

Libya, Obama, and the War Powers Resolution

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The 2011 intervention in Libya can be seen as potentially leading a new tradition in U.S. foreign policy. It did not follow the unilateral tradition that has been used in the past, nor did it play out like the most recent wars in Afghanistan and Iraq. The scope, length, and type of operation that took place in Libya are the characteristics used to argue that the intervention in 2011 was not, in fact, a war.

The War Powers Resolution of 1973 (WPR) outlines the protocols the president is expected to follow when engaging in any hostilities without Congressional approval, but the resolution fails to give a concrete definition of “war” and “hostilities.” The WPR was passed with the intention of reining in the executive’s new found war powers, while reasserting Congress’ original constitutional powers. The resolution does not have the stature to take away or limit presidential power. The war powers debate, as well as the separation of powers debate, between the legislative and executive branches is nothing new, but plays a special role in the Libyan intervention because it was a rare case when Congress wasn’t a necessary actor. President Obama acted within his power as President when authorizing military action in Libya and was not in violation of the WPR. The intervention in Libya cannot be defined as a “war” under the WPR, therefore congressional approval was unnecessary with UN Security Council authorization and military action within NATO. Active U.S. membership within the United Nations and NATO are essential to maintaining good standing in the international community. The UN and NATO are two of our most significant and important treaties and it is the sole responsibility of the president to ensure that such treaties are being upheld and executed properly.

The intervention in Libya was a long time coming. Under the lengthy Qaddafi regime, Libya had maintained both a dangerous and volatile reputation within the international community, being known for harboring terrorists and massacring its own people. Muammar Qaddafi had begun to make concessions during the early 2000’s under George W. Bush’s presidency by being one of the first Arab leaders to denounce the terrorist attacks of 9/11 and giving approval of the American invasion in Afghanistan, but his internationally cooperative attitude did not last long.¹ Things within Libya began to fall apart in February of 2011. What started as rather modest protests from anti-government rebels quickly degenerated into extreme violence and a full on civil war. The government of Libya responded with the repression and violence that had been its hallmark since the late 1960s. Qaddafi declared he would show no mercy when cleansing Libya house by house inflicting punishment, and compared his people to rats.² According to David Lawrence,

1 “Libya - Revolution and Aftermath,” *New York Times*, June 11, 2012, <http://www.nytimes.com/top/news/international/countriesandterritories/libya/index.html>

2 “Libya - Revolution and Aftermath”

“high-level defections from the government, the ordering of large-scale executions, and the threatened use of armored fighting vehicles against civilians and civilian populated areas provided the impetus for an international opposition movement that appeared to have the overthrow of the internationally disliked dictator, Qaddafi, as its object.”³

The continued threats and violence engulfing the country created an environment that was impossible for the world to ignore. U.S interests in Libya were based on our core principles and values, the threat of the Libyan unrest spreading throughout the region, and Qaddafi’s history of supporting, training, and harboring terrorists. The most important of our core values as a country is freedom--freedom from despotic government, freedom from physical and mental abuses, and freedom to live life the way one chooses. Theories of American Exceptionalism hold that the United States has a uniqueness and special virtue that ground our foreign policy in Principles much more than the policies of other countries, and thus the U.S. needs to stand-up for the principles on which it was founded and not be just another player in global power politics.⁴

Assertions of American Exceptionalism are evident throughout history in many different forms. President Woodrow Wilson declared that U.S. entry into World War I was intended “to make the world safe for democracy.” In his speech, he stated:

We shall fight for things which we have always carried nearest to our heart form democracy, for the right of those who submit to authority to have a voice in their own government, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world in itself at last free.⁵

It was also part of President George W. Bush’s launching of the war on terrorism as not only a matter of security but also a war against evil and a “fight of all who believe in progress and pluralism, tolerance and freedom.” President Obama too declared in his inaugural address that “America is a friend of each nation and every man, woman, and child who seeks a future of peace and dignity.”⁶ In the June 3rd Congressional meeting considering House Resolution 294 to remove U.S. armed forces from Libya, Representative Jim Moran defended military action in Libya through the notion of American exceptionalism, stating:

We are always going to be involved in what is taking place around the world, because we are the world’s economic, military and moral superpower. To choose not to act, particularly at a time of such crisis and transformation that is occurring throughout the Arab World, is, in fact, to choose. In this case, it would be to choose to define us as a people who as decided to look the other way, to choose not to hear the cries of desperate help from the Libyan people

3 David F. Lawrence, “The Alliance decides the mission? Multilateral decision making at the UN and NATO on Libya, 2010-2011.” Masters Thesis, Naval Postgraduate School, 2012, 4.

4 Bruce W. Jentleson, *American Foreign Policy: The Dynamics of Choice in the 21st Century*. New York: Norton & Company, 2010, 90.

5 Jentleson, *American Foreign Policy*, 17.

6 Jentleson, *American Foreign Policy*, 17.

who have chosen to put their lives in the line in the cause of democracy, of individual liberty and of freedom from oppression. These are the values that define us as a people and as a Nation. They are the values that that give hope to world of repression and despotism that will continue to exist if we do not stand up, speak out and have their back at such a time as this.⁷

Since World War II, the U.S. has taken on the role as defender of the people all over the world. To be clear, U.S. involvement in the numerous interventions on behalf of repressed people are not solely based on the extremely good nature of our democratic state. The U.S. has serious interest and motive in helping to shape the international community into something mirroring itself. Democratic Peace Theory is the counterpart to American Exceptionalism that brings the importance of America's core values full circle. This theory asserts that by promoting and helping to achieve democracy around the world, the U.S. is promoting peace.⁸ That is, if the majority of the world were democratic in nature and entertained similar values and principles, the international community would be much less conflictual and more cooperative, thus decreasing potential security threats to the U.S. and the world as a whole.

There are numerous dangers that have the potential to arise when situations like the one in Libya go unattended and are given the chance to grow. Bruce Jentleson states, "failures to defend basic values and of confronting crimes against humanity, no matter where they occur, undermine the sense and structure of the international community because these conflicts not only feed on themselves but spread to other areas."⁹ The "Arab Spring" that took place in North Africa in 2010 is a prime example of the threat that is posed by the spread of mass conflict. Although the Arab Spring was generally seen as a positive shift towards democracy for the Middle East, it often produced mass violence and the environment for more unstable governments to be created. Demonstrations in Tunisia, Egypt, and Libya shared a common cause for personal dignity and responsive government, disrupting the old order of the Middle East and leading to conflict in several different countries. The violence shocked the world amid the seismic realignment of power associated with the popular uprisings among the North African and Arab nations.¹⁰

The Libyan people were very clear about their dissatisfaction with Qaddafi and the country was on the verge of a horrific civil war. It had the potential to escalate and spread far beyond the borders of Libya, into other unstable Middle Eastern countries, creating a situation that most definitely would threaten the international community and structure. The Libyan crisis is also the type of conflict that enables and encourages terrorist groups like Al-Qaeda to seek to exploit. It is important not only for the U.S. but the entire international community to prevent this kind of conflict in order to maintain a peaceful environment. Blatant and horrific human rights abuse is not a part of American values and stopping such actions is the duty of the U.S. if we are to stay true to our own principles. American power depends heavily on credibility and weak action or inaction in the face of

7 U.S. Congress, House, 2011, *Libya War Powers Resolution*, 112th Cong., June 3, 2011.

8 Jentleson, *American Foreign Policy*, 17.

9 Jentleson, *American Foreign Policy*, 483.

10 Lawrence, "The Alliance decides the mission?", 15

humanitarian abuses undermines that credibility. Qaddafi believed he had a strong military advantage over the rebel army and so continued his abuses. Without intervention and support for his victims, Qaddafi's strength and power would only have grown, undermining the fundamental basis of U.S. power and creating an even larger security threat.

The United Nations Security Council (UNSC) has the authority to authorize enforcement measures under Articles 39 and 42 of the UN Charter in response to "any threat to the peace, breach of the peace, or act of aggression."¹¹ On March 17, 2011, the UNSC decided that the attacks on and continued threats to civilians and civilian-populated areas in Libya by the Qaddafi government, constituted a serious threat to international security and adopted Resolution 1973. Resolution 1973 invoked Chapter VII of the Charter of the United Nations and authorized member states and regional organizations "to take all necessary measures to protect civilians and civilian populated areas," established a no fly zone, enforced an arms embargo, and increased the scope of Libyan government financial assets to be frozen by the member states in which they are located.¹² This gave the U.S. the choice of whether or not to take action in helping the Libyan people because the resolution was not legally binding. Because the resolution authorizes action from regional organizations, multilateral action within NATO was also a choice for the U.S., an option that would reduce burden to any one country and limit U.S. involvement.

Although Resolution 1973 uses the language "all necessary measures," it explicitly prohibits any "foreign occupation force of any form on any part of Libyan territory" and requests any action by member states be immediately reported to the Secretary-General.¹³ By prohibiting any foreign occupation, the scope and type of all action in Libya was automatically limited. The intention and effect of the intervention was never war. Resolution 1973 is significant in that it is the first time that the UN Security Council has authorized the use of military force for human protection purposes against the wishes of a functioning state.¹⁴ The resolution evidences the threat and fear felt by the international community and the immediate need for limited intervention.

On March 19, 2011, just two days after UN authorization, U.S.-led military action under the code name of Operation Odyssey Dawn began. The initial goal, with help from coalition partners, was to implement a no-fly zone to prevent Qaddafi's forces from carrying out air attacks on the rebel army.¹⁵ Military forces from Britain, France, and the U.S. began

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

12 United Nations Security Council, Resolution 1973 (2011), March 17, 2011.

13 United Nations Security Council, Resolution 1973 (2011), March 17, 2011.

14 Alex J. Bellamy, "Libya and the Responsibility to Protect: The Exception and the Norm," *Ethics and International Affairs*, (2011): 1.

15 John R. Crook, "Contemporary Practice of the United States relating to International Law," *The American Journal of International Law* 105, no. 3 (2011): 572. Accessed October 7, 2012, <http://www.jstor.org/stable/10.5305/amerjintellaw.105.3.0568>.

missile and aircraft attacks on Libyan air defenses and military targets.¹⁶ 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 Security Council.”¹⁷ Within his statement he offered several details on the scope of military operations taking place, with the U.S. acting only temporarily as the leader of the operation. The U.S. initially controlled strategic command of the military intervention, simply coordinating missions between coalition members. He stated that, “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.” He assured Congress that the strikes “will be limited in their nature, duration, and scope and that 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.”¹⁸ His intention was to be clear that the operation was a multilateral effort with the U.S. having a temporary leadership role and that the actions taking place were not consistent with “being at war.”

In the opening hours of Operation Odyssey Dawn (OOD), U.S. strikes involved the launch of 112 Tomahawk cruise missiles from U.S. ships against shoreline air defenses of Qaddafi, while U.S. Air Force B-2 Spirit bombers struck down combat aircraft shelters and fighter jets conducted missions searching for Libyan ground forces to attack.¹⁹ By day two of the operation the no-fly zone had effectively been put in place with the help of U.S. fighter jets. The next 10 days of OOD involved coalition forces using only air and sea capabilities to weaken Qaddafi’s defenses. The U.S. was responsible for 80% of air refueling, 75% of aerial surveillance hours and 100% of electronic warfare missions under OOD.²⁰ Aircraft and naval vessels from many other countries including, Canada, Denmark, Greece, Italy, Romania, Spain, Turkey, the Netherlands, Norway, Qatar, and the United Arab Emirates, were all involved in the operations against Libya.²¹

Just 12 short days after the first action in Libya, on March 31, 2011, the North Atlantic Treaty Organization (NATO) assumed sole operational control of enforcing the no-fly zone and the arms embargo authorized by the UNSC and soon after expanded to include control of attacks on Qaddafi’s ground forces. Operation Odyssey Dawn ended and Operation Unified Protector (OUP) began once under NATO command. The transfer of responsibility for military operations in Libya from the United States to NATO enabled U.S. involvement to assume a strictly supportive rather than leading role in the coalition’s

16 Crook, “Contemporary Practice,” 572.

17 Louis Fisher, “Military Operations in Libya: No war? No Hostilities?,” *Presidential Studies Quarterly* 42, no. 1 (2012): 178.

18 Louis Fisher, “Military Operations in Libya,” 178.

19 Jeremiah Gertler, “Operation Odyssey Dawn (Libya): Background and Issues for Congress,” Congressional Research Service, (2011): 11. Accessed December 6, 2012, <http://fpc.state.gov/documents/organization/159790.pdf>.

20 Gertler, “Operation Odyssey Dawn”, 11.

21 Crook, “Contemporary Practice,” 573.

efforts.²² Through the use of only missiles, fighter aircraft, and drones, the operation was successful in aiding the Rebel army to defeat Qaddafi and remove him from power. Qaddafi was violently killed in the streets of Tripoli by Libyan citizens on October 20, 2011 with an interim government taking his place. NATO officially ended OUP on October 31, 2011. In total, NATO and partner air assets had flown more than 26,000 sorties, an average of 120 sorties per day. Forty-two per cent of the sorties were strike sorties, which damaged or destroyed approximately 6,000 military targets.²³ At its peak, OUP involved more than 8,000 servicemen and women, 21 NATO ships in the Mediterranean and more than 250 aircrafts of all types. By the end of the operation, NATO had conducted over 3,000 hailings at sea and almost 300 boardings for inspection, with 11 vessels denied transit to their next port of call.²⁴

In total, the Libyan intervention lasted seven and a half months, cost the U.S. \$869 million, and resulted in only two military casualties, neither of which were U.S. soldiers. The United Kingdom assumed the most cost out of the nine foreign powers that contributed to funding the intervention -- an estimated \$1.5 billion was spent.²⁵ When comparing the duration, number of casualties, and money spent in Libya to that in Iraq and Afghanistan, the intervention in Libya hardly seems to fit the definition of war. The war in Afghanistan is going on its thirteenth year of operation and the war in Iraq is on its eleventh year of operation, and neither have a definitive end date. As of February 28, 2012 operations in Iraq and Afghanistan have killed 6,383 United States service members and wounded an additional 47,638 men and women of the United States military.²⁶ Congressional Research Services reports the wars in Iraq and Afghanistan along with enhanced homeland security has costs taxpayers \$1.283 trillion through 2011.²⁷ In June 2011, a nonpartisan investigation by Brown University's Watson Institute for International Studies put the cost of wars in Iraq, Afghanistan and Pakistan at \$4 trillion and 225,000 military and civilian deaths.²⁸ The stark differences between the multilateral actions in Libya and the unilateral action in Iraq and Afghanistan provide evidence of how truly limited the Libyan intervention was and what war really looks like.

Although U.S. participation was limited, President Obama and his administration

22 Louis Fisher, "Military Operations in Libya: No war? No Hostilities?," 179.

23 NATO - Topic: NATO and Libya, "Facts and Figures," Accessed December 7, 2012, http://www.nato.int/cps/en/natolive/topics_71652.htm

24 NATO - Topic: NATO and Libya, "Facts and Figures," Accessed December 7, 2012, http://www.nato.int/cps/en/natolive/topics_71652.htm

25 NATO - Topic: NATO and Libya, "Facts and Figures," Accessed December 7, 2012, http://www.nato.int/cps/en/natolive/topics_71652.htm

26 U.S. Department of Defense, "Defense New Casualty Report," Accessed December 7, 2012, <http://www.defense.gov/news/casualty.pdf>.

27 Amy Belasco, *The Cost of Iraq, Afghanistan, and Other Global War on Terror Operations Since 9/11* (Washington, DC: Congressional Research Service, March 29, 2011), Accessed December 7, 2012, <http://www.fas.org/sgp/crs/natsec/RL33110.pdf>

28 Eisenhower Study Group, "The Costs of War Since 2001: Iraq, Afghanistan, and Pakistan" (Research Project, Brown University, Providence, RI, June 2011), Accessed December 7, 2012, <http://costsofwar.org/sites/default/files/Costs%20of%20War%20Executive%20Summary.pdf>.

received substantial criticism for how the Libyan intervention was handled. Many believe his authorization for military action in Libya was unconstitutional and not within his power, while there has also been wide disagreement as to the multilateral approach that was taken, the justification given for the need to intervene, whether or not the actions amounted to “war,” and if President Obama violated the War Powers Resolution. Members of Congress were Obama’s biggest critics, consistently citing his violation of the separation of powers as well as the War Powers Resolution. The majority of Congress felt that Obama had not only encroached on their power to declare war, but also felt that he had failed to adequately inform both Congress and the public of the reasoning and necessity to intervene.²⁹ Representative Dennis Kucinich (D-OH) even went as far as to imply that Obama’s administration purposefully created a tension-filled environment in Libya so there would be reason for an intervention.³⁰ Regardless of the details of the intervention, Congress conclusively agreed that Obama had illegally entered U.S. troops into “war” and that there needed to be repercussions for doing so.

It is not uncommon for the President and Congress to disagree about their roles in foreign policy and they often collide when exercising their war powers. When they do, it is customary to charge one another with having violated a central tenet of American government: the separation of powers. Although this principle is considered the cornerstone of our system and an article of political faith for the Founding Fathers, there are wide differences of opinion as to what the framers of the Constitution meant by it and if it can be expanded beyond the written text.³¹ Congress’s enumerated powers are very clearly specified in the Constitution under Article I, section 8, but the same cannot be said of the powers of the president. Article II of the Constitution grants few specific powers to the president and leaves room for broad interpretation. The inherent and implied powers of both Congress and the President are a source of conflict between the branches because they each have distinctly different responsibilities, practices, and traditions.³² There is extensive literature covering the debate over the separation of powers, with the main arguments either favoring the President or Congress.

Louis Fisher has written countless books and articles reinforcing the constitutional war powers of the legislative branch, while reiterating how the power of war has shifted to the presidency over time and the damage this has done to constitutional values, representative government, and democracy.³³ Fisher and the many other scholars who follow the same school of thought, including John Hart Ely, Harold Hongju Koh, and Louis Henkin, read and interpret the Constitution as the founding fathers wrote it. They base their

29 U.S. Congress. House. 2011, Committee on Foreign Affairs. *War Powers, United States operations in Libya, and related legislation: Hearing before the Committee on Foreign Affairs*, 112th Cong., 1st sess., May 25, 2011.

30 U.S. Congress, House, 2011, *Question of Personal Privilege*, 112th Cong., March 31, 2011.

31 Louis Fisher, *President and Congress: Power and Policy*. New York: The Free Press, 1972, 1.

32 Louis Fisher, *Constitutional Conflicts Between Congress and the President*, Kansas: University Press of Kansas, 2007, 249.

33 Louis, Fisher, *Presidential War Power*. Kansas: University Press of Kansas, 2004, 1.

pro-Congress arguments on the specific war powers that the Constitution grants Congress and the president--nothing more. Fisher states that the Constitution does not allocate foreign policy to a single branch, but assigns portions to Congress and the president. The framers deliberately dispersed political functions to avoid concentrating too much power in a single branch.³⁴ And although both branches are representative, Congress is said to be the more representative branch because they answer directly to the people.

Fisher argues that although Article II of the Constitution empowers the President to be Commander in Chief (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”), it must be understood in the context of military responsibilities that the Constitution grants to Congress. Through this interpretation, the president is merely the leader of the armed forces while Congress holds all other power pertaining to the armed forces (raising, maintaining, funding, etc.).³⁵ Fisher also argues that Article II of the Constitution places the president at the head of the executive branch to provide unity, responsibility, and accountability, but that absolutely does not remove from Congress the power to direct certain executive activities.³⁶ The very heart of the pro-congress argument is that the Constitution empowers Congress and only Congress to declare war, and any war lacking congressional authorization is illegal, with exception to instances of self-defense. And the argument of course whole-heartedly embraces the War Powers Resolution in its entirety and defends its legality always. What this school of thought does not account for is the evolution and change within the world that has taken place since the constitution was written. The founding fathers could never have predicted the kind of threats the world faces today, and hence parts of the document they wrote cannot be interpreted as if they did.

Fisher wrote an article in 2012 addressing the Libyan intervention and how it relates to the pro-Congress argument. In “*Military Operations in Libya: No War? No Hostilities?*” Fisher denounces President Obama’s claim of legal support from the UN and NATO and argues that institutions and organizations are never a substitute to congressional authorization of war.³⁷ Fisher also attacks the Obama administration’s interpretation of “war” and “hostilities,” arguing that just because NATO assumed the majority of the military attacks does not remove the U.S. from engaging in hostilities.³⁸ He even accuses Obama of using “double-talk” when trying to justify the military actions in Libya, in order to distract attention away from his alleged violation of the WPR.³⁹ In the case of Libya, Fisher obviously stayed true to the pro-Congress argument, but failed to give a correct definition to “hostilities.”

On the opposite side of the separation of powers scale is the Unitary Executive

34 Louis, Fisher, *The Politics of Shared Power: Congress and the Executive*, College Station: Texas A&M University Press, 1998, 177.

35 Louis, Fisher, *The Politics of Executive Privilege*, North Carolina: Carolina Academic Press, 2004, 231.

36 Fisher, *The Politics of Executive Privilege*, 233.

37 Louis Fisher, “Military Operations in Libya: No war? No Hostilities?,” 176.

38 Louis Fisher, “Military Operations in Libya: No war? No Hostilities?,” 183.

39 Louis Fisher, “Military Operations in Libya: No war? No Hostilities?,” 186.

Theory. The principle architect of this theory is John Yoo, but it has been expanded upon by many other scholars including Henry Monaghan, Steven Calabresi, and Michael Reisman. The Unitary Executive Theory essentially holds that Congress cannot regulate the executive branch, because the executive power is wrapped up in a single person, the president, and the president has to be able to wield the executive power as he sees fit.⁴⁰ What this means is that when Congress tries to pass rules and regulations for the executive branch that restrict what the president can do, that is unconstitutional, because that entails Congress getting involved in the executive branch when Congress' powers are to be limited to other things.⁴¹ All of the theories' arguments are based upon the Vesting Clause in Article II of the Constitution which states, "The executive Power [of the United States] shall be vested in a President of the United States of America." Proponents of the Unitary Executive Theory argue that this language, along with Take Care Clause, ("The President shall take care that the laws be faithfully executed, and shall Commission all the Officers of the United States,") creates a "hierarchical, unified executive department under the direct control of the President."⁴²

Unitary Executive Theory expands the president's powers in many areas, but the expansion of the war powers is most important. Yoo states that, empowering the president to be Commander in Chief further vests him with all of "the executive power" and the duty to execute the laws.⁴³ He further argues that, "these provisions have long been recognized to give the president absolute command over the armed forces, to the point of ordering their use in hostilities abroad. Nowhere does the constitutional text provide that the commander-in-chief power cannot be used by the president to wage military hostilities unless Congress first issues a declaration of war."⁴⁴ It is also argued that the president possesses inherent power to protect the nation from attack. Advocates of Unitary Executive Theory argue that the president's vital powers should not be second-guessed by persons without diplomatic responsibilities or who lack access to intelligence. In their view, the president's actions in matters of national security should not be subject to a separation of powers analysis.⁴⁵ Yoo relies on history to back up these arguments, stating:

Practice demonstrates that the political branches have read the constitutional text to establish a stable, working system of war powers. The President has taken the primary role in deciding when and how to initiate hostilities. Congress has allowed the executive branch to assume the leadership and initiative in war, and instead has assumed the role of approving military actions after the fact by declarations of support and by appropriations.⁴⁶

40 John C. Yoo, "War and the Constitutional Text," *The University of Chicago Law Review*, 69, no. 4, (2002):1663.

41 John C. Yoo, "War and the Constitutional Text," 1663.

42 Steven Calabresi and Kevin Rhodes, "The Structural Constitution: Unitary Executive, Plural Judiciary," *Harvard Law Review*, 105, no.6 (1992): 1165.

43 John C. Yoo, "War and the Constitutional Text," 1662.

44 John C. Yoo, "War and the Constitutional Text," 1662.

45 Calabresi and Rhodes, "The Structural Constitution", 1166.

46 Harold Hongju Koh, *The National Security Constitution: Sharing Power after the*

Keeping with history, the phrase “declare war” had a fixed meaning in international law; it did not mean to start war, but rather to classify a conflict as a war for legal purposes.⁴⁷ Congress can hold the President accountable only by censure, impeachment, or constitutional amendment. Legislation restricting the executive branch has no power, which makes the WPR null and void.⁴⁸

Unitary Executive Theory is controversial and not without its critics. Some have even gone so far as to say that the actual practice of this theory would be a form of fascist dictatorship. The most recent mention of the “unitary executive” was in the George W. Bush presidency, as he functioned much like a CEO with his power restricted only by the U.S. Constitution as interpreted by the Judiciary.⁴⁹ This theory has not yet been associated with President Obama, but should be along with every other president since WWII. Under this theory, President Obama’s authorization of military action in Libya was within his power as commander-in-chief, and Congress gave approval by continuing to appropriate funds for the NATO operation. Obama’s alleged violation of the WPR would be irrelevant because, as stated earlier, that legislation would hold no power over presidential actions. The Presidency needs to be thought about in terms of both the powers that are possessed and the functions that are assumed because both are needed to fully understand the true role and powers of the president.

The term *foreign affairs* does not appear in the Constitution and so the powers allocated to deal with such issues are limited, vague, and subject to broad interpretation by both the legislative and executive branches. The role and leadership responsibilities of presidents have increased as a result of national security and economic emergencies throughout the past several generations and because of the United States’ world leadership responsibilities in this era.⁵⁰ Congress usually tries to assert itself and serve as a reasonable and responsible check on the exercise of presidential power, as is the case with the WPR. It is sometimes effective and sometimes less effective in this role; and presidents can always expect, at least, suspicion, if not overtly hostile actions, from Congress when initiating war powers.⁵¹

Because the founders failed to delegate the specific powers concerning foreign affairs, disputes between Congress and the President sometimes have to be settled by the Supreme Court—that is when, and if, they will hear the case. In the 1936 Supreme Court case *United States v. Curtiss-Wright Corp.*⁵² a landmark decision was handed down in favor *Iran-Contra Affair*, New Haven: Yale University Press, 1990, 123-133.

47 William Michael Treanor, “Fame, the Founding, and the Power to Declare War,” *Cornell Law Review*, 82 (1997): 698.

48 Calabresi and Rhodes, “The Structural Constitution”, 1166.

49 Bruce Ackerman and Oona Hathaway, “Limited War and the Constitution: Iraq and the crisis of Presidential legality,” *Michigan Law Review* 109, (2011): 449-450.

50 Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, New York: Columbia University Press, 1990, 18-19.

51 Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, 20.

52 *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Curtiss-Wright Export Corp. was indicted for violating the arms embargo through the sale of machine guns to Bolivia, it defended itself on the grounds that the embargo and the proclamation were void because Congress

of executive power over foreign affairs. The case involved principles of both governmental regulation of business and the supremacy of the executive branch of the federal government to conduct foreign affairs.⁵³ The Court held that the Constitution's text constrains only the domestic activities of the federal government, but does not constrain the activities of the government abroad. The Court argued further that, like any other country, the United States has "external sovereignty" by which it may liberally assert or defend itself on the world stage as a free and independent nation.⁵⁴ The federal government thus has unlimited power to conduct foreign affairs on the nation's behalf and that unlimited power lies exclusively with the president.

In the majority opinion, Justice Sutherland quoted former Chief Justice John Marshall stating, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."⁵⁵ At its most basic level, the case ruled that the president's foreign powers are open-ended and inherent in his position as the executive authority of a sovereign nation.⁵⁶ Despite the controversy surrounding it, the *Curtiss-Wright* decision is one of the Supreme Court's most influential and still stands as good law. Most cases involving conflicts between the executive and legislative branches involve political questions that the courts refuse to adjudicate. Therefore, the sweeping language of *Curtiss-Wright* is regularly cited to support executive branch claims of power to act without congressional authorization in foreign affairs, especially when there is no judicial intervention to interpret the meaning of that text--much like Obama's authorization for military action in Libya.⁵⁷ When considering action in Libya within the context of the *Curtiss-Wright* decision, President Obama, as "the sole organ of the nation in its external relations," is not constrained by the Constitution or Congress in the activities he conducts abroad.

Since the *Curtiss-Wright* decision, there have been several cases pertaining to executive authority and the separation of powers in general, but none that overturn *Curtiss-Wright* or that test the executive challenged legality of the WPR. The intention of Congress passing the WPR in 1973 was to protect and reassert its constitutional war powers while seeking to limit the war powers of the president through procedural legislation.⁵⁸ The long standing debate about the separation of powers is at the very heart of the WPR. During the Korean and Vietnam wars, the United States found itself involved for many years in situations of intense conflict without a declaration of war. Many members of Congress became concerned with the erosion of congressional authority to decide when the United

had improperly delegated legislative power to the executive branch by leaving what was essentially a legislative determination to the President's "unfettered discretion." The Court was asked to decide whether Congress had delegated too broadly when it empowered the President to declare an arms embargo in South America. The statute allowed the President to impose an arms embargo whenever he found that it "may contribute to the reestablishment of peace" between belligerents.

53 Louis Fisher, *Presidential War Power*, 69.

54 Louis Fisher, "The Politics of Shared Power," 179-180.

55 Louis Fisher, "The Politics of Shared Power," 179.

56 Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs*, 74.

57 Louis Fisher, "Presidential War Power," 72-73.

58 Jentleson, *American Foreign Policy*, 157.

States should become involved in a war or the use of armed forces that might lead to war.⁵⁹ The WPR was created to spell out the dividing line between the constitutional power of Congress to declare war and the constitutional power of the President as Commander in chief. One of the main objectives of the law was that it would represent a compact between the two branches for making the Constitution work in the gray area of shared war powers, but that proved to be impractical when President Nixon vetoed the law based on grounds of unconstitutionality and his veto was overridden.⁶⁰

Every president, since the WPR was passed, has regarded the law as an unconstitutional infringement on their presidential powers as commander in chief.⁶¹ Although the legislation is short, it is in essence a procedure for the president to follow when engaging the armed forces into “hostilities,” but it is plagued with ambiguity in its legal and legislative language. Congress charged President Obama with violating more than one section of the WPR when he authorized military action in Libya in 2011, which is simply untrue.

The WPR lays out the following procedure for the president to follow when authorizing military action. Section 2(c) attempts to define the President’s constitutional power as Commander in Chief to introduce U.S. forces into hostilities or “into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”⁶² The President may introduce troops 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 its armed forces.⁶³ Section 3 lays out the consultation requirements the President must abide by, stating that the President “in every possible instance shall consult with Congress” before introducing armed forces into hostilities, and shall “consult regularly with Congress” until armed forces are no longer engaged in hostilities or have been removed from the situation.⁶⁴ Section 4(a) governs reports that the President must submit to Congress within 48 hours of U.S. troops being introduced (1) into hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances, (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces, or (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation. The report should include the necessity for the use of armed forces, the constitutional and legislative authority used to introduce troops, and the estimated scope and duration of the involvement.⁶⁵ Section 5(b) is the most contested part of the WPR. It states that the filing of the report required in section 4(a) starts a 60-day clock and the President is to remove all armed forces from hostilities within those 60 days. The following circumstances allow for an extension of the

59 Jentleson, *American Foreign Policy*, 158.

60 Pat M. Holt, “The War Powers Resolution: The Role of Congress in U.S. Armed Intervention,” *American Enterprise Institute for Public Policy Research*, Washington D.C., (1978): 1-2.

61 Jentleson, *American Foreign Policy*, 185.

62 Louis Fisher, “Presidential War Power,” 149.

63 War Powers Resolution of 1973, H. J. Res. 542, 93rd Cong. (1973), Section 2(c).

64 War Powers Resolution (1973), Section 3.

65 War Powers Resolution (1973), Section 4(a).

clock; (1) Congress declares war or authorizes specific use for such forces, (2) Congress extends the 60 day period by law, or (3) if there is an unavoidable military necessity that requires the continued use of armed forces, the clock may be extended for 30 more days.⁶⁶

The intervention in Libya was similar in scope and duration to many other military operations the U.S. has engaged in over the last three decades, many of which had also lacked congressional authorization and were said to have violated the WPR. Congress has accused President Obama of being in violation of sections 2(c), 3, and 5(b).⁶⁷ The failings of the WPR have been very apparent since its existence, but are even more so in the context of the Libyan intervention in 2011. The first and most fundamental problem with the WPR is in section 2(a) within the law's statement of purpose.⁶⁸ It states that the law is to apply to situations in which "imminent involvement in hostilities is clearly indicated."⁶⁹ Yet there is no clear definition in the law of what level of action is necessary to be considered actual hostilities. Thus Congress has no definitive basis for challenging the Obama administration's claim that the multilateral military operation in Libya was below the threshold of "hostilities," and thus did not fall under the limitations of the WPR. President Obama's administration is not the first to expose this issue. President Reagan brought the same claim in 1988 when defending military operations in the Persian Gulf, which had a longer duration and far more casualties than in Libya.⁷⁰

According to Bruce Jentleson, one of the problems inherent in the WPR that history and the case in Libya has made more apparent is that it "runs against institutionally rooted attitudes in both branches."⁷¹ Presidential opposition to the WPR has been almost an institutionally instinctual response.⁷² Section 2(a) is the most presidentially contested part of the WPR, as it is seen as an infringement on the role of the commander in chief and other aspects of the presidency's constitutional share of war powers. Congress stated that Obama's violation of section 2(a) was due to his authorization of military action in Libya without satisfying any of the three requirements listed within the section. Section 2(a) is inconsistent with section 8(d) stating, "nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties."⁷³ Congress expressly limited the President's constitutional executive power as Commander in Chief of the U.S. Armed Forces.⁷⁴ Congress has several different options to manipulate in order to stop military action that they are not in support of and do not authorize. Quite simply, Congress could have passed blanket legislation unauthorizing any actions in Libya, cut off funding, or condition the funding. None of these measures

66 War Powers Resolution (1973), Section 5(b).

67 Jordan J. Paust, "Constitutionality of U.S. Participation in the United Nations-authorized war in Libya." *Emory International Law Review* 26, (2012): 43-45.

68 Jentleson, *American Foreign Policy*, 185.

69 War Powers Resolution (1973), Section 2(a).

70 Jentleson, *American Foreign Policy*, 185.

71 Jentleson, *American Foreign Policy*, 186.

72 Louis Fisher, "Presidential War Power," 148.

73 War Powers Resolution (1973), Section 8(d).

74 Jason R. Struble and Richard A.C. Alton, "The Legacy of Operation Allied Force: A Reflection on its legality under United States and International Law." *Michigan State International Law Review* 20, no.2 (2012): 306.

were taken to cause immediate withdrawal from Libya, and therefore they cannot claim the military action was illegal. To stress again the significance in the lack of a definition for “hostilities” within the law, President Obama cannot be in violation of this provision without a proper definition because the requirements only apply to situations “where imminent involvement in hostilities is clearly indicated.”

Ambiguity is also inherent in Section 3 of the WPR and its provision for consultation with Congress “in every possible instance before introducing U.S. armed forces into hostilities...”⁷⁵ When is consultation “possible”? Using such language in the requirement leaves this provision open for broad interpretation. Congress claimed that President Obama did not consult with them before committing armed forces and did not stay in consistent consultation while troops were in use.⁷⁶ The lack of a definition for “hostilities” is important again in this provision. Without a clear definition, how would a president know to consult with Congress if he understood the military involvement to be less than hostilities? The U.S. was only in leadership of the operation in Libya for twelve days, after which NATO assumed sole control. The U.S. had limited involvement due to the multilateral nature of the operations. Out of courtesy, President Obama did in fact stay in consistent consultation with Congress through the duration of the intervention, but due to the ambiguity in the law, his consultation was apparently not consistent with Congress’s view of “every possible instance.” In the June 3rd Congressional meeting considering House Resolution 294 to remove U.S. armed forces from Libya, Representative Norman Dicks stated,

The President stated clearly that our leadership of the NATO effort would last a matter of days, not weeks. While the direct U.S. leadership of this effort lasted a brief time, U.S. forces remain engaged in the NATO operation; and at this point, it is clear that Members of Congress are not *comfortable* with the extent of information they have been given. Under the War Powers act, the President has an obligation to report to Congress and to seek concurrence if our military involvement extends longer than 60 days, and clearly such consultation has not been *effectively* accomplished.⁷⁷

Congress claimed President Obama’s biggest violation was in regards to section 5(b) and his non-removal of troops after 60 days of military involvement.⁷⁸ Congressional control on this matter is weakened by awkward language that fails to start the 60-to-90-day clock. The way it is written allows the president to extend the deadline by an additional 30 days if he determines that an extension is necessary. The 60-day clock only starts if the president reports under the very specific guidelines within section 4(a)(1). Almost all of the previous presidents, and Obama, report more generally as being “consistent with the WPR.”⁷⁹ Because the reporting can be done this way, there is often discrepancies

75 Jentleson, *American Foreign Policy*, 185.

76 U.S. Congress, House, 2011, *Libya War Powers Resolution*, 112th Cong., June 3, 2011.

77 U.S. Congress, House, 2011, *Libya War Powers Resolution*, 112th Cong., June 3, 2011.

78 U.S. Congress, House, 2011, *Libya War Powers Resolution*, 112th Cong., June 3, 2011.

79 Louis Fisher, “Presidential War Power,” 150.

between the two branches as to when and if the clock started. In the same congressional meeting stated above, there were many members who did not feel comfortable with passing legislation to immediately remove all armed forces from Libya at the expiration of their version of the 60 day clock, and also members who approved of Obama's decision to continue military action. For example, Representative Ileana Ros-Lehtinen stated,

The sudden U.S. withdraw from Libyan operations could do irreparable harm to the NATO alliance, and ultimately undermine support for NATO efforts in Afghanistan. Providing Qaddafi free rein by forcing the U.S. to rapidly withdraw from the NATO operation would pose an even more virulent threat to such other allies in the region as Israel. An emboldened Qaddafi would be in a position to provide both destabilizing types and amounts of conventional weapons, as well as unconventional capabilities through new and existing smuggling routes to violent extremists.⁸⁰

Representative Van Hollen also showed support for President Obama's decision, stating,

The President fulfilled his pledge to greatly redefine the role of American forces and they now play a on-combat, supporting role comprised of intelligence gathering, logistics, surveillance and search and rescue. Given the conversion of special factors in Libya, I believe the president's decision has been justified.⁸¹

Congress did not pass any legislation to stop military action in Libya, thus affirming President Obama's decision to continue support. And again, the clock and this provision are only relevant if the military action in question constitutes "hostilities," which, from the executive's perspective in the case of Libya, they did not. As such, Obama did not need approval from Congress.

The WPR has long been ignored and challenged by presidents, and Congress has been left with few options to enforce the law. Since 1973, Congress has filed three lawsuits against presidents and the courts have refused to rule and dismissed them all.⁸² Congress has attempted to amend the WPR in the past in hopes of making the law more concrete and less ambiguous, but none have been successful, so the law continues to function as a wedge between the two branches and only adds fuel to the separation of powers fire.

The Libyan intervention truly is a new and improved outcome of U.S. foreign policy. The military action lasted a matter of months—as opposed to years or decades—and there was not a single U.S. casualty. The United States, for once, funded less than its allies, and from start to finish the operation was truly multilateral. There has always been much debate about which branch possesses certain war powers and that is unlikely to change any time soon. The WPR has proved to be ineffective in its original purpose and is now used as a political tool by Congress. The ambiguity of the WPR relieves the law of any legal standing and it can no longer be used by Congress to attempt to limit the

80 U.S. Congress, House, 2011, *Libya War Powers Resolution*, 112th Cong., June 3, 2011.

81 U.S. Congress, House, 2011, *Libya War Powers Resolution*, 112th Cong., June 3, 2011.

82 Jentleson, *American Foreign Policy*, 186.

President's power. In authorizing military action in Libya, President Obama acted within his power as Commander in Chief and did not violate the WPR. Because Congress has not offered a definitive answer as to what actions amount to "hostilities," any claims that Libya was a war can be refuted. Military action with UN authorization and within NATO created a more ideal policy for handling the kind of crisis seen in Libya and should be given more thought by Congress.