

FORUM

The Cost of “Empty Words”: A Comment On the Justice Department’s Libya Opinion[†]

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The [April 1, 2011 opinion](#) of the Justice Department’s Office of Legal Counsel (OLC), entitled “Authority to Use Military Force in Libya,” presents three main arguments in seeking to justify the constitutionality of the U.S. use of force against Libya: (1) the President has a “broad constitutional power” to order the use of force without congressional approval, particularly when the use of force isn’t really a war; (2) the existence of a United Nations Security Council resolution expands that power because the President has a responsibility to preserve the Council’s credibility and to ensure that its edicts do not turn out to be “empty words”; and (3) in any event, Congress has allowed the President to undertake this action through the War Powers Resolution, which permits him to use force for up to 60 days without specific, advance approval.

I proceed to suggest that none of these claims is convincing and I conclude with some thoughts about OLC’s concern about empty words.

I. Presidential War Power

The breadth of the President’s power as commander-in-chief has been a topic of heightened debate ever since President Harry Truman ordered U.S. forces into combat in Korea without congressional approval.

[†] This paper draws upon a lecture delivered at the Harvard Law School on April 6, 2011, and upon three earlier works: Michael J. Glennon, *The Constitution and Chapter VII of the UN Charter*, 85 AM. J. INT’L L. 74 (1991); Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); and Michael J. Glennon, *Presidential Power to Wage War Against Iraq*, 6 GREEN BAG 183 (2003). I thank Mat Trachok for research assistance.

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On the one hand are those, like OLC, that contend he can act alone to direct the use of force because he alone has power to “determine that such use [is] in the national interest.” On the other hand are those who believe that the Declaration of War Clause places the decision to go to war in the hands of Congress. For example, in response to [questions from the *Boston Globe*](#) in 2007, then-Senator Barack Obama stated his now well-known position: “The president does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” Those who were to become members of President Obama’s cabinet held similar positions. Then-Senator Hillary Clinton [stated](#): “I do not believe that the President can take military action — including any kind of strategic bombing — against Iran without congressional authorization.” And then-Senator Joseph Biden [stated](#): “The Constitution is clear: Except in response to an attack or the imminent threat of attack, only Congress may authorize war and the use of force.”¹ Other senior officials in the Administration have expressed similar views. Perhaps the most prominent example is the State Department Legal Adviser, Harold Koh; in numerous articles, briefs, and books Koh argued against the expansive view of presidential power now asserted by the OLC (Jack Goldsmith has gathered [several](#)).

In my view, the original, Senate-passed version of the War Powers Resolution contained wording, which was dropped in conference, that came close to capturing accurately the scope of the President's independent constitutional power. It provided — in legally binding, not precatory, terms — that the President may use force “to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack.” This provision was drafted over a period of years, after numerous hearings with and advice from the top constitutional scholars in the country. It was supported by Senators Fulbright, Symington, Mansfield, Church, Cooper, Eagleton, Muskie, Stennis, Aiken, Javits, Case, Percy, Hatfield, Mathias, Scott and Byrd — not frivolous men. They agreed upon a simple premise, the same

¹ As the principal congressional proponent of strengthening the War Powers Resolution, Biden elaborated this view on numerous occasions (see, e.g., [the 2007 interview](#) with Chris Mathews, in which he promised to lead the effort to impeach a President who attacks another country without congressional approval unless the United States is attacked or about to be attacked).

premise later embraced by Senators Obama, Biden and Clinton: that the war power is shared between Congress and the President.

This is the premise that animates all efforts by members of Congress who insist that the Executive meet authorization and consultation requirements before using force. This is the premise that is, for all practical intents and purposes, rejected by OLC. The premise flows from every source of constitutional power:

The constitutional text. Textual grants of war power to the President are paltry in relation to grants of that power to the Congress. The President is denominated "commander-in-chief." In contrast, Congress is given power to "declare war," to lay and collect taxes "to provide for a common defense," to "raise and support armies," to "provide and maintain a navy," to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," to "provide for organizing, arming, and disciplining, the militia," and to "make all laws necessary and proper for carrying into execution . . . all . . . powers vested by this Constitution in the Government of the United States."

The case law. Support for the Executive derives primarily from unrelated dicta pulled acontextually from inapposite cases. The actual record is striking: Congress has never lost a war powers dispute with the President before the Supreme Court. While the cases are few, in every instance where the issue of decision-making primacy has arisen — from *Little v. Barreme* (1804) to the *Steel Seizure Case* (1952) — the Court has sided with Congress.

Custom. It is true that Presidents have used armed force many times throughout U.S. history without prior congressional approval. It is also true that practice can affect the Constitution's meaning and allocation of power. The President's power to recognize foreign governments, for example, like the Senate's power to condition its consent to treaties, derives largely from unquestioned practice tracing to the earliest days of the republic. But not all practice is of constitutional moment. A practice of constitutional dimension must be regarded by both political branches as a juridical norm; the incidents comprising the practice must be accepted, or at least acquiesced in, by the other branch. In many of the precedents that provide the "historical gloss" on which OLC so heavily relies, Congress objected. Furthermore, the precedents must be on point. Here, many are not: nearly

all involved fights with pirates, clashes with cattle rustlers, trivial naval engagements, and other minor uses of force not directed at significant adversaries. In a number of the supposed "precedents," Congress actually approved of the executive's action by enacting authorizing legislation (as with the Barbary Wars).

Structure and function. If any useful principle derives from structural and functional considerations, it is that the Constitution gives the Executive primacy in emergency war powers crises where Congress has no time to act, and requires congressional approval in non-emergency situations — circumstances where deliberative legislative functions have time to play out.

Intent of the Framers. Individual quotations can be, and regularly are, drawn out of context and assumed to represent a factitious collective intent. It is difficult to read the primary sources, however, without drawing the same conclusion drawn by Abraham Lincoln. [He said:](#)

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

Chief Justice William Rehnquist, quoting Justice Robert Jackson in *Dames & Moore v. Regan* (1981), shared Lincoln's belief that the Framers rejected the English model. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

With the text of the Constitution, its structure and function, the intent of the Framers, and case law providing scant support, OLC has fashioned a new, elastic standard to justify presidential war-making: the "nature, scope and duration" of the military operations, it asserts, provide the real test whether the President can act unilaterally. If the nature, scope

and duration can somehow be characterized as “limited,” OLC claims, if the military’s mission is humanitarian, if its object is to uphold the credibility of the United Nations, then the United States is not really engaged in a war.

In obvious ways the military operations against Libya are of course “limited.” They don’t involve ground troops. They don’t involve nuclear weapons. They don’t involve a naval blockade. The word “limited” sounds reassuring. But every use of force that the United States has ever undertaken has in some sense been “limited.” Even in World War II the United States limited the weaponry that it elected to use against Germany and Japan (declining, for example, to use chemical or biological weapons). In its inevitable malleability, the notion of “limited” hostilities applies one way or another to virtually all hostilities. 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. Legal Adviser Koh, in 1994, challenged OLC’s claim that the “planned operation [in Haiti] was not a ‘war’ within the meaning of the Declaration of War Clause.”² “[T]he totality of Congress’ Article I, §8 power,” he wrote, “reserves to Congress alone the prerogative and duty to authorize initiation of hostilities.” The President cannot call a war something other than a war and thereby dispense with the Constitution’s requirement of congressional approval.

Much the same applies to the procrustean notion of the “nature, scope, and duration” of hostilities. It is true that the case for constitutionality is strengthened if few, rather than many, U.S. servicemen are involved, if the number of likely U.S. casualties is low rather than high, and if the likely duration is short rather than long. But OLC acknowledges that “it might not be true here that ‘the risk of sustained military conflict [is] negligible.’” Nor is the scope of the conflict narrow: 160 Tomahawk missiles fired in only the first round of “[ferocious airstrikes](#)” are hardly inconsequential. (Or perhaps that counts as narrow: OLC candidly recalls that it once opined that the deployment of 20,000 into hostilities in the Balkans was not a war.) But war is not a matter for unilateral presidential judgment. Koh, in a 1994 letter to OLC, rejected the assertion “that the President alone may determine that the nature, scope, and duration of a planned military deployment does not rise to the level of ‘war’ for which congressional

² Appendix, *U.S. Practice: Contemporary Practice of the United States Relating to International Law*, 89 AM.J. INT’L L. 96, 127 (1995).

approval under domestic law is constitutionally required.” “The Constitution,” Koh wrote, “contemplates that Congress will make its own determination on such questions”

The nature, scope, and duration of hostilities are not, in any event, the only variables that factor into the constitutional calculus. Among the additional considerations that are ignored by OLC are the two most important ones: the likely risks that the operation runs and whether the situation presents an emergency that precludes Congress from meeting.

OLC’s opinion is notable for identifying only the Libyan military operations’ potential benefits. It fails to put U.S. interests in context or to present the views of others who have put those interests in context.³ OLC places great weight upon the need to avert a humanitarian catastrophe, but nowhere in its opinion are we actually told just how likely it was that a catastrophe would actually occur, how many people were actually endangered, or whether the civilians in question were in fact protected non-combatants. (In traditional international law, governments are not prohibited from using force against persons who take up arms against them and seek to overthrow them.) Indeed, read closely, the opinion will be seen to claim only that some sort of humanitarian crisis was possible, not probable, and that the putative dimensions of any such crisis were wholly speculative.

Weighing against potential benefits are real and identifiable risks.⁴ These risks could be significant. Yet they are not considered or even recognized by OLC. Khadafy is now known, for example, to have been the author of the bombing of Pan Am flight 103 in 1988 that killed 270 people. Most of the victims — 189 — were Americans. Khadafy’s attack was reportedly carried out as retaliation for the 1986 U.S. bombing of Libya (which killed Khadafy’s adopted daughter). The Libyan government therefore has a demonstrated capability to engage in significant terrorist attacks against the civilian population of the United States and a demonstrated intent to do so for retaliatory purposes. How great is the risk

³ Secretary of Defense Robert Gates, for example, [said on March 27 on Meet the Press](#) that he does not believe that Libya represents a “vital interest” for the United States.

⁴ Defense Secretary [Gates told the West Point graduating class](#) on February 25, 2011 that “any future defense secretary who advises the president to again send a big American land army into Asia or into the Middle East or Africa should ‘have his head examined,’ as General MacArthur so delicately put it.”

that U.S. civilians or military personnel, within the United States or elsewhere in the world, will again be targeted by Libyan (or Libyan-friendly) intelligence services in retaliation for the U.S. attacks? For that matter, how many Libyan civilians are likely to be killed, particularly if the fighting turns into a civil war? How likely is a civil war or protracted stalemate in which Khadafy remains a threat? How great a diversion of U.S. military resources will be required from the ongoing conflicts in Afghanistan and Iraq (where, it is now reported, U.S. forces might have to remain years beyond the December 2011 deadline for withdrawal)? Will the Libyan rebels be “led on” by the U.S. attacks on Khadafy — and repeated statements that “he must go” — into believing that they can count on the United States if they should confront defeat? How greatly will U.S. credibility ultimately suffer? Without knowing the answers to these and numerous other questions concerning the costs and risks associated with the Libyan attacks, it is impossible to assess whether the President’s decision was “reasonable,” as OLC asserts.

These are the sorts of considerations that could have been thought through carefully had the Administration sought congressional authorization. OLC’s opinion presents no reason why it could not have done so. The Security Council debated the matter for five weeks prior to the March 17 vote on Resolution 1973.⁵ The possibility of a humanitarian crisis of some sort was therefore eminently foreseeable, and more than adequate time was available to seek approval from Congress to intervene militarily had the Administration been willing to do so.

It is for reasons such as these that the Constitution places the decision to go to war in the hands of Congress: if the nation as a whole is to incur potentially significant costs and be exposed to identifiable risks, the elected representatives of the people should bear the responsibility for accepting them. “No one man should hold the power,” as Lincoln put it — unless it is a bona fide emergency. This was not.

II. Security Council Resolution 1973

The Administration could not constitutionally be heard to contend that the Security Council resolution approving use of force in Iraq constitutes authorization under U.S. domestic law. In *Medellin v. United States*

⁵ It was on February 26, 2011, that the Council “[e]xpress[ed] grave concern at the situation in the Libyan Arab Jamahiriya” in Resolution 1970.

(2008), the United States Supreme Court found that the United Nations Charter is non-self-executing. “A non-self-executing treaty,” the Court explained, “by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President — acting on his own — to achieve precisely the same result.” The Court concluded that the Executive cannot rely upon the President’s responsibility to “take care that the laws be faithfully executed” as grounds for enforcing a non-self-executing treaty. “This authority allows the President to execute the laws, not make them,” the Court noted. *Medellin* thus undercuts arguments that the Charter combined with a Security Council resolution provided a domestic source of war power permitting the President to use force in Libya.⁶

Nonetheless, thwarted from relying squarely upon the President’s Take Care powers in *form*, OLC nonetheless attempts to do so in *substance*. OLC contends that the “words of the international community would be rendered hollow” if he did not attack Libya. “[M]aintaining the credibility of the United Nations Security Council,” OLC maintains, was an important national interest.⁷ Without military action, “[t]he writ of the United Nations Security Council would have been shown to be little more than empty words” Thus the presence of Resolution 1973 had the effect, in OLC’s rationale, of enlarging presidential power — just as it would have if the President had been permitted to take care that Resolution 1973 be faithfully executed.

OLC’s semantic minuet is, unfortunately, too clever by half.

⁶ It also undercuts arguments that Security Council resolutions provided such power in Korea, Somalia, and Haiti, all of which occurred before the *Medellin* opinion was handed down.

⁷ Senator Obama, as a candidate for the presidency, did not appear to share the Administration’s new-found concern about preserving the United Nations’ credibility. In the [second presidential debate, on October 7, 2008](#), Tom Brokaw asked Obama the following question: “If, despite your best diplomatic efforts, Iran attacks Israel, would you be willing to commit U.S. troops in support and defense of Israel? Or would you wait on approval from the U.N. Security Council?” Obama replied that, “we will never take military options off the table. And it is important that we don’t provide veto power to the United Nations or anyone else in acting in our interests.” Senator Obama had no qualms about using U.S. force unilaterally if the Security Council refused to approve — regardless of any loss of credibility that the Council might suffer.

The United Nations Charter's status as a non-self-executing treaty not enforceable by the President alone is the culmination of a long and important chapter in U.S. constitutional history — the upshot of which is that the Charter does not and cannot expand the scope of presidential war-making power. To appreciate the centrality of this proposition, a brief review of that history is in order.

Intent of the Framers. The Framers explicitly decided not to confer upon the Senate and the President alone the power to commit the nation to war. Madison's [notes of the Philadelphia Convention](#) recall the relevant events. Alexander Hamilton, Madison noted, submitted a plan that would have empowered the Executive “to make war or peace, with the advice of the Senate.” After the Committee of Detail recommended instead that the war power be given to Congress, Hamilton's ally, Charles Pinckney, again proposed that the power should reside in the Senate:

Mr. Pinckney opposed the vesting [of] this power in the Legislature. Its proceedings were too slow. It would meet but once a year. The House of Representatives would be too numerous for such deliberations. The Senate would be the best depository, being more acquainted with foreign affairs, and most capable of proper resolutions. If the States are equally represented in the Senate, so as to give no advantage to large States, the power will notwithstanding be safe, as the small have their all at stake in such cases as well as the large States. It would be singular for one authority to make war, another peace.

Sentiment opposing the Hamilton-Pinckney position was overwhelming. Oliver Ellsworth and George Mason argued that the concurrence of both Houses of Congress should be required to declare war because only the Senate's approval was required for peace treaties, and it should be easier to get out of war than into it. Mason further argued that the Senate was “not so constructed as to be entitled to” the war power. Pierce Butler added that Pinckney's concerns about the institutional shortcomings of the House applied equally to the Senate. Apparently, Pinckney's proposal died for lack of a second. Speaking nine years later as a member of the House of Representatives, [Madison pithily summarized his own objection](#) to the view embodied in the defeated proposal: “Congress, in case the

President and Senate should enter into an alliance for war, would be nothing more than the mere heralds for proclaiming it.”

United States practice. The decision of the Framers not to confer upon the Senate and the President the power to commit the nation to war is reflected in subsequent U.S. practice in entering into treaties concerning the use of force. The treaty makers have never made a treaty authorizing the President to make war. As Professor Henkin wrote, “no treaty has ever been designed to put the United States into a state of war without a declaration by Congress.”⁸ In its report on the Panama Canal Treaties, the Senate Foreign Relations Committee discussed the breadth of the commitment in U.S. mutual security treaties, in language that is directly applicable to the United Nations Charter. It said:

All such treaties implicitly reserve to the United States a right of choice in each individual situation to act, militarily, as it deems appropriate under the circumstances. Any treaty which did not do so would, in the Committee's opinion, unconstitutionally divest the House of Representatives of its share of the warmaking power and would, unconstitutionally, delegate to the President the power to place the United States at war.⁹

The threat that the United States could be legally bound, without prior congressional approval, to use armed force penetrated to the heart of the debate in the United States over whether to join the League of Nations. Ambiguities in the League Covenant on that point contributed directly to its rejection. Article 10 of the Covenant provided as follows:

The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled.

⁸ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 160 (1997).

⁹ S. Exec. Rep. No. 12, 95th Cong., 1st Sess. 74 (1978).

Senator Henry Cabot Lodge, leader of the Senate forces opposing the League, proposed a reservation to the Covenant that stated:

The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations — whether members of the league or not — under the provisions of article 10, or to employ the military or naval forces of the United States under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide.

President Woodrow Wilson opposed the Lodge reservation, arguing that it was unnecessary because the Covenant required unanimity. “[T]here could be no advice of the council on any such subject,” [he said](#), “without a unanimous vote, and the unanimous vote includes our own, and if we accepted the advice we would be accepting our own advice.” He implied that he would not, in casting that vote, bind the United States in a situation where prior congressional approval was required to undertake the obligation in question: “I need not tell you,” he said, “that the representatives of the Government of the United States would not vote without instructions from their Government at home, and that what we united in advising we would be certain that the American people would desire to do.” The Covenant, Wilson said, required no “surrender of the independent judgment of the Government of the United States.”

Wilson's Senate supporters viewed the Lodge reservation as a “repudiation” of the Covenant and voted against the resolution of ratification. The Senate defeated the Covenant (39 for, 55 against) with the Lodge reservation attached. Thus a principal reason for the rejection of the League Covenant by the Senate was the belief that it unconstitutionally expanded the power of the President and excluded the House of Representatives from the decision to go to war.

This history was doubtless familiar to the framers of the United Nations Charter, particularly the Americans. Secretary of State Cordell Hull said: “The biggest stumbling block that sent the Wilson movement in

support of the League to utter destruction in 1920 was the argument over this point, and no other political controversy during our time had been accompanied by more deep-seated antagonism."¹⁰ From the beginning, preparations for the negotiations in San Francisco reflected the felt need to avoid any semblance of an automatic requirement to use armed force. In 1943 the House of Representatives adopted the Fulbright Resolution, expressing its support for the "creation of appropriate international machinery with power adequate to establish a just and lasting peace, among the nations of the world, and . . . favoring participation by the United States *through its constitutional processes.*" That same year the Senate adopted the Connally Resolution, urging that the United States, "*acting through its constitutional processes, join with free and sovereign nations in the establishment and maintenance of international authority with power to prevent aggression and to preserve the peace of the world.*" Beginning in early 1944, Secretary of State Hull consulted with leading members of Congress on the developing plans for an international organization. Commenting on the proposals that formed the basis of the U.S. position at Dumbarton Oaks, Senator Arthur Vandenberg wrote in his diary that,

to his credit, [Hull] recognizes that the United States will never permit itself to be ordered into war against its own consent. He has even gone so far as to suggest that we require this consent to be given by an Act of Congress. This is anything but a wild-eyed internationalist dream of a world State.¹¹

The language of the Charter that emerged from the San Francisco Conference need not be belabored. The only provision authorizing use of armed force by the Security Council, Article 42, immediately precedes the only provision relating to the raising of armed forces by it, Article 43. In its report to President Truman, the United States delegation to the conference emphasized that the limitation of Article 42 by Article 43 mooted the objections behind the Senate's scuttling of the League Covenant. Protection against the unwanted requisitioning of forces by the Security Council was afforded, the delegation wrote, by the requirement in Article 43 that special agreements be concluded beforehand. "One point in connection with these agreements which should be stressed is that . . . no Member of the United Nations can be called upon to supply for the use of the Security Council

¹⁰ CORDELL HULL, *THE MEMOIRS OF CORDELL HULL* 1662 (1948).

¹¹ *THE PRIVATE PAPERS OF SENATOR VANDENBERG* 95-96 (1952).

forces which are not provided for in the agreements.”¹² Leo Gross summarized the results:

It was fully realized at the San Francisco Conference that some of the Great Powers would have refused to accept a Charter which imposed upon them a duty comparable to that contained in Article 10 of the Covenant. The battle over Article 10 was fought this time on the floor of the San Francisco Conference rather than on the floor of the Senate. The price for the entry of certain of the Great Powers into an international security organization, now as then, is the elimination of what is widely believed to be the basic notion of collective security from its constitution.¹³

This “notion of collective security” that was eliminated from the Charter presupposed an obligation to use force under specified circumstances. It was rejected because, in the view of the United States, an obligation to do so would eliminate the House of Representatives from the decision to go to war — it would, indeed, eliminate *any* decision by making the use of force automatic. OLC acknowledges that Resolution 1973 does not require the United States to take military action, and seems to imply that the constitutional impediment is eliminated if the Resolution merely authorizes rather than requires. But the problem is not eliminated, because, under OLC’s theory, the Security Council’s action is still seen as enlarging the scope of presidential power and cutting the House of Representatives out of the decision to go to war.

OLC thus misreads the Charter, which did not re-allocate domestic power. This issue has arisen before. In 1994, in connection with Security Council Resolution 940 authorizing military action in Haiti, President Clinton [claimed that](#), “[l]ike my predecessors of both parties, I have not agreed that I was constitutionally mandated to get” the prior approval of Congress before launching a military invasion of Haiti. Legal Adviser Koh, along with nine other prominent professors of international and constitutional law, wrote Clinton that “that statement is an incorrect reading of the War Powers clauses of the Constitution and the precedents

¹² SECRETARY OF STATE, 79TH CONG., 1ST SESS., REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 95 (COMM. PRINT 1945).

¹³ Leo Gross, *The Charter of the United Nations and the Lodge Reservations*, 41 AM. J. INT’L L. 531, 550 (1947).

construing them.”¹⁴ Koh and the professors wrote that a Security Council resolution authorizing member nations to “use all necessary means” (like Resolution 1973) “does not absolve Congress of its constitutional obligation to approve military action or the President of his constitutional obligation to seek and obtain that approval.” Koh’s view was correct then and it remains correct today. As the *Harvard Law Review* concluded, the “language [of] the United Nations Charter . . . clearly illustrates the neutrality of its obligations with respect to the internal distribution of the war-making power.”¹⁵ Indeed, the same approach was adopted in subsequent treaties, leading to “general agreement that current postwar security treaties have not changed the relative powers of Congress and the President with respect to the use of the armed forces.”¹⁶ OLC’s argument that the Charter has effectively enlarged the power of the President is therefore mistaken.

* * *

Any remaining doubt that the United Nations Charter expands the power of the President to use armed force is removed by the War Powers Resolution. Section 8(a) provides as follows:

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred—

(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically

¹⁴ Appendix, *supra* note 2.

¹⁵ Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1800 (1968).

¹⁶ *Id.*

authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

Interpretation of the Charter is governed by paragraph 2. It is not “implemented by legislation specifically authorizing” the introduction of the armed forces into hostilities. or does its implementing legislation, the UNPA, “stat[e] that it is intended to constitute specific statutory authorization within the meaning of” the War Powers Resolution. Only a special agreement under Article 43, approved in accordance with United States “constitutional processes” — *i.e.*, by Congress — would provide such authorization.

It has been suggested that the force of paragraph 2 is vitiated by a later provision in the resolution, section 8(d)(1), which provides that “[n]othing in this joint resolution . . . is intended to alter . . . the provisions of existing treaties.” But, of course, no mere statute could do that: the terms of a treaty cannot be altered unilaterally, without the consent of the other party. The provision must therefore have some other meaning, which its background unveils. The provision originated in the Senate version of the Resolution, which provided that “[n]o treaty in force at the time of the enactment of this Act shall be construed as specific statutory authorization for, or a specific exemption permitting, the introduction of the Armed Forces of the United States into hostilities” In its report, the Senate Foreign Relations Committee explained its understanding of “existing” treaty commitments: “Treaties are not self-executing. They do not contain authority . . . to go to war. Thus, by requiring statutory action, . . . the War Powers Resolution would perform the important function of defining that elusive and controversial phrase — ‘constitutional processes’ — which is contained in our security treaties.” The conference report set forth section 8 as it reads in the Resolution; the joint statement of the managers (appended thereto and explaining the meaning of the conference report) says merely that the Conference Committee “agreed to [the] adoption of modified Senate language defining specific statutory authorization, and defining the phrase ‘introduction of United States Armed Forces’ as used in the joint resolution.” No explanation is given as to the meaning of the cryptic indication of an intent not to alter the provisions of existing treaties.

Given this background, the most reasonable interpretation of section 8 is that the provision was intended to make clear that no treaty may serve as a source of authority for the introduction of the armed forces into hostilities. This limitation should be construed as applying to all treaties, ratified both before and after the enactment of the War Powers Resolution. To construe the provision as exempting the UN Charter or “existing” mutual security treaties would be to create a confused, two-tier system of security treaties. Such a result would be without support in the legislative history and would be completely at odds with the oft-repeated belief that no treaty in force at the time of the debate on the Resolution did or could commit the United States automatically to introduce its armed forces into hostilities. The apparently inconsistent reference in section 8(d)(1) to the “provisions” of “existing” treaties can in fact be read as a straightforward (if infelicitous) attempt to state the congressional understanding that neither the Charter nor any other existing treaty *is* altered by the War Powers Resolution because no existing treaty *does* provide authority of the sort that the Resolution rules out.

III. The War Powers Resolution as Authorization

OLC claims that “Congress itself has implicitly recognized this presidential authority” by enacting the War Powers Resolution, which “allow[s] United States involvement in hostilities to continue for 60 or 90 days” As with its intimations concerning the force of the UN Charter, OLC doesn’t squarely make the argument that the War Powers Resolution *authorizes* the use of force in Libya, but in substance its claim is the same.

That argument is unconvincing. If Congress wished to take no position on the underlying constitutionality of any such use, would the Resolution not read precisely the way it does? Is it not possible that the sponsors of the Resolution might have thought that they had the votes, in 1973, merely to *limit* certain activities without *prohibiting* them? OLC assumes, with no basis, that the act of *limitation* necessarily constitutes an implicit *authorization* of the conduct in question. In reality the Resolution in and of itself implies no judgment whatsoever with respect to the permissibility of the underlying conduct at its inception.

In fact, of course, the sixty-day limitation does not exist “in and of itself.” The limitation exists in a law that expressly provides in section 8(d)(2) that nothing in it may be construed as granting any authority to the

President to use armed force that the President would not have had in its absence. In other words, Congress directs all interpreters of the Resolution to assume its non-existence for purposes of assessing the breadth of presidential power to use force. Faced with explicit instructions by Congress as to how the statute is to be interpreted, OLC disregards those instructions.

Lest there be any doubt concerning the availability of the Resolution (or any other statute) to be pressed into service as an authorization for the use of force, the Resolution, as noted above, sets forth in section 8(a)(1) two specific conditions that must obtain before such reliance is permissible. First, any such law must specifically authorize the introduction of the armed forces into hostilities or likely hostilities. Second, such a law must expressly refer to the War Powers Resolution. The War Powers Resolution contains nothing approaching such wording. As Legal Adviser Koh wrote in an *amicus curiae* memorandum in 1990 in *Dellums v. Bush* (1990), “Congress must manifest its genuine approval [for warmaking] through formal action, not legislative silence, stray remarks of individual members, or collateral legislative activity that the President or a court may construe to constitute ‘acquiescence’ in executive acts.” Koh, in an October 14, 1994 letter to Walter Dellinger, head of OLC, challenged OLC’s claim that the War Powers Resolution “*assumes* that the President already has . . . authority under the Constitution, to introduce troops into hostilities.”¹⁷ Koh wrote that “[n]othing in the War Powers Resolution authorizes the President to commit armed forces overseas into actual or imminent hostilities in a situation where he could have gotten advance authorization, but failed to do so.”

Accordingly, it is incorrect to contend that the President was authorized by Congress to attack Libya. Congress, at best, was silent. More likely, Congress disapproved, as evinced by the statement of congressional opinion in section 2(c) of the War Powers Resolution that the President’s commander-in-chief powers “are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” Clearly, none of these circumstances existed with respect to the attacks on Libya, and the provision is directly applicable to that invasion. OLC, which elsewhere in its opinion cites a nonbinding sense-of-the-Senate resolution (S. Res. 85, concerning the imposition of a no-flight zone), dismisses this sense-of-the-Congress

¹⁷ Appendix, *supra* note 2.

statement because it is a "policy statement." Policy statement or not, if the War Powers Resolution has any bearing upon the issue of presidential authority to attack Libya, the fairest conclusion is that it lays out Congress's opposition, not support.

IV. Conclusion

OLC's Libya opinion cites its past opinions as though they were court cases. They are not. Its Libya opinion conveys an impression that the Office of Legal Counsel is an impartial, objective, independent arbiter of the Constitution. It is not. OLC's strained effort to justify torture during the last Administration need not be recounted. So far as I am aware, the Office has never published an opinion announcing the illegality of any use of force by the Executive (though it conveniently omits reference to its 1980 opinion upholding the constitutionality of the War Powers Resolution's 60-day time limit¹⁸).

One would not expect OLC to make the case against the President's actions. Its opinion on Libya, like its other opinions, is an effort to put the best legal face on those actions. The President is entitled to no less. But no one should mistake OLC's advocacy as a disinterested evaluation of competing constitutional claims. It is, in truth, not an opinion at all but a brief.

Nor would one expect OLC to explain the stark contradictions between its position and the many earlier statements of top Administration officials. The process has not yet become *that* politicized. OLC insists that those officials are now concerned that the UN Security Council's edicts do not turn out to be empty words. It is fine to worry about the United Nations' credibility. But the credibility of the United States' own domestic legal system is also at stake. Millions of people voted for "change we can believe in," thinking that the election of 2008 meant an end to an era of extravagant claims of presidential power. The President, Vice President, Secretary of State and State Department Legal Adviser take an oath, after all, to support the United States Constitution, not the United Nations

¹⁸ "The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad," OLC wrote. "We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers." *Presidential Power to Use the Armed Forces Abroad without Statutory Authorization*, 4A Op. Office of the Legal Counsel, Department of Justice 185, 196 (1980).

Charter. These officials bear a responsibility for maintaining the credibility of *our* system, which rests, in the end, upon the believability, reliability, and integrity of our highest constitutional officers. It's not as though their earlier statements were made off-the-cuff, and it's not as though these officials had no acquaintance with constitutional law. Their statements were deliberate, studied pronouncements by individuals schooled in the history and interpretation of the Constitution, with years of experience in the highest councils of government and legal education. What credibility costs are borne by the United States when the declarations of such officials—measured pronouncements on the meaning of the most fundamental precepts set out in the Constitution — turn out to be empty words?