

## **Obama's Military Commitment in Libya**

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Having escalated the war in Afghanistan while withdrawing U.S. forces from Iraq, President Barack Obama in March 2011 opened a new war in Libya without seeking or obtaining authority from Congress. Instead, he turned for legal support to two outside organizations: the U.N. Security Council and NATO allies. In doing so, he abandoned the constitutional principles he carefully articulated as a presidential candidate in 2007 and ignored the reality that accompanies any military commitment: the inability to anticipate or control its direction. What was announced by President Obama on March 21 as limited in its "nature, duration, and scope" turned out, predictably, to be much broader in its actual operation and purpose.

### **Adopting the No-Fly Zone**

The initiative for military action against Libya began with the decision of the Security Council on March 17, 2011, to pass Resolution 1973. After expressing its earlier concern about the escalation of violence and heavy civilian casualties in Libya, it established a ban on "all flights in the airspace of the Libyan Arab Jamahiriya in order to help protect civilians."<sup>1</sup> Of course the ban did not apply to "all" flights. It covered only those by the Libyan government. Military flights by coalition forces would be necessary to enforce the ban. Resolution 1973 authorized member states "to take all necessary measures . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory . . ."<sup>2</sup> "All necessary measures" are code words for military force.

Passage of Resolution 1973 came only after the Arab League had agreed to support a no-fly zone over Libya.<sup>3</sup> By the time of the March 17 action, "at least two Arab governments appeared ready to participate in enforcing a no-fly zone," according to officials from the Obama administration.<sup>4</sup> This development prompted Russia and China, prepared to veto the resolution, to abstain. So did Germany, India, and Brazil.<sup>5</sup> The full reasons for these abstentions may never be known. Some of the countries may have anticipated a bloodbath and did not want to be associated with tragedies that accompany any large military operation. Russia and China may have welcomed the United States getting bogged down in another costly, misguided war.

Once military action began and the Arab League watched the intensity and destructive force of the bombings, it "voiced concern about civilian deaths" from collateral damage.<sup>6</sup> Amr Moussa, Secretary General of the 22-member Arab League, remarked: "What is happening in

Libya differs from the aim of imposing a no-fly zone, and what we want is the protection of civilians and not the bombardment of more civilians.”<sup>7</sup>

### **Obama’s Notice to Congress**

On March 21, 2011, President Obama notified Congress that, two days earlier at 3 p.m. Eastern Daylight Time, U.S. forces “at my direction” commenced military operations against Libya “to assist an international effort authorized by the United Nations (U.N.) Security Council.”<sup>8</sup> His statement invites a fundamental constitutional question: Does authority for U.S. military actions come from the Security Council or from Congress? For reasons set forth below, the U.S. Constitution does not permit transferring congressional powers to outside bodies, including the United Nations and NATO.

The March 21 statement by President Obama offered several details on the scope of military operations. Acting under Resolution 1973, coalition partners began a series of strikes against Libya’s air defense systems and military airfields “for the purposes of preparing a no-fly zone.” The strikes “will be limited in their nature, duration, and scope.” U.S. military efforts were designed to be “discrete and focused” on American capabilities “to set the conditions for our European allies and Arab partners to carry out the measures authorized by the U.N. Security Council Resolution.”

Although Libya announced an immediate cease-fire, government forces continued attacks on Misurata and Benghazi, resulting in what President Obama called the deaths of civilians, destabilization of the region, and “defiance of the Arab League.” In response, he ordered U.S. forces to target Libya’s air defense systems, command and control structures, “and other capabilities of Qadhafi’s armed forces to attack civilians and civilian populated areas.” His March 21 statement noted that U.S. ground forces were not deployed into Libya. Obama sought “a rapid, but responsible, transition of operations” to coalition and regional organizations, relying on NATO allies.

### **The Military Commitment Deepens**

Expectations and plans about military action against Libya began to unravel week by week. On March 21, President Obama announced at a news conference: “It is U.S. policy that Qaddafi needs to go.”<sup>9</sup> The initial no-fly zone policy now added regime change. During this same period, General Carter F. Ham, in charge of the coalition effort, stated that the United States was not working with the rebels: “Our mission is not to support any opposition forces.”<sup>10</sup> Allied bombing operations in Libya proceeded to do precisely that. On April 21, the Pentagon announced that President Obama had authorized the use of armed Predator drones against Qaddafi forces.<sup>11</sup> On April 25, NATO directed two bombs into a residential and military complex used by Qaddafi in central Tripoli.<sup>12</sup>

Newspaper reports on May 1 described a NATO airstrike in Tripoli that killed one of Qaddafi’s sons and three of his grandchildren.<sup>13</sup> The children included a 6-month-old granddaughter, a 2-year-old grandson, and a 2-year-old granddaughter.<sup>14</sup> On May 5, the Obama administration announced that it had begun efforts to release some of the more than \$30 billion

in assets it had seized from Libya and divert the money to Libyan rebels. Secretary of State Hillary Clinton said that the administration would ask Congress for legislative authority to shift some of the frozen assets to help the Libyan people, including assistance to the rebels.<sup>15</sup>

### **Obama's Constitutional Position**

In his March 21 statement, President Obama explained that he directed the military actions against Libya not on congressional authority but “pursuant to my constitutional authority to conduct U.S. foreign relations and as Commander in Chief and Chief Executive.” Presidents frequently cite their duties as Commander in Chief when ordering military actions unauthorized by Congress. Reference to “Chief Executive” is unclear, unless it is supposed to embrace what has come to be known as the “Unitary Executive” model developed in recent decades to justify unchecked presidential power.<sup>16</sup>

On March 28, in an address to the nation, President Obama described his Libyan actions in this manner: “The United States has done what we said we would do.”<sup>17</sup> His reference to “the United States” did not mean the executive and legislative branches working jointly. Obama alone made the military commitment. He did identify certain supporting institutions: “We had a unique ability to stop that violence: an international mandate for action, a broad coalition prepared to join us, the support of Arab countries, and a plea for help from the Libyan people themselves.”<sup>18</sup> Absent from this picture were Congress and the American people.

During his presidential campaign, Obama was asked by *Boston Globe* reporter Charlie Savage for his position on several constitutional questions. Savage first asked: “Does the president have inherent powers under the Constitution to conduct surveillance for national security purposes without judicial warrants, regardless of federal statutes?” Obama responded: “The Supreme Court has never held that the president has such powers. As president, I will follow existing law, and when it comes to U.S. citizens and residents, I will only authorize surveillance for national security purposes consistent with FISA and other federal statutes.”<sup>19</sup> The second question: “In what circumstances, if any, would the president have constitutional authority to bomb Iran without seeking a use-of-force authorization from Congress? (Specifically, what about the strategic bombing of suspected nuclear sites – a situation that does not involved stopping an IMMEDIATE threat?)”

In a detailed response, Obama answered: “The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” He added that the President, as Commander in Chief, “does have a duty to protect and defend the United States. In instances of self-defense, the President would be within his constitutional authority to act before advising Congress or seeking its consent. History has shown us time and again, however, that military action is most successful when it is authorized and supported by the Legislative branch. It is always preferable to have the informed consent of Congress prior to any military action.” Nothing that Libya did in 2011 amounted to “an actual or imminent threat” to the United States.

## Unleashing the War Power

Obama's analysis in 2007 closely tracks the constitutional principles of the American framers, who specifically and deliberately rejected the British political system that centered all of external affairs – including foreign affairs and the war power – in the Executive. Their rejection is central to America's democratic and constitutional government. In his *Second Treatise on Civil Government* (1690), John Locke identified three functions of government: legislative, executive, and what he called federative. The latter embraced the power of war and peace, treaties, and everything of an external nature, including foreign policy. Locke placed all of the federative power with the Executive.<sup>20</sup> Similarly, William Blackstone gave the whole of external powers to the Executive: the power to declare war, make treaties, appoint ambassadors, issue letters of marque and reprisal, and raise and regulate fleets and armies.<sup>21</sup>

The framers denied the President any of those powers, vesting them either exclusively in Congress or requiring the President to obtain Senate approval for treaties and appointments. This fundamental change in government reflected the framers' intention to secure the principle of self-government and popular sovereignty. Statements at the Philadelphia Convention and the state ratification conventions all emphasize the repudiation of the models offered by Locke and Blackstone. Alexander Hamilton, who looked to the British system with admiration and affection, conceded at Philadelphia that the theories of Locke and Blackstone had no application to America and its commitment to republican government.<sup>22</sup>

At Philadelphia, Pierce Butler stood alone in wanting to give the President the power to take the country to war against another nation. The President “will have all the requisite qualities, and will not make war but when the Nation will support it.”<sup>23</sup> Other delegates, denouncing his proposal, reserved to Congress the power to initiate war and permitted the President only defensive powers “to repel sudden attacks.” Elbridge Gerry expressed shock at Butler's position. He “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>24</sup> In Federalist No. 4, John Jay eloquently explained why Presidents should never have the authority to initiate war:

[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of the people.<sup>25</sup>

Many policies adopted by the framers do not deserve our support, including their acceptance of slavery and denying women the right to vote. But their opposition to executive wars remains on target in the twenty-first century. The United States has suffered greatly from such presidential wars as Korea under Harry Truman, Vietnam under Lyndon B. Johnson, and Iraq under George W. Bush.

## The Korean War

How should we interpret President Obama's dependence on "authorization" from the U.N. Security Council? May the Security Council, rather than the elected representatives of Congress, authorize the United States to use military force against another nation? Is it possible to transfer the constitutional power of Congress to an international body? The answer to both questions: No. Authority under law and the Constitution must come from Congress. Statutory law, dating to 1945, speaks unambiguously about the use of American troops in a U.N. military operation: "The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution."<sup>26</sup>

It is important to understand the history of this law. Why was it ignored when President Truman went to war against North Korea in 1950 without seeking or obtaining authority from Congress? The record plainly demonstrates that he violated the Constitution, the 1945 statute, and his own public pledge to the Senate.<sup>27</sup> The record also shows that members of Congress have failed to protect the Constitution, their own institutional powers, and the rights of citizens who elected them to office.

During World War II, the United States and allied nations agreed to create an international body to act against military aggression. The result was the U.N. Charter of 1945. The drafters of that document understood the need to protect the war powers of Congress. They knew why the United States failed to join the League of Nations. The Versailles Treaty was rejected by the Senate in 1919 and again in 1920 because President Woodrow Wilson refused to accept reservations offered by Senator Henry Cabot Lodge. A key amendment stated that the United States assumed no obligation to engage in wars authorized by the League unless "Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide."<sup>28</sup>

Wilson opposed the Lodge reservations, claiming that they "cut out the heart of this Covenant" and represented "nullification" of the treaty.<sup>29</sup> Personal spite and rigidity caused Wilson to dig in his heels. His principal advisers, including Secretary of State Robert Lansing, Bernard Baruch, Herbert Hoover, and Colonel Edward House, all urged Wilson to accept the reservations.<sup>30</sup> As newspapers reported, "The President has strangled his own child."<sup>31</sup> Wilson had no principled objection to Lodge's language on the war power. On March 8, 1920, Wilson wrote to Senator Gilbert Hitchcock, acknowledging that whatever obligations the U.S. government undertook in a League military action "would of course have to be fulfilled by its usual and established constitutional methods of action." The Constitution, Wilson said, requires that "Congress alone can declare war or determine the causes or occasions for war, and that it alone can authorize the use of the armed forces of the United States on land or on the sea."<sup>32</sup>

Those who drafted the U.N. Charter did not want a repeat of the Versailles Treaty.<sup>33</sup> The Charter provides that whenever member states agree to participate in a U.N. military operation, nations must act in accordance with their "constitutional processes." During Senate debate on the Charter, President Truman from Potsdam wired this note to Senator Kenneth McKellar on

July 27, 1945, pledging: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.”<sup>34</sup>

To implement the Charter, it was necessary for Congress to pass legislation that satisfied U.S. constitutional processes. The language in Section 6 of the U.N. Participation Act of 1945 did precisely that. Agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.”<sup>35</sup> Statutory language could not be written more clearly. The legislative history of this provision, including hearings, committee reports, and floor debate, all point to the same result: the President must seek congressional approval in advance.<sup>36</sup>

With these safeguards in place to protect the Constitution and congressional powers, President Truman on June 26, 1950 announced that the Security Council had acted to order a withdrawal of North Korean forces to positions north of the 38th parallel, and that “in accordance with the resolutions of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace.”<sup>37</sup> At that point he made no commitment of U.S. military forces.

On the following day, he informed the nation that the Security Council had called upon all U.N. members to provide assistance and that he had “ordered United States air and sea forces to give the [South] Korean Government troops cover and support.” The military commitment deepened. At no time did Truman seek authority from Congress. Secretary of State Dean Acheson claimed that Truman had done his “utmost to uphold the sanctity of the Charter of the United Nations and the rule of law.”<sup>38</sup> In fact, Truman had violated the Constitution, the U.N. Participation Act, and his own pledge to the Senate five years earlier. On January 29, 1950, Acheson stated that all U.S. actions taken in Korea “have been under the aegis of the United Nations.”<sup>39</sup> Aegis is a fudge word, meaning shield or protection. Acheson was using the word to suggest that the United States was acting under the legal banner of the United Nations, which was not the case.

Every administration that violates the War Power Clause of the Constitution understands the importance of avoiding the word “war” when unilaterally committing U.S. troops to hostilities. At a news conference on June 29, Truman was asked whether the country was at war. He responded: “We are not at war.” Asked whether it would be more correct to call the conflict “a police action under the United Nations,” he readily agreed: “That is exactly what it amounts to.”<sup>40</sup> The United Nations exercised no real authority over the conduct of the war. Other than token support from a few nations, it remained an American war. The Security Council requested that the United States designate the commander of the forces and authorized the “unified command at its discretion to use the United Nations flag.”<sup>41</sup> Measured by troops, money, casualties, and deaths, it was an American war.

During Senate hearings in June 1951, Acheson finally conceded the obvious by admitting with regard to military operations in Korea “in the usual sense of the word there is a war.”<sup>42</sup> What other sense of the word did Acheson and Truman have in mind? Federal and state courts had no difficulty in defining the hostilities in Korea as war. They had to interpret documents, including life insurance policies, to determine whether Korea legally represented a “state of war.” A federal court remarked in 1953: “We doubt very much if there is any question in the

mind of the majority of the people of this country that the conflict now raging in Korea can be anything but war.”<sup>43</sup>

### **Fruits of an Unconstitutional War**

Truman’s military initiative in Korea was the first time in 160 years that a President went to a major war without first receiving either a declaration or authorization from Congress. Other Presidents have followed Truman’s precedent. In November 1990, President George H. W. Bush obtained a Security Council resolution to act militarily against Iraq after its invasion of Kuwait, claiming that he did not need congressional authority. Nevertheless, Congress passed authorizing legislation in January 1991. In his signing statement, Bush said he asked for “congressional support,” not authority, but the bill he signed into law provided express authorization.<sup>44</sup>

President Bill Clinton relied on Security Council resolutions to act militarily against Haiti and Bosnia. At no time did he seek authority from Congress. When the Security Council refused to support military action against Kosovo, Clinton turned to NATO allies for support. The NATO treaty may not give congressional authority to NATO countries any more than the U.N. Charter may vest congressional authority in the Security Council. Oddly (and unconstitutionally), Clinton sought approval from each NATO country for the Kosovo military operation but not from Congress.<sup>45</sup>

### **OLC Analysis**

On April 1, 2011, the Office of Legal Counsel (OLC) of the Justice Department released a 14-page legal defense entitled “Authority to Use Military Force in Libya.”<sup>46</sup> It begins by saying that in “mid-February 2011” there were “widespread popular demonstrations seeking government reform in the neighboring countries of Tunisia and Egypt, as well as elsewhere in the Middle East and North Africa,” and “protests began in Libya against the autocratic government of Colonel Muammar Qadhafi.”<sup>47</sup> Therefore, there was sufficient time for President Obama to inform Congress of the developing problem and seek legislative authorization. Instead, the Obama administration devoted its energies to attracting support from allies, Arab nations, and the Security Council, not from the legislative branch. As explained in the next section, OLC tried to find support in a non-binding Senate resolution.

OLC looked to action by the Security Council as a source of authority for U.S. military action against Libya. Resolution 1973 “authorized member states, acting individually or through regional organizations, ‘to take all necessary measure . . . to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.’”<sup>48</sup> OLC interpreted Resolution 1973 not only as an initial authorizing instrument, but found supplemental justification for unilateral presidential military action.

To OLC, President Obama could “reasonably” determine that it was necessary to use military force to support “the UNSC’s credibility and effectiveness.”<sup>49</sup> According to this logic, “[s]ince at least the Korean War the United States government has recognized that ‘the continued

existence of the United Nations as an effective international organization is a paramount United States interest.”<sup>50</sup> Use of “United States government” is very misleading. There was no collective judgment by the two elected branches in the form of public law. Instead, OLC refers to two documents prepared by the executive branch: an OLC legal memo in 1992 and a State Department memo in 1950.<sup>51</sup> Rather than looking outside the executive branch for legal authority, OLC looks inside for previous executive interpretations. Similarly, OLC cites itself in 1995 in a memo on Bosnia, which in turn relies on the OLC memo from 1992.<sup>52</sup> Through this self-referential system, OLC concludes that “the UNSC’s credibility and effectiveness as an instrument of global peace and stability were at stake in Libya once the UNSC took action to impose a no-fly zone and ensure the safety of civilians – particularly after Qadhafi’s forces ignored the UNSC’s call for a cease fire and for the cessation of attacks on civilians.”<sup>53</sup>

This is an extraordinary legal and constitutional argument. Barely any effort is made to analyze particular provisions of Articles I and II to determine the relative roles of Congress and the President in going to war. OLC writes: “The Constitution, to be sure, divides authority over the military between the President and Congress, assigning to Congress the authority to ‘declare War,’ ‘raise and support Armies,’ and ‘provide and maintain a Navy,’ as well as general authority over the appropriations on which any military operation necessarily depends.”<sup>54</sup> After briefly reviewing this constitutional language, OLC preferred to turn to what others have called “the historical gloss on the ‘executive Power’ vested in Article II of the Constitution,” citing various broad concurrences and pronouncements by the Supreme Court on foreign policy and national security.<sup>55</sup>

These multiple references have no connection to military action against Libya. For example, OLC relies on this precedent: “as Attorney General (later Justice) Robert Jackson observed over half a century ago, ‘the President’s authority has long been recognized as extending to the dispatch of armed forces outside of the United States, either on missions of goodwill or rescue, or for the purpose of protecting American lives or property or American interests.’ *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 62 (1941).”<sup>56</sup> There was no issue in Libya of missions of goodwill, rescue, or protecting American lives or property. Did Jackson mean that the President could dispatch armed forces against another country merely to satisfy “American interests”? There is no reason to think he intended such an unlimited doctrine. Law professor Michael Glennon, after examining the case law assembled by OLC in its April 1 memo, observed that the department’s sweeping support for independent presidential power “derives primarily from unrelated dicta pulled acontextually from inapposite cases.”<sup>57</sup>

OLC’s memo recounts the number of occasions when Presidents used force abroad in the absence of prior congressional approval.<sup>58</sup> Practice by a single branch, in this case the executive, does not change the Constitution’s allocation of the war power. That point was made in detail in the previous section on the Korean War. Moreover, as Glennon notes, many of the precedents referred to by OLC involved “fights with pirates, clashes with cattle rustlers, trivial naval engagements, and other minor uses of force not directed at significant adversaries. In a number of the supposed ‘precedents,’ Congress actually approved of the executive’s action by enacting authorizing legislation (as with the Barbary Wars).”<sup>59</sup> Of all the precedents cited by OLC, which

relied on a study by the Congressional Research Service, few have anything to do with the Security Council “authorizing” a military action.

According to OLC, once the Security Council adopts a resolution and the country to which the resolution applies does not conform to the purpose of the resolution, a President may decide that the credibility and effectiveness of the Security Council are so threatened that it is necessary to use military force against the target country. Is this presidential action automatic? Not to OLC, which advised: “the President is not required to direct the use of military force simply because the UNSC has authorized it.”<sup>60</sup>

Therefore, the decision to use or not use military force, according to OLC, is solely in the hands of the President, not Congress. In this case, citing an address by President Obama on March 28, 2011, the “writ of the United Nations Security Council would have been shown to be little more than empty words, crippling that institution’s future credibility to uphold global peace and security.”<sup>61</sup> Through this kind of analysis, OLC converts the U.S. Constitution to “little more than empty words.” Nothing in the history of the U.N. Charter contemplates or justifies the kind of strained, executive-oriented, and executive-centered analysis offered by OLC. The Obama administration devoted its concerns to the credibility and effectiveness of the Security Council. It showed no comparable concerns to the credibility and effectiveness of the U.S. Constitution or of Congress.

No one reading OLC’s legal memo would have any idea of the framers’ determination to keep the war power out of the hands of the President, other than to repel sudden attacks. OLC was properly rebuked for allowing Deputy Assistant Attorney General John Yoo to write the memos he did. OLC shelved and rewrote several of his memos because they tilted too much in the direction of unilateral and unchecked presidential power. It can be fairly said that the memo released by OLC on April 1, 2011, could have been written by John Yoo.<sup>62</sup>

### **Senate Resolution 85**

OLC relied in part on support from the Senate: “On March 1, 2011, the United States Senate passed by unanimous consent Senate Resolution 85. Among other things, the Resolution ‘strongly condemn[ed] the gross and systematic violations of human rights in Libya, including violent attacks on protesters demanding democratic reforms,’ ‘call[ed] on Muammar Gadhafi to desist from further violence,’ and ‘urge[d] the United Nations Security Council to take such further action as may be necessary to protect civilians in Libya from attack, including the possible imposition of a no-fly zone over Libyan territory.’”<sup>63</sup> Action by “unanimous consent” suggests strong Senate approval for the resolution, but the legislative record provides no support for that impression. Even if there were evidence of strong involvement by Senators in drafting, debating, and adopting this language, a resolution passed by a single chamber contains no statutory support. Moreover, there is no evidence in the passage of S. Res. 85 for anything other than marginal involvement by Senators.

The resolution begins by condemning violations of human rights in Libya, including attacks on those who protested for democratic reforms.<sup>64</sup> Nothing in that opening language supports U.S. military action or a no-fly zone. Senators were willing to unanimously condemn

violence but few were aware that the resolution would be used to endorse military operations. The resolution begins with six “whereas” clauses. None provides convincing reasons for using military force in March 2011. For example, Whereas 4 refers to Qaddafi ruling for more than 40 years by banning and “brutally opposing” individuals and groups, refusing to permit independent journalists’ and lawyers’ organizations, and engaging in torture and extrajudicial executions. Those actions, long in existence, are not grounds for military action in March 2011. Whereas 5 concerns the flight of Pan Am 103 over Lockerbie, Scotland, a tragedy that took the lives of 270 people. That terrible event, from 1988, cannot justify military action in March 2011. Whereas 6 states that Libya’s election to the U.N. Human Rights Council on May 13, 2010 sent a “demoralizing message of indifference to the families of the victims of Pan Am flight 103” -- another statement that falls short of justifying military action in March 2011.

The circumstances in the passage of this resolution create strong grounds for suspicion and skepticism. S. Res. 85 contains eleven resolutions. They applaud the courage of the Libyan people for standing up to Qaddafi, condemn violation of human rights in Libya, call on Qaddafi to desist from further violence, call on the Qaddafi regime to immediately release persons arbitrarily detained, and welcome a Security Council resolution of February 26, 2011 that refers the situation in Libya to the International Criminal Court to impose an arms embargo and freeze the assets of Qaddafi and family members. None of this supports military action against Libya.

Resolution 7 of S. Res. 85 urges the U.N. 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.” When was this no-fly language added to S. Res. 85? Were Senators adequately informed of this amendment? There is evidence that the sponsors of this resolution added the no-fly language without adequately alerting Senators to this significant change. Resolutions 8, 9, 10 and 11 have nothing to do with the use of military force against Libya, other than this vague language in Resolution 11: “welcomes the outreach that has begun by the United States Government to Libyan opposition figures and supports an orderly, irreversible transition to a legitimate democratic government in Libya.”

What can be learned from the legislative history of S. Res. 85? There were no hearings and no committee report. The resolution was not referred to a particular committee. The *Congressional Record* of March 1 merely notes that the resolution had been “considered and agreed to.”<sup>65</sup> The language makes no mention of military force. On March 1, the *Record* inserts the full language of the resolution, including Resolution 7 on the no-fly zone.<sup>66</sup> Although the resolution passed by “unanimous consent” and implies bipartisan support, the sponsors of the resolution were ten Democrats (Bob Menendez, Frank Lautenberg, Dick Durbin, Kirsten Gillibrand, Bernie Sanders, Sheldon Whitehouse, Chuck Schumer, Bob Casey, Ron Wyden, and Benjamin Cardin) and one Republican (Mark Kirk). For ten years previously, Kirk had held a suburban Chicago congressional district that routinely voted Democratic for President.<sup>67</sup>

There was no debate on S. Res. 85. There is no evidence of any Senator on the floor at that time other than Schumer and the presiding officer. Schumer asked for unanimous consent to take up the resolution. No one objected, possibly because there was no one present to object. Senate “deliberation” took less than a minute. When one watches Senate action on C-SPAN, consideration of the resolution began at 4:13:44 and ended at 4:14:19 – or 35 seconds. On

March 30, Senator John Ensign (R-Nev.) objected that S. Res. 85 “received the same amount of consideration that a bill to name a post office has. This legislation was hotlined.”<sup>68</sup> By the latter term he meant that Senate offices were notified by automated phone calls and e-mails of pending action on the resolution, often late in the evening when few Senators are present. According to Senate aides, “almost no members knew about the no-fly zone language” that had been added to the resolution.<sup>69</sup> At 4:03 pm, through the hotlined procedure, Senate offices received S. Res. 85 with the no-fly zone provision but without flagging the significant change.<sup>70</sup> Senator Mike Lee (R-Utah) noted: “Clearly, the process was abused. You don’t use a hotline to bait and switch the country into a military conflict.”<sup>71</sup> Senator Jeff Sessions (R-Ala.) remarked: “I am also not happy at the way some resolution was passed here that seemed to have authorized force in some way that nobody I know of in the Senate was aware that it was in the resolution when it passed.”<sup>72</sup>

### Conclusions

Presidents have some discretion to use military force without advance congressional authorization, including repelling sudden attacks and rescuing American citizens. None of those justifications apply to Libya. America was not threatened or attacked by Libya. President Obama has called the military operation a humanitarian intervention that serves the national interest. Launching hundreds of Tomahawk missiles and ordering air strikes against Libyan ground forces, for the purpose of helping rebels overthrow Col. Qaddafi, constitutes war. Under the U.S. Constitution, there is only one source for authorizing war. It is not the Security Council or NATO. It is Congress.

To restore constitutional government, Congress and the public must confront Presidents who commit troops to foreign wars without seeking legislative authority. No action by a President would more warrant impeachment and removal than usurping the war power from Congress and undermining representative government and the system of checks and balances. Members of Congress need to understand their institutional duties and discharge them. They take an oath to support and defend the Constitution, not the President.

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<sup>1</sup> UN Security Council Resolution 1973 (2011) on Libya, available at <http://www.guardian.co.uk/world/2011/mar/17/un-security-council-resolution> (paragraph 6).

<sup>2</sup> Id. (paragraph 4).

<sup>3</sup> Karen DeYoung and Colum Lynch, “U.N. Council Opens Door to Strikes in Libya,” *Washington Post*, March 18, 2011, at A1, A6.

<sup>4</sup> Scott Wilson and Joby Warrick, “Obama’s Shift Toward Military Action,” *Washington Post*, March 19, 2011, at A1, A11.

<sup>5</sup> Id. at A11.

<sup>6</sup> Peter Fina and Greg Jaffe, “U.S. Jets Strike Gaddafi’s Ground Forces,” *Washington Post*, March 21, 2011, at A1.

<sup>7</sup> Id., A12.

<sup>8</sup> Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate, March 21, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/03/21/letter-president-regarding-commencement-operations-libya>.

<sup>9</sup> Elizabeth Bumiller and Kareen Fahim, “U.S.-Led Assaults Hit Tripoli Again: Objective is Near,” *New York Times*, March 22, 2011, A1, A11.

<sup>10</sup> Id. at A11.

<sup>11</sup> David D. Kirkpatrick and Thom Shanker, “Libyan Rebels Advance in West; U.S. Will Deploy Armed Drones,” *New York Times*, April 22, 2011, at A1, A9.

<sup>12</sup> Simon Denyer and Leila Fadel, “NATO Bombards Gaddafi Government Complex in Tripoli,” *Washington Post*, April 25, 2011, at A9.

<sup>13</sup> Kareem Fahim and David D. Kirkpatrick, “Qaddafi Survive NATO Airstrike That Kills Son,” *New York Times*, May 1, 2011, at 1; Simon Denyer and Leila Fadel, “NATO Strike Kills Son of Gaddafi,” *Washington Post*, May 1, 2011, at A1.

<sup>14</sup> Simon Denyer, “Mobs Attack U.S., British, Italian Embassies in Libya,” *New York Times*, May 2, 2011, at A8.

<sup>15</sup> Steven Lee Myers and Rachel Donadio, “U.S. Seeks to Aid Libyan Rebels With Seized Assets,” May 6, 2011, at A9; Mary Beth Sheridan, “U.S. to Free Up Frozen Libyan Assets for Humanitarian Assistance,” May 6, 2011, at A8.

<sup>16</sup> Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008). For evaluation, see Louis Fisher, “The Unitary Executive and Inherent Executive Power,” 12 *U. Pa. J. Const. L.* 569 (2010), available at <http://www.loufisher.org/docs/pip/unitaryexecutive2010.pdf>.

<sup>17</sup> “Remarks by the President in Address to the Nation on Libya,” March 28, 2011, at 2, available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

<sup>18</sup> Id. at 3.

<sup>19</sup> “Barack Obama’s Q&A,” available at <http://boston.com/news/politics/2008/specials/CandidateQA/ObamaQA>

<sup>20</sup> John Locke, *Second Treatise on Civil Government* §§ 245-48 (1690).

<sup>21</sup> 1 William Blackstone, *Commentaries on the Laws of England* 232-33, 243-244, 249, 250, 254 (1765).

<sup>22</sup> 1 *Records of the Federal Convention of 1787*, at 288-90 (Max Farrand ed. 1937) (hereafter “Farrand”).

<sup>23</sup> 2 Farrand 318.

<sup>24</sup> Id.

<sup>25</sup> *The Federalist* 101 (Benjamin F. Wright, ed., MetroBooks, 2002).

<sup>26</sup> 22 *U.S.C.* 287d (2006). Part of this section appeared earlier in Louis Fisher, “Obama’s U.N. Authority?,”

*National Law Journal*, April 18, 2011, available at <http://loufisher.org/docs/wp/authority.pdf>.

<sup>27</sup> In addition to the documents footnoted here, see Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act?,” 89 *Am. J. Int’l L.* 21 (1995), available at <http://www.loufisher.org/docs/wp/425.pdf>.

<sup>28</sup> 58 *Cong. Rec.* 8777 (1919).

<sup>29</sup> 63 *The Papers of Woodrow Wilson* 451 (Arthur S. Link, ed. 1990); 64 *The Papers of Woodrow Wilson* 47, 51 (Link ed., 1991).

<sup>30</sup> Townsend Hoopes and Douglas Brinkley, *FDR and the Creation of the U.N.* 6 (1997).

<sup>31</sup> 65 *The Papers of Woodrow Wilson* 71 (Link, ed., 1991).

<sup>32</sup> Id. at 68.

<sup>33</sup> Michael J. Glennon, “The Constitution and Chapter VII of the United States Charter,” 85 *Am. J. Int’l L.* 74, 75-77 (1991).

<sup>34</sup> 91 *Cong. Rec.* 8185 (1945).

<sup>35</sup> 59 *Stat.* 621, sec. 6 (1945).

<sup>36</sup> Louis Fisher, *Presidential War Power* 92-95 (2d ed., 2004).

<sup>37</sup> *Public Papers of the Presidents, 1950*, at 491.

<sup>38</sup> 23 *Dep’t of State Bull.* 46 (1950).

<sup>39</sup> Id. at 43.

<sup>40</sup> *Public Papers of the Presidents, 1950*, at 504. On July 13, at a news conference, Truman again called the Korean war a “police action.” Id. at 522.

<sup>41</sup> Id. at 520.

<sup>42</sup> “Military Situation in the Far East” (part 3), hearings before the Senate Committees on Armed Services and Foreign Relations, 82d *Cong.*, 1st Sess. 2014 (1951).

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<sup>43</sup> *Weissman v. Metropolitan Life Ins. Co.*, 112 F.Supp. 420, 425 (S.D. Cal. 1953). See also *Gagliomella v. Metropolitan Life Ins. Co.*, 122 F.Supp. 246 (D. Mass. 1954); *Carius v. New York Life Insurance Co.*, 124 F.Supp. 388 (D. Ill. 1954); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554 (Tex. 1954); and A. Kenneth Pye, “The Legal Status of the Korean Hostilities,” 45 *Geo. L. J.* 45 (1956).

<sup>44</sup> *Public Papers of the Presidents*, 1991, I, at 40; 105 Stat. 3 (1991).

<sup>45</sup> Fisher, *Presidential War Power*, at 180-92. 198-201; Louis Fisher, “Sidestepping Congress: Presidents Acting under the UN and NATO,” 47 *Case Western Res. L. Rev.* 1237 (1997), available at <http://www.loufisher.org/docs/wp/424.pdf>.

<sup>46</sup> U.S. Justice Department, Office of Legal Counsel, “Authority to Use Military Force in Libya,” April 1, 2011, available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (hereafter OLC Analysis).

<sup>47</sup> *Id.* at 1.

<sup>48</sup> *Id.* at 3.

<sup>49</sup> *Id.* at 10.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> *Id.*, citing *Military Forces in Somalia*, 16 Op. O.L.C. at 11 and *Authority of the President to Repel the Attack in Korea*, 23 Dep’t St. Bull. 173, 177 (1950).

<sup>52</sup> *Id.*, citing *Proposed Bosnia Deployment*, 19 O.L.C. at 333 (1995), quoting *Military Forces in Somalia*, 16 Op. O.L.C. at 11).

<sup>53</sup> *Id.* at 12.

<sup>54</sup> *Id.* at 6.

<sup>55</sup> *Id.*: “(quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 34 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)), and accordingly holds “independent authority ‘in the areas of foreign policy and national security.’” *Id.* at 429 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)); see also, e.g., *Youngstown Sheet & Tube*, 343 U.S. at 635-36 n.2 (Jackson, J., concurring) . . . .”

<sup>56</sup> *Id.* at 7.

<sup>57</sup> Michael J. Glennon, “The Cost of ‘Empty Words’: A Comment on the Justice Department’s Libya Opinion,” *Harvard National Security Journal Forum*, April 2011, at 3, available at <http://harvardnsj.com/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion>.

<sup>58</sup> OLC Analysis, at 7.

<sup>59</sup> Glennon, *supra* note 54, at 4.

<sup>60</sup> OLC Analysis, at 12.

<sup>61</sup> *Id.*

<sup>62</sup> Louis Fisher, “John Yoo and the Republic,” 41 *Pres. Stud. Q.* 177 (2011), available at [http://www.loufisher.org/docs/wp/Yoo\\_psq\\_2011.pdf](http://www.loufisher.org/docs/wp/Yoo_psq_2011.pdf).

<sup>63</sup> OLC Analysis, at 2.

<sup>64</sup> S. Res. 85, 112th Cong., 1st Sess. 1 (2011).

<sup>65</sup> 157 Cong. Rec. S1060 (daily ed. March 1, 2011).

<sup>66</sup> *Id.* at S1069.

<sup>67</sup> The Hill, “New Members Guide,” 2011, at 20.

<sup>68</sup> 157 Cong. Rec. S1952 (daily ed. March 30, 2011).

<sup>69</sup> Conn Carroll, “How the Senate was Bait and Switched into War,”

<http://washingtonexaminer.com/print/blogs/beltway-confidential/2011/04-how-senate-was-bait-and-switched-war>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> 157 Cong. Rec. S2010 (daily ed. March 31, 2011).