ARTICLES

THE HISTORY OF EXECUTIVE BRANCH LEGAL OPINIONS ON THE POWER OF THE PRESIDENT AS COMMANDER-IN-CHIEF FROM WASHINGTON TO OBAMA

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2 This article is an expanded work based on material from my book Supreme Court Jurisprudence in Times of Crisis, Terrorism, and War, Terrorism: A Historical Perspective (Lexington Books, 2011).
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I. INTRODUCTION

After the attacks of September 11, 2001, President Bush asserted that the attacks were an act of war, not an international criminal act, and as such, certain constitutional powers of the President

3 President Bush made this clear in his State of the Union Address on January 20, 2004:

As we gather tonight, hundreds of thousands of American service men and women are deployed across the world in the war on terror. By bringing hope to the oppressed and delivering justice to the violent, they are making America more secure.

America is on the offensive against the terrorists who started this war.

Many of our troops are listening tonight. And I want you and your families to know: America is proud of you. And my administration and this Congress will give you the resources you need to fight and win the war on terror.
were activated, specifically the full war powers of the Commander in Chief. Subsequent to the Bush Administration, President Ob-

I know that some people question if America is really in a war at all. They view terrorism more as a crime, a problem to be solved mainly with law enforcement and indictments.

After the World Trade Center was first attacked in 1993, some of the guilty were indicted and tried and convicted and sent to prison. But the matter was not settled. The terrorists were still training and plotting in other nations and drawing up more ambitious plans.

After the chaos and carnage of September the 11th, it is not enough to serve our enemies with legal papers. The terrorists and their supporters declared war on the United States. And war is what they got.


‘See id.’ Hours after the attacks, as the fires still burned, survivors were still yet to be found under the fallen towers, and the ashes of the World Trade Center littered the streets of New York, President Bush gave a preview of his administration’s policy regarding the attacks:

The search is underway for those who are behind these evil acts. I’ve directed the full resources for our intelligence and law enforcement communities to find those responsible and bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them.

. . . .

America and our friends and allies join with all those who want peace and security in the world and we stand together to win the war against terrorism.

. . . .

This is a day when all Americans from every walk of life unite in our resolve for justice and peace. America has stood down enemies before, and we will do so this time.

President George W. Bush, President Bush’s Address to the Nation (Sept. 11, 2001) (emphasis added), available at http://articles.cnn.com/2001-09-11/us/bush.speech.text_1_attacks-deadly-terrorist-acts-despicable-acts?_s=PM:US. Moreover, President Bush characterized the events of September 11th in both military and politically moral terms in his September 20, 2001 speech to a special joint session of Congress:

Tonight, we are a country awakened to danger and called to defend freedom. Our grief has turned to anger and anger to resolution. Whether we bring our enemies to justice or bring justice to our enemies, justice will be done.

. . . .
On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars, but for the past 136 years they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war, but not at the center of a great city on a peaceful morning.

Americans have known surprise attacks, but never before on thousands of civilians. All of this was brought upon us in a single day, and night fell on a different world, a world where freedom itself is under attack.

We will direct every resource at our command – every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war – to the destruction and to the defeat of the global terror network.

Now, this war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen. It may include dramatic strikes visible on TV and covert operations secret even in success.

Many will be involved in this effort, from FBI agents, to intelligence operatives, to the reservists we have called to active duty. All deserve our thanks, and all have our prayers. And tonight a few miles from the damaged Pentagon, I have a message for our military: Be ready. I have called the armed forces to alert, and there is a reason.

The hour is coming when America will act, and you will make us proud.

Our nation, this generation, will lift the dark threat of violence from our people and our future. We will rally the world to this cause by our efforts, by our courage. We will not tire, we will not falter and we will not fail.

President George W. Bush, Address Before Special Joint Session of Congress (Sept. 20, 2001), available at http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/. President Obama’s remarks after he announced that SEAL Team Six had carried out an operation that resulted in the killing of Osama Bin Laden were in a similar vein:

The American people did not choose this fight. It came to our shores, and started with the senseless slaughter of our citizens. After nearly 10 years of service, struggle, and sacrifice, we know well the costs of war. These efforts weigh on me every time I, as Commander-in-Chief, have to sign a letter to a family that has lost a loved one, or look into the eyes of a service member who’s been gravely wounded.
ama ordered the military of the United States to engage in a multinational force to prevent Colonel Muammar Gaddafi from using his security and armed forces to massacre the Libyan people and later to support Gaddafi's opponents in their effort to depose Gaddafi from power. President Obama, unlike President Bush, did not seek congressional approval for the action. The Office of Legal Counsel (OLC) provided the Obama Administration with an opinion that, not unlike the opinions written by John Yoo in the Bush Administration, asserted that congressional approval was not required because President Obama was exercising his powers as Commander in Chief to conduct foreign policy—in this case, to prevent a humanitarian disaster and to enforce the will of the international community as reflected in a United Nations Security Council resolution.

Many scholars and academics, including myself, have spilled much ink on the role of the OLC and the legal assertions made by the Bush Administration OLC. Alternatively, this Article will put

So Americans understand the costs of war. Yet as a country, we will never tolerate our security being threatened, nor stand idly by when our people have been killed. We will be relentless in defense of our citizens and our friends and allies. We will be true to the values that make us who we are. And on nights like this one, we can say to those families who have lost loved ones to al Qaeda's terror: Justice has been done.


the legal arguments of the Bush and Obama Administrations in the context of the legal interpretations of the Commander in Chief power made by the U.S. Attorneys General from the Washington through Truman Administrations, and subsequently by the OLC.\footnote{See Arthur H. Garrison, The Opinions by the Attorney General and the Office of Legal Counsel: How and Why They are Significant, 76(1) ALB. L. REV. 217 (2012-2013) [hereinafter Garrison, The Opinions by the AG] (discussing the history of the Office of the U.S. Attorney General and later the Office of Legal Counsel and how both hold quasijudicial authority to determine the meaning of the law within the Executive Branch and whose opinions are considered binding on all Executive Branch agencies, including the White House). Although the OLC is a significant agency within the Justice Department and the Executive Branch,
beginning with the Eisenhower Administration through the Obama Administration.

This Article will assert two propositions: first, from the very early history of the American republic, Presidents have been advised that they possess broad and plenary powers to deal with foreign affairs and military policy, and secondly, the OLC opinions on the legal authority to use military force made by the Bush and Obama Administrations were in line with the historical and legal arguments provided to every president of the United States for more than a century and a half. In Part II, this Article will review the legal justifications and arguments posited to Presidents Washington through Clinton. This review will focus on how each successive Administration has developed the legal and constitutional framework for the assertion of presidential plenary authority to use military force to achieve foreign and/or military policy both with and until recently, there was very little written about OLC whether popular press or scholarly work. Indeed, until the George W. Bush administration, with few exceptions, the scholars who researched OLC were OLC alums themselves. ... Despite all of the attention by former OLC attorneys and the popular media, and the obvious attention to political scientists to the executive branch, laws, public policy and the like, there is very little about the Office of Legal Counsel written by political scientists.

without prior congressional approval. Each Administration from Washington through Clinton will be individually and sequentially discussed to review the legal justifications and development of the Commander in Chief power. Specific attention will be placed on the legal justifications provided to each of the presidents by their Attorneys General (and Assistant Attorneys General for the OLC) and later by their State Department Legal Advisors, regarding the broad scope of the President’s power to conduct foreign and military policy with and without congressional approval. Part III of this Article places the OLC opinions provided to both Presidents Bush and Obama in the historical context of prior legal determinations for acting with and without prior congressional approval discussed in Part II. Part IV provides some final conclusions on the history of the Commander in Chief power and why the War Powers Resolution (WPR) as a check on presidential power has failed in its main objective.


The assertion of inherent presidential power to act either in times of crisis or in the protection of the national interests hardly began with the Bush and Obama Administrations. Almost without waver from the Washington Administration to the present, Attorneys General and other presidential legal advisors have similarly asserted a primary—if not an exclusive and plenary—view of presidential power in foreign affairs and the ability to use the military to implement foreign policy for the public good and defense of the nation with or without prior congressional approval.

A. The Power of the President in Times of War: The Presidents of the Founding Generation & the Pre-Civil War Era

President Washington

After the French Revolution in 1789 and the resulting war between England and France, President Washington determined that the U.S. would stay neutral between the two powers, and as President and Commander in Chief, he had the power to determine if

the new government of France was to be recognized by the U.S. and whether the U.S. would honor a military treaty with France. Jefferson was incensed that Washington would claim that foreign policy was an exclusive power of the Presidency. Hamilton supported Washington’s assertion of power in an article signed under the name *Pacificus*. Madison wrote a series of articles attacking the position signed under the name *Helvidius*. The *Pacificus-Helvidius papers* have proven to be the intellectual and political foundations of the debate on presidential power, and as will be discussed in this article, the opinions of the U.S. Attorneys General and American history over the past two hundred years have proven Hamilton to be the victor in the debate with Madison.

Although it is the debate between Hamilton and Madison that is remembered regarding the assertions of presidential power during the Washington Administration, Washington’s Attorney General was not without a contribution. In 1794, Attorney General William Bradford informed President Washington that, as President, Washington was not obligated to provide Congress with diplomatic and other communications that he deemed inappropriate to provide. Attorney General Bradford asserted that communications developed during the conduct of foreign affairs belong to the President as the Chief Executive who is responsible for foreign policy. This established what is now known as the principle of Executive Privilege and the right of the President to protect his confidential documents and advice from congressional oversight and accessibility.

**President Adams**

After the U.S. signed Jay’s Treaty with Great Britain in 1794 and the beginning of war between France and Great Britain, France began a campaign of attacking American shipping. On May

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13 GARRISON, SUPREME COURT JURISPRUDENCE, supra note 10 at 5.
14 *Id.* at 10.
15 *Id.* at 6-10.
16 *Id.* at 11-18.
19 POWELL, supra note 12, at 10-11.
20 *Id.*
16, 1797, President Adams informed Congress\(^{21}\) of the events of the XYZ Affair.\(^2\) On June 21, 1798, President Adams further informed Congress that he would not send another ambassador to France unless the representative would be greeted with the proper respect of a "representative of a great, free, powerful, and independent nation."\(^3\) The political reaction to the XYZ Affair and French attacks on American commerce resulted in Congress passing a series of laws regarding the protection of American commerce with force. The first legislation, passed on May 28, 1798, stated:

> Whereas armed vessels sailing under authority or pretence of authority from the Republic of France, have committed depredations on the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation

> . . . [T]he President . . . is hereby authorized to instruct and direct the commanders of the armed vessels belonging to the United States to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to citizens thereof;—and also to retake any ship or vessel, of any citizen or citizens of the United States which may have been captured by any such armed vessel.\(^4\)

Congress then passed two Acts in June 1798\(^5\) that suspended trade with France, authorized the arming of merchant ships, and specifically authorized President Adams to develop rules of engagement governing the defense of such ships and the capture of


\(^{23}\) President John Adams, Message to the Senate and House Regarding Envoys to France (June 21, 1798), available at http://avalon.law.yale.edu/18th_century/ja98-04.asp.

\(^{24}\) An Act More Effectually to Protect the Commerce and Coasts of the United States, ch. 48, 1 Stat. 561 (1798).

\(^{25}\) An Act to Suspend the Commercial Intercourse Between the United States and France, and the Dependencies Thereof, ch. 48, 1 Stat. 565 (1798); An Act to Authorize the Defense of the Merchant Vessels of the United States against French Depredations, ch. 48, 1 Stat. 572 (1798).
enemy French ships. Congress then followed with a fourth act, which authorized the President:

[T]o instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas.

This Act also authorized the President to supplement the U.S. Navy by granting him the authority:

[T]o grant to the owners of private armed ships and vessels of the United States, who shall make application therefor [sic], special commissions in the form which he shall direct and under the seal of the United States; and such private armed vessels, when duly commissioned, as aforesaid, shad have the same license and authority for the subduing, seizing and capturing any armed French vessel.

Thus, the Quasi-War with France began.

What is important regarding the Commander in Chief power during the Quasi-War with France is that during the early period of the Republic, the Congress of the founding generation of the Constitution exercised a more direct role in foreign policy, and the founding generation presidents were much more inclined to seek congressional approval and cooperation with their foreign and military policies than the generations that would follow them. Also important is that hostilities committed by the U.S. did not require a formal declaration of war. Congress was satisfied with simply authorizing what was required to engage in hostilities.

President Jefferson

On May 10, 1801, the Pasha of Tripoli issued a declaration of war against the United States after Jefferson refused to pay a demanded increase in tributes to Tripoli to prevent naval harassment in the Mediterranean Sea. The formal declaration of war by Tripoli followed the actions of the Pasha in March 1801 when he ordered his navy to attack American shipping. At his cabinet meeting on May 15, Jefferson sought the advice of his cabinet on whether he should send naval forces into the Mediterranean to protect U.S.

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26 An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578 (1798).
27 Id.
28 Id.
During the meeting, he acknowledged that such an action could lead to war (Jefferson had not received the formal declaration by the time of the meeting), and he wanted advice as to the range of authority the Navy should receive. Specifically, could the Navy engage the Tripolitan Navy aggressively or merely defensively if American ships were attacked? Jefferson's Attorney General, Levi Lincoln, asserted that "our men of war may repel an attack on individual vessels, but after the repulse, may not proceed to destroy the enemy's vessels generally." General Lincoln was supported by Secretary of Treasury Albert Gallatin, who asserted:

to declare war & to make war is synomimous. the Exve cannot put us in a state of war. but if we be put into that state either by the decln of Congress or of the other nation, the command & direction of the public force then belongs to the Exve.

Jefferson recorded that "all concur in the expediency" of sending the naval force, but on the question of whether the naval force may "search for [and] destroy the enemy's vessels wherever they can find them?—all except [General Lincoln]—agree they should." Jefferson took the advice of his cabinet by sending a naval force into the Mediterranean but followed the advice of his Attorney General when, on May 20, 1801, he ordered Commodore Richard Dale to lead a naval force of four ships into the Mediterranean Sea to protect American shipping but not to offensively engage the Tripolitan Navy unless he were to find upon arrival that a state of war had been declared; if war was declared, Dale was ordered to "chastise" the Tripolitan Navy "wherever you shall find them."

The debate within Jefferson's cabinet centered on how Jefferson, and specifically Lincoln and Gallatin, viewed the President's limited Commander in Chief power to engage in "war" with and without congressional authorization. Jefferson's Secretary of the Navy, Robert Smith, made clear that if war is commenced upon the nation "the [President] is bound to apply the public force to de-
fend the country," and his Secretary of War, Henry Dearborne, agreed that the Navy should be dispatched to protect American commerce. The distinctions raised at the cabinet meeting centered on whether war had been declared upon the United States, thus allowing the nation to use offensive force. It was this distinction that placed Lincoln in the minority as to whether the Navy should be dispatched. To Lincoln hostile activity was not enough; a declaration of war was required for offensive military action.

Galatin and Smith said that the Navy should be authorized to attack the Tripolitan Navy in its harbors, and Madison (being a diplomat and wanting it both ways) agreed that the Navy should "pursue [the Tripolitan Navy] into the harbours, but . . . they may not enter but in pursuit."

Jefferson, in his first annual message to Congress on December 8, 1801, reflected the views of his Attorney General and Treasury Secretary on the power of the President to respond to military threats imposed upon the United States but not to engage in offensive military operations without the explicit support of Congress when he requested that Congress place the U.S. Navy in the same position as the Tripolitan Navy:

To this state of general peace with which we have been blessed, one only exception exists. Tripoli, the least considerable of the Barbary States, had come forward with demands unfounded either in right or in compact, and had permitted itself to denounce war, on our failure to comply before a given day. The style of the demand admitted but one answer. I sent a small squadron of frigates into the Mediterranean, with assurances to that power of our sincere desire to remain in peace, but with orders to protect our commerce against the threatened attack. The measure was seasonable and salutary . . . . Our commerce in the Mediterranean was blockaded, and that of the Atlantic in peril. The arrival of our squadron dispelled the danger. One of the Tripolitan cruisers having fallen in with, and engaged the small schooner Enterprise, commanded by Lieutenant Sterret, which had gone as a tender to our larger vessels, was captured, after a heavy slaughter of her men, without the loss of a single one on our part . . . . Unauthorized by the constitution, without the sanction of Congress, to go out beyond the line of defence, the vessel being disabled from committing further hostilities, was liberated with its crew. The legislature will doubtless consider whether, by authorizing

38 Id. at 115.
39 See generally id. at 115.
40 See CUNNINGHAM, supra note 30, at 49.
41 Notes on a Cabinet Meeting, supra note 29, at 115.
measures of offence, also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that in the exercise of the important function considered by the constitution to the legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight. On February 6, 1802, Congress complied with Jefferson's request and passed the Act for the Protection of the Commerce and Seamen of the United States, Against the Tripolitan Cruisers, which authorized Jefferson to "equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite for protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas" as well as authorized the President to instruct the commanders of the respective public vessels aforesaid, to subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects, and to bring or send the same into port, to be proceeded against, and distributed according to law; and also to cause to be done all such other acts of precaution or hostility as the state of war will justify, and may, in his opinion, require.

Although Jefferson viewed the power of the President as limited to defensive military action only, it was his exclusive action of determining not to pay the additional ransom that precipitated the war in the first place. In fact, Jefferson's decision (which would later be called "the power of the President to act as the sole organ of U.S. foreign policy") is what created the need for Congress to respond with legislation authorizing a quasi-naval war in the Mediterranean Sea. More importantly, the war with the Barbary Pirates continued the practice and understanding that not all wars or use of military force require a formal declaration of war.


43 An Act for the Protection of the Commerce and Seamen of the United States against the Tripolitan Cruisers, §§1-2, ch. 4, 2 Stat. 129, 129-130 (1802); see also An Act Further to Protect the Commerce and Seamen of the United States against the Barbary Powers, ch. 45, 2 Stat. 291 (1804); An Act for the Protection of the Commerce of the United States against the Algerine Cruisers, ch. 90, 3 Stat. 290 (1815) (under President Madison).

44 See generally Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800). In Bas, the Supreme Court was presented with the status of the ship Eliza, which was secured during the quasi-war with France. Id. at 37. The Justices all agreed that there are different types of war, each having a different legal significance. Id. at 39-46. Justice Washington wrote as follows:
It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called *solemn*, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorized to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorized 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 nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrain the general power.

*Id.* at 40-41. More specifically on the war powers of Congress, Justice Chase's explained:

> 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; but if a partial war is waged, its extent and operation depend on our municipal laws.

What, then, is the nature of the contest subsisting between *American* and *France*? In my judgment, it is a limited, partial war. Congress has not declared war in general terms; but congress has authorized 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; and the authority is not given, indiscriminately, to every citizen of *America*, against every citizen of *France*, but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.

... As there may be a public general war, and a public qualified war; so there may, upon correspondent principles, be a general enemy, and a partial enemy. The designation of 'enemy' extends to a case of perfect war; but as a general designation, it surely includes the less, as well as the greater, species of warfare. If congress had chosen to declare a general war, *France* would have been a general enemy; having chosen to wage a partial war, *France* was, at the time of the capture, only a partial enemy; but still she was an enemy.

*Id.* at 43-44. As Justice Paterson summarized, "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 mod-
President Van Buren

In 1838 Attorney General Benjamin F. Butler prepared a legal opinion addressed to the Secretary of War in which he opined, "There are indeed, cases in which a war between the United States and a public enemy may exist without the sanction of Congress—as where an unexpected war is commenced against the United States, and waged before Congress act upon the subject." General Butler explained to the Secretary of War that a "public war" had existed with the Seminoles since January 1836, regardless of the fact that "no formal declaration of war has been made, (probably because deemed unnecessary,)" by Congress. He concluded that since Congress had provided funds for the suppression of the Indians, "the war, on our part, has been waged by authority of the legislative department, to whom the power of making war has been given by the constitution.

President Pierce

In 1854, acting under orders from President Franklin Pierce and Secretary of the Navy James C. Dubbin, Lt. George Nicholas Hollins ordered the bombardment of Greytown, Nicaragua due to pleas from American citizens living there asserting that they were refused payments for damages caused to the U.S. Consuls Office by a local mob. Upon returning to the United States, Hollins was sued for damages caused by the attack. Supreme Court Justice Samuel Nelson, on circuit, ruled in Durand v. Hollins that the President was the sole authority for Americans to appeal to in disputes involving foreign nations. Moreover, he ruled that the President alone is responsible for protecting the rights and safety of American citizens in foreign nations, stating:

The executive power, under the constitution, is vested in the president of the United States. He is commander-in-chief of the army and navy, and has imposed upon him the duty to "take care that the laws are faithfully executed" . . .

As the executive head of the nation, the president is made the only legitimate organ of the general government, to open and...
carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens. It is to him, also, the citizens abroad must look for protection of person and of property, and for the faithful execution of the laws existing and intended for their protection. For this purpose, the whole executive power of the country is placed in his hands, under the constitution, and the laws passed in pursuance thereof; and different departments of government have been organized, through which this power may be most conveniently executed, whether by negotiation or by force—a department of state and a department of the navy.

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action.

... [T]he interposition of the president abroad, for the protection of the citizen, must necessarily rest in his discretion.... The question whether it was the duty of the president to interpose for the protection of the citizens at Greytown against an irresponsible and marauding community that had established itself there, was a public political question, in which the government, as well as the citizens whose interests were involved, was concerned, and which belonged to the executive to determine; and his decision is final and conclusive, and justified the defendant in the execution of his orders given through the secretary of the navy. 51

Justice Nelson concluded that:

Under our system of government, the citizen abroad is as much entitled to protection as the citizen at home. The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving. 52

This opinion has never been reversed; in fact, it is cited as one of the earliest and still valid affirmations of the President's sole power and responsibility to conduct foreign policy with both diplomatic and military options at his disposal. 53 The Supreme Court affirmed

51 Id. (citations omitted).
52 Id.
53 "[T]he Durand case stands for the proposition that the President has the discretion to take whatever steps may be necessary, short of a full scale war, to protect
this view of presidential power in the landmark case United States vs. Curtiss-Wright,53 holding that because of the President's position of securing both diplomatic and intelligence correspondence provided to his office, by the very nature of the office, and because the Constitution places upon the President the power of Commander in Chief, the President is the sole organ of foreign and military policy under the Constitution.55

In 1857 President Franklin Pierce received information that the Governor of the Territory of Washington had declared martial law, and his Secretary of State therefore asked the Attorney General if any additional action should be taken on the President's part.56 General Cushing stated that no additional action was required, and if any violation of individual rights occurred as a result of actions by the governor, it was to be addressed by the judicial tribunals of the territory.57 General Cushing's opinion is noteworthy because of his observation on the chief executive power to suspend individual rights, including the writ of habeas corpus.58 His views on the power to suspend the writ would differ from the opinion that President Lincoln's Attorney General would assert four years later. General Cushing stated emphatically that the suspension of the writ was not within executive power to order:


[T]he President is the "sole organ" of the government in foreign affairs. That is, the President and his agents are the country's eyes and ears in negotiation, intelligence sharing and other forms of communication with the rest of the world.

This view has a long and until recently unchallenged history. As was mentioned in the earlier historical section, the phrase originated in Alexander Hamilton's Pacificus papers of 1793 and was used by John Marshall in a House floor debate in 1800. The 1860 lower court decision of Durand v. Hollins described the President as "the only legitimate organ of the government, to open and carry on correspondence or negotiations with foreign nations, in matters concerning the interests of the country or of its citizens."

55 Id. at 319-22.
57 Id.
58 See id. at 372.
In the Constitution, there is one clause, of more apparent relevancy, namely, the declaration that ‘The privilege of the writ of habeas corpus shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.’ This negation of power follows the enumeration of the powers of Congress; but it is general in its terms; it is in the section of things denied, not only to Congress, but to the Federal Government as a government, and to the States. I think it must be considered as a negation reaching all the functionaries, legislative or executive, civil or military, supreme or subordinate, of the Federal Government: that is to say, that there can be no valid suspension of the writ of habeas corpus under the jurisdiction of the United States, unless when the public safety may require it, in cases of rebellion or invasion. And the opinion is expressed by the commentators on the Constitution, that the right to suspend the writ of habeas corpus, and also that of judging when the exigency has arisen, belong exclusively to Congress.\textsuperscript{59}

As discussed below, Chief Justice Marshal, although arguably in dicta, came to the same conclusion in 1807.\textsuperscript{60}

**President Buchanan**

At the dawn of the Civil War, Attorney General Jeremiah S. Black opined in 1860 on the plenary power of the President to control, deploy, and assign duties and functions to the armed forces exclusive of Congress.\textsuperscript{61} He opined to the President:

As commander-in-chief of the army it is your right to decide according to your own judgment what officer shall perform any particular duty, and as the supreme executive magistrate you have power of appointment. Congress could not, if it would, take away from the President, or in anywise diminish the authority conferred upon him by the Constitution.\textsuperscript{62}

Although he supported a strong defense of the power of the President to control the military, General Black had serious reservations on the power of the President to force the states to remain in the union or to comply with national law; both views were rejected by Lincoln and history.\textsuperscript{63} Black’s successor, Attorney General Bates,
became the first Attorney General to formally issue an opinion asserting a complete constitutional theory on presidential power in times of war/national security crises, explaining that the President, "as Commander-in-Chief, is obligated to use his powers to preserve, protect, and defend the Constitution and the people of the United States against domestic rebellion as well as foreign aggression." General Bates's answer to Chief Justice Taney's opinion in *Ex Parte Merryman* that Lincoln had violated the Constitution by preventing his service of the writ of habeas corpus to the General holding Merryman inside a military prison has been advocated by subsequent Attorneys General and presidents for more than a century.

B. The Power of the President in Times of War: The Civil War, Chief Justice Taney, & Attorney General Bates

The writ of habeas corpus, also known as the Great Writ, has a history that reaches back to 1215 and the signing of the Magna Carta, in which the right of a citizen to be free from arbitrary detention was forced upon King John. The Great Writ, as well as a control on unrestrained executive power, was seen as the tool of the King to protect and ensure justice. As Attorney General Bradford explained in an opinion to the Secretary of State:

> It is a writ extensively remedial; and, in Bourn's case, even before the *habeas corpus act*, it was declared to be "a prerogative writ, and that it concerns the king's justice to be administered to his subjects; for the king ought to have an account why any of his subjects are imprisoned, and it is agreeable to all persons and places." Hence it has been awarded to every part of the king's dominions—to places usually privileged, and where, in ordinary cases, the king's writ does not run.

General Bradford concluded that a foreign commander of a ship does not have the authority to hold an English citizen aboard his ship within the territory of Great Britain and refuse service of the Great Writ. The reason being, and here is the point regarding the actions of President Lincoln, that "it cannot be conceived that any sovereign power would permit its subjects to be imprisoned in its
own territory, by foreign authority or violence, without using the most effectual means in its power to procure their enlargement without justification and explanation under the law; therefore, neither the King nor the President can hold a citizen without justification under the law or in violation of the law. As the ship’s captain was subject to the Great Writ, so too were the King and the President.

Prior to President Lincoln’s suspension of the writ of habeas corpus, the Supreme Court had one occasion to review the writ. In Ex parte Bollman, the Court was challenged with the question of whether the federal courts had the authority to issue a writ of habeas corpus. Chief Justice Marshall held that section 14 of the Judiciary Act of 1789 gave the Court such power.

After discussing at length the authorization of the Judiciary to make effective the right to the writ through appeal to the federal Judiciary, in the last paragraphs of his opinion, which is arguably dicta, Marshall wrote the following observation on the power to suspend the great writ:

The decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.

But this point also is decided in Hamilton’s case and in Burford’s case.

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.

Chief Justice Marshall also commented on what the drafters of the Judiciary Act were trying to accomplish in implementing the protections and procedures of the constitutional right to the writ:

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared “that the privilege of the writ of habeas corpus should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it.”

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68 Id.  
69 Cf. id.  
70 Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807).  
71 Id. at 76.  
72 Id. at 77-78.  
73 Id. at 101 (emphasis added).  

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity, for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give, to all the courts, the power of awarding writs of habeas corpus.\textsuperscript{74}

The Supreme Court did not address President Lincoln’s suspension of the writ, but Chief Justice Taney had an opportunity to do so when he issued a writ for John Merryman and it was refused by General George Cadwalader.\textsuperscript{75} On May 25, 1861, John Merryman was arrested under orders of General William Keim, commander of the District of Pennsylvania, and placed in the custody of General Cadwalader, the commander of Fort Henry, which housed the military headquarters for the army responsible for Maryland.\textsuperscript{76} On May 26, 1861, Chief Justice Taney ordered the clerk of the court to issue a writ of habeas corpus and have the U.S. Marshall for Maryland serve the writ to General Cadwalader.\textsuperscript{77} The U.S. Marshall, however, was unable to serve the write because he was not granted access to the fort. Upon failure to enter the fort and serve the Court’s Order, the U.S. Marshall returned the writ and reported the failure to Chief Justice Taney. Unable to enforce the issuance and service of the Order, Chief Justice Taney issued his opinion in \textit{Merryman}.\textsuperscript{78}

The Chief Justice asserted from the beginning of his opinion that the “president has exercised a power which he does not possess under the constitution”\textsuperscript{79} because “the privilege of the writ [can] not be suspended, except by act of congress.”\textsuperscript{80}

\textsuperscript{74} Id. at 95 (emphasis added).
\textsuperscript{75} See \textit{Ex parte Merryman}, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487).
\textsuperscript{76} Id. at 147.
\textsuperscript{78} \textit{Ex parte Merryman}, 17 F. Cas. 144 passim; see also Arthur T. Downey, \textit{The Conflict Between the Chief Justice and the Chief Executive: Ex parte Merryman, 31 J. Sup. Ct. Hist.} 262, 263 (2006); Paulsen, \textit{supra} note 77. Chief Justice Taney issued an oral opinion on May 28, 1861, followed by a written opinion on June 1, 1861. On July 10, 1861, Merryman was indicted for treason, but on May 6, 1863, the government moved to quash the indictment, only to be indicted again on July 28, 1863. Bruce A. Ragsdale, \textit{Ex Parte Merryman and Debates on Civil Liberties During the Civil War} 12-13 (2007), \textit{Fed. Jud. Ctr.}, http://www.fjc.gov/history/docs/merryman.pdf. The case finally ended on April 23, 1867, when “U.S. Attorney Andrew Ridgely entered a \textit{nolle prosequi} in \textit{United States v. Merryman}, thus ending prosecution of the treason case.” Id. at 13.
\textsuperscript{79} \textit{Ex parte Merryman}, 17 F. Cas. at 148.
\textsuperscript{80} Id.
Taney proclaimed simply that the power of suspension of the writ is mentioned in the Constitution within Article I Section 9, which is listed within the powers of the Congress under the Constitution.\textsuperscript{81} Further, the list of powers of the Executive, Taney asserted, did not include the suspension of the writ.\textsuperscript{82} Taney concluded that “if the high power over the liberty of the citizen now claimed, was intended to be conferred on the president, it would undoubtedly be found in plain words in this article; but there is not a word in it that can furnish the slightest ground to justify the exercise of the power.”\textsuperscript{83} Further, the Framers placed limits on the power to suspend the writ both by placing the power to suspend it in the branch of government that is directly responsible to and representative of the people—namely Congress—and limiting the ability of Congress to suspend it only in times of insurrection, rebellion, or invasion.\textsuperscript{84}

Defending judicial authority in the area of adjudication of criminal activity, Taney stated that it is a judicial, rather than executive, function to make determinations of arrest and guilt.\textsuperscript{85} The Chief Justice explained that the President:

[I]s not empowered to arrest any one charged with an offence against the United States, and whom he may, from the evidence before him, believe to be guilty; nor can he authorize any officer, civil or military, to exercise this power, for the fifth article of the amendments to the constitution expressly provides that no person “shall be deprived of life, liberty or property, without due process of law”—that is, judicial process.

Even if the privilege of the writ of habeas corpus were suspended by act of congress, and a party not subject to the rules and articles of war were afterwards arrested and imprisoned by regular judicial process, he could not be detained in prison, or brought to trial before a military tribunal, for the article in the amendments to the constitution immediately following the one above referred to (that is, the sixth article) provides, that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

\textsuperscript{81} Id.
\textsuperscript{82} Id. at 148-49.
\textsuperscript{83} Id. at 149.
\textsuperscript{84} Id. at 148.
\textsuperscript{85} Ex parte Merryman, 17 F. Cas. at 149.
process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."\(^{96}\)

Furthermore, the Judiciary, asserted Chief Justice Taney, can handle cases involving acts of treason or other unlawful acts during war.\(^{87}\) The principle that would be argued one hundred and forty-three years later before the Supreme Court\(^{88}\)—that the civilian courts are not to be supplanted by the military—was first asserted by Chief Justice Taney:

For, at the time these proceedings were had against John Merryman, the district judge of Maryland, the commissioner appointed under the act of congress, the district attorney and the marshal, all resided in the city of Baltimore, a few miles only from the home of the prisoner. \(\text{Up to that time, there had never been the slightest resistance or obstruction to the process of any court or judicial officer of the United States, in Maryland, except by the military authority.}\) And if a military officer, or any other person, had reason to believe that the prisoner had committed any offence against the laws of the United States, it was his duty to give information of the fact and the evidence to support it, to the district attorney; it would then have become the duty of that officer to bring the matter before the district judge or commissioner, and if there was sufficient legal evidence to justify his arrest, the judge or commissioner would have issued his warrant to the marshal to arrest him; and upon the hearing of the case, would have held him to bail, or committed him for trial, according to the character of the offence, as it appeared in the testimony, or would have discharged him immediately, if there was not sufficient evidence to support the accusation. \(\text{There was no}\)

\(^{96}\) Id.

\(^{87}\) Id.

\(^{88}\) See Boumediene v. Bush, 553 U.S. 723 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rasul v. Bush, 542 U.S. 466 (2004); see also Reid v. Covert, 345 U.S. 524 (1957) (Congress cannot authorize military trials of civilian dependents of active military personnel); Toth v. Quarles, 350 U.S. 11 (1955) (Congress cannot authorize the seizure of an American citizen for military trial for crimes that were committed while in the military when such a person has been discharged from the military); Duncan v. Kahanamoku, 327 U.S. 304 (1944) (The President does not have the power to close federal courts and impose martial law during a time of war in a state or part of a state that is loyal to the United States in which the Courts are open and functioning); Ex parte Quirin, 317 U.S. 18 (1942) (citizenship does not bar punishment for the violations of the laws of war and the President has the power to create military commissions for violations of the laws of war); Ex parte Milligan, 71 U.S. 2 (1866) (The President cannot subject civilians to military arrest and military justice when such a person is not a member of the military and not engaged in disloyal service to an enemy of the United States in time of war. Military law cannot be imposed where the federal courts are open and loyal to the United States).
danger of any obstruction or resistance to the action of the civil authorities, and therefore no reason whatever for the interposition of the military. 89

Taney asserted that "where the 'life liberty or property' of a private citizen is concerned[,]" the President's authority, under the Constitution:

[I]s the power and duty prescribed in the third section of the second article, which requires "that he shall take care that the laws shall be faithfully executed." He is not authorized to execute them himself, or through agents or officers, civil or military, appointed by himself, but he is to take care that they be faithfully carried into execution, as they are expounded and adjudged by the coordinate branch of the government to which that duty is assigned by the constitution. It is thus made his duty to come in aid of the judicial authority, . . . but in exercising this power he acts in subordination to judicial authority, assisting it to execute its process and enforce its judgments. 90

The President has the power to "take care that the laws are faithfully executed," but he "certainly does not faithfully execute the laws, if he takes upon himself legislative power, by suspending the writ of habeas corpus, and the judicial power also, by arresting and imprisoning a person without due process of law." 91 Chief Justice Taney asserted that the United States government was "one of delegated and limited powers" of which each of the branches of government can only exercise powers specifically granted by the Constitution. 92 Taney rejected the proposition that the President had any inherent powers to suspend the writ on his own authority:

If the president of the United States may suspend the writ, then the constitution of the United States has conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown; a power which the queen of England cannot exercise at this day, and which could not have been lawfully exercised by the sovereign even in the reign of Charles the First. 93

And no one can believe that, in framing a government intended to guard still more efficiently the rights and liberties of the citizen, against executive encroachment and oppression,

90 Ex parte Merryman, 17 F. Cas. at 149.
91 Id.
92 Id.
93 Id. at 151.
they would have conferred on the president a power which the history of England had proved to be dangerous and oppressive in the hands of the crown; and which the people of England had compelled it to surrender, after a long and obstinate struggle on the part of the English executive to usurp and retain it. 

The Chief Justice posited that the threat to civil liberty and executive tyranny, a threat the founders sought to prevent, was realized with the actions of President Lincoln’s suspension of the writ:

[T]he military authority . . . has, by force of arms, thrust aside the judicial authorities and officers to whom the constitution has confided the power and duty of interpreting and administering the laws, and substituted a military government in its place, to be administered and executed by military officers.

Yet, under these circumstances, a military officer . . . assumes to himself the judicial power in the district of Maryland; undertakes to decide what constitutes the crime of treason or rebellion; what evidence (if indeed he required any) is sufficient to support the accusation and justify the commitment; and commits the party, without a hearing, even before himself, to close custody, in a strongly garrisoned fort, to be there held, it would seem, during the pleasure of those who committed him.

The constitution provides, as I have before said, that “no person shall be deprived of life, liberty or property, without due process of law.” It declares that “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” It provides that the party accused shall be entitled to a speedy trial in a court of justice.

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended, like the writ of habeas corpus, by a military order, supported by force of arms. Such is the case now before me, and I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus, upon any pretext or under any circumstances, be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws, but every citizen holds life, liberty and property at the will and pleasure of the army officer in whose military district he may happen to be found.

The Chief Justice concluded that he would provide President Lincoln with a copy of his opinion so as to give the President time to

91 Id. at 150.
95 Id. at 152 (emphasis added).
provide an answer and "determine what measures he will take to cause the civil process of the United States to be respected and enforced."

A month after Taney issued his written opinion, the Chief Justice got his answer. On July 4, 1861, President Lincoln before a special joint session of Congress rhetorically asked:

[A]re all the laws, but one to go unexecuted, and the Government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken if the government should be overthrown, when it was believed that disregarding the single law would tend to preserve it?

To Lincoln, the issue was quite simple: Assuming that he did not have the power to suspend the writ in times of rebellion, it would be ridiculous to comply with such limitations with the result being the destruction of the union. If he had not the power, Lincoln would act so as to preserve the union regardless of legal niceties. The preservation of the union, Lincoln implied, is a constitutional principle and is of greater importance than the strict legal reading of one section of the Constitution. To follow one section to the detriment of the whole document and the government formed upon it, Lincoln thought, would sacrifice the ultimate end to a specific mean.

Lincoln's actions introduced the maxim *Salus Populi, Suprema Lex* into the continuing growth of presidential power in American political thought. The maxim that "the safety of the people is the supreme law" and that the President is duty bound by the "law of saving our country when in danger" has been adopted by every President since. President Bush strenuously advocated this principle. This maxim of protecting the "safety of the American people" as the highest law coupled with the "law of necessity" was the centerpiece of President Bush's actions after the attacks of September 11, 2001. After the attacks of 9/11 the American people were in accord with this view. It was to the President that the nation turned for action and protection after 9/11, not Congress. "Members of Congress who demanded that Congress take the lead

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96 *Ex parte Merryman*, 17 F. Cas. at 152.


98 See id.

99 Id.

in the redrafting of laws dealing with anti-terrorism strategy and those who asserted that the legislation proposed by the President threatened civil liberties were assailed as providing assistance to the terrorists.  

Within the body of a strong democracy are the seeds of its destruction; because a democracy can elect itself out of all of its freedoms and rights if the fear of destruction overrides considerations of liberty for a long enough period of time. The founding generation understood this. The Federalists theory of government, developed by Hamilton, Madison, Wilson, and others, asserted that the protection against the possibility of tyranny was a limited and divided government. The Anti-Federalists, although losing the fight to keep the Articles of Confederation, won the promise to amend the Constitution with specific amendments spelling out the rights that government could not disregard, regardless of the system of checks and balances.

Madison wrote in Federalist 51:

[i]f men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.  

One of the reasons for the need for auxiliary precautions is society’s tendency to give up liberty for security. Benjamin Franklin warned against believing in the utility of safety bought at the expense of liberty. He warned that a society that “would give up essential Liberty, to purchase a little temporary Safety, deserve[s] neither Liberty nor Safety.” The founding generation understood that in a democracy, security and order are not secured when the people no longer hold dear the virtues of liberty and freedom. Madison observed: “To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea.” Benjamin Franklin said as much when he ob-

\*101 Garrison, Supreme Court Jurisprudence, supra note 10, at 55.  
\*102  The Federalist No. 51 (Madison).  
\*103 Benjamin Franklin, Pennsylvania Assembly: Reply to the Governor (Nov. 11, 1755), in The Papers of Benjamin Franklin 242 (Leonard W. Labaree ed. 1963).  
\*104 5 James Madison, June 20—Power of Judiciary, in The Writings of James Madison 223 (Gaillard Hunt ed., 1900). The full text context of the quote, shown below, involves Madison’s belief that a republican government can fall into debauchery
served that "only a virtuous people are capable of freedom. As nations become corrupt and vicious, they have more need of masters." Samuel Adams earlier asserted that there was a link between public education extolling the virtues of freedom and liberty into the people as a whole, the national security of the new nation, and the quality of the leadership of the nation:

A general Dissolution of Principles & Manners will more surely overthrow the Liberties of America than the whole Force of the Common Enemy. While the People are virtuous they cannot be subdued; but when once they lose their Virtue they will be ready to surrender their Liberties to the first external or internal invader. . . . If you are of my Mind, and I think you are, the Necessity of supporting the Education of our Country must be strongly impressed on your Mind. It gives me the greatest Concern to hear that some of our Gentlemen in the Country begin to think the Maintenance of Schools too great a Burden. . . . Virginia is duly sensible of the great Importance of Education, and as a friend in that Country informs me, has lately adopted an effectual Plan for that necessary Purpose. If Virtue & Knowledge are diffus'd among the People, they will never be enslav'd. This will be their great Security. Virtue & Knowledge will forever be an even Balance for Powers & Riches. I hope our Countrymen will never depart from the Principles & Maxims which have been handed down to us from our wise forefathers. This

but it can also rise to greatness. Madison asserted that it is not the virtue in leaders that matters but the virtue in the people who choose the leaders:

I have observed, that gentlemen suppose, that the general legislature will do every mischief they possibly can, and that they will omit to do every thing good which they are authorized to do. If this were a reasonable supposition, their objections would be good. I consider it reasonable to conclude, that they will as readily do their duty, as deviate from it: nor do I go on the grounds mentioned by gentlemen on the other side—that we are to place unlimited confidence in them, and expect nothing but the most exalted integrity and sublime virtue. But I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom. Is there no virtue among us? If there be not, we are in a wretched situation. No theoretical checks—no form of government can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea. If there be sufficient virtue and intelligence in the community, it will be exercised in the selection of these men. So that we do not depend on their virtue, or put confidence in our rulers, but in the people who are to choose them.

Id.

greatly depends upon the Example of Men of Character & Influence of the present Day."  

Only a virtuous nation can know how to balance the need for security with the protection of liberty. It is only the virtues of liberty, freedom, and the rule of law in a nation that set the outer boundaries of the range of options to secure internal security. To the powerful and mighty waves of the necessity for safety and security, liberty says "this far you may come but no farther and here your proud waves must stop." But we digress.

On July 5, 1861, Attorney General Edward Bates provided the Administration’s legal answer to the Chief Justice on the questions of whether the President had the power to arrest and hold suspected insurgents and others who were suspected of providing criminal support to those in rebellion and whether the President had the power to refuse to obey a writ of habeas corpus issued from a federal court. The publication of the opinion by General Bates was the only legal response of the Lincoln Administration on the constitutional issues regarding the suspension of the writ.

Is the arrest of spies, saboteurs, sympathizers and men engaged in supporting those who are in armed rebellion against the United States a political or judicial matter? Is it a question of war or crime? In his opinion on the power of the President to suspend the writ of habeas corpus, General Bates answered that it was a political and military matter, not a judicial matter, and as such it was not for the courts to interfere in those political/military determinations.

General Bates wrote:

Besides, the whole subject-matter is political and not judicial. The insurrection itself is purely political. Its object is to destroy the political government of this nation and to establish another political government upon its ruins. And the President, as the

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chief civil magistrate of the nation, and the most active department of the Government, is eminently and exclusively political, in all his principal functions. As the political chief of the nation, the Constitution charges him with its preservation, protection, and defence, and requires him to take care that the laws be faithfully executed. And in that character . . . he wages open war against armed rebellion, and arrests and holds in safe custody those whom, in the exercise of his political discretion, he believes to be friends of, and accomplices in, the armed insurrection, which it is his especial political duty to suppress. He has no judicial powers. And the judiciary department has no political powers, . . . therefore . . . no court or judge can take cognizance of the political acts of the President, or undertake to revise and reverse his political decisions.109

Reaching a conclusion as to the powers of the President, Bates further stated:

[S]hall it be said that when he has fought and captured the insurgent army, and has seized their secret spies and emissaries, he is bound to bring their bodies before any judge who may send him a writ of habeas corpus, "to do, submit to, and receive whatever the said judge shall consider in that behalf?"

I deny that he is under any obligation to obey such a writ.110

General Bates made clear in his opinion that the Presidency, in times of peace and in war, is the branch of government that, by the Constitution, is to take the initiative to make sure that the laws are faithfully executed as well as to support, preserve, protect, and defend the Constitution of the United States. Under the Constitution, General Bates asserted:

[I]n a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.111

General Bates makes a very interesting and familiar assertion of presidential power based on the Constitution:

The last clause of the oath is peculiar to the President. All the other officers of the Government are required to swear only "to support this Constitution;" while the President must swear to "preserve, protect and defend" it, which implies the power to per-

110 Id. at 90.
111 Id. at 81.
form what he is required in so solemn a manner to undertake. And then follows the broad and compendious injunction to "take care that the laws be faithfully executed." And this injunction, embracing as it does all the laws—Constitution, treaties, statutes—is addressed to the President alone, and not to any other department or officer of the Government. And this constitutes him, in a particular manner, and above all other officers, the guardian of the Constitution—its preserver, protector, and defender.  

... [I]t is plainly impossible for him to perform this duty without putting down rebellion, insurrection, and all unlawful combinations.... 

... The end, the suppression of the insurrection, is required of him; the means and the instruments to suppress it are lawfully in his hands; but the manner in which he shall use them is not prescribed.... He is, therefore, necessarily, thrown upon his discretion, as to the manner in which he will use his means to meet the varying exigencies as they rise.

The President, not Congress or the Judiciary, is the protector and defender of the Constitution, its principles, and its institutions. Lincoln shared this perception of the Presidency. In February 1861 during a debate with New York representatives to a peace conference in New York City, Lincoln said the following in regard to his perception of the duty of one who is President of the United States even if such duty sows the seeds of war:

I shall take an oath. I shall swear that I will faithfully execute the office of President of the United States, of all the United States, and that I will, to the best of my ability, preserve, protect, and defend the Constitution of the United States. This is a great and solemn duty. With the support of the people and the assistance of the Almighty I shall undertake to perform it. I have full faith that I shall perform it. It is not the Constitution as I would like to have it, but as it is, that is to be defended. The Constitution will not be preserved and defended until it is enforced and obeyed in every part of every one of the United States. It must be so respected, obeyed, enforced, and defended, let the grass grow where it may.

General Bates agreed with the Chief Justice that those who are in rebellion could be brought to court for trial, but asserted that there is another interest in the detention of those who support in-

112 Id. at 82.
113 Id. at 82-83.
114 LUCIUS E. CHITTENDEN, RECOLLECTIONS OF PRESIDENT LINCOLN AND HIS ADMINISTRATION 75 (1904).
surrection and rebellion during open civil war. That interest is to arrest and imprison them in order to place them “in custody for the milder end of rendering them powerless for mischief, until the exigency is past.” General Bates would not be the last Attorney General to make this argument. Slightly less than a century and a half later, the Bush Administration would argue that the President, as Commander in Chief, had the power to detain “enemy unlawful combatants” for the purpose of gathering intelligence and removing them from the war on terror. General Bates was not without legal precedence for his opinion, for he cited *Martin v. Mott*, *Fleming v. Page*, and *Luther v. Borden*, the three leading Supreme Court opinions at the time on the President’s power as Commander in Chief. The proposition by General Bates that the President is “the guardian of the Constitution—its preserver, protector and defender” is the antecedent to the view of presidential power that was asserted by President Bush and Vice President Chaney—that the President is the empowered as Commander in Chief to act to protect the people of the United States and this broad power carries various inherent powers to act in the pursuit of that protection.

115 Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. at 84.
117 See *Fleming v. Page*, 50 US (9 How) 603, 615 (1850) ("His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."); *Luther v. Borden*, 48 US (7 How) 1, 43 (1849) ("By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President."); *Martin v. Mott*, 25 US (12 Wheat.) 19, 30 (1827) ("We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress."). *But see Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177 (1804) ("It is by no means clear that the president of the United States whose high duty it is to ‘take care that the laws be faithfully executed,’ and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce."); *Talbot v. See man*, 5 U.S. (1 Cranch) 1, 28 (1801) ("The whole powers of war being by the constitution of the United States, vested in Congress. . ."); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) ("Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time.").
118 Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att’y Gen. at 82.
Since General Bates's opinion more than a century and a half ago, each Administration has asserted that the Constitution, in regard to presidential power, specifically grants the power to the President to protect American interests. As Bates asserted—and modern presidents have agreed—in times of war and national security crisis, "the President must, of necessity, be the sole judge, both of the exigency, which requires him to act, and of the manner in which it is most prudent for him to employ the powers entrusted to him, to enable him to discharge his constitutional and legal duty . . . [a]nd this discretionary power of the President is fully admitted by the Supreme Court."  

As to the obligation of the President to obey a court-issued writ of habeas corpus, General Bates did "not understand how it can be legally possible for a judge to issue a command to the President to come before him ad subiciendum—that is, to submit implicitly to his judgment." After all, "the President and the judiciary are coordinate departments . . . [with] one not subordinate to the other" and in a case of dealing with a military rebellion, the Judiciary has no place under the Constitution to act. After conceding that the answer to his question is based on the meaning of the Habeas Corpus Clause and that the "habeas corpus" mentioned in the Constitution is the "Great Writ" under English common law, Bates concluded that "the Constitution is silent as to who may suspend it when the contingency happens." In answering the Chief Justice that suspension of the writ is for the Legislature to do and not the President, General Bates opined:

If by the phrase the suspension of the privilege of the writ of habeas corpus, we must understand a repeal of all power to issue the writ, then I freely admit that none but Congress can do it. But if we are at liberty to understand the phrase to mean, that, in case of a great and dangerous rebellion, like the present, the public safety requires the arrest and confinement of persons implicated in that rebellion, I as freely declare the opinion, that the President has lawful power to suspend the privilege of persons arrested under such circumstances. For he is especially charged by the Constitution with the "public safety," and he is the sole judge of the emergency which requires his prompt action.

... .

For, not doubting the power of the President to capture and hold by force insurgents in open arms against the Government,
and to arrest and imprison their suspected accomplices, I never thought of first suspending the writ of habeas corpus, any more than I thought of first suspending the writ of replevin, before seizing arms and munitions destined for the enemy.

The power to do these things is in the hand of the President, placed there by the Constitution . . . to be used by him, in his best discretion, in the performance of his great first duty—to preserve, protect, and defend the Constitution. 123

The suspension of habeas corpus is a matter for Congress alone, if what is proposed is to prevent the courts from issuing the writ in toto. But the writ can be suspended by presidential order if applied only to those involved in open acts of rebellion and those who provide support to those in rebellion. Thus General Bates proposes two types of suspension of the writ—a general suspension and a specific suspension. 124 The former case requires an act of Congress to change or eliminate the powers of the Judiciary to issue the writ because it is Congress who gave the Judiciary the power in the first place. 125 But in the latter case, the President is acting in a "political" matter in which he has determined that specific individuals are in rebellion and/or support rebellion and such individuals can be arrested and held under the constitutional powers of the President to " preserve, protect, and defend" the Constitution. 126

In the annals of research and writing on the growth of the President and his powers to act in times of war and national security, not enough notice is paid to General Bates. His opinion has lived on in every president’s assertion of power in times of crisis ever since. President Bush, for more than two years after the attacks of September 11, 2001, asserted that his detention of enemy combatants, refusal to allow detainees access to the courts through habeas corpus, 127 and position on presidential power in general were totally in line with the opinion of General Bates. It is said that there is nothing new under the sun, and the opinions of General Bates and Chief Justice Taney, along with the Pacificus/Helvidius papers, are antecedents to the arguments on the powers asserted by the Bush Administration in the post-September 11 world. 128

123 Id. at 90-91.
125 Id. at 89.
126 Id.
127 Garrison, Hamdi, Padilla and Rasul, supra note 10, at 129; see supra note 108.
128 See e.g., Downey, supra note 78, at 273; John Frank, Edward Bates, Lincoln’s Attorney General, 10 AM. J. LEGAL HIST. 34, 43 (1966); Paulsen, supra note 77, at 95; Mar-
C. The Power of the President in Times of War: The Opinions of Twentieth Century Attorneys General, State Department Solicitors and Legal Advisors, & the OLC

Soon after the Civil War, Attorney General Charles Devens provided President Rutherford Hayes an opinion in 1877 regarding the power of the President to convene courts martial in the absence of congressional authorization. In explaining how to define the powers of the President acting as Commander in Chief, General Devens opined as follows:

As has been already observed, the Constitution, while it declares that the President shall be Commander-in-Chief of the Army, does not define the functions of that office, but these are left to be ascertained by reference to the law and usage of our military service as it existed when the Constitution was formed. On examination of the history of this service down to that period, it is found that the Commander-in-Chief, among the duties of whose office, as set forth in his commission, was that of causing "strict discipline and order to be observed in the Army," from time to time exercised authority to appoint general courts-martial without any formal or specific grant of the authority, but nevertheless with the tacit sanction of Congress and the acquiescence of the Army; and thus it became the established law and usage of the military service of the United States for the Commander-in-Chief to exercise such authority. The conclusion to which this directly leads is, that, as Commander-in-Chief of the Army, the President is by the Constitution invested with authority to constitute general courts-martial, and, consequently, can legally exercise such authority without a legislative grant.

The point made by General Devens is that a presidential action, although not explicitly provided by statute or by a clause within the Constitution, is lawful when (1) the action is reasonably attached to a constitutional power and (2) its use has historically been accepted by Congress; this is an assertion that has been advocated by every presidential administration since in times of war and national crisis.

President McKinley

At the dawn of the twentieth century Acting Attorney General John Richards provided an opinion with an echo that would resonate

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nate as the dominant explanation of the Commander in Chief power held by the President. In 1898 General Richards opined that

\[ \text{t} \text{he preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. The Constitution, established by the people of the United States as a fundamental law of the land, has conferred upon the President the executive power; has made him the commander in chief of the Army and Navy . . . and has made it his duty to take care that the laws be faithfully executed. In protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory and its international rights and obligations as a distinct sovereignty, the President is not limited to the enforcement of specific acts of Congress. He takes a solemn oath to faithfully execute the office of President, and to preserve, protect, and defend the Constitution of the United States. To do this he must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.} \]

The President has charge of our relations with foreign powers. It is his duty to see that in the exchange of comities among nations we get as much as we give.\textsuperscript{131}

**President Taft**

The Office of the Attorney General was not the sole legal officer to opine on the power of the President when acting as Commander in Chief. History has defined the power of the President as Commander in Chief not only as a power to use the armed forces but, along with the general executive power, to control and conduct American foreign policy. As such, the State Department has provided its own assessment of the President's exclusive powers under the Constitution. The State Department in an August 1912 memorandum affirmed the view that the President, as Commander in Chief, has the inherent authority to protect the lives and property of U.S. citizens abroad with the use of the military, if necessary, and that such use of force did not constitute acts of war.\textsuperscript{132} J. Reuben Clark, Solicitor of the Department of State under President William Howard Taft, agreeing with the positions taken by the Attorneys General of the nineteenth century, asserted that “begin-
ning with the time of President Jefferson, and running on down to the present, the Executive has consistently . . . declared that it possessed the right to protect with the forces of the United States the life and property of American citizens” and added that the exercising of that power does not necessarily constitute an act of war if done so on foreign soil.133 “[T]he landing and operation of American forces in foreign countries for the protection of American citizens do not constitute either a declaration of war or acts of war, though it is quite obvious that such acts may lead to a state of war if resistance is encountered.”134 The significance of this distinction between presidential foreign policy decisions that may lead to war (or involved military hostilities) and the need for a formal declaration of war from Congress echoed the views of former Attorneys Generals and Presidents:

The Constitution . . . authorizes Congress “to declare war.” It does not . . . empower the Congress to authorize the President to use the forces of the United States to perform on foreign soil services or acts not amounting to acts of war.

. . . . [I]t is not believed that Congress may, merely because it is authorized to declare war . . . be considered as possessing the power to direct the President in the employment of forces in operations not amounting to war against a foreign country.135

Clark points out the difference between declaring war, a power rested solely with Congress, and the power to protect the American citizens with military force if necessary, which is rested in the President—the latter not being an act of war.136 Clark’s view that the power to declare war is not coupled to the use of military force to protect the American people or American interests was not a new idea. Nor was this the last time this position would be advocated in American foreign policy or legal arguments. Being a State Department Solicitor, Clark also depended on principles of international law and the power of nations to protect their interests as additional support for the defense of presidential power to send armed forces abroad without the need for specific congressional action. Specifically, Clark concluded:

It is therefore believed, as already stated, that the President may, under his constitutional powers and without the necessity

133 CLARK, supra note 132, at 43.
134 Id. at 40.
135 Id.; see also Hamilton v. McClaughry, 136 F. 445, 449 (C.C.D. Kan. 1905) (Observing that “[a] formal declaration of war, however, is unnecessary to constitute a condition of war”).
136 CLARK, supra note 132, at 44.
of ancillary legislation, enforce those rules and principles of international law involved in the matter under discussion.\textsuperscript{137}

\textbf{President Wilson}

Two years later, Attorney General T.W. Gregory issued an opinion supporting the power of President Wilson to order the censorship of domestic radio transmissions. Affirming the views of his nineteenth century colleagues, in a very matter-of-fact tone of reasoning, he explained that the exercise of the President's Commander in Chief power rests on the assumption that the President will use this power in a lawful and proper manner:

The President of the United States is at the head of one of the three great coordinate departments of the Government. He is Commander in Chief of the Army and the Navy. In the preservation of the safety and integrity of the United States and the protection of its responsibilities and obligations as a sovereignty, his powers are broad. In the words of Mr. Justice Miller in \textit{In re Neagle...}, his power includes the enforcement of the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution.

If the President is of the opinion that the relations of this country with foreign nations are, or are likely to be, endangered by actions deemed by him inconsistent with a due neutrality, it is his right and duty to protect such relations; and in doing so, in the absence of any statutory restriction, he may act through such executive officer or department as appears best adapted to effectuate the desired end. . . .

The powers above outlined are not novel; they have been exercised in numerous emergencies by Presidents of the United States; and, whenever their exercise has been attacked in legal proceedings, their validity had, with hardly an exception, been upheld by the courts. Such powers intrusted [sic] to the President are of a fundamental nature, exerted to maintain or preserve the security of the Nation, and subject to that high responsibility to which the Executive is held by the American people; they are not likely to be abused, and not without the gravest reasons are the courts likely to withhold their sanction.\textsuperscript{138}

\textsuperscript{137} \textit{Id.} at 48.

President Roosevelt

The continuity of legal thought on presidential power was maintained in 1939 when Attorney General Frank Murphy answered a congressional inquiry as to the extent of the President’s powers after he has declared a national emergency. Although maintaining that under law and tradition the Attorney General was not authorized to provide legal opinions to Congress, General Murphy provided this conclusion on the powers of the Presidency:

You are aware, of course, that the Executive has powers not enumerated in the statutes—powers derived not from statutory grants but from the Constitution. It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance. These constitutional powers have never been specifically defined, and in fact cannot be, since their extent and limitations are largely dependent upon conditions and circumstances. In a measure this is true with respect to most of the powers of the Executive, both constitutional and statutory. The right to take specific action might not exist under one state of facts, while under another it might be the absolute duty of the Executive to take such action.139

In 1940, Attorney General Robert Jackson opined on the power of the President to make arrangements with Great Britain to exchange naval vessels for the rights to establish military bases on territories held by the British without making such agreements formal treaties subject to Senate approval.140 General Jackson opined that the answer to the question “involves consideration of two powers which the Constitution vests in the President:”

One of these is the power of the Commander in Chief of the Army and Navy of the United States, which is conferred upon the President by the Constitution but is not defined or limited . . . . But it will hardly be open to controversy that the vesting of [the Commander in Chief] function in the President also places upon him a responsibility to use all constitutional authority which he may possess to provide adequate bases and stations for the utilization of the naval and air weapons of the United States at their highest efficiency in our defense. . . .

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140 Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att’y Gen. 484 (1940).
141 Id. at 486.
The second power to be considered is that control of foreign relations which the Constitution vests in the President as a part of the Executive function.\textsuperscript{142} As a constitutional matter, General Jackson concluded that the negotiations for the locations of the bases did not require Senate approval because the negotiations did not involve future expenditures of funds nor did they involve the establishment of present or future United States obligations.\textsuperscript{143} While acknowledging that the power of the President in foreign relations is not unlimited, he provided a very restrictive interpretation on the need for Senate involvement in foreign policy negotiations.

Some negotiations involve commitments as to the future which would carry an obligation to exercise powers vested in Congress. Such Presidential arrangements are customarily submitted for ratification by a two-thirds vote of the Senate before the future legislative power of the country is committed. However, the acquisitions which you are proposing to accept are without express or implied promises on the part of the United States to be performed in the future. The consideration, which we later discuss, is completed upon transfer of the specified items. The Executive agreement obtains an opportunity to establish naval and air bases for the protection of our coastline but it imposes no obligation upon the Congress to appropriate money to improve the opportunity. It is not necessary for the Senate to ratify an opportunity that entails no obligation.\textsuperscript{144}

In 1941 Attorney General Robert Jackson expanded on his opinion on the President's responsibility to protect American interests and that the President was at liberty to use the military to this end.

Article II, section 2, of the Constitution provides that the President 'shall be Commander in Chief of the Army and Navy of the United States.' By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in time of peace as well as in time of war.\textsuperscript{145}

On the question of whether the President had the power to authorize the training of British pilots within the United States by military

\textsuperscript{142} Id.
\textsuperscript{143} See id. at 486-87.
\textsuperscript{144} Id. at 487.
\textsuperscript{145} Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61 (1941) (quotations omitted).
personnel, General Jackson concluded that no statute precluded such use of military personnel, but as a constitutional matter, the President had the authority to authorize such use regardless of congressional approval. General Jackson cited two treatises on constitutional law, one of which concluded that by “virtue of his rank as head of the forces, he has certain powers and duties with which Congress cannot interfere,” including how the President “may regulate the movements of the army and the stationing of them at various posts . . . . [and] the movements of the vessels of the navy, sending them wherever in his judgment it is expedient.”

Thus, General Jackson concluded,

[T]he President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . Indeed the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.

. . . . I have no doubt of the President’s lawful authority to utilize forces under his command to instruct others in matters of defense which are vital to the security of the United States.

In 1944, Attorney General Francis Biddle informed President Roosevelt that he had the power as Commander in Chief in times of war to seize the mail order, production plants, and facilities of Montgomery Ward and Company because it was suffering from a labor strike that was interfering with the commerce of the nation in a time of war. He opined that

[a]s Chief Executive and as Commander-in-Chief of the Army and Navy, the President possesses an aggregate of powers that are derived from the Constitution and from various statutes enacted by the Congress for the purpose of carrying on the war. The Constitution lays upon the President the duty “to take care that the laws be faithfully executed.” The Constitution also places on the President the responsibility and invests in him the powers of Commander-in-Chief of the Army and Navy. In time of war when the existence of the nation is at stake, this aggregate of powers includes authority to take reasonable steps to prevent nation-wide labor disturbances that threaten to inter-
fere seriously with the conduct of the war. The fact that the initial impact of these disturbances is on the production or distribution of essential civilian goods is not a reason for denying the Chief Executive and the Commander-in-Chief of the Army and Navy the power to take steps to protect the nation's war effort. In modern war the maintenance of a healthy, orderly, and stable civilian economy is essential to successful military effort. . . . Therefore, I believe that by the exercise of the aggregate of your powers as Chief Executive and Commander-in-Chief, you could lawfully take possession of and operate the plants and facilities of Montgomery Ward and Company if you found it necessary to do so to prevent injury to the country's war effort. 148

President Truman

On March 5, 1946, the former Prime Minister of Great Britain, Sir Winston Churchill, was invited to Westminster College in Fulton, Missouri to receive an honorary degree where he gave what has come to be known as the “Iron Curtain” speech. 149 In reviewing the recent history of Europe, Churchill observed that

[t]wice in our own lifetime we have seen the United States . . . drawn by irresistible forces, into these wars in time to secure the victory of the good cause, but only after frightful slaughter and devastation had occurred. Twice the United States has had to send several millions of its young men across the Atlantic to find the war; but now war can find any nation, wherever it may dwell between dusk and dawn. 150

Churchill explained to his audience that the war that will find the post-World War II nations was driven by the spread of communism by the Soviet Union. 151 In the famous section from his speech, Churchill lamented at the current state of Europe:

From Stettin in the Baltic to Trieste in the Adriatic, an iron curtain has descended across the Continent. Behind that line lie all the capitals of the ancient states of Central and Eastern Europe. Warsaw, Berlin, Prague, Vienna, Budapest, Belgrade, Bucharest and Sofia, all these famous cities and the populations around them lie in what I must call the Soviet sphere, and all are subject in one form or another, not only to Soviet influence but to a very high and, in many cases, increasing measure of

150 Id.
151 See id.
control from Moscow. Athens alone—Greece with its immortal glories—is free to decide its future at an election under British, American and French observation.

... However, in a great number of countries, far from the Russian frontiers and throughout the world, Communist fifth columns are established and work in complete unity and absolute obedience to the directions they receive from the Communist center. Except in the British Commonwealth and in the United States where Communism is in its infancy, the Communist parties or fifth columns constitute a growing challenge and peril to Christian civilization. These are somber facts for anyone to have to recite on the morrow of a victory gained by so much splendid comradeship in arms and in the cause of freedom and democracy; but we should be most unwise not to face them squarely while time remains.

... I do not believe that Soviet Russia desires war. What they desire is the fruits of war and the indefinite expansion of their power and doctrines. 152

Four years later, war found the Korean peninsula. On June 25, 1950, the communist nation of North Korea, politically and militarily supported by the Soviet Union and the People's Republic of China, invaded the South Korea. As Churchill explained four years earlier, the United States was again "drawn by irresistible forces" into war. 153

At the outset of North Korea's invasion of South Korea, the Truman Administration had determined that the invasion had to be repelled and that as Commander in Chief, Truman's authority "to send the Armed Forces outside the country is not dependent on Congressional authority" and "throughout its history, upon orders of the Commander in Chief . . . without congressional authorization, [Presidents have] acted to prevent violent and unlawful acts in other [countries] from depriving the United States . . . of . . . peace and security." 154 Speaking for the Administration on the legal and historical authority to act without prior action by Congress, the State Department, echoing the opinion by Solicitor Clark in 1912, issued a memorandum that detailed eighty-five prior instances in which the President, acting on his own authority as Chief Executive, Commander in Chief, and lead branch of government in the

152 Id.
153 Id.
154 Authority of the President to Repel the Attack in Korea, 23 DEP'T ST. BULL. 161, 173-74 (1950).
area of foreign affairs, sent military forces to foreign territories to protect American interests.\textsuperscript{155} These prior instances ranged from 1812 on Amelia Island to membership in a multinational force to settle threats in China in 1932.\textsuperscript{156} The memorandum, citing various Senators from the nineteenth century and incidences of U.S. participation in multinational military operations to enforce national treaty rights and interests, made clear that none of these actions taken by the President involved prior congressional approval.\textsuperscript{157} The opinion made clear that historically, congressional approval of the use of military force in foreign lands was never required. Presidents Bush and Obama, discussed in Part III below, were not the first to make broad assertions of plenary Commander in Chief power in foreign affairs and the deployment of American troops to enforce United Nations resolutions without congressional approval.

\textit{President Kennedy}

In Korea, the United States fought a three-year war against a proxy nation of the Soviet Union. In 1962, a new President would face the Soviet Union in a direct conflict over a small nation ninety miles off the coast of Florida, almost leading to war between the two greatest nuclear powers on earth. On January 8, 1959, the forces of Fidel Castro entered the capital of Cuba and deposed the Batista government. Castro became Prime Minister in February 1959 and by 1961, Cuba was recognized as a client state of the Soviet Union. With the aid of Soviet weapons, Cuba maintained the second largest military in Latin America. After the failed April 1961 “Bay of Pigs” attempt to depose Castro, the Soviet Union installed short range nuclear missiles in Cuba which had the ability to strike the United States. Even before the missiles were discovered, it was the policy of the United States to resist and depose Castro. On October 3, 1962, Congress passed the Joint Resolution: Expressing the Determination of the United States with respect to the situation in Cuba, which stated:

[T]he United States is determined—

(a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, . . . its aggressive or subversive activities to any part of this hemisphere;

\textsuperscript{155} Id. at 177-78.
\textsuperscript{156} Id.
\textsuperscript{157} Id.
(b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States.\(^{158}\)

Thirteen days later, President Kennedy was informed that the Soviet Union had installed nuclear missiles in Cuba.\(^{159}\)

The OLC was preparing opinions on the legality of placing a blockade on Cuba long before the Cuban missile crisis occurred. On January 25, 1961, more than a year and a half before the crisis, Assistant Attorney General Robert Kramer provided an opinion to Attorney General Kennedy on the President’s authority to place a blockade on Cuba.\(^{160}\) The 1961 opinion and the subsequent opinions\(^{161}\) addressing the various issues of the blockade almost exclusively focused on the legality of the blockade under international law. On the question of the President’s power under the Constitution, the OLC opinions were very matter-of-fact that the President had the authority to order a blockade under his powers as Commander in Chief. After citing the Prize Cases, the naval blockades ordered by Presidents Lincoln in 1861, McKinley in 1898 (the blockade of the north coast of Cuba), and Truman in 1950 (blockade of the Korean coast), the OLC concluded that “assuming the existence of a state of war, both practice and authority indicate that the President, in the exercise of his constitutional power as commander in chief, can order a blockade of the enemy.”\(^{162}\) The OLC made clear in the 1961 memo that the legality of the blockade would be based on whether the blockade was imposed on an enemy in time of war since a “blockade involves a state of war.”\(^{163}\) On October 19, 1962, in an unsigned opinion, the OLC supplemented its 1961 memo affirming that the main issue of a blockade is its legali-

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\(^{158}\) Joint Resolution: Expressing the Determination of the United States with respect to the situation in Cuba, Pub. L. No. 87-733, 76 Stat. 697 (1962). On the same day, Congress authorized the President to use the reserve military forces of the United States, if necessary, to carry out the U.S. policy to oppose and remove Castro. See Joint Resolution: To authorize the President to order units and members in the Ready Reserve to active duty for not more than twelve months, and for other purposes, Pub. L. No. 87-736, 76 Stat. 710 (1962).


\(^{160}\) To the Attorney General: Authority to Blockade Cuba Jan. 25, 1961 (opinion on file with author and journal).

\(^{161}\) According to research provided to the author by the National Archives, the OLC produced twenty-nine opinions on various legal questions and issues relating to the Cuban Missile Crisis. Only three of which specifically addressed the power of the President to order a “quarantine” under his power as Commander-in-Chief.

\(^{162}\) To the Attorney General: Authority to Blockade Cuba, at 7.

\(^{163}\) Id. at 1.
ty in international law and that international law considers a blockade an act of war. As far as the authority of the President to impose a blockade, international law aside, the OLC wrote that both "practice and authority support the proposition that the President... can order a blockade without prior congressional sanction and without a declaration of war by Congress."

In an approach that John Yoo would take regarding the value of congressional resolutions to use force, the October 1962 memo made an interesting argument:

On April 20, 1898, a joint resolution of Congress directed the President to use the land and naval forces of the United States to compel the government of Spain to relinquish its authority over Cuba. In accordance with this resolution, President McKinley, on April 22, issued a proclamation instituting a naval blockade of Cuba. Subsequently, Congress declared that a state of war existed and that such state had existed since prior to the proclamation. But it is clear that the President did not depend upon any Congressional declaration of war, or even upon a future ratification of his proclamation, when he issued it.

Thus, although Congress authorized the blockade ordered by President McKinley, the authorization did not establish the constitutionality of the blockade because the legality of the blockade was established entirely by President McKinley exercising his powers as

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164 Blockade of Cuba October 19, 1962 (unsigned, unaddressed opinion); see also, Summary of Legal Justification of Quarantine of Shipments of Offensive Weapons and Material to Cuba October 23, 1962 (OLC unaddressed opinion) (both opinions on file with the author and journal). The October 19 memo concluded that [t]here is a good deal of authority to the effect that a blockade assumes the existence of a state of war and that there is legally no such thing as a 'pacific blockade' or 'a blockade during time of peace.' There are frequent statements by commentators that a blockade necessarily means war, or depends upon a pre-existing state of war, or in and of itself creates a state of war. Blockade of Cuba, at 3. "In addition" the OLC "concludes that such a blockade could be regarded by Cuba and other Soviet bloc nations as an act of war." Id. at 1. The conclusions of the October 19 memo were reflected in the October 23 memo authored by OLC Attorney Advisor Leon Ulman, who changed the term from "blockade" to "quarantine" and then concluded that since the quarantine only applied to stopping "the shipment to Cuba of the means and equipment needed to effectuate the threat of nuclear attack" the action taken by "the United States is therefore a justifiable measure of self-defense" and thus under the "terms of existing international law, the action which the United States has taken is not an act of war." Summary of Legal Justification of Quarantine of Shipments of Offensive Weapons and Material to Cuba, at 1-2.

165 Blockade of Cuba, at 9; Summary of Legal Justification of Quarantine of Shipments of Offensive Weapons and Material to Cuba, at 4.

166 Blockade of Cuba, at 10 (emphasis added).
Commander in Chief. The October 1962 memo, taking into account that Congress in the same month passed a resolution authorizing the President to use whatever means necessary to prevent Cuba from becoming a military threat in the region, asserted that "with or without the Congressional Resolution of October 3, 1962, (PL 87-733), the President could declare a blockade of Cuba, and it is doubtful if Congress could circumscribe this right." The OLC opinion concluded that the international law issues on the legality of a blockade (admittedly asserting that a blockade is legal only during a state of war under international law) did not affect the determination of the power of the President to act. The OLC opinion asserted that

\[\text{[i]his international rule is not pertinent to the President's Authority under the Constitution. There are numerous examples of American Presidents taking measures which could internationally be regarded as acts of war without first seeking Congressional Authority. And no foreign state could argue that a state of war did or did not exist because American constitutional procedures were or were not followed in a particular instance.}\]

Leaving aside the correctness of the proposition that the actions of a President when exercising his powers as Commander in Chief are not legally defined by international law, it is clear that the argument did not originate with the Bush Administration after the events of September 11, 2001. Nor was President Kennedy the last President to use military force to protect the interests of the United States or another nation in order to prevent communist advances on the world stage; as Truman and Kennedy did, so did President Johnson. The legal opinions of all three Administrations were in congruence with the proposition that the decision to use the military to implement foreign policy was solely with the President, that such actions did not require prior action by Congress, and although Congressional resolutions affirming such action would provide additional constitutional support for the legality of such actions, such resolutions were not constitutionally or legally required.

**President Johnson**

Although U.S. involvement in Vietnam predates President Johnson, the Americanization of the Vietnam War began on January 31, 1965. On this day, President Johnson ordered the mobilization of the 18th Tactical Wing to the Da Nang Air Force Base, au-

\[167 \text{Id.}\]
\[168 \text{Id. at 11.}\]
thorizing General Westmoreland to commit American ground forces to offensive combat in June 1965. By the end of the year, the number of U.S. troops involved in the conflict had increased to 184,000. On March 4, 1966, speaking for the Administration on the legality of U.S. involvement in Vietnam, Leonard C. Meeker, State Department Legal Advisor, informed Congress of the Administration's legal assertion of authority to defend Vietnam.169 Echoing the position the State Department took in 1912 and in 1950, Meeker made clear that

[t]here can be no question in present circumstances of the President's authority to commit United States forces to the defense of South Viet-Nam.

Under the Constitution, the President . . . holds the prime responsibility for the conduct of United States foreign relations. These duties carry very broad powers, including the power to deploy American forces abroad and commit them to military operations when the President deems such action necessary to maintain the security and defense of the United States.170 Meeker further asserted that, as an Article I versus an Article II matter,171 the constitutional power to declare war is not synonymous with the power to make war and that at the Constitutional Convention the founders specifically removed the power to make war from the Congress, and by implication gave that power to the President.172 Echoing the positions taken in 1800 by the Supreme Court in Bas v. Tingy and by Solicitor Clark in 1912, Meeker asserted that

170 Id. at 484.
171 Meeker also asserted that Congress had authorized the President to take military action through the ratification of the SEATO treaty, which Article IV, paragraph 1, of the SEATO treaty "establishes as a matter of law that a Communist armed attack against South Viet-Nam endangers the peace and safety of the United States." Id. at 485. Additionally, he concludes that under "our Constitution it is the President who must decide when an armed attack has occurred. He has also the constitutional responsibility for determining what measures of defense are required when the peace and safety of the United States are endangered." Id. Further, Meeker argued that Article II and Article IV of the U.S. Constitution aside, Congress on August 10, 1964 authorized military operations through the Gulf of Tonkin resolution, which contained "important declarations and provisions of law," authorizing the President to act. Id. at 485-88. The resolution, Meeker observed, continued to receive support by way of Congressional funding to the tune of 4.8 billion dollars authorized on March 1, 1966. Id. at 487. "An amendment that would have limited the President's authority to commit forces to Viet-Nam was rejected in the Senate by a vote of 94-2." Meeker, supra note 169, at 488.
172 Id. at 484.
[a]t the Federal Constitutional Convention in 1787, it was originally proposed that Congress have the power "to make war." There were objections that legislative proceedings were too slow for this power to be vested in Congress; it was suggested that the Senate might be a better repository. Madison and Gerry then moved to substitute "to declare war" for "to make war," "leaving to the Executive the power to repel sudden attacks." It was objected that this might make it too easy for the Executive to involve the nation in war, but the motion carried with but one dissenting vote. Meeker, almost citing verbatim the Court’s opinion in the Prize Cases, concluded that "[t]he Constitution leaves to the President the judgment to determine whether the circumstances of a particular armed attack are so urgent and the potential consequences so threatening to the security of the United States that he should act without formally consulting the Congress." As to the Article II power providing the President with the authority to deploy military forces to protect American interests, Meeker asserted—as did Solicitor Clark and the Bush and Obama Administrations would decades later—that history had established the authority of the President to act without Congress:

Since the Constitution was adopted there have been at least 125 instances in which the President has ordered the armed forces to take action or maintain positions abroad without obtaining prior congressional authorization, starting with the 'undeclared war' with France (1798-1800). For example, President Truman ordered 250,000 troops to Korea during the Korean War of the early 1950's. President Eisenhower dispatched 14,000 troops to Lebanon in 1958. The point being that Johnson’s actions in Vietnam were a continuation of a long line of presidential military actions without a formal declaration of war and perpetuation of the assertion that a formal declaration was neither historically or constitutionally required.

Meeker, citing Congressional complicity in the actions of President Johnson, asserted that the actions of President Johnson rest not only on the exercise of Presidential powers under article II but on the SEATO treaty—a treaty advised and consented to by the Senate—and on actions of the Congress, particularly the joint resolution of August 10, 1964. When these sources of authority are taken together . . . there can be no

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173 Id. at 484; see Bas v. Tingy, 4 U.S. (4 Dall.) 41-46 (1800); see also supra text accompanying notes 132-137.
174 Meeker, supra note 169, at 485.
175 Id. at 484-85.
question of the legality under the domestic law of United States actions in Viet-Nam.\footnote{Id. at 484.}

The joint resolution of August 10, 1964, named the Gulf of Tonkin Resolution, read in part:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.

SEC. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

SEC. 3. This resolution shall expire when the President shall determine that the peace and security of the area is reasonably assured by international conditions created by action of the United Nations or otherwise, except that it may be terminated earlier by concurrent resolution of the Congress.\footnote{Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).}

As a constitutional matter, it is no small event when Congress passes a resolution authorizing or supporting presidential actions.\footnote{See Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure), 343 U.S. 579 (1952).}

The significance of congressional resolutions is that such resolutions free the hand of the President both as a matter of law and public policy.

As a side note, notice the expansive and unlimited wording of the resolution, "This resolution shall expire when the President shall determine," and the abdication of congressional responsibility. Congress, in these types of resolutions, says to the President, "Go and do as you will; you need not come back for further consultation." The results of the Vietnam war led to the War Powers Resolution of 1973 as a means of Congress trying to regain its footing in matters of foreign policy determinations that lead to war. The problem is Congress did not learn its lesson, for after 9/11, Congress passed the Authorization to Use Military Force, which in-
cluded the same open ended language freeing the President to act as he determined, without the need for further consultation or agreement from Congress as a legal matter. As a historical matter, what is interesting is that the founding generation did not pass such open-ended resolutions. When Congress authorized President Adams to arm merchant ships, it specifically authorized that such actions under the Act "shall continue and be in force for the term of one year, and until the end of the next session of Congress thereafter." More importantly, Congress set a policy limitation in the Act by making clear that

whenever the government of France, and all persons acting by, or under their authority, shall disavow, and shall cause the commanders and crews of all armed French vessels to refrain from the lawless depredations and outrages hitherto encouraged and authorized by that government against the merchant vessel[s] of the United States, and shall cause the laws of nations to be observed by the said armed French vessels, the President of the United States shall be, and he is hereby authorized to instruct the commanders and crews of the merchant vessels of the United States to submit to any regular search by the commanders or crews of French vessels, and to refrain from any force or capture to be exercised by virtue hereof.

When Jefferson debated how to respond to the Barbary Pirates, he did not unleash the force of the U.S. Navy to offensively respond to the pirates until Congress specifically authorized him to do so. The point being that Congress has not always shifted responsibility of foreign policy making to the President but it has placed boundaries on presidential action. But, as U.S. history progressed, Congress receded in its role as a foreign policy initiator and instead became a reactor to foreign policy once made by the President.

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179 The authorization stated:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.


180 Act of June 25, 1798, ch. 60, § 5, 1 Stat. 572, 573 (an act to authorize the defense of the merchant vessels of the United States against French depredations).

181 Id. at § 6.
President Nixon

During the later involvement of the United States in the Vietnam War, Assistant Attorney General for the OLC, William H. Rehnquist, affirmed the position of the State Department on presidential power and defended the presidential prerogative to dictate military policy in times of war.\(^\text{182}\) In a May 1970 opinion to Charles W. Colson, Special Counsel to the President, Rehnquist reflected a view of the Presidency dating back to the days of the Founders when he quoted from Hamilton's article in the famous *Pacificus* and *Helvidius* debates:

Because of the nature of the President's power as Commander-in-Chief and because of the fact that it is frequently exercised in external affairs . . . the designation of the President as Commander-in-Chief of the Armed Forces is a substantive grant of power, and not merely a commission which entitles him to precedence in a reviewing stand.\(^\text{183}\)

Rehnquist also affirmed the legal positions of the State Department on the meaning of "declare war" as opposed to "make war," concluding that

\[\text{[i]t is well to first dispel any notion that the United States may lawfully engage in armed hostilities with a foreign power only if Congress has declared war. From the earliest days of the republic, all three branches of the federal government have recognized that this is not so, and that not every armed conflict between forces of two sovereigns is "War."\(^\text{184}\)}\]

The questions of how far the Chief Executive may go without Congressional authorization . . . have arisen repeatedly throughout the Nation's history. The Executive has asserted and exercised at least three different varieties of authority under his power as Commander-in-Chief:

(a) Authority to commit military forces of the United States to armed conflict, at least in response to enemy attack or to protect the lives of American troops in the field;

(b) Authority to deploy United States troops throughout the world, both to fulfill United States' treaty obligations and to protect American interests; and


\(^{183}\) Id. at 689.

\(^{184}\) Id. at 688 (internal citations omitted).
(c) Authority to conduct or carry on armed conflict once it is instituted, by making and carrying out the necessary strategic and tactical decisions in connection with such conflict.\(^{185}\)

Congress has on some of these occasions acquiesced ... on others it has ratified ... and on still others it has taken no action at all. [A] long continued practice on the part of the Executive, acquiescence in by the Congress, is itself some evidence of the existence of constitutional authority to support such a practice.\(^{186}\)

This was a legal position that was not unheard of before or since. Defending President Nixon’s authority to use military force to expel Vietnamese forces from Cambodia, in part to protect American forces in Vietnam, Rehnquist concluded:

> Since even those authorities least inclined to a broad construction of the Executive power concede that the Commander-in-Chief provision does confer substantive authority over the manner in which hostilities are conducted, the President’s decision to invade and destroy the border sanctuaries in Cambodia was authorized under even a narrow reading of his power as Commander-in-Chief.\(^{187}\)

After the Vietnam War and the revelations of the Gulf of Tonkin incident and abuses by the FBI and other law enforcement and intelligence agencies of civil liberties combined with the Watergate scandal, Congress sought to reassert itself and place controls and limitations on the Commander in Chief powers of the President by passing the War Powers Resolution in 1973.

**President Ford**

In March 1975, the War Powers Resolution (WPR) was implemented when President Ford ordered air and sea forces to participate in transporting American, and other, refugees from Danang, Vietnam.\(^{188}\) President Ford informed Congress of the action on April 4, 1975.\(^{189}\) President Ford further informed Congress, on April 12, 1975, that he had directed American forces to facilitate the evacuation of American, Cambodian, and other foreign nation-

\(^{185}\) *Id.* at 691.

\(^{186}\) *Id.*

\(^{187}\) *Id.* at 704.


\(^{189}\) *Id.* at 4-5 (referring to April 4, 1975 report to Congress from President Ford).
als from the American mission in Cambodia. A report to Congress on the evacuation of Saigon was submitted to Congress on April 30, 1975. On May 7, 1975, the House Committee on International Relations held hearings on the three uses of American forces in relation to the requirements of the WPR. The hearings were convened in an effort to enforce the WPR in its first test as a tool to hold the President accountable for the use of military force without prior congressional approval.

Congressman Stephen Solarz questioned Monroe Leigh, Legal Advisor to the Department of State, on the legality of the President’s actions when they occurred without prior approval of Congress as required by Section 2(c) of the WPR. Congressman Solarz asked if, by the terms of the WPR, the power of the President to use force was restricted to situations involving “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States.” Leigh, responding in line with the historical positions asserted by the Justice and State Departments, asserted that “from a legal point of view . . . Congress cannot by statute circumscribe a power which is derived from the Constitution.” In a letter submitted subsequent to the hearing, answering the question of Congressman Solarz, the State Department advocated a broad reading of the Commander in Chief power as follows:

With respect to the Commander-in-Chief clause, we do not believe that any single definitional sentence could clearly encompass every aspect of the Commander-in-Chief authority. This authority would include such diverse things as the power to make armistices, to negotiate and conclude cease-fires, to effect

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190 Id. at 5-6 (referring to May 12, 1975 report to Congress from President Ford).
191 Id. at 1.
193 Id. at 28-29 (codified in 50 U.S.C. § 1541(c) (2012)). The statute states:

(c) Presidential executive power as Commander-in-Chief; limitation The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

194 Hearing on War Powers: A Test of Compliance Relative to the Danang Sealift, supra 188, at 28-29.
195 Id. at 29.
196 “Would you give us briefly your legal interpretation of what precisely the President’s authority is as Commander-in-Chief?” Id. at 37.
deployments of the armed forces, to order the occupation of surrendered territory in time of war, to protect U.S. embassies and legations, to defend the United States against attack, to suppress civil insurrection, and the like.\footnote{Id. at 39 (quoting letter from Monroe Leigh, Legal Advisor, Dep't of St., and Martin R. Hoffmann, Gen. Couns., Dep't of Def.). The State Department supplemented the letter with a memo titled, The President's Authority to Use the Armed Forces To Evacuate U.S. Citizens and Foreign Nationals From Areas of Hostility, which asserted: From the time of Jefferson to the present, American Presidents have exercised their authority under the Constitution to use military force to protect U.S. citizens abroad.}

On June 4, 1975, the same committee held hearings on President Ford's decision to send U.S. Naval forces to secure the crew of the S.S. \textit{Mayaguez}, which was attacked and seized by the naval forces of Cambodia and forced to anchor at Koh Tang Island on May 12, 1975.\footnote{Id. at 76 (referring May 15, 1975 report to Congress from President Ford).} On May 13, 1975, President Ford ordered naval forces, including a detachment of the U.S. Marines, to land on the island and secure the \textit{Mayaguez}, which resulted in the sinking of three Cambodian naval patrol boats.\footnote{\textit{Hearing on War Powers: A Test of Compliance Relative to the Danang Sealift}, supra 188, at 76-77 (referring May 15, 1975 report to Congress from President Ford).} The \textit{Mayaguez} was secured on May 14, 1975, and U.S. forces withdrew. In his second attempt to enforce the WPR, Congressman John Seiberling stated in the committee hearing on President Ford's action that the passage of the WPR was not enough to control presidential power:

\begin{quote}
Unfortunately, the mere passage of a law does not automatically change ingrained patterns of behavior. American Presidents have become accustomed over many years to ordering the commitment of American troops to action without either first consulting with or gaining the approval of Congress. The \textit{Mayaguez} incident shows such behavior will continue, despite the law, unless Congress demands a change. That is why I think these hearings today are so important. Just writing a law is not enough in this case. Congress must take action to see that the law works. The best way to do that is to . . . determine if its pro-
\end{quote}
visions are being complied with and, if not, what should be done to correct the situation.200

The dispute was centered on the meaning and application of Section 3 of the WPR, which requires the President to consult with Congress before the deployment of American forces into a hostile environment.201 As Congressman Jacob Javits explained in the hearing, consultation means that when the Executive wishes to come to a decision about a given matter he shall consult with the Congress as to what the decision should be, and take into account what the Congress believes should be the decision before it is made. Otherwise you are not consulting, you are just reporting a fact or a decision which has already been taken.202

Leigh returned to defend the actions of President Ford, making clear that (1) various members of Congress were contacted203 and their advice was provided to President Ford before he ordered the Armed Forces into the Cambodian Island; (2) the list of situations in Section 2(c) are not exclusive;204 and (3) Congress, by concurrent resolution, could not force the President to remove deployed American Forces.205 On the question of the meaning of the WPR and its relationship to the President’s inherent powers as Commander in Chief, Leigh’s answer would be echoed by Presidents and the OLC for decades to come:

I don’t accept that the President gets his authority to send in troops from the War Powers Resolution . . . . I don’t believe the War Powers Resolution was intended to give the President authority.

This resolution does not delegate anything to the President. It is not an act of delegation by the Congress of power to the President. It is, as Senator Javits was saying, a procedural

200 Id. at 42-43 (statement of Representative John F. Seiberling).
201 Section 3 of the WPR is codified in 50 U.S.C. § 1542 as follows:

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

202 Id. at 91.
203 Id. at 78-80.
204 Id. at 90-91.
205 Id. at 91.
scheme for arranging an interchange in what is obviously a difficult area between the two branches of the Government, but I don’t think there is any delegation here.\textsuperscript{206}

Congressman Solarz responded, “I think your interpretation makes the whole act meaningless because the President” has the power to commit troops into combat and since this power is his by the Constitution and thus his originally; “the limitations in this bill don’t apply because of the fact that... Congress can’t put limits on the exercise on that constitutional authority.”\textsuperscript{207} The congressman received no challenge to his conclusion, except for the qualification that a President cannot declare war, but can carry one out regardless of whether the war is declared or not.\textsuperscript{208} The views of Solicitor Clark had prevailed.

**President Carter**

Five years after the passage of the War Powers Resolution, the Carter Administration requested an opinion on the ability of the President to authorize “warrantless foreign intelligence surveillance using certain specific techniques” through the exercise of his powers as Commander in Chief, to which Assistant Attorney General John M. Harmon, Chief of the OLC, answered,

> We conclude that the President may, in a proper case, invoke his constitutional powers to regulate foreign affairs and thereby authorize such surveillance.

\ldots  

\ldots [T]he President can authorize warrantless electronic surveillance of an agent of a foreign power, pursuant to his constitutional power to gather foreign intelligence. This Office has taken the position that the same constitutional power authorizes limited physical entries and seizures incident to installation of such devices.\textsuperscript{209}

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\textsuperscript{206} Id. at 96-97.

\textsuperscript{207} Id. at 97.

\textsuperscript{208} Hearing on War Powers: A Test of Compliance Relative to the Danang Sealift, supra 188, at 97; see also Note, The Recapture of the S.S. Mayaguez: The Failure of the Consultation Clause of the War Powers Resolution, 8 N.Y.U. J. INT’L. L. \\& POL. 457 (1976).

On November 4, 1979, a mob of students stormed the American Embassy in Iran and took sixty-three members of the embassy staff hostage. Three days after the seizure, Harman provided Attorney General Benjamin Civiletti a detailed assessment of the diplomatic options open to the President, concluding that “[i]t is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad . . . . The War Powers Resolution . . . does not limit the President’s power to act in this instance.”

In a supplemental opinion, Harmon asserted that the reporting requirements of the WPR, properly read, are not, per se, an unconstitutional interference with the power of the President to protect Americans abroad. The Reagan Administration would take the same position little more than five years later.

By early 1980 President Carter was considering using force to free the hostages. On February 12, 1980, Harmon provided an answer to the Attorney General regarding the power of the President to use military force without special congressional authorization as required by the WPR. Not wanting to assert the Resolution was unconstitutional on its face, Harmon asserted that “the War Powers Resolution . . . has neither the purpose nor the effect of modifying the President’s power” to deploy military forces into the Persian Gulf, or the use of military force to “rescue the hostages or to retaliate against Iran” for harm inflicted upon the hostages, or repel an assault against American interests in the region.

DoD may assist civilian law enforcement agencies to identify or confirm suspected illegal drug production within structures located on private property by conducting aerial reconnaissance that uses [Forward Looking Infrared Radars] technology . . . . A memorandum that you have made available to us preliminarily concludes that FLIR reconnaissance of structures on private lands does constitute [a search under the Fourth Amendment] . . . . [W]e conclude that it does not.


Id.

Id. at 185-86.
Harmon continued to support the general proposition maintained by previous Attorneys General by making clear "that the Framers contemplated that the President might use force to repel sudden invasions or rebellions without first seeking congressional approval" and the President has "broad foreign policy powers [to] support deployment of the armed forces abroad" to which any "substantive constitutional limits on the exercise of these inherent powers by the President are, at any particular time, a function of historical practice and the political relationship between the President and Congress." Harmon concluded his defense of broad presidential power with an observation that would be echoed by the OLC for both the Bush and Obama Administrations post-9/11:

Our history is replete with instances of presidential use of military force abroad in the absence of prior congressional approval. This pattern of presidential initiative and congressional acquiescence may be said to reflect the implicit advantage held by the executive over the legislative under our constitutional scheme in situations calling for immediate action. Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.

The power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President's general power as a matter of historical practice.

In answering the policy assertion of the WPR, Harmon responded that "while Presidents have exercised their authority to introduce troops . . . without prior congressional authorization, those troops remained only with the approval of Congress." Harmon, echoing the opinion of President Nixon, rejected one of the key means of the WPR to achieve its objective and maintained that

[the Resolution requires the President to terminate any use of the armed forces in hostilities after 60 days unless Congress has authorized his action. It also requires termination whenever Congress so directs by concurrent resolution.]

. . . We believe that Congress may terminate presidentially initiated hostilities through the enactment of legislation, but that it cannot do so by means of a legislative veto device such as a concurrent resolution.
Congress may regulate the President's exercise of his inherent powers by imposing limits by statute. We do not believe that Congress may, on a case-by-case basis, require the removal of our armed forces by passage of a concurrent resolution which is not submitted to the President for his approval or disapproval pursuant to Article I, § 7 of the Constitution.220

Although Harmon's defense of presidential power in foreign affairs was in line with previous Attorneys General, his defense was more deferential to Congress's power to place some limits on the President's broad powers as Commander-in-Chief. "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. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers."221 "The important provisions of the Resolution concern consultation and reporting requirements ... [which] apply not only when hostilities are taking place or are imminent, but also when armed forces are sent to a foreign country ... within 48 hours from the time that they are introduced"222 to which Harmon concluded that although "[t]here may be constitutional considerations involved in the consultation requirement ... [n]o Administration has taken the position that these requirements are unconstitutional on their face. Nevertheless, there may be applications which raise constitutional questions."223

To escape these "constitutional questions" Harmon affirmed the State Department Legal Adviser, whom he asserted spoke for the Carter Administration, who testified before Congress that the consultation clause leaves it to the President to determine precisely how consultation is to be carried out ... unless the President determines that such consultation is inconsistent with his constitutional obligation. In the latter event the President's decision could not as a practical matter be challenged but he would have to be prepared to accept the political consequences of such action, which might be heavy.224

Such was the most deferential and positive reception the WPR has received by any presidential administration. Even with the concession that the 60-day termination and the congressional reporting

220 Id. at 196.
221 Id.
222 Id. at 190.
223 Id. at 195.
requirements were not unconstitutional *per se*, the President was at liberty as Commander in Chief not to comply with the provisions. The next administration would not be so conciliatory.

**President Reagan**

In 1984, Theodore Olsen, Assistant Attorney General for the OLC, provided an opinion to Attorney General William French Smith addressing the WPR. The 1984 opinion provided a summary of opinions previously provided by the OLC in connection with the deployment of United States Armed Forces in Lebanon, the provision of military assistance and intelligence to our allies in Central America, the deployment of sophisticated radar aircraft in Chad and in the Sinai, responses to an armed attack on our armed forces in the Gulf of Siddra, the deployment of troops to Grenada, and in various other circumstances.

The majority of the opinion focused on compliance with the reporting requirements of the WPR. But the opinion, affirming the State Department testimony given to Congress in 1975, made clear that

> [t]he Executive Branch has taken the position from the very beginning that § 2(c) of the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces. The Department of State’s position set forth in a letter of November 30, 1973 was that § 2(c) was a ‘declaratory statement of policy.’ Were the Executive to concede that § 2(c) represented a complete recitation of the instances in which United States Armed Forces could be deployed without advance authorization from Congress, the scope of the Executive’s power in this area would be greatly diminished.

Any attempt to set forth all the circumstances in which the Executive has deployed or might assert inherent constitutional authority to deploy United States Armed Forces would probably be insufficiently inclusive and potentially inhibiting in an unforeseen crisis.

Olsen affirmed Leigh’s testimony to Congress in 1975 and the State Department’s description of situations that authorize the President to deploy military forces without Congress’s prior approval. These included the deployment of forces:

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226 Id.
227 Id. at 274.
228 Id.
1. To rescue Americans;
2. To rescue foreign nationals where doing so facilitates the rescue of Americans;
3. To protect U.S. Embassies and legations;
4. To suppress civil insurrection in the United States;
5. To implement and administer the terms of an armistice or cease fire designed to terminate hostilities involving the United States; and
6. To carry out the terms of security commitments contained in treaties.

Olsen cited Leigh's testimony that "the Administration 'did not believe that any single definitional statement can clearly encompass every conceivable situation in which the President's Commander-in-Chief authority could be exercised'" and that the WPR does not place any limits on the situations that can necessitate the use of such authority.

In 1986, the Reagan Administration OLC was even more emphatic, asserting that "any statute infringing upon the President's inherent authority to conduct foreign policy would be unconstitutio[nal] and void" on its face. Assistant Attorney General Charles J. Cooper, Chief of the OLC, in his opinion submitted to Attorney General Edwin Meese addressed "the legality of the President's decision to postpone notifying Congress of a recent series of actions that he took with respect to Iran . . . [in which he was pursuing] a multifaceted secret diplomatic effort aimed at bringing about better relations between the United States and Iran." Cooper, affirming the opinion of Harmon, concluded, "On these facts, we conclude that the President was within his authority in maintaining the secrecy of this sensitive diplomatic initiative from Congress until such time as he believed that disclosure to Congress would not interfere with the success of the operation.

Cooper not only continued to support the traditional and historic view of the Justice and State Departments that the President as Commander in Chief had plenary authority to utilize the military as he deemed appropriate to protect American interests, Cooper also added to the development of the modern theory of plenary presi-

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229 Id.
230 Id. at 275 (internal citation omitted).
231 The President's Compliance with "Timely Notification" Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. 159, 168 (1986) (capitalization removed).
232 Id. at 159.
233 Id. at 160.
dential power to determine American foreign policy. He asserted that “the President possesses inherent and plenary constitutional authority in the field of international relations” and that his power is “subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers.”

“The President’s executive power,” Cooper explained, “includes, at a minimum, all the discretion traditionally available to any sovereign in its external relations.” Thus the President’s power to develop and implement foreign policy is limited only by the text of the Constitution itself, and Congress has only a role so far as it can justify its role by a specific enumerated power within Article 1. Such a view asserts in practicality that, as a constitutional matter, Congress has no significant role in foreign policy after confirming the Secretaries of State and Defense, the sub-cabinet officers in the State and Defense Departments, senior military commanders, and funding the Departments of State and Defense. Cooper, citing Alexander Hamilton, explained that Congress is the legislative department and as such is responsible for establishing the rules for the “regulation of society,” while the President is the head of the executive department which is responsible for employing the common strength of the society for its common defense—which includes the formation and implementation of foreign policy.

Cooper wrote that whatever the outer limits of Presidents’ authority over foreign policy, “the conduct of secret negotiations and intelligence operations lies at the very heart of the President’s executive power” —a theme that the George W. Bush Administration would later assert with great emphasis. After citing, among other sources, In re Neagle, United States v. Curtiss-Wright Export, John Jay’s Federalist 64, Durand v. Hollins, and Marbury v. Madison, Cooper advanced three principles that govern the protection of the Presidents foreign policy powers:

\[\text{Id. at 160-61 (capitalization removed).}\]

\[\text{Id. at 161.}\]

\[\text{Id. at 161.}\]

\[\text{The President’s Compliance with “Timely Notification” Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. at 165.}\]

\[\text{See United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); Cunningham v. Neagle, 135 U.S. 1 (1890); Durand v. Hollins, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860).}\]

\[\text{“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 165-66 (1803).}\]
First, decisions and actions by the President and his immediate staff in the conduct of foreign policy are not subject to direct review by Congress.

Second, while Congress unquestionably possesses the power to make decisions as to the appropriation of public funds, it may not attach conditions to Executive Branch appropriations that require the President to relinquish any of his constitutional discretion in foreign affairs.

Third, any statute that touches on the President's inherent authority in foreign policy must be interpreted to leave the President as much discretion as the language of the statute will allow.\(^{240}\)

In case one would try to interpret principles two and three as conservative conciliatory acceptance of congressional involvement in foreign policy as an important but junior partner, Cooper explained his third principle as follows:

Because the President's constitutional authority in international relations is by its very nature virtually as broad as the national interest and as indefinable as the exigencies of unpredictable events, almost any congressional attempt to curtail his discretion raises questions of constitutional dimension. Those questions can, and must, be kept to a minimum in the only way possible: by resolving all statutory ambiguities in accord with the presumption that recognizes the President's constitutional independence in international affairs.\(^{241}\)

Cooper concluded that section 501(B) of the National Security Act that required the President to report to Congress "in a timely fashion" any intelligence operations that were not reported prior to initiation must be interpreted to mean when the President determines that the information regarding the operation can be disclosed without risk of disrupting the operation.\(^{242}\)

In the spring of 1986 the Reagan Administration sparked a new round of congressional hearings on the applicability and utility of the WPR when, on April 14, 1986, it ordered a naval and air attack on several facilities in Libya as retaliation for terrorist attacks supported by Libya. In response, the House Committee on Foreign Affairs Subcommittee on Arms Control, International Security and Science held a series of hearings on the attacks and the Reagan

\(^{240}\) The President's Compliance with "Timely Notification" Requirement of Section 501(B) of the National Security Act, 10 Op. O.L.C. at 169-70.

\(^{241}\) Id. at 170 (emphasis in original).

\(^{242}\) Id. at 173.
Administration’s compliance with the WPR.245 Similar to how Congressman Javits interpreted the consultation clause in 1975—that the President is required to come to Congress before a decision is made and seek congressional advice, but not that the President is only required to report on a decision already made—Congressman Dante Fascell, Chairman of the House Committee on Foreign Affairs, Subcommittee on Arms Control, International Security and Science, argued that the consultation clause “envisions more than mere notification”; it must require more than having the President come to Congress and say “you will be happy to know, gentlemen, that a decision has been made, and the troops are on the way.”246 In describing how Congress was informed of the Libyan attacks, Congressman Fascell complained that

[we] went down there at 4 p.m. and we were told: Gentlemen, you will be happy to know a decision has been made. Planes are in the air.

And then the maps were dragged out, and we were given all the details. About halfway through, somebody said, well, do you have any objection. Well, of course, nobody objected.

That is not the purpose of consultation, to discuss the specific military plans of an operation.247

To answer congressional complaints that the Reagan Administration had not honored the text or the spirit of the WPR, like the Ford Administration, the Reagan Administration was represented by the State Department Legal Adviser.246

Like Leigh before him, Abraham Sofaer argued that although consultation is required the WPR “does not define the nature of the consultations required, but allows the President to determine precisely how such consultations are to be carried out.”247 But more importantly, in practice “consultations have depended upon the circumstances of each case,”248 and the President is authorized by both law and the practicalities of a military operation to determine how those circumstances dictate how and when Congress will be consulted. His contention was as follows:

246 Id. at 4.
247 Id. at 37.
248 Id. at 5 (Judge Abraham Sofaer was the legal advisor from the Department of State).
249 Id.
In practice, the form and substance of consultations have depended upon the circumstances of each case. In some instances, such as the introduction of United States forces into Egypt to participate in a peacekeeping operation, or the case of the Vietnam evacuation, the situation permitted detailed consultations well in advance of the action contemplated. In the case of the Teheran rescue mission, prior consultation was not possible because of extraordinary operational needs.\footnote{Hearing on War Powers, Libya, and State-Sponsored Terrorism, supra note 243, at 5.}

\ldots

The purpose of such consultations is to keep the Congress informed, to determine whether the Congress approves of a particular action or policy, and to give the Congress an opportunity to provide the President with its views, especially where it may disagree with the policy. Consultations are not intended to involve the Congress in reviewing the detailed plans of a military operation. The degree to which the President is implementing a policy of which the Congress is well aware and which it has already approved in principle is one important factor to be considered in determining the nature and timing of consultations.\footnote{Id. at 14-15.}

In a colloquy with Congresswoman Snowe, similar to one that occurred during the Bush Administration after 9/11,\footnote{See Applying the War Powers Resolution to the War on Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm on the Judiciary, 107th Cong. 68-69 (2002) [hereinafter Hearing on Applying the War Powers Resolution to the War on Terrorism]. The following exchange occurred during the hearing:}

[Chairman Feingold] So I guess what I would like to ask you in that context is, why, as a practical matter, would any administration ever seek a congressional authorization for committing military troops abroad, if there is no military necessity to do so?

And then, if it makes practical rather than legal sense, especially given Congress' power of the purse, would not that suggest that our constitutional structure has in effect a built-in preference for preauthorization, except for in clear emergencies when such authorization would not be possible?

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Mr. Yoo. I think you are quite right that the administration's position has been that the congressional authorization was not necessary, but it was welcome. And I think it goes to the administration's preference, as a practical matter, as a political matter, as a matter of prudence and good policy, to seek cooperation with the legislature in matters involving the use of armed forces abroad.
serted that the consultation provision of the WPR does not require approval by the Congress:

**Ms. Snowe.** Finally, do you think—I would like your definition of the consultation. *Do you think that consultation suggests approval by the Congress,* for example, in consulting with the leaders of the Congress prior to or during the initiation of military action against Libya? Do you think that that does constitute a required authorization or approval by congressional leaders?

**Mr. Sofaer.** No, *I do not think that that constitutes approval by the Congress.* I think that the President has the responsibility to act in certain situations and assumes the risk for his actions. And that is the historic separation and division of powers between the President and Congress. We are not shirking our responsibility.

**Ms. Snowe.** So, in other words, you are referring to the meeting that did take place three hours before the strike. If the congressional leaders, for example, had objected or conveyed disapproval of that mission, that obviously would have still taken place.

**Mr. Sofaer.** I do not know about that at all.

**Ms. Snowe.** Well, had they expressed disapproval.

**Mr. Sofaer.** I would not agree with that. Let me say that most emphatically. Put aside the War Powers Resolution for a minute. Let's just talk about America and how our system works here.

The President needs the support of Congress. He cannot do anything in the world without your support. And if he gathers the leadership in the White House and discusses with them a particular strike that may be underway, and significant opposition is expressed against it, I would not say that the President would not change his mind. I would certainly say that he would take that fully and properly into account.

The President is well aware, more aware perhaps than any President in this century, of the need to get along with Congress and to do things that Congress will accept. So, if there had been opposition expressed, the President would have taken it into ac-

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However, I agree as a matter of practical good sense, we do seek Congress' cooperation to make sure that all appropriations will be forthcoming for military operations. And that does involve consultation, which this administration, I think the record shows, has engaged in with Congress. I think there have been over 10 consultations between the President and the executive branch and Congress. And this administration fully intends to make sure that that continues wherever possible.

_Id._ at 68-69.
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count, and then exercise his judgment. And then he would have been responsible for the exercise of his judgment.

All I said in my testimony was that none of the Members that were consulted on that day in fact expressed any opposition. Some went out of their way to make it clear that they were not approving. On the other hand, they also said they were not opposing.

Ms. Snowe. Thank you very much, Judge. Thank you, Mr. Chairman.

As asserted by the Nixon and Ford Administrations before, the Reagan Administration made clear that it did not consider the 60-day rule constitutional or binding. Sofaer, being from the State Department, was diplomatic by saying "you, I am sure . . . are familiar with the probable, unconstitutionality of the concurrent resolution provision." In his written statement, Sofaer was not so diplomatic, and stated flatly that the 60-day legislative veto "cannot stand in the face of the Supreme Court's 1983 decision in INS v Chadha. The Executive Branch has historically differed with Congress over the wisdom and constitutionality of the 60-day provision of section 5."

But more importantly, the Reagan Administration focused on the purpose of the WPR by asserting that it should be applied with attention to its history and purpose derived from the Vietnam War and the Watergate scandal and not the modern problem of terrorism. Specifically, the Reagan Administration asserted that the goal of the WPR was to prevent long term secret wars in which the regular armed forces of the United States were engaged in traditional military hostilities with the regular armed forces of a sovereign nation. Sofaer asserted that the WPR was never intended to address the power of the President to deal with terrorism and engage in short term special operations to suppress terrorists or nations supporting terrorists.

It is a regrettable reality in the world that Americans abroad are increasingly subjected to murder, kidnapings, and other attacks by terrorists who seek to further their political ends through such means. The hijacking last year of TWA flight 847, with the murder of Navy diver Stethem, is a well-known recent

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253 Hearing on War Powers, Libya, and State-Sponsored Terrorism, supra note 243, at 43-44 (emphasis added); see also the colloquy between Sofaer and Congressman Leach, id. at 58-61.
254 Id. at 6.
255 Id. at 17.
256 See id. at 6.
257 Id. at 11.
example. In that case, we had no reason to believe that the Government of Lebanon had encouraged or otherwise supported the terrorists. It was simply unable to control them.

In such a situation, the President may decide to deploy specially trained antiterrorist units in an effort to secure the release of the hostages or to capture the terrorists who perpetrated the act. Does the War Powers Resolution require consultation and reporting in this kind of situation? The answer was clearly "no." This approach would be one that Presidents Bush, Clinton, and Obama would later assert. Sofaer explained to Congress in regard to the WPR:

We doubt that the resolution should in general be construed to apply to the deployment of such antiterrorist units where operations of a traditional military character are not contemplated, and where no confrontation is expected between our units and forces of another state. To be sure, the language of the resolution makes no explicit exception for activities of this kind. But such units can reasonably be distinguished from the resolution's language of 'forces equipped for combat.' And their actions against terrorists differ greatly from the 'hostilities' expressly contemplated by the resolution.

Nothing in the legislative history of the resolution indicates, moreover, that the Congress intended the resolution to cover deployments of such antiterrorist units. These units are not conventional military forces. A rescue effort or an effort to capture or otherwise deal with terrorists where the forces of a foreign nation are not involved is not a typical military mission, and our antiterrorist forces are not equipped to conduct sustained combat with foreign armed forces.

Rather, these units operate in secrecy to carry out precise and limited tasks designed to liberate U.S. citizens from captivity, or to attack terrorist kidnapers and killers. When used, these units are not expected to confront the military forces of a foreign state.

Furthermore, in situations in which the special forces of the nation are deployed, the very nature of the operations will void the consultation clause in so far as Congress will not be granted advanced notice of an action because of the "need for swiftness and secrecy." Although Congress was informed of the attack on Libya after the forces were dispatched but before the attack occurred, Sofaer made clear that such consultation was more than that which

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257 Hearing on War Powers, Libya, and State-Sponsored Terrorism, supra note 243, at 6-7.
258 Id. at 6-7.
259 Id. at 7.
is required and that it actually placed the mission at risk of detection and thus put the lives of the forces at risk:

In the case of the April 14 operation, extensive consultations occurred with congressional leaders. They were advised of the President's intention after the operational deployments had commenced, but hours before military action occurred. This satisfied the Resolution's requirement that consultation occur "before" the "introduction" of troops into hostilities or a situation of imminent hostilities. Congressional leaders had ample opportunity to convey their views to the President before any irrevocable actions were taken (in fact, no one who was consulted objected to the actions undertaken). The President took a serious risk in conducting these consultations. The press observed legislative leaders entering the White House for the consultations, and speculation about possible military action ensued. The press also learned immediately after the consultations that the President was to make an address later that evening, and this led to rumors of imminent military action that could have jeopardized the success of the operation.\footnote{Id. at 27-28.}

Although clearly overstating the point, it was this position—that consultation with Congress before a special operations deployment is to be avoided due to security and secrecy concerns and that Congress is to be informed only after its completion (or at the very least after secrecy is no longer a strategic necessity)—that has been the position of every presidential administration since.

Congressman Fascell raised an interesting question, the answer of which has been of great assistance and provided additional support for assertions made by both President Bush (after 9/11) and Obama. Fascell posed the question, "can the President, as Commander in Chief, take the country to war wherever an act of state-sponsored terrorism has taken place" and be relieved of congressional approval based on the reasoning that because "they have declared war on us, we do not really have to declare war on them."\footnote{Id. at 2-3.} The point of the Fascell's question was, does an act of terrorism allow a President to make war without congressional approval because violence has been inflicted upon the United States? Although the question in terms of terrorism may have been novel, the answer was not. Since President Washington, it has been understood that an act of war inflicted upon the United States does not require an act of Congress in order for the President to respond.\footnote{See Fleming v. Page, 50 U.S. 603, 614-615 (1850); Luther v. Borden, 48 US 1 (How) (1849); Martin v. Mott, 25 US (12 Wheat.) 19 (1827); Bas v. Tingy, 4 U.S.} Sofaer came to the same conclusion when he answered
Congressman Fascell. Sofaer asserted that, in regard to addressing the limited attack on Libya, the President acted within his authority as Commander in Chief, and the WPR does not confer power upon the President but "recognizes that the President has independent constitutional authority to take appropriate military action" to protect American interests and security when attacked for a foreign power.

Sofaer made one last point that is significant in understanding the development of Executive Branch rejection of the WPR as a legal impediment to presidential actions as Commander-in-Chief. The Reagan Administration sent a naval force into the Gulf of Sidra to enforce recognized international water and air boundaries in the face of Libya's assertion claiming the Gulf within its territorial waters. Libya made clear threats that if the U.S. Navy entered the Gulf it would cross Libya's "Line of Death." The question was thus raised—Was the sending of force a deployment into a situation that involved "hostilities" or "imminent hostilities" that invokes the WPR? To which Sofaer answered:

The War Powers Resolution, we believe, was not intended to require consultation before conducting routine maneuvers in international waters or airspace in the context of this global

(4 Dall.) 37 (1800); Durand v. Hollins, 8 F. Cas. 111, 112 (C. C. S. D. N. Y. 1860) (No. 4, 186); Existence of War with the Seminoles, 3 Op. Att'y Gen. 307, 307 (1838); Suspension of the Privilege of the Writ of Habeas Corpus, 10 Op. Att'y Gen. 74, 82-86 (1861); Foreign Cables, 22 Op. Att'y. Gen. 13, 25-26 (1898); Censorship or Radio Stations, 30 Op. Att'y Gen. 291, 292 (1914); Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61-63 (1941); Presidential Powers Relating to the Situation in Iran, 4A Op. O. L. C. 115, 121 (1979); Garrison supra note 10, at 61-64; Notes on a Cabinet Meeting, supra note 29, at 114; Clark supra note 132; Meeker, supra note 169, at 484-88; Rehnquist Memo, supra note 182, at 691; Hearing on War Powers: A Test of Compliance Relative to the Danang Sealift, supra note 188, at 31, 39. Moreover, in The Prize Cases the Court observed that

If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader or States organized in rebellion, it is nonetheless a war although the declaration of it be "unilateral." Lord Stowell (1 Dodson 247) observes, "[i]t is not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other."


Hearing on War Powers, Libya, and State-Sponsored Terrorism, supra note 243, at 29.
freedom of navigation program. We are aware of no previous suggestion that the resolution would require consultation in such situations. This question was carefully considered in connection with the Sidra exercise in March, and the decision was made that the conduct of those operations did not place U.S. forces into hostilities or into a situation in which imminent involvement in hostilities was clearly indicated by the circumstances.

... The threat of a possible hostile response is not sufficient, in our judgment, to trigger the consultation requirement of section 3, which refers only to actual hostilities and to situations in which imminent involvement in hostilities is clearly indicated by the circumstances.

... Where, however, we have a situation in which our Armed Forces might withdraw from an area after we have been attacked, and then be reintroduced into the same area, we believe an argument could be made that the resolution would apply. We do not accept that argument as valid.254

The proposition that when the U.S. enforces international law against an illegal proposition by a rogue nation the WPR resolution is not invoked is a position the Obama Administration would take a few decades later when enforcing a U.N. Security Council resolution against Libya. As discussed in Part III below, a few decades after Sofaer testified to Congress, the Obama Administration sent SEAL Team Six into Somalia to rescue foreign aid workers held by Somali pirates. The Obama Administration would assert the same proposition that Sofaer provided Congress regarding the use of Special Forces to deal with terrorists.

President Bush

The George H.W. Bush Administration continued the aggressive defense and assertion of plenary power of the President to develop and implement foreign and intelligence policy. On July 31, 1989, William Barr, Chief of the OLC, provided Attorney General Dick Thornburgh with an opinion answering his question “on the constitutionality of a proposed amendment to section 502 of the National Security Act,” noting that the amendment “would prohibit the expenditure or obligation of any funds from the ‘Reserve for Contingencies’ for any covert action in a foreign country... if the

254 Id. at 8-9.
President has not first notified the appropriate congressional committees of the proposed expenditure.\textsuperscript{265}

Building on Cooper's absolutist position, Barr informed the Attorney General that "we believe such a requirement is an unconstitutional condition on the President's authority to conduct covert activities abroad pursuant to the President's constitutional responsibilities, including his responsibility to safeguard the lives and interests of Americans abroad."\textsuperscript{266} Focusing on the operational nature of the President's constitutional power to conduct foreign policy as well as the constitutional limits placed on congressional appropriations power, Barr asserted that

\[\text{we believe that because the Constitution permits the President, where necessary, to act secretly to achieve vital national security objectives abroad, a rigid requirement of prior notice for covert operations impermissibly intrudes upon his constitutional authority.}\]

\[\ldots\]

\[\ldots\] Congress's authority incident to its power over the purse is broad, and generally includes the power to attach conditions to appropriations, but its power is by no means limitless. For example, Congress appropriates money for all federal agencies in all three branches of government. But the fact that Congress appropriates money for the Army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces.\ldots\] Interpreting the appropriations power in this manner would in effect transfer to Congress all powers of the branches of government.\ldots\] Accordingly, however broad the Congress'[s] appropriations power may be, the power may not be exercised in ways that violate constitutional restrictions on its own authority or that invade the constitutional prerogatives of other branches.\textsuperscript{267}

In summary, Barr asserted that "the President cannot be compelled to give up the authority of his Office as a condition of receiving the funds necessary to carrying out the duties of his office."\textsuperscript{268} The Clinton Administration would take this same position in 1996.

On December 4, 1992, Timothy Flanigan, Assistant Attorney General for the OLC, citing the absolutist OLC opinions by Cooper and Rehnquist as well as Attorney General Jackson's 1941 opinion

\textsuperscript{266} Id. at 258.
\textsuperscript{267} Id. at 260-61.
\textsuperscript{268} Id. at 262.
and the *Durand v Hollins* case, informed the Attorney General William Barr that

[i]n our opinion, the President's role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests such as protecting the lives of Americans overseas. Accordingly, where, as here, United States government personnel and private citizens are participating in a lawful relief effort in a foreign nation, we conclude that the President may commit United States troops to protect those involved in the relief effort.\footnote{Authority to Use United States Military Force in Somalia, 16 Op. O.L.C. 8,8 (1992).}

While Cooper and Barr focused on the constitutional justification for the President's actions, Flanigan focused on defending the policy of the President to support the United Nations as well as protect American lives, i.e., use military personnel to protect aid workers in their attempts to ensure that food and other humanitarian supplies are protected during relief work to stave off starvation in Somalia.\footnote{Id. at 13, n. 1, 4.}

**President Clinton**

In case one would think that the aggressive defense of presidential power to use the foreign policy, intelligence, and military resources of the United States to develop, assert, and defend American interests without prior congressional approval is a Republican Party concept, such a view would be quickly disappointed by the OLC legal opinions issued during the Clinton Administration. In 1994 Assistant Attorney General for the OLC Walter Dellinger provided an opinion to Senators Dole, Simpson, Thurmond, and Cohen defending the Clinton Administration's deployment of troops to Haiti.\footnote{Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173 (1994); *Word for Word; A President's Ability to Declare War*, N.Y. TIMES, Sept. 30, 1994, http://www.nytimes.com/1994/09/30/us/word-for-word-a-president-s-ability-to-declare-war.html.} Although the Clinton Administration continued to send military forces overseas without specific authorization from Congress, Dellinger defended the actions on a much more conciliatory tone by defending the policy itself and asserting that: (1) Congress authorized the action through Department of Defense Appropriation Act of 1994; (2) the action was in obedience with the War Powers Resolution reporting requirements; and (3) the scope of the deployment did not engage the Article I War Declaration
Clause. Although Dellinger was justifying classical presidential action without prior congressional support in a much less confrontational approach, his opinion cited Cooper for the proposition that historically Presidents have deployed American military force to protect American interests on their own authority as Commander in Chief.

In 1995 Dellinger, in an opinion to the General Counsel to the President, responded to an inquiry as to the power of the President to use force in Bosnia:

This is to provide you with our analysis of whether the President, acting without specific statutory authorization, lawfully may introduce United States ground troops into Bosnia and Herzegovina ("Bosnia") to help the North Atlantic Treaty organization ("NATO") ensure compliance with the recently negotiated peace agreement. We believe that the President may act unilaterally in the circumstances here.

Citing Harmon's opinion, Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, Dellinger observed that "American soldiers are deployed at many places around the world. . . . [I]n some instances they deal with conditions of appreciable danger. Indeed, continuously for the last 40 years, American forces have been deployed under [hostile] conditions." In an opinion that would be echoed by John Yoo, Dellinger cited General Jackson's Training of British Flying Students in the United States opinion that asserted the President has the power to dispense the Armed Forces of the United States as he deems fit to protect the safety of the nation, and that this view was in line with "[h]istorical practice" that supplies numerous cases in which Presidents, acting on the claim of inherent power, have introduced armed forces into situations in which they encountered, or risked encountering, hostilities, but which were not "wars" in either the common meaning or the constitutional sense. . . . In at least 125 instances, the President acted without express authorization from Congress.

After citing Flanigan's Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia opinion with

272 Id. at 173.
273 Id. at 174.
275 Id. at 327.
276 Id. at 330.
277 Id. at 330-331.
approval, Dellinger concluded that historical "practice reinforces the most natural reading of the constitutional [declare war] language: at the least, the President may deploy United States forces here without express authorization to protect the national interests, even if the deployment is not without some risk." As Harmon attempted during the Carter Administration, Dellinger sought to defend the inherent power of the President as Commander in Chief without making a frontal assault on the WPR:

The Resolution necessarily presupposes the President's authority, even in the absence of express authorization by Congress, to deploy troops in circumstances such as those here. Where (as here) the President would be ordering United States forces into foreign territory while equipped for combat, the Resolution requires a report to Congress. The Resolution thus assumes that the President sometimes may order such deployments without prior statutory authorization . . . . At the least, even if the Resolution does not add to the President's authority, it takes for granted that he may make deployments in situations where hostilities are not actual or imminent, without purporting to limit the circumstances in which such deployments may be made . . . and without placing any restriction on the time during which the deployments may continue.

In our view, the Resolution lends support to the broader conclusion that the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances. By May 1996, Dellinger took a much more aggressive position supporting the use of presidential power in foreign affairs in the face of assertions of congressional authority over military and foreign policy. In his 1996 memo, Placing of United States Armed Forces Under United Nations Operational or Tactical Control, Dellinger asserted that a proposed congressional act preventing funds from being allocated to actions placing American armed forces under United Nations operational or tactical control

unconstitutionally constrains the President's exercise of his constitutional authority as Commander-in-Chief. Further, it undermines his constitutional role as the United States' representative in foreign relations. While "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping," Congress may not deploy that power so as to exercise functions constitutionally committed to the Executive alone. . . . Nor may

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278 Id. at 334.
279 Id. at 334-335 (citations omitted).
Congress legislate in a manner that "impermissibly under-
mine[s]" the powers of the Executive Branch.280

In 1793, Hamilton asserted that it was within the exclusive
province of the powers exercised by President Washington to de-
terminate if the new French government was to be recognized and
the treaty of alliance between the United States and France was to
be honored.281 Madison disagreed.282 In 1996, Dellinger, backed by
two hundred years of history, affirmed Hamilton and asserted the
recognition power was exclusive to the Chief Executive and Com-
mander in Chief. As did Rehnquist, Dellinger echoed Hamilton
when he asserted that "[e]ven though there are areas in which both
Congress and the President have a constitutional voice . . . it may
not impose constraints in the areas that the Constitution commits
exclusively to the President."283 Those exclusive powers include
the power to determine how and by whom American military forces
will be led and under what circumstances.284 "[T]here can be no room
to doubt that the Commander-in-Chief Clause commits to the Pres-
ident alone the power to select the particular personnel who are to
exercise tactical and operational control over U.S. forces."285

As had previous Attorneys General and heads of the OLC,
Dellinger made clear that the Commander in Chief power not only
provides the President with plenary power to determine military
tactical policy but also to direct foreign policy. The proposed act,
Dellinger asserted, "unconstitutionally undermin[ed] the Presi-
dent's constitutional authority with respect to the conduct of dip-
loamy.286 In absolutist language worthy of the Reagan and both
Bush Administrations, Dellinger, citing an opinion287 by Eisenhow-
er's first Attorney General Herbert Brownell, concluded as follows:

Congress cannot, however, burden or infringe the President's
exercise of a core constitutional power by attaching conditions
precedent to the exercise of that power.

280 Placing of United States Armed Forces Under United Nations Operational or
281 GARRISON, SUPREME COURT JURISPRUDENCE, supra note 10, at 6-10.
282 Id. at 11-18.
283 Id. at 184-85.
284 Id.
285 Id. at 186.
286 Id.
287 Authority of Congressional Committees to Disapprove Action of Executive
... That Congress has chosen to invade the President's authority indirectly, through a condition on an appropriation, rather than through a direct mandate, is immaterial. Broad as Congress'[s] spending power undoubtedly is, it is clear that Congress may not deploy it to accomplish unconstitutional ends. ... "Congress may not use its power over appropriation of public funds 'to attach conditions to Executive Branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."^288

One month later, Dellinger again forcefully defended the President's powers as Commander in Chief against congressional legislative action. In an echo of the debate between Hamilton and Madison on the power of the President to be the lead branch in determining the meaning and applicability of a treaty, Dellinger advised that a proposed appropriation bill stating that the “United States shall not be bound by any international agreement entered into by the President that would substantially modify the Anti Ballistic Missile Treaty with the Soviet Union” unless it was submitted to the Senate as a treaty would result in “serious constitutional questions.”^289 Dellinger concluded that the proposed appropriation amendment “intrudes on two exclusively Executive prerogatives: the power to interpret and execute treaties, and the power of recognition.”^290

It belongs exclusively to the President to interpret and execute treaties. This is a direct corollary of his constitutional responsibility to “take care” that the laws are faithfully executed.

The responsibility to interpret and carry out a treaty necessarily includes the power to determine whether, and how far, the treaty remains in force.^291

Citing a Congressional Research Service report, which asserted that “there is clear judicial recognition that the President may without consulting Congress validly determine the question whether specific treaty provisions have lapsed,” Dellinger made clear that “Congress may not interfere with or direct the President's interpretation and execution of a treaty any more than it may do so in the case of a statute.”^292 Hamilton’s opinion had prevailed.

^290 Id.
^291 Id. at 248-249.
^292 Id. at 249-250.
Dellinger’s opinion was a much more conservative position than the one taken by Rehnquist in his 1970 memo, in which Rehnquist acquiesced that

Congress undoubtedly has the power in certain situations to restrict the President’s power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation . . . Congress, exercising its constitutional authority to “make rules concerning captures on land and water” may thus restrict the President’s power to direct the manner of proceeding with such captures.293

Moreover, according to the Rehnquist opinion “Congress has enacted legislation providing that United States forces shall not be dispatched to Laos or Thailand in connection with the Vietnam conflict. This proviso was accepted by the executive.”294 Constitutional doubt on congressional appropriation of funds in order to direct foreign and military policy arises only when “Congress attempt[s] by detailed instructions [to direct] the use of American forces already in the field to supersede the President as Commander-in-Chief of the armed forces.”295

III. THE PRESIDENTIAL COMMANDER-IN-CHIEF AUTHORITY AS DEFINED BY THE OLC IN THE BUSH & OBAMA ADMINISTRATIONS

A. The Bush Administration

On September 11, 2001, agents from al Qaeda succeeded in hijacking four American airplanes and flying two of them directly into the World Trade Center, one into the Pentagon, and the last into a field in Pennsylvania.296 Subsequently, the OLC issued a series of opinions on the power of the President to take military action to respond to the attacks. One of the positions that the OLC advocated was that the President, as Commander in Chief, had the inherent power to use military action and he did not require congressional approval to respond to the attacks of September 11, 2001.297

293 Rehnquist Memo, supra note 182, at 699.
294 Id. at 700.
295 Id.
After the attacks of 9/11, the Bush Administration viewed the attacks not as an international criminal act, but an act of war warranting a complete military response. On September 12, 2001, during the first National Security Council (NSC) meeting after the attacks, discussions on how the government would track down those responsible for the attacks occurred. FBI Director Robert Mueller commented that if some of the tactics being discussed were used “it may impair our ability to prosecute” to which Attorney General John Ashcroft replied, “This is different.” In the meeting, Ashcroft’s views reflected what would become official policy on the War on Terror. Ashcroft’s response to Director Mueller continued:

We simply can’t let this happen again. Prosecution cannot be our priority. If we lose the ability to prosecute, that’s fine; but we have to prevent the next attack. Prevention has to be our top priority. The chief mission of U.S. law enforcement is to stop another attack and apprehend any accomplices and terrorists before they hit us again. If we can’t bring them to trial, so be it.

Ashcroft’s exactitude and indifference to the consequences resulting from his principled stand on protection over criminal prosecution is reminiscent of Lincoln’s indifference to the consequences of the seeds of war that would be planted by assuring that the Union would remain intact and that his election would be honored under the Constitution. Indeed, on the eve of Lincoln’s inauguration, to a group advocating letting the southern states govern themselves outside of the Constitution, he said that the Constitution will be preserved, obeyed, and enforced in “every part of every one of the United States . . . . [L]et the grass grow where it may.”

The Bush Administration’s perception that terrorism in the post-9/11 world required a military response—rather than a traditional law enforcement response—is only part of the background to its assertion of broad, exclusive, and plenary presidential power. John Yoo, along with Vice President Dick Cheney and his General Counsel, David Addington, believed that the power of the President had been fundamentally weakened by Congress and the

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299 Id.
300 CHITTENDEN, supra note 114, at 75.
301 Id.
302 The view that Congress had weakened the Office of the Presidency was not a new assertion made by the second Bush Administration. Within months of inauguration the first Bush Administration, the OLC asserted that Congress had uncons-
courts during the 1970s and 1980s. The Church investigations, Watergate, President Ford appearing before Congress, the War Powers Resolution, the Foreign Intelligence Surveillance Act (FISA), the Iran-Contra hearings, and congressional formation of permanent committees to oversee foreign and military policy were all considered by the Bush Administration as successful systemic attempts to limit the power of the President to exercise his constitutional powers as Commander in Chief as he deemed necessary. Yoo, Addington, and the Vice President were not only determined to prevent any additional erosion of presidential authority, they intended to reassert and restore the lost powers and prerogatives of the President.

Yoo, Addington, and the Vice President believed that the President, especially when he acted as Commander in Chief in time of war, was not subject to the desires, dictates or approval of Congress. The Vice President, in an interview in 1996 after the first war with Iraq, explained that when he was Secretary of Defense, he opposed President Bush going to Congress to seek authorization to use force against Iraq to compel its withdrawal from Kuwait because he believed that congressional authorization was not required, that he was afraid it would not be provided, and that if Congress did not approve military action he would have advised the President to initiate hostilities against Iraq anyway. After thanking Congress for authorizing the use of force in Iraq, President Bush reflected the sentiments of his then-Secretary of Defense in his signing statement (January 14, 1991). In his statement, the President made clear that he was of the view that he did not need the approval Congress:

As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the longstanding positions of the Executive Branch on either the President's constitutional authority to use the Armed Forces to defend vital

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U.S. interests or the constitutionality of the War Powers Resolution.\(^{304}\)

President Bush’s view—that the Constitution did not require a congressional resolution to authorize him to use military force after he determined it was in America’s national interests to use such forces to expel Iraq from Kuwait—was not unique. It was the same view that the Kennedy OLC opined President McKinley shared and was the same view that the OLC asserted that provided President Kennedy with the legal authority to impose a quarantine around Cuba during the Cuban Missile Crisis. This view of plenary executive power was asserted by the Truman and Johnson Administrations, and it was the same view that the George W. Bush Administration asserted in 2001.\(^{305}\)

Within months of the 9/11 attacks, the government of Afghanistan—which provided a sanctuary and support for al Qaeda—was deposed by a multinational force led by the United States, and the Bush Administration initiated a worldwide covert military operation to find and capture the major members of al Qaeda. The memos written by John Yoo would form the legal basis for all of the Bush Administration’s initial activities in the War on Terror.

On September 25, 2001, the OLC, under the pen of John Yoo, submitted an opinion to Timothy Flanigan, the Deputy Counsel to the President, which asserted that the President has the constitutional power not only to retaliate against any person, organization, or State suspected of involvement in terrorist attacks on the United States, but also against foreign States suspected of harboring or supporting such organizations. Finally, the President may deploy military force preemptively against terrorist organizations or the States that

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\(^{305}\) In his signing statement George W. Bush echoed the views of his father writing:

Senate Joint Resolution 23 recognizes the seriousness of the terrorist threat to our Nation and the authority of the President under the Constitution to take action to deter and prevent acts of terrorism against the United States. In signing this resolution, I maintain the longstanding position of the executive branch regarding the President’s constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution.

harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11.

Our analysis . . . conclude[s] that the Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad—especially in response to grave national emergencies created by sudden, unforeseen attacks on the people and territory of the United States.306

John Yoo, among others in the Bush Administration, correctly asserted before Congress that “Presidents throughout U.S. history have exercised broad unilateral power to engage U.S. Armed Forces in hostilities. Congress has repeatedly recognized the existence of presidential constitutional war power.”307 According to Yoo, the first principles regarding presidential power in times of war are that (1) the President as Commander in Chief is not only empowered, but obligated to use whatever force he determines necessary to address, confront, and defeat an adversary that possess a military threat or has conducted an act of war against the United States; (2) it is for the President to determine if a military threat exists or if a military attack has been committed which amounts to an act of war against the United States; and (3) Congress has a very limited role in developing policy to address national security threats to the United States and the Judiciary has no role at all.308 Such legal assertions regarding plenary presidential power in foreign affairs were not dissimilar to the OLC positions by Rehnquist, Harman, Flanigan, Dellinger, Cooper, and Barr or the opinions of prior Attorneys General or State Department legal counsels over the past century and a half. It is a historical and political fact that every sitting President has asserted plenary—if not complete and exclusive—authority to use military force when he deems it necessary to implement foreign policy or defend American interests. It was the opinions by the OLC asserting that (1) the federal statute prohibiting torture was unconstitutional when applied to the President in his role as Commander in Chief; (2) the President, using his powers as Commander in Chief, had the authority to create military commissions without Congress and in contradiction to the


307 Hearing on Applying the War Powers Resolution to the War on Terrorism, supra note 251.

308 See JOHN YOO, WAR BY OTHER MEANS: AN INSIDER’S ACCOUNT OF THE WAR ON TERROR 1-17 (2006); see also supra notes 108 and 127.
Uniform Code of Military Justice (UCMJ)); (3) the President could detain and question captured enemy combatants under circumstances and conditions as he exclusively determined were necessary and proper; and (4) the Geneva Conventions did not limit the authority of the President to detain and interrogate captured enemy combatants that caused much more of a political and legal backlash than the assertion of presidential power to use the military without congressional prior approval.  

B. The Obama Administration

1. The Libya Operation

Starting in December 2010 and through March 2011, a series of demonstrations and political revolutions involving a number of nations occurred in the Middle East and North Africa. In two nations, Tunisia and Egypt, the governments were deposed and a full civil war started in Libya. This revolutionary movement, referred to as the Arab Spring, found military opposition in February 2011 when Colonel Gaddafi’s “security forces responded with extreme violence” against Libyan protestors. President Obama reported to Congress that under Gaddafi’s orders, “[f]ighter jets and helicopter gunships attacked people who had no means to defend themselves.”

In response the President ordered economic sanctions on Libya and the U.N. Security Council passed U.N. Resolution 1970, which demanded an end to the violence and specifically ordered Gaddafi to refrain from using military force against his own people. On March 1, 2011, the Senate passed Senate Resolution 85 which in part “urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.” After the “Gulf Cooperation Council and the Arab League called for the establishment of a no-fly zone” the U.S., NATO, “the Arab World and the African members of the Security Council . . . pushed for the passage of U.N. Security Council Resolution 1973 on March 17” with the stated goal of creating a

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511 Id.
512 Id. at 5-6.
513 Id. at 6.
ceasefire in Libya. The Resolution authorized member states to impose a no-fly zone and protect the citizens of Libya from the forces of Gaddafi.

On March 19, 2011, President Obama authorized the launching of air strikes on various Libyan targets to enforce U.N. Resolution 1973. On March 28, President Obama, in his speech to the nation on the issues of Libya, stated that the U.S. was acting with its NATO allies and under the U.N. Security Council Resolution 1973 to prevent a humanitarian disaster and military slaughter of innocent civilians. On March 31, 2011, NATO took over command of the air campaign enforcing the no fly-zone and the United States took on a supportive, non-direct military role by providing intelligence and refueling assets. On October 20, 2011, Gaddafi was killed by Libyan opposition forces and NATO formally ended its military operations in Libya the following day, which was followed by a formal declaration of Libyan liberation by the Libyan Transitional government on October 23, 2011.

2. Modern Presidents and the WPR

To say that no sitting President has viewed the WPR as completely constitutional, is almost a truism. On October 24, 1973,
President Nixon vetoed House Joint Resolution 542. President Nixon rejected the WPR because

House Joint Resolution 542 would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years. One of its provisions would automatically cut off certain authorities after sixty days unless the Congress extended them. Another would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation.

I believe that both these provisions are unconstitutional. The only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.

The President specifically rejected the sixty-day rule with assertions that every subsequent President, regardless of party, would later reflect. As President Nixon observed:

I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under this resolution. 60 days after they were invoked. No overt Congressional action would be required to cut off these powers—they would disappear automatically unless the Congress extended them. In effect, the Congress is here attempting to increase its policymaking role through a provision which requires it to take absolutely no action at all.

In my view, the proper way for the Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking the responsibility of casting a yes or no vote after considering those merits. The authorization and appropriations process represents one of the ways in which such influence can be exercised. I do not, however, believe that the Congress can responsibly contribute its considered, collective judgment on such grave questions without full debate and without a yes or no vote. Yet this is precisely what the joint resolution would allow. It would give every future Congress the ability to handcuff every future President merely by doing nothing and sitting still.

320 President Nixon, Veto of the War Powers Resolution, 5 PUB. PAPERS 893 (Ocl. 24, 1973).
321 Id.
In my view, one cannot become a responsible partner unless one is prepared to take responsible action.\textsuperscript{322}

Congress overrode his veto on November 7, 1973.\textsuperscript{323}

Since its passage the OLC has had various opportunities to pass on the constitutionality, and more importantly the applicability, of the WPR to specific military initiatives by various presidents subsequent to its passage. Although the OLC has been consistent in placing limits on the unqualified acceptance of the WPR, opinions by Republican administrations tend to be more absolute in rejecting the Commander in Chief limitations of the Resolution than Democratic administrations. The Ford Administration made clear to Congress that "from a legal point of view . . . Congress cannot by statute circumscribe a power which is derived from the Constitution."\textsuperscript{324} The Ford Administration OLC set the terms for executive rejection of the WPR as a source of presidential power when it made clear that the President does not get "his authority to send troops from the War Powers Resolution . . . This resolution does not delegate anything to the President. It is not an act of delegation by the Congress of power to the President."\textsuperscript{325} More importantly, the Ford Administration set the terms for the rejecting the idea that Congress could restrict the Commander in Chief power of the President regarding the use of the military in implementing foreign policy as a constitutional matter.\textsuperscript{326} The Reagan Administration affirmed this view, asserting that the WPR does not constitute a legally binding definition of Presidential authority to deploy our armed forces . . . Were the executive to concede that § 2(c) represented a complete recitation of the instances in which United States Armed forces could be deployed without advance authorization from Congress, the scope of the Executive’s power in this area would be greatly diminished.\textsuperscript{327}

The Administration made clear that "decisions and actions by the President . . . in the conduct of foreign policy are not subject to

\textsuperscript{322} Id.


\textsuperscript{324} Hearing on War Powers: A Test of Compliance Relative to the Danang Sealift, supra note 188, at 29.

\textsuperscript{325} Id. at 96-97; see also supra note 206 and accompanying text.

\textsuperscript{326} Id. at 91, 96-97; see also supra notes 205-08 and accompanying text.

\textsuperscript{327} Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274 (1984); see also supra note 227 and accompanying text.
direct review by Congress. . . . Any congressional attempt to curtail his discretion raises questions of constitutional dimensions.328

The first Bush Administration was no less clear on the Commander in Chief power. In an opinion on the power of the President to use military force, the Administration made clear that the President can use force to protect both government personnel and private citizens oversees in order to protect national interests or support international relief operations.329 The Administration also made clear that although an authorization from Congress was appreciated, it was not constitutionally required. Upon signing the resolution authorizing force to expel Iraq from Kuwait, President Bush stated, "[M]y signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution."330 The second Bush Administration made clear in a hearing before Congress that Article 2, Sections 1 and 2 give the President the Constitutional authority to introduce U.S. armed forces into hostilities when appropriate, with or without specific Congressional authorization. Notably, nothing in the text of the Constitution requires the advice and consent of the Senate or the authorization of Congress before the President may exercise the executive power and his authority as Commander in Chief.331

Democratic administrations came to similar conclusions. The Carter Administration came to terms with the WPR during the Iranian Hostage Crisis in 1980, and in regard to the Commander in Chief power, concluded that the "power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the president's general power as a matter of historical practice."332 But in an effort to split the difference between the congressional assertion that prior approval was required under sections 2(c) and 333 of the WPR and both prior and subsequent assertions

328 Hearing on War Powers: A Test of Compliance Relative to the Danang Sealift, supra note 188, at 96-97; see supra note 206 and accompanying text.
329 Authority to Use United States Military Force in Somalia, 16 Op. O.L.C. 8 (1992); see also supra note 269 and accompanying text.
331 GARRISON, SUPREME COURT JURISPRUDENCE, supra note 10, at 286.
333 See supra notes 193, 201 and accompanying text.
by the President that the Commander in Chief power is plenary, the Carter Administration stated that "[w]hile Presidents have exercised their authority to introduce troops . . . without prior congressional authorization, those troops remained only with the approval of Congress." Thus, this avoided a frontal assault on the section 5(b) and (c) requirements that the President remove troops if Congress does not approve the action within sixty days or orders him to remove such forces by concurrent resolution. Note the distinction.

The Carter Administration accepted that Congress has a role in military deployment long term but rejected the means adopted within the WPR. The Carter Administration, echoing the veto message of President Nixon, made clear that although "Congress may terminate presidentially initiated hostilities through the enactment of legislation, . . . it cannot do so by means of a legislative veto device such as a concurrent resolution. . . . Congress may regulate the President's exercise of his inherent powers by imposing limits by

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335 50 U.S.C. § 1544(b)-(c) (2012) states:

(b) Termination of use of United States Armed Forces; exceptions; extension period

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Concurrent resolution for removal by President of United States Armed Forces

Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Id.
To soften both the rejection of the sixty day rule and the rule itself, the Carter Administration interpreted the sixty day rule as a political maneuver in which the rule shifted "the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad" because "placing that burden on the President [did not] unconstitutionally intrude[] upon his executive powers."

The Clinton Administration made clear that the possibility that American forces might be deployed in an environment with the risk of hostilities does not limit the power of the President to deploy those forces. The Administration concluded that the WPR, as a constitutional matter, presumes that "the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances." With this history of interpretation of the WPR in mind it should come as no surprise that the Obama Administration, in an effort to prevent a humanitarian disaster during a popular uprising in Libya, did not remove U.S. military participation in the "hostilities" against Colonel Muammar Gaddafi sixty days after Congress failed to authorize President Obama’s deployment of forces.

3. The Obama Administration OLC Opinion

The OLC traditionally has provided the President with an analysis that allows the President a broad range of power to act in foreign policy under his constitutional power as the Chief Executive and Commander in Chief. On April 1, 2011, the OLC issued an opinion to Attorney General Holder regarding (1) the power of the President to order the use of U.S. forces to enforce the U.N. Resolution and (2) the applicability of the War Powers Resolution—specifically the power of the President to act without congressional approval and the application of the sixty day rule. As

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537 Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. at 196; supra note 221.
538 See supra notes 275-78.
539 See supra note 279.
540 See infra Part III.B.3
541 See generally Garrison, The Opinions by the Attorney General, supra note 11; Garrison, The Role of the OLC, supra note 9; Garrison, Torture Memos, supra note 10.
542 Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011)(Ms. Krass, the author of the opinion at the time of its publication, was not the Assistant Attorney General for the Office of Legal Counsel but was the acting head of the OLC and is currently the Principal Deputy Assistant Attorney General of the OLC. The OLC did not have a confirmed Assistant Attorney General and head for the first two
prior OLC opinions issued by both Democratic and Republican administrations have observed, the OLC opined to Attorney General Holder that in passing the WPR, "Congress itself has implicitly recognized this presidential authority," and the WPR was "intended 'to fulfill the intent of the framers of the Constitution of the United States.'" The opinion made clear that the WPR is not a bar on the President but rather a recognition of the constitutional and historical authority of the President:

The Resolution further provides that the President generally must terminate such use of force within 60 days (or 90 days for military necessity) unless Congress extends this deadline, declares war, or "enact[s] a specific authorization." As this Office has explained, although the WPR does not itself provide affirmative statutory authority for military operations, the Resolution’s "structure . . . recognizes and presupposes the existence of unilateral presidential authority to deploy armed forces" into hostilities or circumstances presenting an imminent risk of hostilities. That structure—requiring a report within 48 hours after the start of hostilities and their termination within 60 days after that—"makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress."

Continuing with the traditional executive interpretation of the WPR, the OLC made clear that "historical practice of presidential military action without congressional approval precludes any suggestion that Congress's authority to declare war covers every military engagement, however limited, that the President initiates." But, like the Clinton and Carter Administrations, rather than stating that the President's power to dispatch the U.S. military is exclusive and plenary, the Obama Administration tried to split the difference by asserting that "[w]e have acknowledged one possible constitutionally-based limit on this presidential authority to employ military force in defense of important national interests—a planned military engagement that constitutes a 'war' within the years after the election of President Obama. The Senate failed to act on his initial nominee Dawn Johnson who was nominated in January 2009 and positively reported out of the Senate Judiciary Committee in March 2009. Ms. Johnson withdrew her nomination in April 2010 when her nomination was successfully blocked from a full vote in the Senate. The Senate confirmed Virginia Seitz as Assistant Attorney General and head of OLC on June 30, 2011.

343 Id. at 8 (quoting 50 U.S.C. § 1541(a) (2006)).
344 Id. (citations omitted).
345 Id.
meaning of the Declaration of War Clause.\textsuperscript{546} The OLC responded to this assertion by stating that

the President's legal authority to direct military force in Libya turns on two questions: first, whether United States operations in Libya would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.\textsuperscript{547}

Citing the OLC opinions of the Clinton Administration on the lawfulness of the deployment of military force in Haiti and Bosnia, the Obama Administration asserted that the Declare War Clause becomes applicable based on the "nature, scope and duration" of the deployment of military force and the nature of military engagements that American forces would be exposed to during the deployment, which requires a fact-finding analysis.\textsuperscript{548} Applying this fact-finding analysis, the OLC opined that in 1994 it applied this test and determined that the "deployment of up to 20,000 . . . troops to Haiti to . . . reinstall [the legitimately elected] government was not a 'war' [that required] advance congressional approval," and in applying the same test in 1995, the dispatching of "20,000 . . . troops to enforce a peace agreement in Bosnia and Herzegovina . . . was not a 'war'" although there was some risk of casualties due to hostilities.\textsuperscript{549} The OLC concluded that (1) the interests of the United States were at stake in Libya because a military slaughter of civilians by Gaddafi would risk "regional stability [and] the UNSC's credibility and effectiveness"\textsuperscript{550} and (2) "the limited military operations the President anticipated directing were not a 'war' for constitutional purposes."\textsuperscript{551}

In regard to the second factor, which the OLC opined implicates the requirements of the Declare War Clause, the OLC concluded by analogy that if the deployment of 20,000 troops to Haiti and 20,000 troops to Bosnia did not implicate the Declare War Clause, then the operation authorized by President Obama did not implicate the Clause because the military deployment was not as

\textsuperscript{546} Id.
\textsuperscript{547} Id. at 10.
\textsuperscript{548} Authority to Use Military Force in Libya, 35 Op. O.L.C. at 8.
\textsuperscript{549} Id. at 9.
\textsuperscript{550} Id. at 10.
\textsuperscript{551} Id. at 12.
significant and did not involve ground troops. The OLC concluded:

As in the case of the no-fly zone patrols and periodic airstrikes in Bosnia before the deployment of ground troops in 1995 and the NATO bombing campaign in connection with the Kosovo conflict in 1999—two military campaigns initiated without a prior declaration of war or other specific congressional authorization—President Obama determined that the use of force in Libya by the United States would be limited to airstrikes and associated support missions; the President made clear that “[t]he United States is not going to deploy ground troops in Libya.” The planned operations thus avoided the difficulties of withdrawal and risks of escalation that may attend commitment of ground forces—two factors that this Office has identified as “arguably” indicating “a greater need for approval [from Congress] at the outset,” to avoid creating a situation in which “Congress may be confronted with circumstances in which the exercise of its power to declare war is effectively foreclosed.”

Since the military action did not include the goal of “conquest or occupation” and the mission was limited in scope, duration, and purpose, the level of military force deployed by the Obama Administration did not rise to the level of force that requires prior approval of Congress. This is the same position taken by the Taft Administration in 1912. Although the Obama Administration OLC opinion cited previous opinions by the Clinton Administration regarding the use of the purpose, goal, and nature of the engagement as a basis for concluding that the operation in Libya did not rise to the level of hostilities that required congressional approval, the logic of the opinion was in line with the Rehnquist memo in May 1970, which asserted that historically there are three

352 Id. at 13.
353 Id.
354 Authority to Use Military Force in Libya, 95 Op. O.L.C. at 13-14. The OLC concluded:

Considering the historical practice of even intensive military action—such as the 17-day-long 1995 campaign of NATO airstrikes in Bosnia and some two months of bombing in Yugoslavia in 1999g—without specific prior congressional approval, as well as the limited means, objectives, and intended duration of the anticipated operations in Libya, we do not think the 'anticipated nature, scope, and duration' of the use of force by the United States in Libya rose to the level of a "war" in the constitutional sense, requiring the President to seek a declaration of war or other prior authorization from Congress.

Id. at 13.
355 See supra notes 132-137 and accompanying text.
varieties of authority placed in the President as Commander in Chief to dispatch American armed forces which do not require prior congressional approval. 356

With the State Department (discussed below) and the OLC opinions as a basis, on June 15, 2011, President Obama reported to Congress on his actions in Libya, and asserted the following with respect to the WPR and the sixty day rule:

The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, because U.S. military operations are distinct from the kind of 'hostilities' contemplated by the Resolution's 60 day termination provision. U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile forces, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors. 357

Every presidential administration from Ford through Bush has interpreted the WPR reporting requirements as constitutional while maintaining that the WPR cannot limit the power of the President to use military force after he determines such force is necessary to implement foreign policy. The Obama Administration is no different. While Republican administrations tended to assert that the WPR did not apply to military engagements, regardless of the level of engagement, the Obama Administration tried to split the difference by limiting the sixty day rule to engagements that entail occupation, conquest, or significant military engagement as a stated goal, like Iraq in 2003, Japan in 1941, or Germany in 1917. 358

According to the Obama Administration, the Declare War Clause is limited to military engagements on the level of what Generals Sherman and Grant would have called "total war" more than a century ago. Military operations that fall short of total war do not im-

356 See supra notes 184-86 and accompanying text.
plicate the Declare War Clause, and as such do not require congressional approval under the WPR sixty day rule.

4. The Obama State Department Legal Opinion

As Monroe Leigh represented the Ford Administration on the applicability of the WPR after the Administration utilized American forces in limited military operations, Harold Koh, the State Department Legal Advisor, represented the Obama Administration before the Senate Foreign Relations Committee on June 28, 2011, on the applicability of the WPR in light of the utilization of American forces to support the U.N. Resolution in Libya.\(^5\) Koh made

\(^5\) _Libya and War Powers: Hearing Before the S Comm. on Foreign Relations, 112th Cong. 7-40 (2011) [hereinafter _Hearing on Libya and War Powers_] (Prepared Statement of Harold Hongju Koh, Legal Advisor, Dep't of State). One of the duties of the State Department Legal Advisor is to represent the Administration before the foreign relations committees in the House and Senate regarding any questions of law and/or policy in relation to foreign policy. This includes informing Congress of a position taken by the Administration regarding the implementation of the WPR. Koh stated:

I continue nearly four decades of dialogue between Congress and Legal Advisers of the State Department, since the War Powers Resolution was enacted, regarding the Executive Branch’s legal position on war powers. Id. at 11. Koh’s prepared statement also contained a footnote with relevant history of the War Powers. The footnote is as follows:

clear that the Administration did not challenge the constitutionality of the WPR,\(^{360}\) that it had complied with the WPR by constant and frequent reporting to Congress on the nature of the military actions in Libya, and that it had fully complied with the consulting and reporting requirements.\(^{361}\) Koh made two main assertions during the hearing, the first being the reiteration of the OLC position that "the situation in Libya does not constitute a war requiring specific congressional approval under the Declaration of War Clause of the Constitution." Koh stated that

the President has constitutional authority, long recognized, to direct the use of force to serve important national interests and preserving regional stability and supporting the credibility and effectiveness of the U.N. Security Council. The nature, scope, and duration of the military operations he ordered here did not rise to the level of war for constitutional purposes.\(^{362}\)

Adviser publicly explaining the legal basis for United States military actions that might occur in the international realm\(^{\text{Id. at n.1.}}\).

\(^{360}\) Id. at 18, 22, 33. Although the Administration did not challenge the constitutionality of the WPR, Koh echoed the veto message of President Nixon when he made clear that

[t]he major structural flaw of the War Powers Resolution has been that it requires an automatic termination after 60 days without Congress ever making a specific judgment in a particular case as to whether this is a case in which they'd like to authorize force or like affirmatively not to authorize force, and you cannot run these kinds of things by auto-pilot. It has to be done through judgment, political judgment of the kind that you exercise every day.

\(^{361}\) Id. at 35.

\(^{362}\) Id. at 12.\(^{\text{Hearing on Libya and War Powers, supra note 359 at 12. This is the same position the Reagan Administration took in 1986. Under questioning, Sofaer asserted that there are various levels to the use of force by the United States and the Declaration of War Clause does not cover all of them:}}\)

A declaration of war, particularly historically, is a very significant thing. It is a significant power. When a state declares war, it triggers historically that concept in international law known as unlimited hostility. During unlimited hostilities a state's armed forces do a vast range of things that would not be appropriate in more limited hostilities.

So, I think it is very important that Congress has the authority to declare war. But that does not mean either that Congress cannot approve what in colloquial terms would be a war effort, and it does not mean that the President cannot use military force.

\(^{\text{Hearing on War Powers, Libya, and State-Sponsored Terrorism, supra note 243, at 40.}}\)
Koh's second assertion focused on the WPR policy and purpose ("It is the purpose of this chapter to . . . insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.").

[The 60 day rule] directs the President—absent express Congressional authorization . . .—to remove United States Armed Forces within 60 days from "hostilities" or "situations where imminent involvement in hostilities is clearly indicated by the circumstances." But as virtually every lawyer recognizes, the operative term, "hostilities," is an ambiguous standard . . . . [T]his standard [has never] been defined by the courts or by Congress in any subsequent war powers legislation.

Note the argument. Unlike the Reagan and Bush Administrations that asserted that Congress had no authority to govern how the President exercised his power as Commander in Chief, the Obama Administration accepted the proposition that "Congress has powers to regulate and terminate use of force." But the tool the Congress used to implement its power—the term "hostilities" used in the WPR—"was vague [and Congress] specifically declined to give it more concrete meaning." Therefore, the meaning of "'hostilities' for purposes of the resolution has been determined more by interbranch practice than by a narrow parsing of dictionary definitions." The term "hostilities," which governs the applicability of the 60-day rule, is governed by the facts and circumstances of the situation. Just as the Ford Administration recognized the significance of the WPR, the Obama Administration characterized the WPR as a tool that "plays an important role in promoting interbranch dialogue and deliberation." As with all presidents from Ford through Bush, the Obama Administration viewed the WPR largely as a political policy mechanism to be addressed, rather than a direct control on Executive Branch power to be complied with. To read the WPR as a requirement for the President to justify his actions as the Ford Administration did, as policy requiring interbranch dialogue as the Obama Administration does, or as unconstitutional on its face as the Nixon and Reagan Administrations did, it comes to the same result—the WPR is almost irrelevant in placing a


Id. at 12.

Id. at 13.

Id.

Id. at 12, 35.
direct control on the decision of the Executive Branch to deploy forces without congressional prior approval or subsequent approval.

In line with the position of the State Department in the Ford and Reagan Administrations, Koh made clear that "hostilities" can be defined as a situation in which "units of the U.S. Armed Forces are actively engaged in exchanges of fire with opposing units of hostile forces." But engagements that include exchanges of fire are not the same because there is a "distinction between full military encounters and more constrained operations, [and] ‘intermittent military engagements’ do not require withdrawal of forces under the resolution’s 60-day rule." Koh asserted that this approach to the WPR has been a historical approach by prior administrations for the past "36 years since Leigh and Hoffmann provided their analysis" of the WPR and the Obama Administration "was thus operating within this longstanding tradition of executive branch interpretation when he relied on these understandings in his legal explanation to Congress on June 15, 2011." During questioning, Koh made it clear that boots on the ground and risk, per se, does not trigger "hostilities" under the WPR. He explained:

But going to the earlier point which you made, which is when someone is firing, when there are boots on the ground, does that per se rise to the level of hostilities, the testimony that I gave points to in prior administrations in situations in Lebanon.

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569 Id. at 14 (internal citation omitted).
570 Hearing on Libya and War Powers, supra note 359, at 14. Under questioning from Senator Lee, Koh clarified how administrations have defined "hostilities," beginning with the Ford Administration:

And the net result was that in 1975 under the Ford administration—and you know it well because of service that your own family did in that administration—the Congress—and this is in the first footnote of my testimony—invited the legal adviser, my predecessor, Monroe Leigh, to come forward with a definition of hostilities from the executive branch, applying exactly the judgments that we are describing here. And in my testimony, I describe the response that was given by Mr. Leigh and his coauthor in which they essentially set forth a standard—and this is on page 6 of the testimony—in which they said the executive branch understands the term 'to mean a situation in which units of the U.S. Armed Forces are actively engaged in exchanges of fire with opposing units of hostile forces,' and then said that the term should not include situations which were ones in which the nature of the mission is limited, where the exposure of U.S. forces is limited, where the risk of escalation is limited, or when they are conducting something less than full military encounters as opposed to surgical military activities.

Id. at 31.
571 Id. at 14.
Grenada, the Persian Gulf tanker controversy, Bosnia, Kosovo, all were circumstances in which there were more casualties, more boots on the ground, many, many hundreds of more munitions dropped, and those were not deemed, under those circumstances to be hostilities. It is on that basis that we have come here saying that this factual situation, unique factual situation, limited in these ways fits within the frame of hostilities as has been understood that therefore it does not trigger the 60-day limit.

...But I think the critical point here is that what we are arguing here simply is the provisions of the statute from our perspective are not triggered, therefore we don’t even get to the question of whether the constitutionality of the statute is in play. We have no intention in this situation to raise that issue, and we are operating as a matter of good faith statutory interpretation based on the very unusual facts present here.

Koh concluded that there are four questions that aid in determining if the 60-day rule applies to a deployment of U.S. forces into situations that may be hostile: (1) Is the mission limited?; (2) Is exposure to casualties and combat limited?; (3) Is the risk of military escalation limited?; and (4) Is the means or power with which military force is applied limited?

Koh applied these four criteria and concluded the following: First, the U.S. was providing “a constrained and supporting role in a NATO-led multinational civilian protection operation [with a] limited purpose” tailored by a U.N. National Security Resolution. Second, this involvement “to date . . . ha[s] not involved U.S. casualties or a threat of significant U.S. casualties.” Third, the forces used in the action have “not involved the presence of U.S. ground troops, or any significant chance of escalation into a broader conflict.” And finally, the situation does not present the kind of open-ended military engagement that produced the WPR (i.e., the history of Vietnam). Therefore, “the Libya operation did not fall within the War Powers Resolution’s automatic 60-day pullout rule.”

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372 Id. at 32. Refer to notes 343-349 and the accompanying text for a discussion of prior military engagements that involved more military involvement and threat of military casualties, than the Libya deployments, that did not require Congressional prior approval.

373 Hearing on Libya and War Powers, supra note 359, at 33.

374 Id. at 14-16.

375 Id.

376 Id. at 16.
The Obama Administration continued the consistent approach by the Executive Branch to maintain the impotence of the WPR by asserting that the WPR was never intended to restrict or control the Commander in Chief from deploying U.S. forces as needed in Lebanon, Grenada, Somalia, or Haiti, but rather

[the Congress that passed the resolution in that year had just been through a long, major, and searing war in Vietnam, with hundreds of thousands of boots on the ground, secret bombing campaigns, international condemnation, massive casualties, and no clear way out. In Libya, by contrast, we have been acting transparently and in close consultation with Congress for a brief period; with no casualties or ground troops; with international approval; and at the express request of and in cooperation with NATO, the Arab League, the Gulf Cooperation Council, and Libya’s own Transitional National Council. We should not read into the 1973 Congress’ adoption of what many have called a “No More Vietnams” resolution an intent to require the premature termination, nearly 40 years later, of limited military force in support of an international coalition to prevent the resumption of atrocities in Libya. Given the limited risk of escalation, exchanges of fire, and U.S. casualties, we do not believe that the 1973 Congress intended that its resolution be given such a rigid construction—absent a clear congressional stance—to stop the President from directing supporting actions in a NATO-led, Security Council-authorized operation, for the narrow purpose of preventing the slaughter of innocent civilians.].

Put simply, wars like Vietnam, World War II, the First Gulf War, and the War in Iraq require some type of congressional approval (either by formal declaration, resolution, or budgetary appropriation), but limited military engagements like Libya, Somalia, Grenada, or Haiti do not require congressional action. Such legal and

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377 Id.
378 During his testimony, Koh made clear that the Administration was not asserting that the WPR was inapplicable or unconstitutional but that the appliance of the 60-day rule is a question of fact and circumstances not law:

Now, I agree that there have been cases in which the executive branch has overreached. I have written about this in my academic work for many years, which is precisely why the precedent here we think has been narrowly drawn. As I said, we are not challenging the constitutionality of the resolution, which a number of administrations have. We are not saying the War Powers Resolution should be scrapped, whether it is constitutional or not. What we are simply saying is that when the mission is limited, the risk of escalation is limited, the threat to troops is limited particularly because of no ground troops, and when the tools being used are extremely limited, that that does not trigger the 60-day clock.
factual distinctions made by the Executive Branch pre-date World War I.379

In a final conclusory prose, Koh asserted that although "[r]easonable minds may read the Constitution and the War Powers Resolution differently . . . that should not distract those of us in government from the most urgent question now facing us, which is not one of law but of policy: Will Congress provide its support for NATO’s mission in Libya . . . ?"380 The significance of this last proposition should not be overlooked. It defines the issue of use of military force as a strictly political question, one that, institutionally, the President always wins. For once a military engagement begins, no Congress will immediately cut funds to force the cessation of the engagement. Congress, as a political and historical fact, is always trapped by a determinative President who deploys U.S. forces to implement a foreign policy initiative. The Congress is always trapped for two reasons, one institutional and the other political.381 Institutionally Congress does not, assuming it ever did, function, operate, or perceive itself as a check on the President.382 The reason for this is politics.383 Congress today is driven by the party politics of the occupant in the White House. Members of Congress who are of the same party as the President seek to support the policy goals of their President, and members of the party not holding the White House view their purpose in Congress as one of opposing the Pres-

And in doing so, we look to Executive and congressional precedents dating back to 1975, the Persian Gulf tanker controversy, Lebanon, Somalia, Grenada, to see where it fit. And when you have a situation in which something like Kosovo or Bosnia where campaigns on a very large scale—and we are talking here about a zero casualty, little or no risk of escalation situation and 1 percent of the munitions, that strikes us as a difference that ought to be reflected in whether it fits within the scope of the statute.

So the very rationale that I am presenting today is limited. If any of those elements are not present, none of what I have said necessarily applies. You would have to redo the analysis.

Id. at 22. Koh further asserted under a hostile question from Senator Corker regarding the Administration’s position that “the War Powers Resolution is not a mechanical device. It has to be construed in light of the facts at the time. Otherwise, the 1973 Congress would be making decisions instead of the Congress of 2011. So it has to take account of the circumstance.” Hearing on Libya and War Powers, supra note 359, at 23.

379 See supra notes 132-137 and accompanying text.
380 Hearing on Libya and War Powers, supra note 359, at 17.
381 Garrison, Hamiltonian, supra note 10, at 123-127.
382 Id. at 125.
383 Id. at 124.
ident. The actual policy issues are secondary to the constant fight for occupation of 1600 Pennsylvania Avenue. Since a President can always count on some level of support in Congress for the use of military force, the President need not fear an institutional reaction and defense of congressional power.\footnote{Id.} This institutional and political dynamic has only added to the Executive Branch’s general perception that the WPR provides no legal bar against the use of military force without prior congressional approval. As the Obama Administration made clear, the WPR is seen as something that raises questions and issues of policy rather than law.

This does not mean that the WPR is without value or utility, for it has established the need for presidents to consider Congress when making military policy. As such, all presidents have accepted the constitutionality of the WPR as far as it requires the President to inform Congress of military deployments, thus preventing the initiation of secret wars. All presidents have conceded that the WPR requires communication with Congress, and presidents have complied with this interpretation. As a practical matter, Congress, although reluctantly and sometimes with complaint and resistance, has accepted this fact almost from its enactment.\footnote{Id. at 126.} In 1986, as Congressman Fascell concluded right after Sofaer finished his testimony, that

with respect to the invasion of Grenada, we did not hold any hearings on Grenada. Congress simply accepted the Presidential position that he can go to war to save American lives. Fortunately, the operation was successful, and I would suppose that through the acquiescence of the Congress, not by formal action, that the constitutional requirement was met. I think a reasonable person could say that. I do not know of any court decision to that effect, but I think reasonable people could agree.

Now, with respect to the application of war powers, it has always been a question of interpretation of the facts. That is the reason for the War Powers Resolution, to give the Congress and the Chief Executive an opportunity to talk about the facts and then determine whether or not the resolution applies, and then get into the question as to whether or not a specific act of consultation is indeed sufficient consultation.

And, as I said at the start of this discussion, there is always a question of negotiation.\footnote{Hearing on War Powers, Libya, and State-Sponsored Terrorism, supra note 243, at 33.}
But even with this assertion, Congressman Fascell reflected the institutional surrender by Congress that decisions as to war initially belong to the President, and the WPR only requires consultation.

But there is a way to engage in consultation in advance. That would be, for example, to call in whoever seem to be the right people in matters of this kind—and that is another issue. Do you just call in the President of the Senate and the Speaker of the House, some people and not other people? That is an important issue for the President to make a decision on, but he has total control over that. Nobody is pinning him down.

He could say, for example: gentlemen, we have this kind of problem, either specifically with country X or with any number of countries. We have 10 options available to us. We have tried one, two, three, four, and they all failed. Now, we are down to 6 to 10. How do you ladies and gentlemen feel about these options? And that is it. You do not have to say, I am contemplating doing this, that, or the other. But at least the Congress has had some input into the problem and maybe some expression of opinion with respect to the solution.

Now, the final decision is always the President's. He makes it, and Congress, as you have pointed out, has ample authority to act afterward by either ratifying, supplying the money, passing a resolution, or doing a whole host of other things that would indicate its support or lack of support. So, I do not think that is a particular problem.

And therefore, I hope that we will continue this dialog, with Mr. Broomfield's help and others, to achieve a method that meets the consultation requirement.\footnote{E.g., Harold Hongju Koh, Statement Regarding the Use of Force in Libya, American Society of International Law Annual Meeting (Mar. 26, 2011), available at http://www.asil.org/am11/pdfs/haroldkoh/2011_Libya_Harold_Koh_ASL_.Remarks.pdf.}

The WPR is, in the end, a policy and political obstacle that all presidents must consider in implementing a foreign policy that involves the use of military force; it is not, as originally hoped, a legal barrier to the deployment of U.S. forces by the Commander in Chief without prior congressional approval.

IV. CONCLUSION

Historically the State Department,\footnote{Id. at 37.} various Attorneys General, and the OLC, from the Washington through Obama Administrations, have issued formal and informal opinions supporting the broadest interpretation of the Article II Commander in Chief pow-
er of the President. Almost from the inception of the Constitution, presidents have been advised that they have plenary, if not exclusive, power over foreign policy and the use of military force with and without prior congressional approval. Historically, Congress has exercised a secondary role in the face of presidential decision-making regarding American foreign policy and has never successfully asserted that the power to declare war belonged primarily to the Legislative branch. The power to declare war has been a different power than the power to make war or respond to war inflicted upon the United States. From Lincoln to the modern Presidency, all presidents have asserted the power to deploy the military, even if that could entail military combat to protect American interests, and that congressional approval is not constitutionally required for such deployments to be lawful. The Obama Administration continued this traditional view and has continued to defend the theory of plenary power in foreign and military affairs as Commander in Chief.

Subsequent to the military engagements in Libya, on May 1, 2011, at 11:35 p.m., nine years, seven months and twenty days (3,519 days) after September 11th, President Obama informed the nation and the world that under his authority as President and

See supra notes 12-44 and accompanying text.

See supra Part II.B, C and Part III.A.

See supra Part III.B.


Press Release, President Barack Obama, Remarks By the President on Osama Bin Laden (May 2, 2011), http://www.whitehouse.gov/blog/2011/05/02/osama-bin-laden-dead.

Good evening. Tonight, I can report to the American people and to the world that the United States has conducted an operation that killed Osama bin Laden, the leader of al Qaeda, and a terrorist who's responsible for the murder of thousands of innocent men, women, and children.

... . . . [A]fter taking office, I directed Leon Panetta, the director of the CIA, to make the killing or capture of bin Laden the top priority of our war against al Qaeda, even as we continued our broader efforts to disrupt, dismantle, and defeat his network.

... . . .
Commander in Chief he had ordered SEAL Team Six into Pakistan and had killed Osama Bin Laden. On January 25, 2012, President Obama sent twenty members of SEAL Team Six into Mogadishu, Somalia to rescue two charity workers kidnapped by Somali pirates. While the former military action was celebrated by Congress, and subsequently considered part of the general War on Terror authorized by the Congressional Resolution Authorization to Use Military Force passed in 2001, the latter military operation

Today, at my direction, the United States launched a targeted operation against that compound in Abbottabad, Pakistan. A small team of Americans carried out the operation with extraordinary courage and capability. No Americans were harmed. They took care to avoid civilian casualties. After a firefight, they killed Osama bin Laden and took custody of his body.

For over two decades, bin Laden has been al Qaeda’s leader and symbol, and has continued to plot attacks against our country and our friends and allies. The death of bin Laden marks the most significant achievement to date in our nation’s effort to defeat al Qaeda.


The killing of Osama bin Laden represents a milestone victory in bringing to justice the mastermind of September 11, 2001.

....

[T]he killing of Osama bin Laden is a major victory for international justice and for the United States in the war against terrorism and radical extremists.

Id. § 1099(a)(5)(b)(2). We will leave alone the party politics of the Republican held House of Representatives which specifically congratulated the military but specifically omitted congratulating President Obama, a Democrat, who authorized the operation.

See id. § 1034.

Id. at § 1034(2). Section 1021(a) of the National Defense Authorization Act of 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2012) states that “Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority for the Armed Forces of the United States to detain covered persons (as defined in subsection (b)) pending disposition under the law
in Somalia was not.\textsuperscript{400} The significance of the latter act is that there was no public or political outcry of Presidential use of military force

of war." \textit{Id.} at \$ 1021(a). Section 1021(b)(2) states that persons covered under \$ 1021(a) include

A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

\textit{Id.} at \$ 1021(b). This authority further authorized that those captured in the war on terror are subject to "Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force." H.R. Res. 1540, 112th Cong. \$ 1021 (c) (1). Although broad in language, the authorization does not apply to U.S. citizens, legal residents, or arrests made within the United States:

AUTHORITIES. - Nothing in this section shall be construed to affect existing law or authorities relating to the detention of United States citizens, lawful; resident aliens of the United States, or any other persons who are captured or arrested in the United States.


\textsuperscript{400} The National Defense Authorization Act defines the military conflict the United States is engaged in as follows:

\begin{quote}
Congress affirms that—
\begin{enumerate}
\item the United States is engaged in an armed conflict with al-Qaeda, the Taliban, and associated forces. . .
\end{enumerate}
\end{quote}
that resulted in the military invasion of a neutral nation without a declaration of war, prior approval by Congress, involvement in the attacks of 9/11, or a determination by Congress that military action was required. On September 14, 2012, President Obama informed Congress that he had dispatched special security Marine forces on September 12th to secure the U.S. Embassies in Yemen and Libya. This action was in response to an armed mob attack and burning of U.S. Embassies in Egypt and Yemen and the armed Al Qaeda affiliated attack on the Embassy in Libya that resulted in the deaths of four American Diplomats, including the U.S. Ambassador to Libya. In the letter to Congress, President Obama did not quote the WPR as the source of his authority to reinforce the security of the embassies, rather he evoked his general powers as Commander in Chief.

(2) the President has the authority to use all necessary and appropriate force during the current armed conflict with al-Qaeda, the Taliban, and associated forces pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note);

(3) the current armed conflict includes nations, organization, and persons who—

(A) are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or

(B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A); and

(4) the President’s authority pursuant to the Authorization for Use of Military Force (Public Law 107-40; 50 U.S.C. 1541 note) includes the authority to detain belligerents, including persons described in paragraph (3), until the termination of hostilities.

Id. at § 1034. The use of military force to engage pirates operating for criminal gain is not included within the specifically defined nations, organization, and entities covered by the Congressional Resolution Authorization to Use Military Force. Id.


Id. President Obama only cited the WPR in regard to informing Congress.
On February 4, 2013, Michael Isikoff of NBC News made public a Department of Justice unclassified white paper asserting the legal authority of the President to order the use of lethal force on American citizens who were living outside of the United States that were key leaders of Al Qaeda. The white paper sets forth a legal framework for considering the circumstances in which the U.S. government could use lethal force in a foreign country outside the area of active hostilities against a U.S. citizen who is a senior operational leader of al-Qa’ida or an associated force of al-Qa’ida—that is, an al-Qa’ida leader actively engaged in planning operations to kill Americans.

The Department of Justice concluded that such actions are lawful under the following conditions: (1) an informed, high-level official of the U.S. government has determined that the targeted individual poses an imminent threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation is conducted in a manner consistent with the four fundamental principles of the laws of war governing the use of force.

The four fundamental principles of the laws of war are “necessity, distinction, proportionality, and humanity (the avoidance of unnecessary suffering).” The white paper defined proportionality to be defined as an operation that the “anticipated civilian casualties would be excessive in relation to the anticipated military objective.” In regard to the use of stealth technology to achieve military objectives, the white paper quoted the state department that there is no prohibition under the laws of war on the use of technologically advanced weapons systems in armed conflict—such as pilotless aircraft or so-called smart bombs—as long as they are employed in conformity with applicable laws of war.

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406 Id. at 1.
407 Id. at 16.
408 Id. at 8.
409 Id.
410 Id. at 9.
In regard to stealth, the white paper concluded that although the laws of war forbid the killing or wounding treacherously of individuals in a hostile army "[t]hese prohibitions do not, however, categorically forbid the use of stealth or surprise, nor forbid attacks on identified individual soldiers or officers." \[411\]

Eleven months before the leak and publication of the Justice Department white paper, Attorney General Eric Holder (without disclosing the existence of the white paper) affirmed the logic, substance and conclusions of the white paper in a speech he provided to the Northwestern School of Law in which he discussed the role of the law in the modern post 9/11 war on terror. \[412\] While admitting that it is preferable to capture a terrorist and bring him to justice, "we must also recognize that there are instances where our government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force." \[413\] The Attorney General made clear that a nation at war has both the responsibility and authority to use lethal force in an effort to defeat the enemy. Put simply

This principle has long been established under both U.S. and international law. In response to the attacks perpetrated—and the continuing threat posed—by al Qaeda, the Taliban, and associated forces, Congress has authorized the President to use all necessary and appropriate force against those groups. Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law. The Constitution empowers the President to protect the nation from any imminent threat of violent attack. And international law recognizes the inherent right of national self-defense. None of this is changed by the fact that we are not in a conventional war.

Our legal authority is not limited to the battlefields in Afghanistan. Indeed, neither Congress nor our federal courts has limited the geographic scope of our ability to use force to the current conflict in Afghanistan. We are at war with a stateless enemy, prone to shifting operations from country to country. Over the last three years alone, al Qaeda and its associates have directed several attacks—fortunately, unsuccessful—against us from

\[411\] *Department of Justice White Paper, supra* note 405, at 8. The white paper concluded on this point that "article 23(b) of the Annex to the Hague Convention IV does not 'preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or else-where.'" *Id.*


\[413\] *Id.*
countries other than Afghanistan. Our government has both a responsibility and a right to protect this nation and its people from such threats.414

Attorney General Holder affirmed the Department of Justice white paper that although the U.S. is engaged in a war which involves an enemy that operates in multiple geographic locations simultaneously; the President is not authorized to use lethal force without limitation. Holder made clear that the realities of the war on terror
do[] not mean that we can use military force whenever or wherever we want. International legal principles, including respect for another nation’s sovereignty, constrain our ability to act unilaterally. But the use of force in foreign territory would be consistent with these international legal principles if conducted, for example, with the consent of the nation involved—or after a determination that the nation is unable or unwilling to deal effectively with a threat to the United States.

Furthermore, it is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al Qaeda and associated forces. This is not a novel concept. In fact, during World War II, the United States tracked the plane flying Admiral Isoroku Yamamoto—the commander of Japanese forces in the attack on Pearl Harbor and the Battle of Midway—and shot it down specifically because he was on board. As I explained to the Senate Judiciary Committee following the operation that killed Osama bin Laden, the same rules apply today.

General Holder said the President is authorized to use lethal force on individuals who have allied themselves with Al Qaeda when “[f]irst, the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; second, capture is not feasible; and third, the operation would be conducted in a manner consistent with applicable law of war principles.”415 As to the applicability of the Due Process under the Fifth and Fourteenth Amendments regarding the power of the President to take the life of an American citizen engaging in terrorism against the United States while on foreign soil, General Holder asserted that judicial review is not required for the President to act:

Some have argued that the President is required to get permission from a federal court before taking action against a United States citizen who is a senior operational leader of al Qaeda or

414 Id.
415 Id.
associated forces. This is simply not accurate. "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process.

. . . . The Constitution's guarantee of due process is ironclad, and it is essential—but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war—even if that individual happens to be a U.S. citizen.410

Admitting that Due Process requires some level of oversight417 General Holder explained that with proper notification to Congress regarding its counterterrorism activities, which include the procedures in operation that dictate what circumstances would warrant the use of lethal force against a U.S. citizen who is a leader of Al Qaeda,418 "these circumstances are sufficient under the Constitution

410 Id.; see also Ex parte Quirin, 317 U.S. 18 (1942), Ex parte Milligan, 71 U.S. 2 (1866), Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861)(No. 9,487); supra notes 88 and 108.
417 Attorney General Holder noted:

That is not to say that the Executive Branch has—or should ever have—the ability to target any such individuals without robust oversight. Which is why, in keeping with the law and our constitutional system of checks and balances, the Executive Branch regularly informs the appropriate members of Congress about our counterterrorism activities, including the legal framework, and would of course follow the same practice where lethal force is used against United States citizens.

Id.

Moreover, Holder discussed the threat of terrorism to the U.S.:

The unfortunate reality is that our nation will likely continue to face terrorist threats that—at times—originate with our own citizens. When such individuals take up arms against this country—and join al Qaeda in plotting attacks designed to kill their fellow Americans—there may be only one realistic and appropriate response. We must take steps to stop the—in full accordance with the Constitution. In this hour of danger, we simply cannot afford to wait until deadly plans are carried out—and we will not."

Holder Speech, supra note 412. General Holder found agreement with Senator Lindsey Graham, no friend of the Administration, when Senator Graham stated on the floor of the U.S. Senate:

This Congress, right after the September 11 attacks, designated authorization to use military force against al-Qaida and affiliated groups. So the Congress has given every President since 9/11 the authority to use military force against al-Qaida and affiliated groups. And American citizens such as Anwar al-Awlaki and that guy Hamdi who was captured in Afgha-
for the United States to use lethal force." The use of drones was a significant issue before the leaking of the white paper, for Congress had already held hearings on the legality and use of predator drones by domestic law enforcement for public safety and surveillance purposes. But after the leaking of the white paper, the question was raised whether the President could order a drone strike or other use of deadly force on an American citizen on American soil. Controversy occurred when Attorney General Holder was unclear during his testimony before the Senate Judiciary committee as to the answer.

What would be novel is for us to say that if a terrorist cell came to the United States, if an al-Qaida cell was operating in the United States, that is a common crime and the law of war doesn't apply. It would be the most perverse situation in the world for the Congress to say that the United States itself is a terrorist safe haven when it comes to legal rights; that we can blow you up with a drone overseas, we can capture you in Afghanistan and hold you under the law of war, but if there is a terrorist cell operating in the United States, somehow you are a common criminal and we will read you your Miranda Rights.


"Addressing the hearing on the floor of the U.S. Senate, Senator Bob Durbin stated:

I think Attorney General Holder could have been more artful in his language yesterday, but at the end of the day, even Senator CRUZ acknowledged he said it would be unconstitutional to use this kind of lethal force if there weren't an imminent threat pending against the United States.

159 Cong. Rec. S1246 (daily ed. Mar. 7, 2013) (statement of Sen. Bob Durbin). During the Senate Judiciary Committee hearing, the following exchange occurred between Senator Ted Cruz and General Holder:
CRUZ: . . . If an individual is sitting quietly in a café in the United States, in your legal judgment does the constitution allow a U.S. citizen on U.S. soil to be killed by a drone?

. . .

CRUZ: [The person is a suspected terrorist and there is ample evidence to prove it but if such a person is] a U.S. citizen [and in the cafe and] is not posing an immediate threat to life and bodily harm, does the constitution allow a drone to kill that citizen?

HOLDER: I wouldn't think that that would be appropriate lethal force. We would deal with that typically the way we do—

CRUZ: With all due respect, General Holder, my question wasn’t about appropriateness or prosecutorial discretion. It was a simple legal question: Does the Constitution allow a US citizen on US soil who doesn’t pose an imminent threat to be killed by the US government?

HOLDER: I do not believe that—again, you have to look at all of the facts. But on the facts that you have given me—and this is a hypothetical—I would not think that in that situation the use of a drone or lethal force would be appropriate, because—

CRUZ: General Holder, I have to tell you, I find it remarkable that in that hypothetical—which is deliberately very simple—you are unable to give a simple one-word, one-syllable answer: “No.” I think it is unequivocal, that if the U.S. government were to use a drone to take the life of a U.S. citizen on U.S. soil and that individual did not pose imminent threat, that would a deprivation of life without due process.

HOLDER: I said the use of lethal force. I am saying, drones, guns, or whatever else would not be appropriate in that circumstance.

CRUZ: You keep saying appropriate, Mr. Holder. My question isn’t about propriety. It’s a simple question about whether something is constitutional or not. As Attorney General, you’re the chief legal officer of the United States. Do you have a legal judgment on whether it would be constitutional to kill a US citizen on US soil in those circumstances?

HOLDER: A person who is not engaged as you described—this is the problem with hypotheticals, but the way in which you have described this person sitting at the cafe, not doing anything imminently, the use of lethal force would not be appropriate, would not be something—

CRUZ: I find it remarkable that you still will not give an opinion on the constitutionality. Let me move on to the next topic, ’cause we—

HOLDER: Translate my—

CRUZ: —we’ve gone round and round.

HOLDER: Let me be clear. Translate my “appropriate” to “no.” I thought I was saying “no,” all right! No!

CRUZ: Well, then I am glad. After much gymnastics, I am very glad to hear that it is the opinion of the Department of Justice that it would be
unconstitutional to kill a US citizen on US soil if that individual did not pose an imminent threat. That statement has not been easily forthcoming. I wish you had given that statement in response to Senator Paul’s letter asking you it. And I will point out that this week I will be introducing legislation in the Senate to make clear that the US government cannot kill a US citizen on US soil absent an imminent threat; and I hope, based on that representation, that the department will support that legislation.

HOLDER: Well that is totally consistent with the letter that I sent to Senator Paul. I talked about 9/11 and Pearl Harbor. Those are the instances where I said it might possibly be considered. But other than that, we would use our normal law enforcement authorities in order to resolve situations along those lines and use the normal things you do when you try to decide if cops can shoot somebody.

Hearing on DOJ Oversight, supra note 421. Subsequent to the hearing, Republican Senator Lindsey Graham spoke on the issue on the Senate floor:

So as much as I disagree with President Obama, I think you have been responsible in the use of the drone program overseas. I think you have been thorough in your analysis. I would like to make it more transparent. I would like to have more oversight.

As to the accusation being leveled against you that if you don’t somehow answer this question, we are to assume you are going to use a drone—or the administration or future administrations would—to kill somebody who is a noncombatant—no intelligence to suggest there are enemy combatants sitting in a cafe hit by a Hellfire missile—I think it is really off base.


On March 4, 2013 Attorney General Holder sent a letter to Senator Paul addressing Paul’s concerns:

On February 20, 2013, you wrote to John Brennan requesting additional information concerning the Administration’s views about whether “the President has the power to authorize lethal force, such as a drone strike, against a U.S. citizen on U.S. soil, and without trial.”

Letter to Senator Rand Paul, from Att’y Gen. Eric Holder (Mar. 4, 2013), available at http://www.paul.senate.gov/files/documents/BrennanHolderResponse.pdf. General Holder stated in his letter that it was theoretically possible for the President to use military force within the United States. General Holder wrote that the posed question is hypothetical, and noted:

It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States. For example, the President could conceivably have no choice but to authorize the military to use such force if necessary to protect the homeland in the circumstances of a catastrophic attack like the ones suffered on December 7, 1941, and September 11, 2001.

Id.
After an almost thirteen hour verbal filibuster on the Obama Administration's nomination of the CIA director by Senator Rand Paul\(^1\) on March 6, 2013, the White House released a letter the following day from General Holder stating that a President does not

\(^1\) Senator Paul began his filibuster with the following statement:

Madam President, I rise today to begin to filibuster John Brennan's nomination for the CIA. I will speak until I can no longer speak. I will speak as long as it takes until the alarm is sounded from coast to coast that our Constitution is important, that your rights to trial by jury are precious, that no American should be killed by a drone on American soil without first being charged with a crime, without first being found to be guilty by a court. That Americans could be killed in a cafe in San Francisco or in a restaurant in Houston or at their home in Bowling Green, KY, is an abomination. It is something that should not and cannot be tolerated in our country.

At the heart of his almost thirteen hour filibuster was this:

I asked the President: Can you kill an American on American soil, it should have been an easy answer. It is an easy question. It should have been a resounding and unequivocal no. The President's response: He hasn't killed anyone yet.

I will speak today until the President responds and says: No, we won't kill Americans in cafes. No, we won't kill you at home in your bed at night. No, we won't drop bombs on restaurants.

But if you are sitting in a cafeteria in Dearborn, if you happen to be an Arab American who has a relative in the Middle East and you communicate with them by e-mail and someone says your relative is someone we suspect of being associated with terrorism, is that enough to kill you? For goodness sake, wouldn't we try to make an arrest and come to the truth by having a jury and a presentation of the facts on both sides of the issue?


I find myself genuinely puzzled that both Mr. Brennan and Attorney General Holder, when asked whether the U.S. Government may kill a U.S. citizen on U.S. soil with a drone strike, absent an imminent threat of harm to life or grievous bodily injury—I find it quite puzzling that both of them did not simply respond: Of course not. Of course we can't. We never have in the history of this country, and we never will. The Constitution forbids it.

have the power to kill an American citizen involved in terrorism on American soil who does not pose an imminent threat.\footnote{In a short and curt one sentence letter on dated March 7, 2013, General Holder responded to Senator Paul as follows: It has come to my attention that you have now asked an additional question: "Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?" The answer to that question is no.}

Leaving aside the issues raised in the debate of using drones to target U.S. citizens who are terrorists in the United States, politically raised as they were;\footnote{The day after Senator Paul’s filibuster, Social Conservative, Tea Party favorite, Senator Lindsay Graham Republican from South Carolina and no supporter of President Obama remarked on the floor of the U.S. Senate in response to Senator Paul, But to my Republican colleagues, I don’t remember any of you coming down here suggesting that President Bush was going to kill anybody with a drone—I don’t even remember the harshest critics of President Bush from the Democratic side. They had a drone program back then, so what is it all of a sudden about this drone program that has gotten every Republican so spun up? What are we up to here? I think President Obama has, in many ways, been a very failed President. I think his executive orders overstep, I think he has intruded into the congressional arena by Executive order, I think ObamaCare is a nightmare, and there are 1,000 examples of a failed Presidency, but there is also some agreement. People are astonished, I say to the Senator, that President Obama is doing many of the things President Bush did. I am not astonished. I congratulate him for having the good judgment to understand we are at war. To my party, I am a bit disappointed that you no longer apparently think we are at war. Senator PAUL, he is a man unto himself. He has a view I don’t think is a Republican view. I think it is a legitimately held libertarian view. }

President Obama was informed through the military intelligence community channels of Anwar al-Awlaki's existence, all the videos he made supporting Jihad and killing Americans, and he, as Commander in Chief, designated this person as an enemy combatant.

Mr. President, you did what you had the authority to do, and I congratulate you in making that informed decision.
But now, apparently, Senator PAUL says it is OK to kill him because we have a photo of him with an RPG on his shoulder. He has moved the ball. He is saying now that he wants this President to tell him he will not use a drone to kill an American citizen sitting in a cafe having a cup of coffee who is not a combatant. I find the question offensive.

As much as I disagree with President Obama, as much as I support past Presidents, I do not believe that question deserves an answer because, as Senator MCCAIN said, this President is not going to use a drone against a noncombatant sitting in a cafe anywhere in the United States, nor will future Presidents because if they do, they will have committed an act of murder. Noncombatants, under the law of war, are protected, not subject to being killed randomly.

So to suggest that the President won’t answer that question somehow legitimizes that the drone program is going to result in being used against anybody in this room having a cup of coffee cheapens the debate and is something not worthy of the time it takes to answer.


Senator John McCain, President Obama’s Republican rival in the 2008 Presidential campaign, made the follow comment on the same day:

The U.S. Government cannot randomly target American citizens on U.S. soil or anywhere else.

I watched some of that “debate” yesterday. I saw colleagues of mine who know better come to the floor and voice this same concern, which is totally unfounded. I must say that the use of Jane Fonda’s name does evoke certain memories with me, and I must say she is not my favorite American, but I also believe that as odious as it was, Ms. Fonda acted within her constitutional rights. To somehow say that someone who disagrees with American policy, and even may demonstrate against it, is somehow a member of an organization which makes that individual an enemy combatant is simply false. It is simply false.

But to somehow allege or infer the President of the United States is going to kill somebody such as Jane Fonda or someone who disagrees with the government’s policies is a stretch of imagination which is, frankly, ridiculous—ridiculous.

We have done a disservice to a lot of Americans by making them believe that somehow they are in danger from their government. They are not. But we are in danger—we are in danger—from a dedicated, longstanding, easily replaceable leadership enemy that is hellbent on our destruction, and this leads us to having to do things perhaps we haven’t had to do in other more conventional wars.
ment white paper, General Holder's testimony, speech and letters is that throughout them all, the WPR is not mentioned. While the WPR is not mentioned in these documents, the President's power to order lethal force on a specific American citizen who is allied with Al Qaeda is supported in the following respects: both the white paper and General Holder's speech claim military history, the Supreme Court and its decisions on the meaning and applicability of the Due Process Clause to governmental action, the limitations on the use of force in war under international law, both Congressional action and judicial recognition that the U.S. is engaged in a military conflict with Al-Qaeda, and federal laws prohibiting murder and assassination. However, the proposition that the WPR has any impact on the President is not addressed because it is not even considered to be true that the WPR places a limit on the Commander-in-Chief power in the implementation of war prior to congressional approval.

There are few ideas in the American governmental system that remain the same regardless of politics, policy, or party and regardless of who holds the presidency; the view that the WPR does not legally restrict the power of the president to act is one of those ideas. The Obama Administration has simply added another nail in the coffin of the WPR's goal of controlling, by statute, presidential power to use military force without prior congressional approval.

All I can say is, I don't think what happened yesterday is helpful for the American people. We need a discussion, as I said, about exactly how we are going to address this new form of almost interminable warfare, which is very different from anything we have ever faced in the past, but somehow to allege the United States of America, our government, would drop a drone Hellfire missile on Jane Fonda, that brings the conversation from a serious discussion about U.S. policy to the realm of the ridiculous.


477 See Department of Justice White Paper, supra note 405; Holder Speech, supra note 412.

478 See supra notes 392-400 and accompanying text.


480 See e.g. text accompanying, notes 392-403; President Obama's Letter on Libya, supra 402. The letter from President Obama to Congress addressed his Commander-in-Chief powers regarding the operation in Libya:
The history of the WPR reveals that the sixty-day rule and the prior approval sections were specifically designed to prevent a president from involving the nation in military operations without Congressional approval. It is also clear that history was never on the side of the WPR to achieve this goal. The history of presidential action has established, at least since the rise of the post founding generation of presidents, that presidents view the implementation of foreign affairs and the use of military as a plenary power granted to them alone by the Constitution. Historically this view is not a post-World War Two or Cold War phenomenon, but a historical fact more than a century and a half old.

Dear Mr. Speaker: (Dear Mr. President)

On September 12, 2012, in response to an attack on our diplomatic post in Benghazi, Libya, that killed four U.S. citizens, including U.S. Ambassador John Christopher Stevens, a security force from the U.S. Africa Command deployed to Libya to support the security of U.S. personnel in Libya. Further, on September 13, an additional security force arrived in Yemen in response to security threats there.

Although these security forces are equipped for combat, these movements have been undertaken solely for the purpose of protecting American citizens and property. These security forces will remain in Libya and in Yemen until the security situation becomes such that they are no longer needed.

These actions have been directed consistent with my responsibility to protect U.S. citizens both at home and abroad, and in furtherance of U.S. national security and foreign policy interests, pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.

I am providing this report as part of my efforts to keep the Congress fully informed, consistent with the War Powers Resolution (Public Law 93-148). I appreciate the support of the Congress in these actions.

Sincerely,
Barack Obama

Id. (emphasis added).

43 Supra notes 44-54 and accompanying text.