) (“[I]f any act is required on the part of the United States, it is to be performed by the executive, and not the legislative power, as declared in the case of *The Peggy* in 1801.”); *Taylor v. Morton*, 23 F. Cas. 784, 786 (Curtis, Circuit Justice, C.C.D. Mass. 1855) (No. 13,799) (“[T]reaties must . . . be . . . executed by the president.”); JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, *INTERNATIONAL LAW AND LITIGATION IN THE U.S.* 271–73 (3d ed. 2009) (regarding these and other cases addressing treaties, customary international law, and general enhancement of presidential power); Louis Henkin, *International Law as Law of the United States*, 82 MICH. L. REV. 1555, 1567 (1984) (“[T]he President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed. The President does this regularly.”); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1118–19 (1985); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 402–05 (1987); Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. RICH. L. REV. 373, 380, 394, 421, 441, 449–50, 454 (2012). *But see* *Medellín v. Texas*, 552 U.S. 491, 530 (2008) (unsupported erroneous dictum alleging “that the Executive cannot unilaterally execute a non-self-executing treaty”).

²⁸ See, e.g., PAUST, VAN DYKE & MALONE, *supra* note 27, at 1170, 1201–03 (regarding testimony of Monroe Leigh, Legal Adviser to the Secretary of State, before the House Committee on International Relations in 1975 regarding the WPR and the fact that the President has, among others not addressed in Section 2(c), an independent constitutional authority “to carry out the terms of security commitments contained in treaties”); John W. Davis, W.W. Grant, Philip Jessup, George Rublee, James T. Shotwell & Quincy Wright, Letter, *Our Enforcement of Peace Devolves upon the President*, N.Y. TIMES, Nov. 5, 1944 (stating that the President has “powers to carry out a commitment for participation in international policing such as that” under a Security Council resolution); Thomas Franck & Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT’L L. 63, 72, 74 (1991); Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 26 GA. J. INT’L & COMP. L. 15, 19–24 (1996); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely’s War and Responsibility*, 34 VA. J. INT’L L. 903, 914–15, 920 n.76, 958–59 (1994); Walker, *supra* note 18; *infra* note 30; cf. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 232–35, 250–56, 258–60 (2d ed. 1996). *But see* JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 11, 151–52 n.60 (1993); HENKIN, *supra*, at 257; Ackerman, *supra* note 12 (stating that “the U.N. Charter is not a substitute for the U.S. Constitution,” which otherwise is true but begs the question at stake and does not consider the fact that treaties are laws of the United States and can often be a substitute for federal legislation); Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT’L L. 58, 67 (1995); Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L L. 21, 37 (1995); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT’L L. 74, 75, 81, 88 (1991); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 153–54 (1995).

²⁹ See, e.g., U.N. Charter art. 51; PAUST, VAN DYKE & MALONE, *supra* note 27, at 1100; *infra* notes 31, 34, 38. Although Professor Stromseth opposes presidential authority to execute UN Security Council authorizations to use force involving war, she has written that “[t]o be sure, the President as Commander in

Chief clearly has the authority under the Constitution (and under Article 51 of the UN Charter) to repel sudden attacks against the United States and its forces.” Stromseth, *supra* note 28, at 158. Yet, if the President can exercise one competence under the UN Charter that might place the United States at war (e.g., executing the right of the United States to engage in Article 51 self-defense measures if an armed attack occurs), it is logical that the President can exercise another (e.g., enforcing Security Council measures involving the use of armed force). Conversely, if the President could not exercise a competence under the UN Charter that leads to war, the right of the United States to respond to an armed attack on the country or on its embassies, military personnel, and other citizens abroad would be placed in serious jeopardy. *See also infra* note 51 and accompanying text.

With respect to armed invasions of the United States, which are merely one type of armed attack that can trigger responsive measures of self-defense under international law, it should be noted that congressional legislation had been enacted in 1795 (1 Stat. 424) and 1807 (2 Stat. 443) in order to delegate authority in advance to the President in “case of invasion by foreign nations.” *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). Too many misquote and abuse language in *The Prize Cases* as if the Supreme Court had recognized an independent constitutionally based presidential power to repel invasions (one that some Founders had preferred) and they often do so by merely quoting the sentence in Justice Grier’s majority opinion that immediately followed his recognition that, by the 1795 and 1807 Acts of Congress, the President “is authorized . . . in case of invasion.” *Id.* The next sentence notes that, “[i]f a war be made by invasion,” the President “is not only authorized but bound to resist force by force.” *Id.* The second sentence that follows recognizes that the President can do so “without waiting for any special legislative authority,” which follows logically from the fact that the President was “authorized” by a general legislative authority in advance that had been provided by the 1795 and 1807 Acts of Congress, and did not need new special legislative authority. *See id.* Once the war had already occurred, triggering the laws of war, the President also had authority to exercise a right of the United States “to institute a blockade . . . on the principles of international law,” or to exercise a right “*jure belli*.” *Id.* at 665, 671. In that way, international law had enhanced presidential powers to choose among permissible methods of war once the war had started. Justice Grier stated that the President “has no power to initiate or declare a war.” *Id.* at 668. He added that “[t]he right of prize and capture has its origin in the ‘*jus belli*,’ and is governed and adjudged under the law of nations” once a war exists “*de facto*.” *Id.* at 666. Justice Nelson dissented in part because of his belief that the war power was vested entirely in Congress and could not “be delegated or surrendered to the Executive” by the Acts of 1795 and 1807, that Congress must recognize that a particular war exists and had not done so, and that such legislation merely delegated a power to respond to “insurrection at home or invasion from abroad” as an “exercise of a power under the municipal laws of the country and not under the law of nations.” *Id.* at 690, 692, 693. He noted that “[t]he framers of the constitution fully comprehended” the problem posed if Congress could not meet “in case of . . . invasion from abroad.” *Id.* at 690. The Acts of 1795 and 1807 were created to delegate a power under municipal law “if this [war] power could not be exercised by the President.” *Id.* at 691. Justice Paterson echoed the same general sentiment in *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342), where he addressed the Act of 1795’s authorization for the President to “call forth the militia to repel invasions,” while also stating that if there was an invasion “it would . . . be not only lawful for the president to resist such invasion, but also to carry hostilities into the enemy’s own country.” *Id.* at 1230. In 1827, Justice Story recognized that “[t]he power thus confided by Congress to the President” under the Act of 1795 “is, in its terms, a limited power, confined to [certain] cases,” but that “[w]e are all of [the] opinion, that the authority to decide whether the exigency [of invasion mentioned in the Act of 1795] has arisen, belongs exclusively to the President and that his decision is conclusive upon all persons.” *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29–30 (1827) (Story, J.). *See* Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 121 (1984).

Modern legislation allows the President to call into federal service members and units of the National Guard of any state, for example, “[w]hensoever . . . the United States . . . is invaded or is in danger of invasion by a foreign nation.” 10 U.S.C. § 12406 (2006). However, this legislation does not cover all circumstances of armed attack that allow responsive measures of self-defense under international law. Nonetheless, the

President Harry Truman authorized participation of U.S. military forces under UN Command in Korea and the authorizing resolutions of the UN Security Council, although President Truman lacked congressional authorization for the use of armed force.³⁰ During our last war in Libya, President Ronald Reagan justified the defensive use of armed force against Libyan targets by U.S. Air Force and Navy elements from “about 7:00 p.m. (EST) on April 14, [1986 to] approximately 7:30 p.m. (EST)” partly “in the exercise of our right of self-defense under Article 51 of the United Nations Charter” and as “self-defense measures . . . undertaken pursuant to my authority under the Constitution, including my authority as Commander in Chief of United States Armed Forces.”³¹ The half-hour war involved U.S. strikes on multiple Libyan military targets.³² Although the war was clearly short and quite limited, did not involve use of ground troops, and did not

President can execute the right of the United States under Article 51 of the UN Charter to engage in self-defense as part of the President’s competence to faithfully execute the laws, because treaties are also laws of the United States that can authorize and bind. *See* U.N. Charter art. 51; PAUST, VAN DYKE & MALONE, *supra* note 27, at 1100.

³⁰ *See, e.g.*, STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW 291–92 (4th ed. 2007); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 579, 692–93 (2d ed. 1993); W. Michael Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT’L L. 203, 210–13 (1991); Stromseth, *supra* note 28, at 152–53; 23 STATE DEP’T BULL. 173, 173 (1950) (President Truman justifying the use of force in part in order to adhere to our obligation under “traditional international law and Article 39 of the United Nations Charter and the resolution [of the Security Council] pursuant thereto”); *cf.* Margaret E. McGuinness, *The President, Congress and the Security Council: Counterterrorism and the Use of Force Through the Internationalist Lens*, 45 WILLAMETTE L. REV. 417, 437, 439 (2009) (Truman’s initial actions were taken prior to UN Security Council authorizations, but the UN Charter “altered constitutional understandings of the war powers,” and since its adoption, “every administration has taken the view that the President has broad legal authority to take” action authorized by the Security Council, “even without congressional approval”). For cases recognizing that the hostilities in Korea constituted a limited war, see *infra* notes 69–70.

³¹ *Report of President Ronald R. Reagan to Congress*, 22 WEEKLY COMP. PRES. DOC. 499–500 (Apr. 16, 1986); *see also War Powers, Libya, and State-Sponsored Terrorism: Hearings Before the Subcomm. on Arms Control, Int’l Sec., & Sci. of the Comm. on Foreign Affairs, H. of Rep.*, 99th Cong. 26–27 (1986) [hereinafter Sofaer, *Testimony*] (statement of Abraham D. Sofaer, Legal Adviser, Department of State) (noting that U.S. “military action in self-defense . . . falls within the specific terms of” the WPR, but was also constitutionally authorized as an exercise of presidential power to use military force in self-defense); Elaine Sciolino, *U.S. Defends Raid Before U.N. Body*, N.Y. TIMES, Apr. 16, 1986, at A17 (United States claiming right of self-defense in statements before the UN Security Council). President Reagan’s report stated that “the Libyan-ordered bombing of a discotheque in West Berlin,” which “resulted in the death of . . . an American soldier . . . and the wounding of 50 United States Armed Forces personnel,” among others, “was the latest in a long series of terrorist attacks against United States installations, diplomats and citizens carried out or attempted with the support and direction of Muammar Qadhafi.” *Report of President Ronald R. Reagan to Congress, supra*, at 500. Such forms of continual armed attacks at the direction of Libya clearly allowed U.S. responsive measures of armed force under Article 51 of the UN Charter and presidential choice with respect to use of such measures of force. *See* U.N. Charter art. 51.

³² *Report of President Ronald R. Reagan to Congress, supra* note 31, at 499.

present a real risk of escalation, President Reagan provided a report to Congress “[i]n accordance with . . . [his] desire that Congress be informed . . . and consistent with the War Powers Resolution.”³³

In 1989, President George H.W. Bush justified U.S. use of military force in Panama in part as “an exercise of self-defense recognized in Article 51 of the United Nations Charter . . . and to fulfill our responsibilities under the Panama Canal Treaties.”³⁴ With respect to use of force in Iraq in 1991, prior to the January 14, 1991 congressional authorization for President Bush to use armed force against Iraq (which was not retroactive³⁵), the President could have exercised his duty to faithfully execute UN Security Council authorizations to use force, a duty that in such a circumstance actually enhanced presidential power to make the choice on behalf of the United States of whether and how to execute such treaty-based authorizations. Yet, because the 1991 congressional authorization was dated after the Security Council authorization and was far more limited,³⁶ congressional limitations were binding on the President under the last in time rule.³⁷ With respect to U.S. use of armed force in and around Bosnia and Herzegovina in 1994, President William Clinton rightly claimed that a presidential competence to execute UN Security Council and NATO

³³ *Id.* at 500; *see also* Sofaer, *Testimony*, *supra* note 31 (“falls within” the WPR). Professor Louis Henkin remarked that the 1986 attack on Libyan targets “would seem to be an act of war . . . and which are ‘hostilities’ for purposes of the War Powers Resolution,” but he thought that Congress must approve such measures. HENKIN, *supra* note 28, at 99 n.*. He added: “Even an ‘easy’ invasion against a weak target” should be viewed, as it has traditionally, as “an act of war.” *Id.* at 98. Professor Harold Koh also decried Reagan’s “procedural violation” of Section 3 of the WPR when President Reagan sent “bombers to Libya without complying with the terms of the War Powers Resolution” regarding consultation with Congress. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 126, 133 (1990). Professor Koh’s comments suggest that he recognized that the short bombing war in Libya constituted “hostilities” within the meaning of the WPR. *Id.* Later, Professor Koh stated that “during recent military interventions in Grenada, Libya, the Persian Gulf, and Panama, . . . the President ignored or paid lip service to the War Powers Resolution’s clear procedural requirements of consultation, notice, and mandatory withdrawal” under Sections 3 and 4 of the WPR and, therefore, he necessarily considered that each use of armed force involved “hostilities.” Harold Hongju Koh, *Reply*, 15 *YALE J. INT’L L.* 382, 387 (1990).

³⁴ *Report of President George H.W. Bush to Congress*, 25 *WEEKLY COMP. PRES. DOC.* 1984, 1985 (Dec. 21, 1989). As President Bush noted in his report, a U.S. Marine officer had been killed, a U.S. Naval officer had been beaten, and the Naval officer’s wife had been abused and threatened as part of “[a] series of vicious and brutal acts directed at U.S. personnel and dependents” in Panama by elements of the Panama Defense Forces. *Id.* Under international law, such armed attacks against U.S. nationals trigger the right of the United States under Article 51 of the UN Charter to respond with military force in self-defense. *See* PAUST, VAN DYKE & MALONE, *supra* note 27, at 1100.

³⁵ *See* Joint Resolution, Authorization for Use of Military Force Against Iraq, H.R.J. Res. 77, 102d Cong., 1st Sess., Pub. L. No. 102-1, § 2(b), 105 Stat. 3 (Jan. 14, 1991).

³⁶ *See* Paust, *Use of Armed Force*, *supra* note 4, at 549–51.

³⁷ Concerning application of the last in time rule in case of an unavoidable clash, *see generally* PAUST, *supra* note 24.

authorizations of use of armed force existed because the President has the constitutional duty faithfully to execute treaty law.³⁸ The same claim was made with respect to U.S. use of armed force in 1999 in and around Kosovo in view of a NATO treaty-based authorization for the use of regional action.³⁹

Although the United States was not at war with al Qaeda or Afghanistan on August 20, 1998, and there was no specific authorization from Congress, President Clinton authorized some seventy-five cruise missile strikes against Osama bin Laden and other members of al Qaeda and their training camps in Afghanistan without consent of the Taliban government in response to al Qaeda bomb attacks on U.S. embassy compounds in Nairobi, Kenya, and Dar Es Salaam, Tanzania, that killed more than 250 persons (including twelve U.S. nationals) and injured more than 5,500 people.⁴⁰ The United States based its claim to do so partly on its right to use selective force in self-defense against groups and “key terrorist leaders” that “played the key role in the Embassy bombings,” had “executed terrorist attacks against Americans in the past,” and “were planning additional terrorist attacks against our citizens and others.”⁴¹ In a letter to the UN, U.S. Ambassador William Richardson stated that the United States had “acted pursuant to the right of self-defense confirmed by Article 51

³⁸ See, e.g., PAUST, VAN DYKE & MALONE, *supra* note 27, at 1201–03; Paust, *supra* note 28, at 23–24; Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT’L L. 515, 522–25 (1994) (President Clinton stating, “I am taking these actions in conjunction with our allies in order to implement the NATO decision and to assist the parties to reach a negotiated settlement to the conflict. . . . I have directed the participation by U.S. armed forces in this effort pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief. . . . [And t]his action, part of the NATO effort to enforce the no-fly zone, was conducted under the authority of U.N. Security Council resolutions and in full compliance with NATO procedures”).

³⁹ See, e.g., Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 628, 629–36 (1999); see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 93 AM. J. INT’L L. 161, 169 (1999) (regarding NATO’s authorization). Regional action authorized by a relevant regional organization such as NATO or the Organization of American States (“O.A.S.”) can be permissible under Article 52 of the UN Charter and was lawful in the case of Kosovo. See U.N. Charter art. 52, para. 1 (“Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.”); Paust, *supra* note 4, at 546–47. For a judicial opinion addressing U.S. participation in the war in Kosovo, see, for example, *Campbell v. Clinton*, 203 F.3d 19, 39–40 (D.C. Cir. 2000) (Tatel, J., concurring).

⁴⁰ Jordan J. Paust, *Self-defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 247 (2010).

⁴¹ President’s Remarks on Departure for Washington, D.C. from Martha’s Vineyard, Massachusetts, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998); President’s Remarks to the Nation on Military Action Against Terrorist Sites in Afghanistan and Sudan, 34 WEEKLY COMP. PRES. DOC. 1642 (Aug. 20, 1998).

of the Charter” in response to prior armed attacks and “to prevent these attacks from continuing.”⁴²

II. THE FOCUS OF THE OBAMA ADMINISTRATION ON THE WORD “HOSTILITIES” IS SURPRISING, UNPERSUASIVE, AND POTENTIALLY PROBLEMATIC

Although the Obama Administration mentioned the President’s power as Commander-in-Chief and as Chief Executive, and the nation’s foreign affairs as part of its justification for U.S. military action in Libya without congressional approval,⁴³ and mentioned the need to enforce UN Security Council Resolution 1973 in connection with such powers,⁴⁴ the primary focus of the administration involved a strange read of the word “hostilities” that is found in Section 4(a)(1) of the WPR⁴⁵ and its surprising claim that the international armed conflict in Libya did not amount to “hostilities” within the meaning of the WPR or, even more surprisingly, a “war” in the constitutional sense.⁴⁶ As the administration’s report to Congress in June 2011 stated:

⁴² William Richardson, Letter to the United Nations (Aug. 20, 1998), U.N. Doc. S/1998/780. President Clinton and Ambassador Richardson were correct, because, under Article 51 of the Charter, the United States had the right to respond to non-state actor armed attacks on its embassies and nationals abroad even without the consent of the Taliban government of Afghanistan. See Paust, *supra* note 4, at 534–36; Paust, *supra* note 40, at 249–53 (stating that the UN Charter Article 51 authorizes selective force in self-defense against non-state actor armed attacks emanating from a foreign state even when the foreign state does not provide specific consent and is not responsible for the armed attacks.).

⁴³ See, e.g., Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Attorney General, for the Attorney General, Authority to Use Military Force in Libya, at 1, 6–7, 9 (Apr. 1, 2011) [hereinafter Krass Memo], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf>; WHITE HOUSE, REPORT TO CONGRESS, UNITED STATES ACTIVITIES IN LIBYA 25 (June 15, 2011) [hereinafter REPORT TO CONGRESS], available at <http://www.washingtonpost.com/wp-srv/politics/documents/united-states-activities-libya.html> (“[T]he 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.”); Savage & Landler, *supra* note 9.

⁴⁴ See, e.g., Krass Memo, *supra* note 43, at 6 (“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 . . . [for example,] preserving the credibility and effectiveness of the United Nations Security Council. . . . The goal of action [sets the stage] for further action . . . in implementing UNSC Resolution 1973.”). The Krass Memo cited Article II, Sections 1 and 2 of the U.S. Constitution as bases for presidential authority, but did not cite Section 3, which provides constitutional authority to faithfully execute treaties of the United States. See *id.* at 6.

⁴⁵ War Powers Resolution, Pub. L. 93-148, § 4(a)(1), 87 Stat. 555.

⁴⁶ See, e.g., Krass Memo, *supra* note 43, at 13 (claiming that “anticipated United States operations in Libya” do not amount “to a ‘war’ in the constitutional sense necessitating congressional approval” and alleging that “applicable historical precedents demonstrate that the limited military operations the President anticipated directing were not a ‘war’ for constitutional purposes”); REPORT TO CONGRESS, *supra* note 43, at 25; *Libya and War Powers: Before the S. Foreign Relations Comm.*, 112th Cong. 3, 13 (June 28, 2011) (testimony by Legal Adviser Harold Hongju Koh, U.S. Department of State) (making an even more surprising claim that “the

current U.S. military operations in Libya are consistent with the War Powers Resolution . . . 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 forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof . . .⁴⁷

While testifying before the Senate Foreign Relations Committee in June 2011, Legal Adviser Harold Hongju Koh claimed that “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”⁴⁸ and that these allegedly distinguishing features are that the mission is limited, exposure of U.S. armed forces is limited, risk of escalation is limited, and military means being used are limited.⁴⁹

It is not surprising to say that the war in Libya initiated under UN Security Council authority and the President’s independent constitutionally based authority to faithfully execute treaties does not require congressional approval, but it is shocking to see claims that the war in Libya is not a war for constitutional purposes and it is doubly shocking to see a claim that President Obama does not claim an authority of any sort to take the nation to war without

President has never claimed the authority to take the nation to war without Congressional authorization” and that “[n]or are we in a ‘war’ for purposes of Article I of the Constitution”). Curiously, this is the same administration that has claimed that the United States is at war with the non-state actor al Qaeda. *See, e.g.*, Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Speech Before the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (claiming that “the United States is in an armed conflict with al-Qaeda, . . . [which] continues to attack us”). However, under international law, the United States cannot be at war or in an armed conflict with al Qaeda. *See, e.g.*, Paust, *supra* note 24, at 400 & n.147, 402 & n.150.

⁴⁷ REPORT TO CONGRESS, *supra* note 43, at 25. Concerning the fact that at least some U.S. pilots had been fired at and exchanged fire, see, for example, Eric Schmitt, *Safely Back, A Pilot Tells of His Raid over Libya*, N.Y. TIMES, Mar. 26, 2011, at A9; *Turmoil in the Mideast*, HOUS. CHRON., Mar. 26, 2011, at A4.

⁴⁸ *Libya and War Powers: Before the S. Foreign Relations Comm.*, *supra* note 46, at 7.

⁴⁹ *Id.* at 7–10, 12. *But see* KOH, *supra* note 33 (regarding the 1986 half-hour bombing war in Libya, which had involved the same four factors); Koh, *supra* note 33 (regarding Libya in 1986, as well as use of force in Grenada, the Persian Gulf, and Panama). After his testimony, the Senate approved a resolution stating that U.S. actions in Libya “constitute hostilities within the meaning of the War Powers Resolution.” Editorial, *Obama’s Hostility to the Truth*, *supra* note 12 (internal quotation marks omitted).

congressional authorization.⁵⁰ If true and not changed by President Obama, continuation of this preference would mean that President Obama, unlike several past Presidents (including Truman, Reagan, Bush, and Clinton), will not exercise an authority on his own, for example, to use military force amounting to de facto war (1) in self-defense against armed attacks on the United States or on its embassies, military personnel, or other nationals abroad;⁵¹ (2) in collective self-defense with other countries when permissible under treaties⁵² or other international law (even at their urgent request while under attack); or (3) pursuant to UN Security Council, NATO, or O.A.S. authorizations when permissible under international law. In historical context, this would amount to a significant and potentially crippling denial of presidential authority that, in some instances, might even place the United States and its nationals in significant danger. Yet, of course, President Obama actually exercised his authority to direct U.S. military forces to participate in UN and NATO measures involving de facto war in Libya without congressional authorization while pretending that such conduct did not amount to participation in “hostilities” or “war.” Therefore, if there is an emerging Obama doctrine concerning presidential use of armed force it may be more

⁵⁰ See Clinton, *supra* note 41; see also Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. FORUM 13, 36 (2011) (noting an earlier Obama’s campaign statement that “[t]he 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”) (internal quotation marks omitted). Of course, in this instance, the Security Council authorized initiation of the use of armed force. As a professor, Harold Koh had made a similar claim before. See, e.g., Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 123 (1991) (“The Constitution did not permit the President to order U.S. armed forces to make war without meaningful consultation with Congress and receiving its affirmative authorization.”), 125 (“[T]he President may not, absent meaningful consultation with and genuine approval by Congress, order U.S. armed forces to make war.”) (citing Brief for Dellums et al. as Amici Curiae Supporting Respondents, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990), reprinted in 27 STAN. J. INT’L L. 257, 259 (1991)). Importantly, however, the Amicus Memorandum added that a court should also analyze the relevance of “treaty obligations of the United States.” *Id.* at 262 (internal quotation marks omitted). With respect to Korea, Professor Koh stated, “I believe that the President committed troops unconstitutionally, but Congress cured the violation almost immediately with ratifying actions.” Koh, *supra*, at 124 n.12. But see Reisman, *supra* note 30; *supra* note 28.

⁵¹ See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed.”).

⁵² Examples include public or secret treaties with Japan, South Korea, and Israel. See, e.g., Treaty of Mutual Cooperation and Security, U.S.–Japan, art. V, Jan. 19, 1960, 11 U.S.T. 1632; Mutual Defense Treaty, U.S.–Rep. Korea, arts. II–III, Oct. 1, 1953, 5 U.S.T. 2368. The North Atlantic Treaty is also a collective defense treaty. North Atlantic Treaty, arts. 5–6, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. These all have a qualifier such as “in accordance with their respective constitutional processes.” *Id.* art. 11 (providing that treaty provisions shall be “carried out by the Parties in accordance with their respective constitutional processes”).

Orwellian in nature⁵³ than a new and fundamental abnegation of presidential authority and responsibility.

With respect to the primary focus of the White House on the word “hostilities” in the WPR and its strange and surprising claim that U.S. participation in the war in Libya is not covered, it should be noted that, on its face, the WPR makes no distinction regarding short, limited, constrained, risky, or sustained hostilities and all hostilities are expressly covered.⁵⁴ Moreover, Section 4(a)(1) of the WPR reaches situations in which U.S. armed forces are “introduced . . . into hostilities,” a circumstance that can cover more than actual fighting.⁵⁵ Second, the White House claim that it is not directly or

⁵³ Adding to the possible double-speak nature of the White House position is the revelation by news reporter Charles Savage. He wrote:

When I was interviewing Koh and Bauer about this, I asked whether it would be a ‘war crime’ if a US drone operator deliberately targeted civilians in Libya. Their answer was ‘yes’ because, as a matter of international law analysis, IHL applies to any use of military force, but that is distinct from the domestic law question of whether any particular set of military activities rises to the level of ‘hostilities’ for purposes of the War Powers Resolution.

E-mail from Charles Savage, to author (June 16, 2011) (on file with author). This Article demonstrates why international law, including the reach of laws of war, is highly relevant to proper interpretation of domestic legislation. See *infra* text accompanying notes 58–77. Although it is contained in separate legislation, the definition of hostilities in the 2009 Military Commissions Act provides a sensible example of an approach to interpretation that is consistent with international law. See 10 U.S.C. § 948a(9) (2009) (“[t]he term ‘hostilities’ means any conflict subject to the laws of war”—which, under international law, would cover any armed conflict).

⁵⁴ See also Bruce Ackerman, *supra* note 12 (“[A] war with Libya . . . the Libyan war The War Powers Resolution doesn’t authorize a single day of Libyan bombing. . . . The president’s insistence that his Libya campaign is limited in its purposes and duration is no excuse.”); Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinion*, HARV. NAT’L SEC. J. FORUM 1, 5 (2011), http://harvardnsj.org/wp-content/uploads/2011/04/Forum_Glennon_Final-Version.pdf (“To read the Constitution as permitting the President to wage war any time he can identify some remotely plausible ‘limit’—to claim that the existence of any conceivable ‘limit’ means that the action is not really a war—is to read the Congress out of the decision to wage war.”); Peter M. Shane, *The Obama Administration and the Prospects for a Democratic Presidency in a Post-9/11 World*, 56 N.Y.L. SCH. L. REV. 27, 53–54 (2011) (“[Such a] ‘sub-hostilities theory,’ [especially when] the Libya campaign is offensive, sustained, and continuous . . . is an obviously steep uphill climb for any legal argument that U.S. military involvement in the ongoing use of lethal force against an adversary . . . falls short of what the WPR calls ‘hostilities.’”); see also *supra* text accompanying note 33.

⁵⁵ See War Powers Resolution, Pub. L. 93-148, § 4(a)(1), 87 Stat. 555. Members of U.S. armed forces were clearly engaged in targetings during the war, which are forms of combat and fighting. See *supra* text accompanying notes 9–10, 46. Even use of drones and aircraft by members of U.S. armed forces for supportive surveillance and planning of missions, air routes to be flown and targetings to be engaged in by non-U.S. NATO aircraft would amount to a combat role, direct and significant participation in hostilities, and an “introduction” or insertion into the hostilities. Similarly, use of a U.S. naval vessel as part of a military communications network for support of specific air or missile operations would amount to significant and direct participation. A U.S. Air Force drone operator sitting in Nevada and flying a drone in Libyan airspace

significantly involved in hostilities lacks common sense.⁵⁶ Even within the administration, there had been disagreement among legal experts with respect to the meaning and reach of the word “hostilities.” For example, reports show that Jeh Johnson, General Counsel of the Department of Defense, and Caroline Krass, acting head of the Department of Justice’s Office of Legal Counsel, had argued that U.S. military activities in Libya fit within a proper interpretation of the word.⁵⁷ Third, and more importantly, the White House claim lacked legal sense and was unnecessary in view of the President’s independent constitutional authority to execute treaties of the United States—an authority that, as noted above, is not covered under Section 2(c) of the WPR and, in any event, is carved out from the reach of the WPR’s time limitations by Section 8 of the Resolution.

Not only does the WPR contain no express exception for short, limited, constrained, non-sustained, or relatively one-sided and less risky hostilities or those not involving use of ground troops, but a proper interpretation of the joint resolution using international law and relevant U.S. cases also stands in sharp and ultimately unavoidable opposition to the administration’s interpretation of the word “hostilities.” First, as a matter of statutory construction, legislation must be interpreted consistently with international law. This venerable rule of construction is known as the Charming Betsy

either to target military targets in Libya or to provide supportive surveillance or intelligence for other targetings would be engaged in a combat role in connection with the hostilities in Libya.

⁵⁶ See also Ackerman, *supra* note 50, at 36 (stating that in order to try to avoid the reach of the WPR and statements during the Obama campaign, Office of Legal Counsel of the Department of Justice “would have to engage in ‘creative lawyering’”); Ackerman, *supra* note 12; Schell, *supra* note 12 (noting the obvious fact of war and the administration’s attack on language).

⁵⁷ See, e.g., Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27; Charlie Savage, *2 Top Lawyers Lose Argument on War Power*, N.Y. TIMES, June 18, 2011, at A1 (reporting a split between Johnson and Krass on the one hand (recognizing that U.S. military directly participated in “hostilities”) and Koh and White House Counsel Robert Bauer on the other (claiming that use of U.S. military force did not occur during “hostilities”)); Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. FORUM 62, 65 (2011) (also questioning whether reports of details of the internal debate were accurate); Zach Zagger, *Obama Administration Lawyers Divided over Legality of US Operations in Libya*, JURIST (June 21, 2011), http://jurist.law.pitt.edu/paperchase/2011/06/index_2011_06_21.php#36532. Reports regarding opposing internal claims of Krass and Koh may be incorrect in view of claims made in the April Krass memo that U.S. actions were not taken during hostilities or war and the prior views of Harold Koh that the short 1986 U.S. bombing campaign in Libya constituted hostilities. See Krass Memo, *supra* note 43, at 13. Adding to speculation about an internal disagreement and whether his personal views really changed, Legal Adviser Koh stated that a confluence of factors “led the President to conclude that the Libya operation did not fall within the War Power Resolution’s automatic 60-day pullout rule.” Koh, *supra* note 46, at 11–12. However, without limiting his statement by reference to a choice by the President, Legal Adviser Koh declared “[n]or are we in a ‘war’ for purposes of Article I of the Constitution.” *Id.* at 13.

rule.⁵⁸ As the Supreme Court has long recognized, federal statutes must be interpreted consistently with international law and international law is a necessary background for interpretive purposes whether or not the federal statute at first appears to be unambiguous.⁵⁹ *Charming Betsy* was actually a

⁵⁸ See, e.g., *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 117–18 (1804) (“An act of congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate . . . rights . . . further than is warranted by the law of nations.”). Chief Justice Marshall added that “[i]f it was intended that any American vessel sold to a neutral should, in the possession of that neutral, be liable to the commercial disabilities imposed on her while she belonged to citizens of the United States, such extraordinary intent ought to have been plainly expressed.” *Id.* at 119. In the WPR, there was no plainly expressed intent to deviate from the ordinary meaning of the word “hostilities,” or its meaning under international law. See *infra* notes 64–65.

⁵⁹ See *Charming Betsy*, 6 U.S. (2 Cranch) at 117–18. There were other early recognitions of this fundamental rule of statutory construction favoring international law. See, e.g., *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 43–44 (1801); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792); *Rutgers v. Waddington*, Mayor’s Court of the City of N.Y.C. (1784) (cited in 2 AMERICAN LEGAL RECORDS, SELECT CASES OF THE MAYOR’S COURT OF NEW YORK CITY 1674–1784, at 302–27 (R. Morris ed. 1935)) (construing the 1783 N.Y. Trespass Act consistently with the Treaty of Peace), discussed in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 413–14 (Julius Goebel Jr. ed. 1964); *The Resolution*, 2 U.S. (2 Dall.) 1, 4 (1781); *Who Privileged from Arrest*, 1 U.S. Op. Att’y Gen. 26, 27 (1792) (stating that the municipal law is strengthened by the law of nations); PAUST, VAN DYKE & MALONE, *supra* note 27, at 153 (citing *United States v. Haun*, 26 F. Cas. 227 (C.C.S.D. Ala. 1860) (No. 15,329)); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 457–58 (1969).

The *Charming Betsy* rule has extensive subsequent recognition. See, e.g., *Skilling v. United States*, 130 S.Ct. 2896, 2929 n.40 (2010); *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 143–44 (2005) (Ginsburg, J., concurring); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (adding that the rule is “‘wholly independent’ of the presumption against extraterritoriality” and “is relevant to determining the substantive reach of a statute” in view of limitations under “customary international law”); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (Stevens, J.); *Id.* at 207 (Blackmun, J., dissenting); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (“We think that some affirmative expression of Congressional intent to abrogate the United States’ international obligations is required.”); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (stating that to shift from the normal approach regarding allocations of concurrent jurisdiction under international law, “there must be present the affirmative intention of the Congress clearly expressed”) (internal quotation omitted); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); *Lauritzen v. Larsen*, 354 U.S. 571, 577–78 (1953); *Cook v. United States*, 288 U.S. 102, 120 (1933) (holding that the purpose to override a treaty must be “clearly expressed”); *United States v. Flores*, 289 U.S. 137, 159 (1933) (“[I]t is the duty of the courts of the United States to apply to offenses committed by its citizens on vessels flying its flag, its own statutes, interpreted in light of recognized principles of international law.”) (emphasis added); *United States v. Payne*, 264 U.S. 446, 449 (1924); *MacLeod v. United States*, 229 U.S. 416, 434 (1913); *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) (stating that the “purpose . . . [to override a treaty] must appear clearly and distinctly from the words used” by Congress); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Chew Heong v. United States*, 112 U.S. 536, 539–40, 549–50 (1884); *United States v. Forty-Three Gallons of Whiskey*, 108 U.S. 491, 496 (1883) (“The laws of congress are always to be construed so as to conform to the provisions of a treaty.”); *The Pizarro*, 15 U.S. (2 Wheat.) 227, 245–46 (1817); *The Rose*, 36 Ct. Cl. 290, 301 (1901); *The Nancy*, 27 Ct. Cl. 99, 109 (1892); *Military Commissions*, 11 Op. Att’y Gen. 297, 299–300 (1865); *Right of Expatriation*, 9 Op. Att’y Gen. 356, 362–63 (1859); PAUST, VAN DYKE & MALONE, *supra* note 27, at 154, 553–54, 662; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004)

case decided in the context of a limited war with France and addressed the laws of war and expressed a fundamental rule of primacy that had been of critical importance to the Framers: that federal statutes “can *never* be construed to violate” rights under international law, although international law might place limits on such rights⁶⁰—all of which makes the rule even more relevant for authoritative interpretation of federal legislation addressing war, hostilities, and combat, such as the WPR.⁶¹

Using the *Charming Betsy* rule, one must inevitably recognize that the meaning of the word “hostilities” in the WPR should be consistent with its meaning under international law, and therefore, that whenever U.S. Armed Forces are directly involved in an international armed conflict they are

(“[O]ur understanding [of the AUMF] is based on longstanding law-of-war principles.”); *id.* at 551 (Souter, J., dissenting in part and concurring in the judgment) (using the law of war and stating that “there is reason to question whether the United States is acting in accordance with the laws of war. . . . I conclude accordingly that the Government has failed to support the position that the” AUMF “authorizes the described detention”); *Karnuth v. United States*, 279 U.S. 231, 235 (1929) (regarding a possible conflict with a treaty, such is “a result, of course, to be avoided if reasonably it could be done”). *But see* *Sampson v. Fed. Repub. of Germany*, 250 F.3d 1145, 1152–53 (7th Cir. 2001) (stating that *Charming Betsy* “has traditionally justified a narrow interpretation of ambiguous legislation to avoid violations of international law” and “directs courts to construe ambiguous statutes to avoid conflict with international law,” but “international law itself does not mandate Article III jurisdiction over foreign sovereigns”); *Mississippi Poultry Ass’n, Inc. v. Madigan*, 992 F.2d 1359, 1367 (5th Cir. 1993) (although Supreme Court decisions made no such distinction, circuit panel was “loath . . . to extend this maxim to multi-lateral trade agreements”); *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (completely ahistorical and unsupported dictum alleging a duty of courts merely to enforce statutes, “not to conform” them “to norms of customary international law”).

⁶⁰ *Charming Betsy*, 6 U.S. (2 Cranch) at 117–18 (emphasis added). With respect to the instructions given to the captain of the ship of war that seized the Schooner *Charming Betsy*, the Chief Justice stated that “[h]is orders were such as might well have induced him to consider this as an armed vessel within the law” and that “[a] public officer entrusted on the high seas to perform a duty deemed necessary by his country, and executing according to the best of his judgment the orders he has received, if he is a victim of any mistake he commits, ought certainly never to be assessed with vindictive or speculative damages.” *Id.* at 124. Justice Chase stated, however, that “he was always against reading the instructions of the executive; because if they go no further than the law, they are unnecessary; if they exceed it, they are not warranted.” Transcript of Oral Argument at 78 n.†, *Charming Betsy*, 6 U.S. (2 Cranch) 64. Soon thereafter, Chief Justice Marshall ruled that although orders had been

given by the executive under the construction of the act of Congress made by the department to which its execution was assigned [*i.e.*, the Secretary of the Navy to captains of U.S. ships of war] . . . , the instructions cannot change the nature of the transaction, or legalize an act which without those instructions, would have been a plain trespass.

Little v. Barreme (The Flying Fish), 6 U.S. (2 Cranch) 170, 179 (1804). Concerning recognition in *Charming Betsy* and numerous other cases of the controlling force of the laws of war, see, for example, Paust, *supra* note 26, at 240–45, and numerous cases cited.

⁶¹ For use of such terms in the Resolution, see, for example, War Powers Resolution, Pub. L. 93-148, §§ 2(c), 4(a)(1)–(2), 87 Stat. 555.

involved in hostilities as that term is properly interpreted under international law and the WPR.

More generally, the U.S. Supreme Court has also recognized that

where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.⁶²

One can apply such recognition with respect to congressional use of the word “hostilities,” because it is a term of art with an accumulated legal tradition under international law as well as early U.S. Supreme Court and subsequent U.S. cases.⁶³ Congress presumably knew that the reach of such a term can extend at least to any international armed conflict in which U.S. Armed Forces participate.

Legal Adviser Harold Koh actually noted that “[w]hen 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 to specifically define it,’”⁶⁴ and that the House Report on the WPR had recognized 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.”⁶⁵ For these reasons, the word “hostilities” should have a

⁶² *Morrisette v. United States*, 342 U.S. 246, 263 (1952).

⁶³ *See, e.g., Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Montoya v. United States*, 180 U.S. 261, 267 (1901).

⁶⁴ Koh, *supra* note 46, at 5 n.6 (citing *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)).

⁶⁵ *Id.* (citing H.R. REP. NO. 93-287, at 7 (1973)); *see also* SENATE COMM. ON FOREIGN RELATIONS, MULTINATIONAL FORCE IN LEBANON RESOLUTION, S. REP. NO. 98-242 (1983) (“Congress made little effort to go beyond the ‘plain meaning’ of key terms ‘hostilities’ and ‘situations where imminent involvement in hostilities is clearly indicated by the circumstances.’ . . . ‘In addition to a situation in which fighting actually has begun,’ the [1973 House Foreign Affairs] Committee wrote, ‘hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict.’” Further, with respect to arguments that hostilities did not exist in Lebanon in 1983 “because the Marines: (a) Only returned rather than initiated fire; (b) Acted only in self-defense; (c) Remained essentially in one location rather than taking offensive actions; (d) Performed a mission of ‘peacekeeping,’ ‘presence,’ or

broad, malleable reach, including at least any form of international armed conflict and should not be restricted in ways that the Administration presently prefers. The drafting history demonstrates that drafters understood that there is a relation between the term hostilities and the phrase armed conflict and that a broad reading of hostilities (broader than the reach of the phrase armed conflict) was clearly contemplated.

Importantly, there are at least two U.S. Supreme Court cases decided early in our history that are especially informing of the traditional use of terms such as “war” and “hostilities” in domestic legislation and international law, and these cases completely undercut the strained interpretive claim of the Obama Administration. The first of these was the Supreme Court case of *Bas v. Tingy*,⁶⁶ a case in which the words “war,” “hostility,” and “hostilities” were defined to apply to a very limited war and hostilities with France.⁶⁷ In *Bas v. Tingy*, Justice Washington offered a definition of war, whether general or limited, for interpretation of legislation and its reach to relevant rights under international law.⁶⁸ As he stated, “[E]very contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war.”⁶⁹ An even broader definition was offered in 1862 when the Supreme Court quoted the eighteenth century writer Emmerich de Vattel who had affirmed that war is “[t]hat state in which a nation prosecutes its right by force.”⁷⁰ In 1901, the Supreme Court reiterated

‘interposition’ . . . there is nothing in the legislative history . . . to indicate that any of these considerations would alter the fact that ‘hostilities’ are indicated. . . . Nor is it necessary or sufficient that fatalities occur.”)

⁶⁶ *Bas*, 4 U.S. (4 Dall.) 37.

⁶⁷ *Id.*

⁶⁸ *Id.* at 40 (opinion of Washington, J.).

⁶⁹ *Id.* This definitional orientation has been used in subsequent cases for interpretation of insurance policies and the federal legislation. *See, e.g.*, *New York Life Ins. Co. v. Bennion*, 158 F.2d 260, 263 (10th Cir. 1946), *cert. denied*, 331 U.S. 811 (1947); *Cushing v. United States*, 22 Ct. Cl. 1, 11 (1886) (argument of the U.S. Solicitor-General); *Gray v. United States*, 21 Ct. Cl. 340, 369–70 (1886); *United States v. Anderson*, 38 C.M.R. 386, 390–91, 17 U.S.C.M.A. 588, 598–93 (1968); *United States v. Bancroft*, 11 C.M.R. 3, 7, 3 U.S.C.M.A. 3, 7 (1953); *see also* *United States v. Prosperi*, 573 F. Supp. 2d 436, 446–47 (D. Mass. 2008) (regarding *Bas v. Tingy* and limited undeclared wars or hostilities); *United States v. Ayers*, 15 C.M.R. 220, 223–24 (1954) (using *Bas v. Tingy* and other cases with even broader, realistic, and practical definitions to recognize that *de facto* limited wars exist); *United States v. Ayers*, 12 C.M.R. 413, 415 (1953) (regarding use of *Bas v. Tingy* with respect to limited “Korean hostilities” and the fact that “the Korean hostilities constitute a United Nations war”).

⁷⁰ *The Prize Cases*, 67 U.S. (2 Black) 635, 666 (1863) (quoting EMMERICH DE VATTEL, *THE LAW OF NATIONS* bk. 3, ch. I, § 1 (1758)). The Court added that with respect to the Civil War, “[t]he President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact” of war. *Id.* at 669. Earlier, the Court had used the same quotation from Vattel. *See* *Penhallow v. Doane’s Adm’rs*, 3 U.S. (3 Dall.) 54, 68 (1795). Other cases have followed these definitional orientations. *See, e.g.*, *Campbell v. Clinton*, 203 F.3d 19, 37–39 (D.C. Cir. 2000)

the definitional approach of *Bas v. Tingy* while recognizing that limited “hostilities” constitute “a state of war” in the context of “acts of general hostility” committed by Native Americans, “especially if the Government has deemed it necessary to dispatch a military force for their subjugation.”⁷¹

In *Bas v. Tingy*, Justice Moore apparently accepted Justice Washington’s definitional orientation while addressing legislative use of the word “enemy” and asking with respect to the limited conflict with France “how can the characters of the parties engaged in hostility or war, be otherwise described than by the denomination of *enemies*?”⁷² In that case, Justice Washington added:

hostilities may subsist between two nations more confined in its nature and extent [than full war]; being limited as to places, persons, and things . . . and . . . those who are authorised to commit hostilities act under special authority, and can go no farther than to the extent of their commission. Still, however, it is *public war*, because it is an external contention by force, between some of the members of the two nations⁷³

In the same case, Justice Chase recognized:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations. . . . What, then, is the nature of the contest subsisting between *America* and *France*? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms; but congress

(Tattle, J., concurring) (quoting *The Prize Cases*, *Bas v. Tingy*, *Talbot v. Seeman*, and other cases, and considering that an issue concerning the fact of war is a legal issue and not a political question); *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420, 422–23 (D.C. Cal. 1953) (with respect to the fact of U.S. participation in a war in Korea); *Hamilton v. McLaughry*, 136 F. 445, 449–51 (C.C.D. Kan. 1905) (U.S. participation during the Boxer rebellion was participation in a war); *Alire v. United States*, 1 Ct. Cl. 233 (1865) (same definitional approach used regarding actual war with Indians), *rev’d*, 73 U.S. (6 Wall.) 573 (1868). Professor Michael Ramsey has noted that, in addition to Vattel’s treatise, other “[e]ighteenth-century international law treatises . . . used the term ‘war’ broadly to mean armed conflict—without limitations”—and that these included affirmations that war is “‘the state of those who try to determine their differences by the ways of force’ or . . . war results ‘if one enters into violent contest with another’ and is the [s]ituation of those . . . who dispute by Force of Arms.” Michael D. Ramsey, *The President’s Power To Respond to Attacks*, 93 CORNELL L. REV. 169, 173–74 (2007) (quoting treatises of Jean-Jacques Burlamaqui, Richard Lee, Thomas Rutherford, Emmerich de Vattel, and Christian Wolff).

⁷¹ *Montoya v. United States*, 180 U.S. 261, 267 (1901).

⁷² *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39 (1800) (Moore, J.).

⁷³ *Id.* at 40 (Washington, J.).

has authorised hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture French armed vessels lying in a *French* port. . . . [This is], unquestionably, a partial war; but, nevertheless, it is a public war⁷⁴

And in that case, Justice Paterson declared:

The *United States* and the *French* republic are in a qualified state of hostility. An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare [is authorized by Congress, and a]s far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations. It is a maritime war; a war at sea as to certain purposes.⁷⁵

The second important early Supreme Court case arose out of the same limited war and limited hostilities with France. In *Talbot v. Seeman*,⁷⁶ Chief Justice Marshall addressed “partial hostilities” and “limited hostilities” with France that, although quite limited, constituted war and hostilities to which the laws of war applied both in the constitutional sense and with respect to relevant legislation.⁷⁷

Finally, the surprising primary focus of the Obama Administration on the word “hostilities” and its claim that U.S. Armed Forces had not been directly involved in hostilities or war in Libya can also be highly problematic for U.S. military personnel. Consider the fact that two U.S. Air Force pilots lost their aircraft and ejected safely over Libya.⁷⁸ If they had been captured by Qaddafi’s forces, would they not have been prisoners of war? Would they not have been

⁷⁴ *Id.* at 43 (Chase, J.).

⁷⁵ *Id.* at 45–46 (Paterson, J.).

⁷⁶ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801).

⁷⁷ *Id.* at 28, 41 (Marshall, C.J.) (also stating that “Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed”). Marshall, however, had been one of the Justices who considered that “[t]he whole powers of war . . . [were], by the constitution of the United States, vested in congress.” *Id.* at 28. Justice Paterson also held that view. *See, e.g., Bas*, 4 U.S. (4 Dall.) at 45–46 (opinion of Paterson, J.) (“[M]odified warfare is authorized by the constitutional authority of our country . . . prescribed by the constitutional organ of our country.”); *United States v. Smith*, 27 F. Cas. 1192, 1228–31 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (“[T]he power of making war . . . is exclusively vested in congress.”). Justice Nelson would later share such views. *See supra* note 29 and accompanying text.

⁷⁸ *See, e.g.,* Richard Pendlebury, *We Were Having a Celebration . . . Then They Started Shooting: Dispatch on the Libyans Shot at As They Rescued U.S. Pilots*, DAILY MAIL (Mar. 23, 2011, 10:43 AM), <http://www.dailymail.co.uk/news/article-1369020/Libya-6-civilians-shot-rescuing-US-pilots-F-15E-plane-crash-near-Benghazi.html> (the crew of an F-15E fighter bomber ejected and survived, although the aircraft was destroyed).

“combatants”⁷⁹ as that word is used in the laws of war during an international armed conflict (and during war and international “hostilities”); and if they would not have been combatants, would they not have had “combatant immunity”⁸⁰ for lawful targetings during an international armed conflict and, therefore, could be prosecuted under relevant domestic law for murder, assault and battery, and so forth? Such might have been the significantly deleterious consequence of following legal nonsense evident in the administration’s interpretation of the words “hostilities” and “war” but for the fact that its interpretation is unavoidably in error and, as the world knows, we had been at war with Qaddafi’s armed forces in Libya and had been directly engaged in an international armed conflict and hostilities in Libya to which rights, duties, and competencies under the laws of war clearly had been applicable.

CONCLUSION

Although the Obama Administration’s primary focus on the word “hostilities” in the WPR is unconvincing and there does not appear to be a new and significantly inhibiting Obama doctrine regarding presidential use of armed force abroad, the President had independent constitutional authority to authorize U.S. military forces to participate in UN measures involving the use of armed force in Libya and what clearly was an international armed conflict under international law. Such independent constitutional authority is outside the reach of Section 2(c) of the WPR and, therefore, is not subject to the WPR’s limitations. Even if it had applied, the WPR provides two express exceptions that are relevant: (1) that relating to the President’s independent constitutional authority, and (2) that relating to the provisions of existing treaties and, therefore, to relevant provisions of the UN Charter and, as an authoritative outcome of the treaty process, the UN Security Council authorization to use military force in Libya.⁸¹ The two exceptions are related in the sense that the President has independent constitutional authority as the

⁷⁹ For discussion of “combatant” status under the laws of war during an international armed conflict, see, for example, PAUST ET AL., *supra* note 11, at 651–52; Paust, *supra* note 40, at 261, 277; Jordan J. Paust, *Responding Lawfully to al Qaeda*, 56 CATH. U. L. REV. 759, 768 n.44, 770–71 (2007) [hereinafter Paust, *Responding Lawfully to al Qaeda*].

⁸⁰ For exposition of “combatant immunity” for lawful acts of warfare, see, for example, Paust, *Responding Lawfully to al Qaeda*, *supra* note 79, at 770–71. Every time U.S. military personnel participate in combat overseas, it should be recognized that the armed conflict is an international armed conflict so that U.S. military personnel will have combatant and prisoner of war status and combatant immunity for lawful acts of war. See Paust, *supra* note 40, at 261.

⁸¹ War Powers Resolution, Pub. L. 93-148, § 8(d)(1), 87 Stat. 555 (codified at 50 U.S.C. § 1547(d)(1) (1973)).

Executive to execute laws and has the concomitant duty and authority faithfully to execute the laws, which include treaties of the United States. In view of these constitutionally based presidential powers, the President did not need congressional approval to participate in UN measures against Qaddafi's armed forces and the WPR did not obviate the propriety of presidential use of such constitutionally based authority.

If Congress had wanted to limit U.S. participation in the war in Libya, it could have passed legislation (subject to a presidential veto and, thereafter, a congressional override) to limit the extent, operations, and timing of U.S. participation as well as types of persons and things affected.⁸² Notably, Congress did not do so.

⁸² See *supra* note 24.