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Presidential War Powers and Humanitarian Intervention

Michael J. Sherman*

Abstract

Does the fact that Article I, Section 8 of the United States Constitution reserves to Congress the authority to “declare war” mean that the president needs congressional approval before using military force?¹ As this Article discusses, there are a range of answers to this question. The Article examines this debate in the context of humanitarian intervention, i.e. military actions taken, not for purposes of conquest, but instead to stop large-scale, serious violations of human rights. If the president wishes to use the military for these purposes, should he have more authority under the Constitution to do so? Less? The same? What this Article suggests is that the concerns which drove the Founders to place limits on the President’s war powers, especially the fear that a glory-seeking chief executive would precipitously use the military in order to serve his own desire for fame, are not as serious when it comes to humanitarian intervention. Presidents are unlikely to significantly enhance their short-term popularity or historical legacies by using the military in this way. As a result, there is less reason to fear that they will be incautious in these situations. In addition, it is possible to establish standards by which to judge presidential action in this arena, placing another effective limit on the President. In light of the reduced risks, as well as the terrible costs of inaction in the face of grave human rights crises, we should accept some flexibility for the President to decide to intercede for humanitarian reasons.

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1. U.S. CONST. art, I, § 8, cl. 11.

Introduction

Constitutional debates about the degree of power the president should have to engage the United States in military action are hardly new. Commentators have proposed an array of answers to this question, ranging from very restrictive views of the President's war-making power to especially broad visions of this authority. Naturally, there are also those who have taken more moderate positions than either of these two extremes. This Article considers the question of presidential war powers in the context of humanitarian intervention. It will explore the degree of license the president should possess to commence military action if it is for humanitarian purposes. Should the President's war making authority, whatever it may be, be greater in these settings? Should it be lessened? Should it be no different than in other contexts?

This Article suggests there should not be as much concern over abuse of power by a Commander in Chief in calling out the armed forces for humanitarian purposes and, therefore, presidents should have at least some flexibility to initiate military action for legitimate humanitarian causes. The troubling incentives that exist for presidents to use the military for selfish, self-promoting reasons in other contexts do not exist to the same degree in the case of humanitarian intervention. On a related note, public opinion is likely to act as a brake on presidential action in these situations. Finally, humanitarian interventions are generally smaller scale operations involving less risk to (at least) American life, meaning that the cost of abuse of power by the president will be lower. This is not to say that presidents should engage in such actions at the drop of a hat; there needs to be due consideration as to what criteria should be used to judge a proposed intervention. Such standards should also guard against presidential abuse of military authority in this arena, again reducing the risk that presidents will misuse their power.

As a starting point, this Article will first discuss some of the main lines of thought about the president's war-making powers under the Constitution. It will then examine the idea behind humanitarian intervention and the related concept of Responsibility to Protect ("R2P"). While the definition of

humanitarian intervention is further discussed below,² for now this Article will broadly define it as foreign intervention or military action whose primary goal is not necessarily a victory over an enemy state's armed forces (or a non-state actor's armed forces), but is instead directed to relieve or end a serious violation of human rights involving civilians or others who are hors de combat (literally "outside the fight"; for these purposes, essentially not engaged in military encounters). Understanding the rationales grounding the theories of the president's war-making authority will help determine whether his power should be enhanced, diminished, or unchanged when considering use of military force for humanitarian reasons.

Theories of the President's War Making Powers Under the Constitution: The Restrictive, Pro-Congress View

The restrictive view maintains that the president's authority to commit United States forces to armed conflict in the absence of congressional assent—either through a declaration of war or some sort of statutory authorization—is quite limited. In this telling, the president needs congressional approval for just about anything more than defensive action to repel an attack. This viewpoint draws its support primarily from the constitutional text and its delegation to Congress of the power to "declare war"³ and appropriate funds for the armed forces.⁴ However, its proponents can also cite to a significant number of statements made by the Founders indicating it was precisely their intent to limit the ability of any one person to bring the United States to a state of war.

John Hart Ely was one of the restrictive view's champions. To Ely, the question of whether Congress or the president had the primary authority to commence hostilities was not a close one. He famously opened his book, *War and Responsibility*, by stating that:

2. See *infra* notes 126–31 and accompanying text.

3. See U.S. CONST. art. I, § 8, cl. 11.

4. See *id.* art. I, § 8, cl. 12.

[F]rom the standpoint of twentieth-century observers, the ‘original understanding’ of the document’s framers and ratifiers can be obscure to the point of inscrutability. Often this is true. In this case, however, it isn’t. The power to declare war was constitutionally vested in Congress. The debates, and early practice, establish that this meant that all wars, big or small, ‘declared’ in so many words or not—most weren’t, even then—had to be legislatively authorized.⁵

Ely explained that Congress was specifically given this power to make it difficult for the country to go to war. In other words, as George Mason put it, the Founders wanted to “‘clog’ the road to combat.”⁶ They feared that the executive would be more anxious to fight wars than the legislature, so the less combative branch was inserted into the process.⁷ This decision rested on the theory that it would be harder to get a larger number of people on board with a given action than if the decision were to be left to a single individual.⁸ The House was included in this process, unlike the approval process for treaties and many presidential appointments in which the legislative role is limited to the Senate.⁹ Its inclusion was probably due to its closer relationship to the population as a whole, i.e. those who would be fighting and paying the most direct costs of any decision to go to war.¹⁰ At Pennsylvania’s ratifying convention, James Wilson, who had participated in the writing of the Constitution, defended the document in part by asserting that power was divided in such a way that “[i]t will not be in the power of a single man, or a single body of men, to involve us in [war]; for the important power of declaring war is vested in the

5. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993) (internal citations omitted).

6. *Id.* at 4; see also M. Andrew Campanelli et al., *The Original Understanding of the Declare War Clause*, 24 J.L. & POL. 49, 54 (2008) (discussing Mason’s views).

7. See ELY, *supra* note 5, at 4.

8. See *id.*

9. See *id.*

10. See *id.*

legislature at large.”¹¹ Jon Michaels writes:

[T]he United States would also be a great democracy: its decisions would reflect the will of the citizenry. Hence, Congress as the most direct representatives of the People, would necessarily be involved in military policy, simultaneously promoting the virtues of limited government by checking the perceived natural inclinations of the strong Executive and upholding the ideals of democracy by remaining the true servants of the People. Moreover, decisions by the president to wage war could not be undertaken without first benefiting from the deliberative insights of a legislative assembly and without concomitantly securing the tacit blessings and consent of the citizenry.¹²

More recently, when President Obama was considering how to respond to Syria’s use of chemical weapons, commentators who argued that any action would require congressional involvement referenced Mason’s language. Doug Bandow has suggested that the president would need to consult Congress, and this was the very design intended by the Founders, including Mason, to “clog” up the road to war.¹³ Similarly, David Cole opined in the *New York Review of Books* in defense of the President’s consultation with Congress, staking the claim that “[g]oing to Congress *did* clog war,” but this very clogging would lead to a better long-term resolution to the problem of Syria’s use of chemical weapons.¹⁴

11. See Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637, 1648–49 (2000) (internal citation omitted).

12. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1051–52 (2004).

13. See Doug Bandow, *Bomb Syria? President Obama Must Go to Congress for a Declaration of War*, CATO INST. (Aug. 30, 2013), <https://www.cato.org/publications/commentary/bomb-syria-president-obama-must-go-congress-declaration-of-war>.

14. See David Cole, *Clogging the War Machine*, N.Y. REV. DAILY (Sept. 19, 2013, 9:10 AM), <https://www.nybooks.com/daily/2013/09/19/syria-clogging->

Louis Fisher is another well-known advocate of the restrictive view. Fisher makes the point that the Founders were concerned with creating an executive with limited powers in comparison to the British monarch whose rule they had only recently thrown off. He notes that, in *The Federalist*, Alexander Hamilton—one of the staunchest supporters of strong executive power of his generation—stated that the American president would be “less threatening” to the people than an English king, precisely because the former lacked the power to declare war or raise an army.¹⁵ Fisher also mentions that when President Washington used the militia to protect Americans living on the frontier from hostile Indian attacks, he understood his authority to be strictly limited to defensive measures. Any offensive plans against tribal forces would first have to be authorized by Congress.¹⁶ As James Baker points out, this defense versus offense distinction also represented former President (and future Chief Justice) Taft’s view more than a century later.¹⁷

In expounding on why the Founders thought it so important to create an executive whose war making powers would be more circumscribed than the British monarch’s, both Fisher and William Treanor¹⁸ assert that the Founders saw the possibility of an executive becoming motivated (far more so than Congress) to engage in war out of a desire for fame. Fisher points to Federalist No. 4, in which John Jay wrote that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts,

war-machine/ (emphasis in original).

15. See Fisher, *supra* note 11, at 1645; see also THE FEDERALIST NO. 69, at 398 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

16. See Fisher, *supra* note 11, at 1653; see also Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the “Zone of Twilight,”* 44 ST. MARY’S L.J. 1, 26–27 (2012) (discussing Washington’s views).

17. See JAMES E. BAKER, IN THE COMMON DEFENSE: NATIONAL SECURITY LAW FOR PERILOUS TIMES 179–80 (2007) (internal citation omitted); see also Bejesky, *supra* note 16, at 32 (discussing *Chae Chan Ping v. United States*, 130 U.S. 581, 591 (1889), in which the Court took note of the previous Secretary of State, William Marcy’s expressed viewpoint that the president lacked authority to initiate offensive hostilities with another country).

18. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997).

ambition, or private compacts to aggrandize or support their particular families or partisans.”¹⁹ Unlike the executive, Treanor argues, “individual members of Congress would not win fame if the nation went to war and won.”²⁰

Both authors cite to Madison’s *Helvidius* letters, written during the neutrality crisis of 1793. The United States was trying to avoid being drawn into the ongoing conflict between France and Great Britain.²¹ The question arose whether President Washington could issue a proclamation of neutrality.²² Secretary of State Jefferson argued that this was beyond the President’s power, because he could no more pronounce that there would not be a war (i.e. that the U.S. would remain neutral) than he could declare that there would be one.²³ The *Helvidius* letters were published in support of Jefferson’s position and in response to Treasury Secretary Hamilton’s *Pacificus* letters claiming that the President could issue such an edict.²⁴

In the fourth *Helvidius* letter, Madison contended that:

In no part of the constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. . . . [T]he trust and the temptation would be too great for any one man: not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. War is in fact the true nurse of executive aggrandizement.²⁵

19. THE FEDERALIST NO. 4, at 97–98 (John Jay) (Isaac Kramnick ed., 1987); see also Fisher, *supra* note 11, at 1651.

20. Treanor, *supra* note 18, at 700.

21. See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 14–20 (5th ed. Wolters Kluwer Law & Bus. 2014).

22. See *id.* at 14.

23. See *id.* at 14–15.

24. See *id.* at 15–16.

25. Treanor, *supra* note 18, at 747 (quoting James Madison, “*Helvidius*” Number 4, in 15 THE PAPERS OF JAMES MADISON 108–09 (Robert Rutland et al. eds., Virginia Univ. Press 1985)).

Madison also noted that war is a temptation for the executive in particular because:

It is in war . . . that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.²⁶

In summing up his own argument, Treanor writes that:

Combined, these statements about fame and war strongly suggest why the Framers gave Congress the power to declare war. First, these statements are evidence of a widely-held belief among Federalists and Antifederalists that kings—the “executive” that they knew—had frequently led their nations into war solely to achieve glory. Second, they reveal a widespread conviction that the passions that influenced leaders of a monarchy would also hold sway over leaders of a republic. Third, the statements reflect an understanding that the President, the head of the new executive branch, was the governmental official most likely to pursue fame. These statements lead to the logical, if unexpressed, conclusion that the President could not be trusted with the power to declare war because, in order to achieve glory, he would lead the nation into war when it was not in the national interest.²⁷

Thus, because the executive may have the most to gain personally from a decision to go to war, he should not be the one entrusted to make that determination. As Robert Delahunty

26. Madison, *supra* note 25, at 108; *see also* Fisher, *supra* note 11, at 1651–52; Treanor, *supra* note 18, at 747.

27. Treanor, *supra* note 18, at 745.

notes, the rise of Napoleon likely confirmed for the Founders that their fears of a glory-seeking executive had been well-founded.²⁸

Treanor points to solid empirical evidence to support the Founders' fears. He writes that "[a] concern with how they would be remembered has driven many Presidents."²⁹ As it turns out, a number of studies have found a correlation between time spent at war during a particular presidential administration and positive views of that administration.³⁰ In particular, Treanor references one study which considered previous scholarship on this topic and found that, other than years in office, years spent at war had the strongest positive correlation with ranking of presidential satisfaction.³¹ Thus, there is good reason to fear that a president will succumb to the temptation to lead the country into battle as a means of enhancing his own historical legacy.³² As a result, the decision to go to war should be taken out of the president's hands, or at least should not be in his hands alone.

Marty Lederman, though not in the restrictive camp, makes the case that international law also places limits on the president's authority to initiate hostilities on his own. In April 2017, when President Trump ordered the bombing of a Syrian airfield, Lederman argued that this sort of unprovoked strike on Syrian territory by the U.S. violated Article 2(4) of the U.N. Charter.³³ The relevant portion of this provision says that

28. See Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1034 (2003) (stating "[w]ithin the lifetimes of many of the Founders, a figure rose up in Europe—Napoleon Bonaparte—in whom these dangers were personified to perfection").

29. Treanor, *supra* note 18, at 761.

30. See *id.* at 768 (internal citations omitted).

31. See *id.* (citing Dean Keith Simonton, *Presidential Greatness: The Historical Consensus and Its Psychological Significance*, 7 POL. PSYCHOL. 259, 270–71 (1986)).

32. See Treanor, *supra* note 18, at 766 (quoting former Joint Chiefs Chairman William J. Crowe saying that "to be a great president you have to have a war" (internal citation omitted)). On the other end, there is a fear that Presidents will refuse to seek peace for similar reasons: President Johnson rejected attempts to end American involvement in Vietnam because he would "not be the first President to lose a war." *Id.* at 764 (internal citation omitted).

33. See Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter and (Therefore) the U.S. Constitution*, JUST SEC. (Apr. 6,

member states shall “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.”³⁴ Because the U.N. Charter is a treaty ratified by the United States, it has the force of binding (and supreme) domestic law, as per Article VI of the Constitution.³⁵ Lederman further points out that, to the extent the U.S. can violate the terms of a previously ratified treaty, it is only by means of congressional authorization.³⁶ Thus, once again, if a president wishes to attack another U.N. state, he needs congressional approval first.³⁷

The high-water mark for the advocates of the Restrictive view appeared to be the 1973 passage of the War Powers Resolution (“WPR”).³⁸ This statute, passed into law over the veto of President Nixon, ostensibly places important limits on the president’s ability to commit American troops for long periods of time without congressional approval. It first states that the president in every possible instance “shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.”³⁹ Once the military is called into action, the president “shall consult regularly with the Congress” for as long as American forces are fighting.⁴⁰ Additionally, once the president sends soldiers into battle, he is required to make a report to Congress within forty-eight hours. This report must include a statement why American forces have been employed, what the president’s authority for using them was, and how long military action is expected to last.⁴¹ Perhaps

2017), <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/> [hereinafter *Why the Strikes*].

34. U.N. Charter art. 2, ¶ 4; see also *Why the Strikes*, *supra* note 33.

35. See U.S. CONST. art. VI, cl. 2.

36. See *Why the Strikes*, *supra* note 33.

37. See Marty Lederman, *No, the President Cannot Strike North Korea Without Congressional Approval*, JUST SEC. (Aug. 10, 2017), <https://www.justsecurity.org/44056/no-president-strike-north-korea-congressional-approval/> (explaining that, in August, 2017, Lederman used this same logic to argue that the President could not make a first strike against North Korea without congressional approval).

38. 50 U.S.C. §§ 1541–48 (2018).

39. *Id.* § 1542.

40. *Id.*

41. See *id.* § 1543.

most importantly, according to the terms of the WPR, the president is supposed to terminate the use of armed forces within sixty days, unless he has received authorization from Congress for continued use, Congress has granted a (one-time) thirty-day extension of the deadline, or Congress is unable to meet.⁴²

If followed scrupulously, the WPR would indeed place serious limits on a president's ability to commit armed forces for any lengthy period. In other words, the WPR was passed specifically to prevent a repeat of American involvement in Vietnam, at least without congressional agreement.⁴³

However, it is not clear that the WPR has had a significant impact on a president wishing to send out the troops. As James Baker writes, "the [sixty-day] clock has generated considerable debate, but has not in fact triggered the withdrawal of U.S. armed forces."⁴⁴ Harold Koh adds that "[w]e should accept the bitter truth that the War Powers Resolution has become increasingly obsolete."⁴⁵ Naval Officer John Rolph offers an even gloomier assessment, writing that "[d]espite the minor war powers concessions that Congress has wrested from the President since the Resolution's enactment, the legislation has proven to be an abysmal failure overall."⁴⁶

The WPR's lack of effectiveness can be chalked up to a number of factors. For one, many administrations have questioned its constitutionality and/or supported its repeal.⁴⁷

42. *See id.* § 1544.

43. *See* Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 991 (2016) (stating "it seemed clear that the focus of the War Powers Resolution was as a 'No More Vietnams' statute"); *see also* BAKER, *supra* note 17, at 183 ("[A]t the close of the Vietnam conflict, the Congress sought to exercise its 'war power' prospectively through creation of a statutory framework. The War Powers Resolution was 'necessary and proper,' proponents argued, in light of the American experience in Vietnam and Cambodia."); Transcript of Testimony by Legal Adviser Harold Hongju Koh at 12, Before the Senate Foreign Relations Committee (2011) (making a similar point about the Vietnam War) [hereinafter Koh Statement].

44. BAKER, *supra* note 17, at 188.

45. Koh, *supra* note 43, at 1020.

46. John W. Rolph, *The Decline and Fall of the War Powers Resolution: Waging War Under the Constitution After Desert Storm*, 40 NAVAL L. REV. 85, 85–86 (1992).

47. *See, e.g.*, BAKER, *supra* note 17, at 187–88; Rolph, *supra* note 46, at 89.

However, even if the WPR is constitutional, it does not appear to include a real enforcement mechanism. As Baker points out, for a claim to be brought that a President violated the WPR, a member of Congress would have to obtain standing to sue, and this “is unlikely to happen, as a matter of substance or process.”⁴⁸ Even if this barrier were surmounted, it remains uncertain whether a court would be willing to address the underlying merits of such a claim.⁴⁹

Another factor disfavoring the WPR is the changing nature of warfare in the forty-five years since its passage. War is becoming less likely to be carried out by large armies on battlefields⁵⁰ and more likely to be fought through new technologies, such as drones, or cyber attack. The rules set out by the WPR do not seem well-suited for these forms of modern warfare. What will count as “hostilities,” in situations where “war” is fought by remote control or by computers, and not by soldiers or sailors? As Professor Eric Jensen explains, “[m]any of these advancing technologies will be so qualitatively different from current means and methods of warfare that they will undercut the fundamental understanding of the WPR and Congress’s intent to regulate the use of military force by the President.”⁵¹ He also observes that President Obama argued that the WPR was not triggered by his actions in Libya precisely because they did not involve “boots on the ground.”⁵² Jensen’s proposed solution is that the WPR be amended to make clear that “boots on the ground” and “hostilities” are not required to trigger the WPR’s provisions.⁵³

Additionally, many uses of these advanced technologies may well start and be completed too quickly for the timetable the

48. BAKER, *supra* note 17, at 191.

49. *See id.* at 192.

50. *See* Eric Talbot Jensen, *Future War and the War Powers Resolution*, 29 EMORY INT’L L. REV. 499, 503 (2015) (describing the WPR as having been “written in an era where the means and methods of armed conflict were centered on humans interacting on a geographically limited battlefield” and noting that while this may continue to be the case for many countries, “technologically advanced nations such as the United States are developing and will continue to develop new weapons that will not require human interaction in combat to be effective”).

51. *See id.* at 504.

52. *See id.* at 529–30 (internal citations omitted).

53. *See id.* at 552–55.

WPR establishes.⁵⁴ Because of this, even if one were to accept the sixty-day clock, it is not clear how much of a limitation it really imposes. If there are going to be significant limits on the president's war-making powers, they are likely to be the same ones that have always existed: popular opinion, namely how willing the public is to support a president's decision to go to war or even engage in more limited actions, and Congress' appropriations and investigative powers.

The Expansive, Pro-Executive View

In stark contrast to the proponents of the restrictive view are those who see the president's authority to enter the United States into military conflict as relatively unbounded. These scholars argue that the declare war clause, rather than serving as a grant of permission from Congress to the president to engage in hostilities, was instead merely intended to give Congress the power to declare that a state of war did, in fact, exist—perhaps in response to actions already taken by the president or by a hostile power. John Yoo, one of the leading advocates of this viewpoint, writes that “[a]ccording to the international law authorities of the time [of the founding], a declaration of war played the technical function of providing notice to the enemy nation that hostilities were to begin, due to some injury suffered.”⁵⁵ Eugene Rostow further explains that:

With regard to the actual employment of the armed forces, it is apparent that the term “declare war” in the Constitution referred to the classifications of the law of nations, which makes a sharp distinction between the law of war and the

54. See, e.g., Stephen Dycus, Cybersecurity Symposium: National Leadership, Individual Responsibility: *Congress's Role in Cyber Warfare*, 4 J. NAT'L SECURITY L. & POL'Y 155, 162 (2010) (“The War Powers Resolution, for example, is concerned with sending U.S. troops into harm's way, rather than with clicking a computer mouse to launch a cyber attack, although the strategic consequences might be similar. And the WPR's relatively relaxed timetable for executive notice and legislative response is unrealistic for war on a digital battlefield”).

55. John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1193 (1999).

law of peace. The law of nations was an intimate familiar to the men of the revolutionary generation in America. So far as international law is concerned, nations were then, and are now, free to use force in time of peace by way of self-help against acts or policies of other nations which they deem contrary to international law, and which have remained unredressed after a demand for amends.⁵⁶

In a review of Ely's book, Philip Bobbitt maintains that "a declaration of war only comes after war has commenced"⁵⁷ and that, therefore, "such declarations cannot be conditions precedent to the making of war."⁵⁸ To the extent that Congress could assert its own authority in the realm of war making, it would be through use of its appropriations powers.⁵⁹ As Rostow noted in 1986, American forces up to that point had been used in international conflicts over 200 times, but the United States had only declared war five times.⁶⁰ Similarly, in a speech criticizing the WPR (a natural focus for modern commentary on this debate), Robert Bork also pointed to the long history of presidential use of force, even in the absence of a declaration of war, and asserted that "[t]he need for Presidents to have that power, particularly in the modern age, should be obvious to almost anyone."⁶¹

As for Yoo, he contends that rather than relying on the views of the participants at the Philadelphia convention who

56. Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833, 850–51 (1972).

57. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1376 (1994).

58. *Id.*

59. See Yoo, *supra* note 55, at 1179; see also Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 WASH U. L. Q. 693, 700 (1990). Of course, at the time of the founding, the United States did not have a standing army, which likely gave Congress' appropriations power even more bite than it has now.

60. See Eugene V. Rostow, "Once More Unto the Breach:" *The War Powers Resolution Revisited*, 21 VALPARAISO U. L. REV. 1, 5 (1986); see also Yoo, *supra* note 55, at 1170.

61. Bork, *supra* note 59, at 698.

wrote the Constitution, we should look to the views of those who ratified it—i.e. the delegates to the state ratifying conventions—as more authoritative voices on how the language of the declare war clause was understood: “[t]he action of ratification by popularly elected conventions selected specifically for the purpose gave the Constitution its political legitimacy. Therefore, what those who ratified the Constitution believed the meaning of the text to be is determinative for originalist purposes, rather than the intentions of those who drafted the document.”⁶² This takes some of the steam out of the other side’s reliance on statements from the likes of Madison, Hamilton, Wilson, and Mason. Madison himself appeared to take this position, declaring in Congress that “[i]f we were to look, therefore, for the meaning of the [Constitution] beyond the face of the instrument, we must look for it, not in the General Convention, which proposed, but in the State Conventions, which accepted and ratified the Constitution.”⁶³

The states were a bit haphazard when it came to preserving records of their ratifying conventions, so access to the deliberations varies. Gregory Maggs explains that “some states engaged in lengthy debates and kept excellent records, while other states considered the question of ratification only briefly and kept almost no records.”⁶⁴ Only four states—Virginia, Pennsylvania, Massachusetts, and New York—had extensive records of their debates, while five others—Delaware, New Jersey, Georgia, North Carolina, and Rhode Island—have none at all.⁶⁵ Yoo examines some of the debates from the Virginia convention and alleges that they give us a representative sample of the overall scene. This is because of Virginia’s geographical

62. Yoo, *supra* note 55, at 1173; *see also* Bobbitt, *supra* note 57, at 1375 (likewise arguing for looking to the views of those who ratified the Constitution, rather than those who wrote it, for understanding its meaning). Of course, many of the Constitution’s writers in Philadelphia also participated in their states’ ratifying conventions. *See* Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 481–84 (2009) (discussing statements made by Founders at state ratifying conventions as bases of Constitution’s meaning).

63. 4 ANNALS OF CONG. 776 (1796); *see also* Maggs, *supra* note 62, at 458–59.

64. Maggs, *supra* note 62, at 460.

65. *See id.* at 481.

and political importance,⁶⁶ and because the debate in its convention was widespread and contentious.⁶⁷ Yoo concludes that the views expressed in Virginia's ratifying convention "approximated the views of the median Framer."⁶⁸ The four "extensive" states were also four of the five largest states, so it is not entirely clear that the views of delegates from these states can speak for those from the other nine.⁶⁹ Similarly, it may not be safe to assume that states where the vote was close, such as New York (three vote margin), Virginia (ten), and Rhode Island (two), viewed things the same as the three states where the vote was unanimous: Delaware, New Jersey, and Georgia. Of course, there may well have been significant differences between the small states and the large, as well as regional variances. Maggs also points out that, even where we have extensive records, these accounts may not be entirely accurate because of limited technology and bias on the part of the reporters themselves.⁷⁰ Indeed, a page after his statement extolling the state ratifying conventions as a source of constitutional meaning, Madison hastened to add that such records likely contained errors and misconceptions.⁷¹

66. See Yoo, *supra* note 55, at 1203.

67. See *id.*

68. *Id.* Chris DeRose asserts that what really made the difference in Virginia's ratification of the Constitution was not some acceptance of a particular viewpoint or reading of the document. Rather, many delegates realized that whatever reservations they might have, given how many states had already ratified prior to the opening of Virginia's convention (eight, or one short of the number required for ratification), the fledgling country's then largest state risked being left out in the cold if it rejected the document. See CHRIS DEROSE, *FOUNDING RIVALS, MADISON VS. MONROE: THE BILL OF RIGHTS AND THE ELECTION THAT SAVED A NATION 171-72* (2011). Though, as it turns out, New Hampshire became the ninth state to ratify, beating Virginia by two days; this fact was not yet known by the Virginia delegates at the time they voted to ratify. See *id.* at 198-99. Maggs also cautions against relying too heavily on the records of the state ratification debates, writing that "anyone citing the records of the state ratifying conventions should recognize that these records often do not provide perfect proof of the original meaning of the Constitution. On the contrary, various significant grounds may exist for impeaching claims about the original meaning based on these records." Maggs, *supra* note 62, at 486.

69. See Maggs, *supra* note 62, at 491.

70. See *id.* at 488-89.

71. 4 ANNALS OF CONG. 777 (1796) (remarks of James Madison); see also Maggs, *supra* note 62, at 488.

As for the debates Maggs considered, Yoo concedes that there was great concern among Antifederalists about presidential power in the newly proposed system. But Federalists (including Madison himself) responded to those concerns not by arguing that the President lacked the power to initiate armed conflict without congressional assent, but rather by claiming that Congress would control presidential war making ambitions through the power of the purse.⁷² If the views of Ely, Fisher, and others were correct, Federalists would surely have eased Antifederalist fears by claiming that the president could not take the country to war unilaterally.⁷³ Furthermore, Yoo observes that Article II of the Constitution could have been written as “the [president] shall have no power to commence war, or conclude peace, . . . without legislative approval.”⁷⁴

Yoo also argues that his position is supported by the history of state constitution writing in the period leading up to the Constitutional Convention. Prior to the revolution, the American colonies were governed by royal charters. These charters gave strong authority to the colonial governor, including powers over the “raising and deployment of the military.”⁷⁵ To the extent that colonial legislatures tried to restrict such powers, it was through appropriations.⁷⁶ When the colonies became states and wrote new constitutions, there was a reaction against this strong executive power. The limitations on executive power in the new states took a multitude of forms; in many states, the decision was made to do away with a single, unitary executive.⁷⁷

Far from supporting a restrictive view of executive war making authority, Yoo makes the case that the states discovered these severe restrictions on executive power to be unworkable.

72. See Yoo, *supra* note 55, at 1207. In a subsequent article co-authored with Jide Nzelibe, Yoo and Nzelibe assert that Congress has used this power effectively on occasion. See Jide Nzelibe & John Yoo, *Rational War and Constitutional Design*, 115 YALE L.J. 2512, 2521 (2006).

73. See Yoo, *supra* note 55, at 1207.

74. *Id.* at 1200–01 (internal quotation marks omitted).

75. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 219 (1996).

76. See *id.* at 220–21.

77. See *id.* at 222–23 (noting that Pennsylvania, for example, replaced its governor with a twelve-person executive council).

Thus, by the time of the Constitutional Convention (and its aftermath), the pendulum had swung back in the direction of greater executive power. Yoo notes that a draft of the Virginia Constitution authored by Jefferson which greatly restricted executive authority (including war making powers) was rejected, not only in Virginia, but also in the approaches taken by other states.⁷⁸ Instead, the new state constitutions favored an approach closer to (if not exactly the same as) that used by England, which did not place such severe restrictions on executive authority to commence hostilities.⁷⁹ Though, as Yoo mentions, some states did place limits on a governor's power to call out the militia,⁸⁰ he claims that this actually supports his argument about the federal Constitution because it indicates that constitution writers thought it necessary to explicitly indicate where the executive's war making powers were limited, yet no such similar limitation appears in the federal Constitution⁸¹—assuming, that is, one first accepts his reading of what the declare war clause actually means.

Rostow takes a similar line, asserting that the declare war clause “does not mean that the national force can only be used if Congress has first approved the President's action through a declaration of war.”⁸² He further charges that those who advocate the restrictive view have a naïve picture of how international affairs truly operate, writing that they “suppose that if the United States were weak, pacifist, and unarmed, the predators of the jungle would fully respect its rights under international law.”⁸³ Sounding a somewhat related theme, Bobbitt argues that the claims of the restrictive views' advocates

78. *See id.* at 224–25 (stating that “[a]lthough a dead end, Jefferson's scheme was widely circulated, and it provided an example of how the Framers could have created a legislature-first approach to war—if they had chosen to do so”).

79. *See id.* at 225–26.

80. *See id.* at 227 (referring to Delaware's constitution as an example).

81. *See Yoo, supra* note 75 at 227 (stating “if the Framers of the federal Constitution had wanted the President to consult with either the legislature or within the executive before embarking on a military venture, they easily could have borrowed from these state provisions and required the President to consult with the Senate (as some in the Constitutional Convention proposed) or some other body”).

82. Rostow, *supra* note 60, at 16.

83. *Id.* at 18.

prove too much: they proclaim that the change in language in early drafts of the Constitution from giving Congress the power to “make” war to “declare” war meant that Congress would not be responsible for the conduct of military action, but its permission would be required in order to take the country into armed conflict.⁸⁴ If so, Bobbitt argues, then there is no room left for a stance that the President can, for example, respond to a sudden attack, even in the absence of congressional authorization—a position no one is willing to take.⁸⁵ In addition to agreeing with Yoo’s claims about the true meaning of “declaring war” under international law,⁸⁶ Rostow turns the democratic accountability argument made by proponents of the restrictive view on its head. Members of Congress, he argues, would actually prefer that the responsibility for putting American lives at risk lie exclusively with the President.⁸⁷

Aside from these claims about textual meaning and original intent, but related to Rostow’s point about how international affairs are actually conducted is an argument that the President, because of informational advantages that he has due to the vast resources at his disposal, and because he is a single actor, is simply in a better position than Congress to make decisions about war making. This is especially so when those conclusions need to be reached with dispatch. Professor David Moore writes that “[a]s has been recognized since the Founding, the President, in comparison to Congress, is better able to act quickly, uniformly, with secrecy, and based on information gathered from far-flung diplomatic and military agents.”⁸⁸ Or, as Robert

84. See Bobbitt, *supra* note 57, at 1376.

85. See *id.*

86. See Rostow, *supra* note 60, at 16.

87. *Id.*; see also ELY, *supra* note 5, at 49 (quoting former Senator Thomas Eagleton testifying in a Senate hearing that he had concluded “Congress didn’t really want to have its fingerprints on sensitive matters pertaining to putting our Armed Forces into hostilities [Instead,] Congress preferred the right of retrospective criticism” (internal citation omitted)); Jensen, *supra* note 50, at 502 (describing struggle over war powers as one “characterized by what seems to be an ever-increasing adventurism by the President and an ever-decreasing willingness to exert power by the Congress”); Rolph, *supra* note 46, at 90 (stating “Congress has been reluctant to assert itself on war powers issues”).

88. David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90

Bejesky puts it, “[i]n military affairs, members of Congress cannot expeditiously garner the level of information about a potential or existing hostility that the Executive can attain.”⁸⁹

The Supreme Court has accepted the logic of this argument as well. In a 1965 decision challenging the Secretary of State’s refusal to validate passports for travel to Cuba, the Court wrote:

[B]ecause of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.⁹⁰

While many of the arguments discussed so far call upon original intent to bolster their claims, the informational argument has a decidedly non-originalist bent to it. Many have suggested that part of the reason for the president’s advantages here is the increasing complexity of world affairs and the centrality of the United States in those undertakings, things that were not true and were likely not foreseen at the time of the founding.⁹¹

NOTRE DAME L. REV. 1019, 1033–34 (2015).

89. Bejesky, *supra* note 16, at 51.

90. *Zemel v. Rusk*, 381 U.S. 1, 17 (1965).

91. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444-45 (2012) (stating “[t]he complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have necessitated broad delegations of authority to the executive branch”); Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140, 267 (2009) (noting “[t]he United States, which was at the time of its creation a small and relatively insignificant entity in world politics, was by the 1940s a dominant economic, military, and political force”). Hathaway also points out that the dramatic increase in foreign aid by the United States in the aftermath of World War II increased presidential authority in the realm of international affairs relative to that of Congress. *See id.* at 185.

The Middle Ground

In between the pro-executive and pro-Congress viewpoints exists something of a compromise approach. These analyses, coming largely from Obama and Clinton administration officials, have taken the position that, for limited military operations, a president can move forward on his own. In other words, the president's authority to act on military matters is not without restrictions, but Congress' input is only required for actions that reach a certain threshold of military involvement.

In justifying President Obama's decision to intervene in 2011 in Libya without seeking prior congressional authorization, Principal Deputy Assistant Attorney General Caroline Krass, writing on behalf of the Office of Legal Counsel ("OLC"), first explained the limited nature of the planned Libya operation: America would be acting in concert with allies and ground forces would not be used at all or, at most, as part of search and rescue operations, and, therefore, the risk of substantial casualties was low.⁹² As a result, the President had not been required to seek congressional authorization.⁹³ The Krass memo also referenced prior OLC memos which had concluded that the President could take military action to "protect[] important national interests" without prior input from Congress.⁹⁴

Picking up on this theme, then-State Department Legal Adviser Harold Koh argued that American engagement in Libya did not rise to the level of "hostilities,"⁹⁵ and, therefore, even if one accepted the authority of the WPR, it was not implicated by our actions in Libya.⁹⁶ Though, as Koh also pointed out, in spite of the claim that the WPR was not triggered by the

92. See Memorandum from Caroline D. Krass, U.S. Principal Deputy Assistant Att'y Gen., to Eric H. Holder, Jr., U.S. Att'y Gen., Authority to Use Military Force in Libya 6 (Apr. 1, 2011), <https://fas.org/irp/agency/doj/olc/libya.pdf>.

93. See *id.*

94. *Id.* (internal citation omitted).

95. See Koh Statement, *supra* note 43, at 4; 50 U.S.C. § 1541(a) (2012) (stating the WPR is triggered by "the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations").

96. See Koh Statement, *supra* note 43, at 4.

Administration's activities in Libya, President Obama in fact followed the WPR's requirement to notify Congress within forty-eight hours of the beginning of the intervention.⁹⁷ Nevertheless, Koh asserted that "hostilities" was an "ambiguous standard"⁹⁸ and noted that, not only was it not defined in the WPR itself, but it had also never been fleshed out by any reviewing court or in subsequent legislation.⁹⁹

Koh further argued that the vagueness was intentional to allow some flexibility for presidential action.¹⁰⁰ As a result, what "constitutes 'hostilities' . . . has been determined more by interbranch practice than by a narrow parsing of dictionary definitions."¹⁰¹ However, quoting former Executive Branch officials, it has been seen as existing when American forces are actively exchanging fire with the armed forces of other countries.¹⁰² By contrast, "hostilities" should not be said to exist when the threat to U.S. forces is low.¹⁰³ According to these standards, American military activities in Libya did not cross the "hostilities" threshold.¹⁰⁴

Similarly, in 1994, Walter Dellinger, then the Assistant Attorney General for OLC, authored an opinion on behalf of his office arguing that American military activities in Haiti did not constitute war in the constitutional sense.¹⁰⁵ Thus, even for proponents of the restrictive view, there was no constitutional violation. This was because of the limited nature of the military's involvement, the low risk of escalation, and because the intervention was with the full approval of the Haitian government itself¹⁰⁶—something which of course was not true in the case of American intervention in Libya.

The arguments put forth here essentially try to avoid the debate between the proponents of the restrictive and pro-

97. See § 1543(a)(3); see also Koh Statement, *supra* note 43, at 3.

98. Koh Statement, *supra* note 43, at 4.

99. See *id.*

100. See *id.* at 4–5.

101. *Id.* at 5.

102. See *id.* at 6.

103. See *id.* at 7.

104. See Koh Statement, *supra* note 43, at 12.

105. See Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994).

106. See *id.*

executive positions. Instead of quarreling about what the literal meaning of “declaring” war is and what this establishes with regard to the relative power of the executive and legislative branches, Krass, Koh, and Dellinger try to carve out a use of military force that is minimal enough so as not to rise to the level of “war,” or “hostilities,” resulting in the avoidance of constitutional and statutory questions about the correct understanding of the declare war clause and the meaning and constitutionality of the WPR. Koh asserts that Congress has “largely acquiesced in this interpretation.”¹⁰⁷ Though, as he also points out, the Clinton Administration essentially ignored this distinction when it came to the Kosovo bombing campaign and the sixty-day deadline,¹⁰⁸ principally because officials came to the conclusion that, even though what was occurring at the sixty-day mark constituted hostilities, it would have been disastrous to stop at that point and wait for congressional assent.¹⁰⁹

While it is fair to characterize the position of Krass, Dellinger, and Koh as between the poles represented by the restrictive and pro-executive viewpoints, it is equally fair to note that it is a somewhat pro-executive position in its own right. This stance allows the executive branch to take the initiative in determining what level of military activity does and does not constitute “hostilities.” Thus, the president will still have considerable power to commence military engagements without congressional sanction. The pro-executive bent of this position should not be surprising given that the statements of the position have come from individuals who were acting in their capacities as executive branch attorneys.¹¹⁰

107. Koh, *supra* note 43, at 978.

108. *See id.* at 978–79.

109. *See id.* at 979.

110. Though beyond the scope of this article, the question of whether the primary obligation of lawyers in OLC or elsewhere in the Executive Branch should be to what they truly believe the state of the law is, or whether they should act as advocates for their client (especially when that client is the President), even if it means promoting a less convincing position, is an important one. *See, e.g.*, Robert Bauer, *The National Security Lawyer, in Crisis: When the “Best View” of the Law May Not Be the Best View*, 31 *GEO. J. LEGAL ETHICS* 175 (2018).

Humanitarian Intervention

When the United Nations was created, its primary (if not only) purpose was to prevent, or at least reduce, armed conflict between its member states. The preamble to the U.N. Charter states that one of the organization's goals would be "to maintain international peace and security."¹¹¹ In the new international body's view, the main way to attain this goal would be to eliminate armed interstate conflict. Thus, Article 2(4) of the Charter states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹¹² Additionally, Article 2(3) directs member states to "settle their international disputes by peaceful means."¹¹³

It should not be surprising that the U.N. started with such a strong focus on interstate armed conflict. It was, of course, founded in the ashes of the most destructive war the world had ever seen and not long after the end of the second most lethal. As if to leave no doubt, the Charter's preamble references the two world wars right from the start.¹¹⁴ The choice of solution to prevent a repeat of these two catastrophes was a focus on the sovereignty of nation states. It was thought that if such sovereignty were to be protected, then it would greatly reduce, perhaps even eliminate, large-scale armed conflict. As Mariano-Florentino Cuellar writes:

Directly after the war, Americans and their allies emphasized the importance of creating a collective security arrangement to promote international security by protecting sovereign nations against aggressive war. I call this approach 'sovereignty-centered collective security.' Its overt, organizing principle was a deep reverence for an expansive concept of national territorial sovereignty.¹¹⁵

111. U.N. Charter pmbl.

112. *Id.* at ch. 1, art. 2, ¶ 4.

113. *Id.* at ch. 1, art. 2, ¶ 3.

114. *See id.* at pmbl.

115. Mariano-Florentino Cuellar, *Reflections on Sovereignty and*

This focus on the sovereignty of nation-states was hardly a radical choice in 1945. David Scheffer observes that:

Sovereignty is the central pillar of international law. The very purpose of the law of nations, as international law was formerly described, was to create legal safeguards for the preservation of the sovereign power vested in the governments of distinct territorial units called nation-states. For centuries, sovereignty identified the nation-state as the legitimate international actor entitled to the protection of international law.¹¹⁶

This is a concept that dates back to the Treaty of Westphalia in 1648.¹¹⁷ Though this is not to say that there had been no attempts in international lawmaking to protect individuals as individuals and not just as members of nation states. Multiple Geneva and Hague Conventions, all passed before the creation of the U.N., addressed the rights of individuals, especially in times of armed conflict.¹¹⁸

The flip side of the emphasis on the inviolability of international boundaries was a commitment from the U.N. to stay out of the internal affairs of its member states. Thus, Article 2(7) of the Charter states that “[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction

Collective Security, 40 STAN. J. INT’L L. 211, 215 (2004).

116. David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253, 259–60 (1992).

117. See, e.g., RICHARD HAASS, A WORLD IN DISARRAY: AMERICAN FOREIGN POLICY AND THE CRISIS OF THE OLD ORDER 22–24 (2017); T. Modibo Ocran, *The Doctrine of Humanitarian Intervention in Light of Robust Peacekeeping*, 25 B.C. INT’L & COMP. L. REV. 1, 3 (2002) (explaining “[i]n modern history, the principle of sovereignty was established under the Treaty of Westphalia of 1648, which brought an end to the Thirty-Year War”).

118. See generally Amanda Alexander, *A Short History of International Humanitarian Law*, 26 EUR. J. INT’L L. 109 (2015) (discussing conventions); see also Karina Michael Waller, *Intrastate Ethnic Conflicts and the Rise of International Law: How the Rise of Intrastate Ethnic Conflicts Has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 AM. U. J. GENDER SOC. POLY & L. 621, 624–25 (2001) (discussing Geneva and Hague conventions).

of any state or shall require the Members to submit such matters to settlement under the present Charter.”¹¹⁹ As Ocran writes, “[t]he principle of noninterference in the affairs of another state is viewed as a corollary of the more basic principle of sovereignty.”¹²⁰

The hands-off approach to domestic issues does have a limitation: it does not preclude “the application of enforcement measures under Chapter VII.”¹²¹ However, an examination of Chapter VII shows that it is concerned with taking action against states which violate the sovereignty of other states, not against states that violate the rights of their own people. Most importantly, Article 51’s self-defense provision applies in situations in which a member-state has suffered an armed attack.¹²² There is no discussion of the right of self-defense by, for example, a minority group in a member-state that is being attacked by its own government, much less the right of another member-state to intervene on behalf of that minority group. So, while the Security Council invoked Chapter VII on behalf of South Korea, the use of armed force against North Korea was triggered by its invasion of the South, not because of any violation of the rights of North Koreans. The first Security Council Resolution on the Korean conflict, Number 82, began by noting that the Republic of Korea was a “lawfully established government.”¹²³ All North Korea was expected to do was retreat to the 38th Parallel;¹²⁴ there wasn’t any discussion concerning the North Korean government’s treatment of its nationals.

However, in the years since 1945, support for humanitarian intervention, the idea that there is a need in some circumstances to intercede in the internal affairs of states to prevent or end human rights catastrophes, has gathered steam—Article 2(7) notwithstanding.¹²⁵ While there may not be one universally

119. U.N. Charter ch. 1, art. 2, ¶ 7.

120. Ocran, *supra* note 117, at 3.

121. *Id.* (quoting Richard B. Lillich, *Intervention to Protect Human Rights*, 15 MCGILL L.J. 205, 208–09 (1969)).

122. *See* U.N. Charter art. 51.

123. S.C. Res. 82, pmb. (June 25, 1950).

124. *See id.* at ¶ 1.

125. *See, e.g.,* Ved P. Nanda, *The Protection of Human Rights Under International Law: Will the U.N. Human Rights Council and the Emerging New Norm “Responsibility to Protect” Make a Difference?*, 35 DENV. J. INT’L L &

accepted definition of the term, it has been characterized as “the justifiable use of force for the purpose of protecting the inhabitants of another state from treatment so arbitrary and persistently abusive as to exceed the limits within which the sovereign is presumed to act with reason and justice.”¹²⁶

Similarly, Scheffer affirms that:

The classical definition of ‘humanitarian intervention’ is limited to those instances in which a nation unilaterally uses military force to intervene in the territory of another state for the purpose of protecting a sizable group of indigenous people from life-threatening or otherwise unconscionable infractions of their human rights that the national government inflicts or in which it acquiesces.¹²⁷

However defined, as Harold Koh points out, the concept can be found as far back as in the writings of seventeenth-century international law scholar Hugo Grotius.¹²⁸ In Volume 2 of *De Jure Ac Pacis* (The Rights of War and Peace), Grotius considers “[w]hether we have a just Cause for War with another Prince, in order to relieve his Subjects from their Oppression under him.”¹²⁹ While he acknowledges that “since the Institution of Civil Societies, the Governors of every State have acquired some peculiar Right over their . . . Subjects,”¹³⁰ he concludes that “if the Injustice be visible, as if a *Busiris*, a *Phalaris*, or a Thracian Diomedes exercise such Tyrannies over Subjects, as no good Man living can approve of, the Right of human Society shall not be

POL’Y 353, 355 (2007) (stating “[t]he international human rights movement is of relatively recent origin. However, in a short time it has blossomed into a developed body of international human rights law, with the establishment of necessary institutions for its implementation and enforcement”).

126. ELLERY STOWELL, INTERVENTION IN INTERNATIONAL LAW 349, 352 (1931); *see also* Ocran, *supra* note 117, at 8.

127. Scheffer, *supra* note 116, at 264.

128. *See* Koh, *supra* note 43, at 976 n.10.

129. 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 1159 (Richard Tuck ed., Indianapolis: Liberty Fund 2005).

130. *Id.*

therefore excluded.”¹³¹

Michael Reisman argues that one of the first seeds of contemporary support for humanitarian intervention was pro-democracy language in the Universal Declaration of Human Rights (“UDHR”).¹³² The UDHR was written shortly after the U.N. Charter and, therefore, at a time when state sovereignty was still the rule.¹³³ However, it included language establishing popular will expressed through regular, free elections as the basis for governmental legitimacy.¹³⁴ As Reisman notes, because it has become feasible to measure a state’s commitment to free elections, it is now possible to call to account states that fail to meet this standard, even at the cost of impinging on their sovereignty.¹³⁵ It also means that already-existing states have the means to deny recognition to a group that seizes power through a coup or revolution, instead of by means of popular support.¹³⁶ Thus, we have now reached the stage where Reisman can say that “no serious scholar still supports the contention that internal human rights are ‘essentially within the domestic jurisdiction of any state’ and hence insulated from international law.”¹³⁷

Apart from the issue of a particular government’s democratic legitimacy is the question whether an internationally-recognized government acts humanely toward its own people. Furthermore, if its people are being treated poorly and the government is in serious violation of international human rights treaties, what corrective action, if any, may be taken in response?

In her book, “*A Problem From Hell: America and the Age of Genocide*,” Samantha Power details the efforts of Raphael

131. *Id.* at 1161.

132. *See* W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT’L L. 866, 867–68 (1990).

133. *See id.* at 867.

134. *See id.* at 867–68.

135. *See id.* at 868.

136. *See id.* at 870.

137. *Id.* at 869; *see also* Koh, *supra* note 43, at 1004 (stating “I believe that international law has evolved sufficiently to permit morally legitimate action to prevent atrocities by responding, for example, to the deliberate use of chemical weapons”).

Lemkin, who barely escaped Poland ahead of the Nazi army¹³⁸ and lost dozens of family members to the Holocaust,¹³⁹ to create and define the term genocide.¹⁴⁰ As Power informs her readers, Lemkin was a critic of the Nuremberg trials because the Court only sought to punish crimes that occurred after the Nazis had crossed international borders, waging “aggressive war.”¹⁴¹ Thus, “[b]y inference, if the Nazis had exterminated the entire German Jewish population but never invaded Poland, they would not have been liable at Nuremberg.”¹⁴² Lemkin wanted something that would encompass actions taken by a government against its own nationals.¹⁴³ Though at first he struggled to win support for his ideas,¹⁴⁴ he was instrumental in the General Assembly’s 1948 vote to establish the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁴⁵ Because the Convention defined genocide as, *inter alia*, killing members of “a national, ethnical, racial or religious group,”¹⁴⁶ there was no requirement of interstate conflict to invoke the Convention’s prohibitions. Thus, despite the traditional notions of sovereignty expressed in Articles 2(4) and 2(7) of the U.N. Charter, there were at least some indications from early in the U.N.’s history that sovereignty might not be completely inviolable.

Still, humanitarian intervention has always been a troubling concept for many people, not only because of its challenge to traditional notions of state sovereignty, but also due to fears that making such actions acceptable would have significant pernicious effects and encourage states to pursue all sorts of goals while claiming to be intervening on humanitarian grounds.¹⁴⁷ Edward Luttwak makes a slightly different

138. See SAMANTHA POWER, “A PROBLEM FROM HELL.” AMERICA AND THE AGE OF GENOCIDE 23–26 (2002).

139. See *id.* at 49.

140. See *id.* at 31–60.

141. *Id.* at 49.

142. *Id.*

143. See *id.* at 51.

144. See POWER, *supra* note 138, at 50.

145. See *id.* at 59–60.

146. G.A. Res. 260 art. II, Convention on the Prevention and Punishment of the Crime of Genocide (Dec. 9, 1948).

147. See Scheffer, *supra* note 116, at 258 (noting that opponents of

argument, claiming that peacekeeping operations cause more long-term harm than good because it is better to let the belligerents wear themselves out.¹⁴⁸

Regardless, even if everyone were to agree on the acceptability of humanitarian intervention, it is one thing to pass a treaty banning genocide and quite another to get member-states to actively put it into effect. Power argues that, in order for the ban to have been effective, it required leadership from the United States.¹⁴⁹ However, the U.S. did not even ratify the treaty until 1988, much less attempt to lead the world in enforcing its prohibitions.¹⁵⁰

Unfortunately, the second half of the twentieth century saw more than its share of mass killings, providing plenty of opportunities for the world to decide whether, and under what conditions, humanitarian intervention might be acceptable or even a necessity. As Power highlights, very little was done to respond to mass killings in Cambodia and Rwanda, and not nearly enough in the former Yugoslavia.¹⁵¹ Even as this is being written, humanitarian disasters are occurring in Syria and Burma, among other places.

Nevertheless, even if relatively little action has been taken in response to these events, their occurrences have increased discussion of and support for at least the concept of humanitarian intervention, despite the fact that such interventions would seem to violate Articles 2(4) and 2(7) of the U.N. Charter. In decrying the lack of response to various human rights crises, Ved Nanda lays the blame squarely on these provisions: “the underlying cause remains the current state-centered international system, under which each state jealously guards its sovereignty and often invokes the doctrine of non-

humanitarian intervention argued that “to invoke a ‘principle’ of humanitarian intervention would open a Pandora’s Box of military interventions that would disrupt the nation-state system and permit the forcible pursuit of political, economic, and security objectives far removed from alleged humanitarian concerns”).

148. See Edward N. Luttwak, *Give War a Chance*, 78 FOREIGN AFF. 36, 37–38 (1999); see also Ocran, *supra* note 117, at 3 (discussing Luttwak).

149. See POWER, *supra* note 138, at 61.

150. See *id.* at 161–69.

151. See generally *id.* at 87–155, 247–475.

intervention in its internal affairs.”¹⁵² Still, as he also observes, the situation is changing:

The period since 1976 has witnessed great strides in the development of international human rights law as an impressive body of norms, institutions, and procedures has transformed the subject. Regional human rights machinery exists in Europe, the Americas, and Africa, and is in the formative stage in Southeast Asia, complementing the U.N. machinery created to promote and protect human rights and to provide effective remedies. Customary international law has also played a significant role in this process.

It would have been inconceivable sixty years ago to envisage the development and progress of international human rights law we see today. To illustrate, numerous international agreements have created a wide range of international human rights norms, treaty bodies have been established to monitor implementation by member states of their treaty obligations, and an ever-growing body of soft law—emerging international human rights guidelines, principles, and norms—has developed. All these developments are of great significance for every student of international human rights law.¹⁵³

Similarly, Scheffer shines a light on a significant evolution in international attitudes during the latter half of the twentieth century, describing a “new standard of intolerance for human misery and human atrocities.”¹⁵⁴ As a result, “[d]espite the emphatic character of [Article 2(7) of the U.N. Charter], its terminology has been interpreted and qualified.”¹⁵⁵ Scheffer quotes a 1991 speech by then U.N. Secretary-General Javier

152. Nanda, *supra* note 125, at 354.

153. *Id.* at 356.

154. Scheffer, *supra* note 116, at 259.

155. *Id.* at 261.

Perez de Cuellar in which the Secretary-General, while not willing to endorse any sort of open-ended principle of humanitarian intervention, did say that “[i]t is now increasingly felt that the principle of non-interference with the essential domestic jurisdiction of States cannot be regarded as a protective barrier behind which human rights could be massively or systematically violated with impunity.”¹⁵⁶

When looking for concrete examples of this change in attitude translating into action, the NATO intervention in the former Yugoslavia seems to have marked an important moment in the willingness of U.N. member-states to engage in military action in the name of humanitarian interests—Articles 2(4) and 2(7) of the Charter notwithstanding.¹⁵⁷ The intervenors had to claim humanitarian justifications in order to defend their “restrictive” view of the notion of state sovereignty.¹⁵⁸ As Rohini Sen points out, the trend toward taking action on humanitarian grounds has increased post-Yugoslavia.¹⁵⁹

Contributing to this trend is the rise in importance of NGOs and civil society groups. Not only is state sovereignty no longer inviolable, but states are no longer the only significant actors on the world stage. While NGOs played advisory roles in the U.N.’s founding, such groups were initially given no formal role in the organization’s governing structure.¹⁶⁰ Additionally, while NGOs and other groups still lack the formal authority and position of

156. *Id.* at 262 (internal citation omitted).

157. See Rohini Sen, *Use of Force and the ‘Humanitarian’ Face of Intervention in the 21st Century*, 32 WIS. INT’L L.J. 457, 459 (2014) (writing that NATO’s actions “invigorated the notion of unilateralism” and that “[f]or the first time since the establishment of the United Nations’ collective security system, a group of states expressly defended a breach of state sovereignty through unilateral use of force, predominantly on humanitarian grounds”).

158. See *id.* at 460.

159. See *id.*; see also Koh, *supra* note 43, at 1007. (“Since Kosovo . . . within the international legal order, the multilateral use of force for humanitarian ends is perceived as far more legitimate than it was only a few decades ago” (internal citation omitted)). As Sen also discusses, the Pandora’s Box fears that Scheffer brings up in his article have also materialized: Russia has justified its annexation of Crimea on humanitarian grounds, claiming human rights violations against ethnic Russians in the area. See *supra* note 148 and accompanying text; see also Sen, *supra* note 157, at 461; see *infra* notes 189–94 and accompanying text for further discussion.

160. See David Gartner, *Beyond the Monopoly of States*, 32 U. PA. J. INT’L L. 595, 609 (2010).

sovereign states, “[t]he emergence of twenty-first century institutions that are adopting multi-stakeholder models of governance and expanding the role of civil society creates an opening for new ways of thinking about the governance of international institutions.”¹⁶¹ As a result, “[c]ivil society groups are among a range of non-state actors that are now centrally involved in the formal governance of diverse institutions and are transforming the nature of the debate around many key global challenges.”¹⁶² These institutions provide yet another source of authority beyond the nation-state.

The Responsibility to Protect

A more recent development in humanitarian-intervention thinking comes in the form of the so-called “Responsibility to Protect,” or R2P. Whereas humanitarian intervention, as first understood, was thought to give countries a means to intervene in the internal affairs of fellow sovereign states, R2P takes this a step further, putting forth the notion that countries may in fact have an affirmative obligation or responsibility to intervene in the face of human rights crises outside their own borders.

R2P was first formalized and explained in a 2001 report of the International Commission on Intervention and State Sovereignty (“ICISS”), which was created by the Canadian government. The ICISS document defined the issue as follows: “the question of when, if ever, it is appropriate for states to take coercive – and in particular military – action, against another state for the purpose of protecting people at risk in that other state.”¹⁶³ A report from the 2005 World Summit led to a General Assembly resolution stating that:

[W]e are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and

161. *Id.* at 615.

162. *Id.*

163. INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT vii (2001).

in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.¹⁶⁴

As Richard Haass explains, “what made R2P even more significant was an associated notion, namely that the ‘international community’ also had the responsibility to help to protect populations . . . including through the use of military force . . . even if [the affected sovereign] opposed outside involvement.”¹⁶⁵

R2P remains a controversial idea. Milena Sterio writes that R2P “has experienced several important advancements,”¹⁶⁶ including being specifically referenced in at least two Security Council Resolutions.¹⁶⁷ However, she also observes that it has

164. G.A. Res. 60/1, ¶ 139 (Oct. 24, 2005) (stating that this resolution leaves the ultimate decision in the hands of the Security Council, which some advocates of greater intervention fear will too often stymie needed action. Because of this, some R2P proposals have extended to an imposition on a different, though related, form of sovereignty: proposals to restrict the veto powers of the 5 permanent members (“P5”) of the Security Council, in situations deemed humanitarian crises by the Secretary-General); see also Harvard Law Review, *Recent Draft Resolution: International Law—The Responsibility to Protect—Draft Security Council Resolution Referring Syrian Conflict to the International Criminal Court Vetoed by Russia and China (13 in Favor, 2 Against)*.—*U.N. Scor., 69th Sess., 7180th Mtg. at 4, U.N. Doc. S/PV.7180 (May 22, 2014)*, 128 HARV. L. REV. 1055, 1062 (2015) (describing the concept known as the Responsibility Not to Veto, or RN2V).

165. HAASS, *supra* note 117, at 116; see also Nadia Banteka, *Dangerous Liaisons: The Responsibility to Protect and a Reform of the U.N. Security Council*, 54 COLUM. J. TRANSNAT’L L. 388 n.18 (2016) (stating “[h]istorically, R2P had been invented to replace the highly controversial concept of humanitarian intervention by shifting the terms of the debate from sovereignty as control to sovereignty as responsibility and from a right to intervene to a responsibility to protect”).

166. Milena Sterio, *Humanitarian Intervention Post-Syria: Legitimate and Legal?*, 40 BROOK. J. INT’L L. 109, 132 (2014).

167. See S.C. Res. 1674 ¶ 4 (“[r]eaffirm[ing] the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity”); see also S.C. Res. 1706 pmbl. (referencing Resolution 1674 as well as the relevant portions of the World Summit document on R2P); see Sterio, *supra* note 166, at 132.

not reached the level of general acceptance necessary for it to be considered binding, customary law.¹⁶⁸ Furthermore, the General Assembly refused to allocate funds for a newly formed office on R2P,¹⁶⁹ and “member states have not progressed further than agreeing to continue ‘considering’ this concept.”¹⁷⁰ Neomi Rao argues that “[p]roponents of R2P have failed to identify the particular duty that State R owes to People V and to provide an adequate foundation for it.”¹⁷¹ She makes the additional claim that, wholly apart from the imposition on the sovereignty of the state that is victimizing its nationals, casting intervention as an obligation on the part of the potentially intervening state interferes with that state’s right to choose not to intervene.¹⁷²

These practical and theoretical criticisms of R2P are hardly trivial. That said, it remains the case that in little longer than a half century since World War II, the international community has shown signs of shifting from the idea of sovereignty being all but inviolable to the notion that countries might have the authority to violate the sovereignty of other countries in the name of humanitarian concerns, to the idea that these countries not only have the option to intervene, but might well be obligated to do so—no small amount of movement in a relatively short period of time.

Humanitarian Intervention and Theories of Presidential Warmaking Authority

Having looked at some of the main theories on what the Constitution says about the President’s authority to engage in military action without first seeking congressional approval, we can now consider those theories as they apply to humanitarian intervention, whether in its more traditional version or under the rubric of R2P.

168. See Sterio, *supra* note 166, at 133.

169. See *id.*

170. *Id.* at 135; see also Neomi Rao, *The Choice to Protect: Rethinking Responsibility for Humanitarian Intervention*, 44 COLUM. HUM. RTS. L. REV. 697, 703 (2013) (stating “[t]he real-world adoption of R2P by states, however, has been more modest”).

171. Rao, *supra* note 170, at 726.

172. See *id.* at 733–34.

An initial problem is the difficulty in arguing that the Founders anticipated the concept of humanitarian intervention, much less how it should be evaluated under the Constitution. There is nothing to suggest that the attendees at the 1787 Constitutional Convention envisioned a time when the United States would be *α*, much less *the*, dominant world power with the capacity (and standing army) to intervene at times and places of its choosing, and in circumstances that did not involve serious threats to America's national security. Even if we accept that the Founders wanted to limit military "adventurism" by the Commander in Chief, it is not clear that humanitarian intervention qualifies as the sort of adventurism the Founders feared.

Are humanitarian interventions different than other military actions for purposes of the president's constitutional authority? One implication of the position taken by the expansive, pro-executive camp appears to be that, if the Constitution intends to entrust the president with at least the initial decision to take America into some form of armed conflict, then it should not matter whether it is to (a) fend off an immediate attack; (b) engage in a longer term conflict to protect vital national security interests; or (c) stave off a humanitarian disaster.

On the other hand, part of the argument for giving the president sole authority to make this decision (at least initially) is because he is in a uniquely strong and well-informed position to quickly assess the national interest and respond appropriately. This may not be the case with regard to humanitarian intervention, where the United States is less likely to be under any immediate threat and where there will generally be more time for fuller consideration of what America's options are before a decision is made. The genocides in Cambodia, Rwanda, and the former Yugoslavia, for example, did not happen overnight. While any delays in responding risked additional lives lost, these were not situations where a choice to intervene had to be taken at a particular moment, if it was to be made at all. Thus, the sorts of explanations given to defend a pro-executive version of war powers may not apply when it comes to humanitarian intervention. The president's

informational and efficiency advantages are probably not as important.

Similarly, even if one accepts the R2P notion that countries, under some circumstances, do not have the choice, but rather an obligation, to intervene, this does little to change the picture. The facts that indicate a major humanitarian disaster is occurring are likely to be available to Congress as well as the president. Once again, the president's informational advantage will not be substantial, not to mention a decision will probably not need to be made overnight. Plus, until such time as R2P gains significant authority in international law, there appears to be little suggestion that there is anything that would translate R2P into an affirmative, constitutional obligation of the president to initiate humanitarian interventions.

The discussion of the presidential desire for fame provides useful insight into the question of presidential war power in the context of humanitarian intervention. Irrespective of what the Founders' intent was with regard to this authority, much less how this might apply in the context of humanitarian interventions, if we are concerned about an overly aggressive executive seeking out lasting fame, then we have less to worry about when it comes to humanitarian intervention. This is partly true because public support for these types of actions tends to be somewhat weak to begin with and will likely disintegrate at signs of significant costs to the United States.

Public opinion will have an impact on presidential authority in any kind of military conflict, especially if things go poorly, but presidents may be on an especially tight leash when it comes to humanitarian intervention. In a 1996 article, Carolyn Logan discusses changes in public approval of American intervention in Somalia in the early 1990s.¹⁷³ As Logan points out, when the intervention was initiated in December of 1992 by the (lame duck) Bush administration, there was an extremely high level of public backing.¹⁷⁴ However, by October of the following year, especially after the deaths of eighteen American servicemen in Mogadishu, public support had fallen, leading to the withdrawal

173. See Carolyn J. Logan, *U.S. Public Opinion and the Intervention in Somalia: Lessons for the Future of Military-Humanitarian Interventions*, 20 FLETCHER F. WORLD AFF. 155 (1996).

174. See *id.* at 156.

of U.S. forces under public pressure.¹⁷⁵

One consequence of the seeming failure of the Somalia mission was the issuance in 1994 by the Clinton Administration of Presidential Decision Directive 25 (“PDD 25”). This document set out standards for American involvement in what it described as “peace operations.”¹⁷⁶ According to the Directive:

[T]he United States will vote in the UN Security Council for multilateral peace operations, or, where appropriate, take the lead in calling for them, when member states are prepared to support the effort with forces and funds; when the U.S. decides that the operation’s political and military objectives are clear and feasible; and when UN involvement represents the best means to advance U.S. interests.¹⁷⁷

An annex to PDD 25 expands a bit on the factors to be considered in determining whether the U.S. would support a vote in favor of a “multilateral peace operation.”¹⁷⁸ In addition to deciding whether involvement would advance American interests, the U.S. would consider whether:

There is a threat to or breach of international peace and security, often of a regional character, defined as one or a combination of the following:

- international aggression;
- a humanitarian disaster requiring urgent action, coupled with violence;
- sudden and unexpected interruption of [an] established democracy or gross violation of human rights, coupled with violence or the threat thereof.¹⁷⁹

175. *Id.* at 155–56.

176. Presidential Decision Directive (PDD) 25 (1994).

177. *Id.* at 2.

178. *Id.*

179. *See id.* at 17.

Logan asserts that PDD 25 had “provide[d] guidelines that virtually preclude American involvement in most types of peacekeeping and humanitarian missions.”¹⁸⁰ Naval Officer Glenn Ware writes that “[w]hat PDD 25 has done is unmistakable. Support or participation will not be forthcoming from the United States if the peace operation does not advance vital U.S. interests.”¹⁸¹ The “vital national interests” standard places a much higher bar than a “just causes” test, which would seem to allow for American intervention even where significant national interests could not be articulated.¹⁸² The impact of this change could be seen almost immediately in the American decision not to intervene in the Rwandan genocide.¹⁸³ The impact of public opinion here, as well as a long-term trend of reduced public support in the U.S. for intervening in humanitarian crises,¹⁸⁴ suggest that American presidents are constrained, even apart from whether they have the constitutional power to unilaterally authorize humanitarian intervention.

Thus, if public opinion is liable to be cool toward humanitarian intervention, presidents are less likely to engage in such operations as a means of enhancing their own historical legacies. Certainly, neither Presidents Bush nor Clinton added to their fame or historical legacies by means of the Somalia intervention. As a result, there is less reason to fear a pro-

180. See Logan, *supra* note 173, at 155 (stating that it is now known that PDD-25 was in the works before the Black Hawk Down incident, so the Clinton administration was likely moving toward a more restrictive policy on peacemaking even before the loss of the 18 soldiers); see also Flavia Gasbarri, *PDD-25 and the Genocide in Rwanda: Why Not a Task for the United States?*, WILSON CTR. (Sept. 18, 2017), <https://www.wilsoncenter.org/blog-post/pdd-25-and-the-genocide-rwanda-why-not-task-for-the-united-states>. Whether the final document would have been different in the absence of this disaster is, of course, impossible to know for sure.

181. Glenn T. Ware, *The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive 25*, 44 NAVAL L. REV. 1, 33 (1997).

182. See *id.* at 2–3.

183. *Id.*; see also POWER, *supra* note 138, at 377–80. Though as Power also points out, President Clinton came to regret not intervening in Rwanda. See *id.* at 386.

184. See Max Fisher, *American Isolationism Just Hit a 50-Year High. Why That Matters.*, WASH POST (Dec. 4, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/12/04/american-isolationism-just-hit-a-50-year-high-why-that-matters/?noredirect=on&utm_term=.e42ef93baf7.

executive analysis when it comes to humanitarian interventions, especially if they are short and limited to purely humanitarian objectives. Power writes that “[n]o U.S. president has ever made genocide prevention a priority, and no U.S. president has ever suffered politically for his indifference to its occurrence.”¹⁸⁵ The incentives to be overactive on humanitarian grounds (or allegedly humanitarian grounds) appear to be rather small or even non-existent. If America has a president who is willing to misuse the military in the service of personal fame and glory, it is doubtful that he will see humanitarian interventions as a way to accomplish this goal.

Any statutory limits on presidential war power that actually have been imposed by the WPR do not appear to have been created with humanitarian interventions in mind. Koh makes this argument explicitly, both in an article and in his Senate testimony. In the former, he writes that “it seemed clear that the focus of the War Powers Resolution was as a ‘No More Vietnams’ statute, not a ‘Let’s Have More Rwandas’ statute.”¹⁸⁶ In his Senate testimony, he asserted that “[w]e should not read into the 1973 Congress’s adoption of what many have called a ‘No More Vietnams’ resolution an intent to require the premature termination, nearly forty years later, of limited military force in support of an international coalition to prevent the resumption of atrocities in Libya.”¹⁸⁷ Thus, even to the extent that Congress has shown interest in dialing back executive power in this area, it was probably not with the desire to restrict presidential attempts to stop serious, large scale human rights violations.

Reasons for Caution

This is not to say that there is nothing to fear from greater presidential autonomy when it comes to making the decision to intercede for humanitarian purposes; even seemingly legitimate authority can be abused. While intervening in Rwanda, for example, would have clearly been a valid humanitarian attempt

185. POWER, *supra* note 138, at xxi.

186. See Koh, *supra* note 43, at 991.

187. Koh Statement, *supra* note 43, at 12.

to stop mass slaughter, not all claims may be similarly justified.

Russia's recent actions in Georgia and Ukraine were both defended on the desire to protect Russian nationals living in those two countries,¹⁸⁸ a claim that was viewed rather skeptically throughout much of the world.¹⁸⁹ The result is that, as one commentator has put it:

While the legal concept of humanitarian intervention may allow for a solution to an immediate crisis, such as that in Syria, it may also allow for an opportunist state, such as Russia, to exploit the amorphous nature of morality to justify an intervention into a coveted territory, such as the Ukraine, for geographic or political purposes.¹⁹⁰

In fact, protecting one's nationals abroad has been viewed under some circumstances as a category of humanitarian intervention.¹⁹¹ Russian Foreign Minister Sergey Lavrov

188. See, e.g., Ingrid Wuerth, *International Human Rights Law: An Unexpected Threat to Peace*, 101 MARQ. L. REV. 803, 811 (2018).

189. See, e.g., Adam Twardowski, Note, *The Return of Novorossiya: Why Russia's Intervention in Ukraine Exposes the Weakness of International Law*, 24 MINN. J. INT'L L. 351, 364 (2015) (noting that the Ukrainian Association of International Law pointed out that "no duly authorized national, foreign or international institution has declared any violation of human rights on the territory of Ukraine, or specifically in the Autonomous Republic of Crimea, which would have required the intervention of any subject of international law or the international community" (internal citation omitted)). With regard to Russia's invasion of Georgia, see Robert P. Chatham, *Defense of Nationals Abroad: The Legitimacy of Russia's Invasion of Georgia*, 23 FLA. J. INT'L L. 75, 100–01 (2011) (stating "the imminence of the danger Russian nationals faced is debatable at best. More significantly, the Russian citizens were very likely voluntarily residing in South Ossetia and free to leave at any time as they had Russian passports and lived in territory bordering Russia." (internal citations omitted)).

190. Shane Reeves, *To Russia With Love: How Moral Arguments for a Humanitarian Intervention in Syria Opened the Door for an Invasion of the Ukraine*, 23 MICH. ST. INT'L. L. REV. 199, 212–13 (2014) (internal citations omitted).

191. See, e.g., Chatham, *supra* note 189, at 91 (stating "[s]ome consider humanitarian intervention to encompass defense of a state's nationals abroad" (internal citation omitted)). American intervention in Grenada in 1983 was justified on the basis of a threat to American nationals. See, e.g., John Norton Moore, *Grenada and the International Double Standard*, 78 AM. J. INT'L L. 145,

specifically referenced R2P in standing up for his country's engagements in Georgia¹⁹² and made similar-sounding statements in justifying the invasion of Ukraine.¹⁹³ While Russia's government may be less constrained by popular opinion than America's, this does not eliminate the possibility that power may be abused by an American president who has less-than-pure humanitarian motivations for acting. It is worth noting that the one recent humanitarian intervention by the United States that most clearly crossed the line into "hostilities" that would trigger the WPR framework—Bosnia¹⁹⁴—was said to be motivated at least in part by President Clinton's desire to "look forceful"¹⁹⁵ and concern with "his place in history."¹⁹⁶

Another factor that may lead to intervention, even when not fully justified, is the greater ease with which some forms of military action may be undertaken. While technological developments which result in a reduced threat to the lives of American forces is a positive development, it may make it, in effect, too easy to intervene. As Rebecca Crootof explains:

Drones, cyber operations, and other technological advances in weaponry already allow the United States to intervene militarily with minimal boots on the ground, and increased autonomy in weapon systems will further reduce risk to soldiers. As human troops are augmented and supplanted by robotic ones, one of the remaining incentives for Congress to check presidential warmongering—popular outrage at the loss of American lives—will diminish. By making it politically easier to justify the use of military force, autonomous weapon systems will contribute to the growing concentration of the war power in the hands of the Executive, with potential implications for the

149–51 (1984).

192. See Twardowski, *supra* note 189, at 364 (internal citation omitted).

193. See *id.* at 363 (internal citation omitted).

194. See *supra* notes 108–09 and accompanying text.

195. See Treanor, *supra* note 18, at 771 n.440 (internal citation omitted).

196. See *id.* at 766 (internal citation omitted).

international doctrine of humanitarian intervention.¹⁹⁷

When combined with the arguments for presidential flexibility to initiate military activity that does not rise to the level of “hostilities,” this has the potential to allow for presidential freedom to engage in fairly serious military action relatively free of oversight.¹⁹⁸

This is an issue with implications that go far beyond the impact on presidential war powers. Crootof mentions that there have been calls for an international ban on autonomous weapons precisely because they make war “too easy,”¹⁹⁹ or, failing that, at least regulation of their use.²⁰⁰ In particular, for liberal democracies such as the United States, one of the limiting factors in going to war is the potential political unpopularity of a costly war. If this constraint is removed, then more peaceful countries may generally feel less restrained in resorting to force.²⁰¹ As Dawn Johnsen observes, while the intervening country may be glad to know that its own nationals are exposed to less risk, this does not mean that concern should not be given to casualties at the site of intervention:

In a situation in which the United States has the capacity to devastate populations in another country through air strikes without risk to American lives, that potential loss of life must be a relevant factor in determining whether the intervention constitutes either “war” in the constitutional sense or “hostilities” for purposes of

197. Rebecca Crootof, *War, Responsibility, and Killer Robots*, 40 N.C. J. INT'L L. & COM. REG. 909, 910–11 (2015).

198. See Bejesky, *supra* note 16, at 5–6 (quoting argument made by former Bush adviser Jack Goldsmith that the claims made by the Obama Administration in relation to its Libya intervention would mean that “the [P]resident can wage war with drones and all manner of offshore missiles without having to bother with the War Powers Resolution’s time limits” (internal citation omitted)).

199. See Crootof, *supra* note 197, at 919–20.

200. See Rebecca Crootof, *The Killer Robots Are Here: Legal and Policy Implications*, 36 CARDOZO L. REV. 1837, 1894–1903 (2015).

201. See Crootof, *supra* note 197, at 925.

the War Powers Resolution (or both). Not to consider foreign casualties inflicted by U.S. forces would seem especially perverse in the context of humanitarian interventions.²⁰²

Crootof concludes with regard to America specifically, that while the existence of autonomous weapons will not greatly increase a president's ability to involve the United States in what are likely to be major, long-term military conflicts, a president may well feel that he has a freer hand when it comes to short-term actions,²⁰³ a category that likely includes interventions that are defended as being humanitarian in nature.²⁰⁴ Thus, future occupants of the White House could be increasingly tempted to intervene, even if a truly legitimate basis for doing so is lacking, because it is both quick and easy to do so, thereby removing previously existing checks on presidential action. If we give presidents an additional basis for military conflict, such as humanitarian intervention, and reduce the costs for such action, there is certainly the potential for abuse of authority. Furthermore, Johnsen argues that precedents that are generated in cases of humanitarian intervention risk being applied in other contexts: "if we recognize a humanitarian exception to the War Powers Resolution, why not also a counterterrorism exception? Why not a similar exception for military 'first strikes' to degrade nuclear and other capabilities of nations controlled by extraordinarily dangerous hands?"²⁰⁵

One response to this is to create explicit criteria for when humanitarian intervention is justified. Such guidelines would provide both a basis upon which to judge a state's action and at least some constraint to an executive before he decides to intervene. The standards set out in PDD 25 discussed above²⁰⁶ establish a high bar for American support of humanitarian

202. Dawn Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOUS. L. REV. 1065, 1096 (2016) (internal citations omitted).

203. See Crootof, *supra* note 197, at 926–27.

204. See *id.* at 929–30.

205. Johnsen, *supra* note 202, at 1078.

206. See *supra* notes 176–82 and accompanying text.

efforts. Koh supports some role for humanitarian intervention, criticizing an “absolutist” conception of state sovereignty that “tolerates gross atrocities.”²⁰⁷ However, Koh argues that a failure to articulate a clear standard for when the default rule of protecting state sovereignty must give way to a need to end human rights abuses will cause mischief of its own.²⁰⁸ In particular, he faults the Clinton Administration for failing to set forth a standard that explained its decision to intervene in Kosovo,²⁰⁹ a somewhat ironic criticism given the arguments that the post-Somalia PDD 25 standards were alleged to be too hard to meet—and perhaps they were.

There have been a number of attempts to develop specifications for when humanitarian intervention is justified. For example, in a 2014 letter, British officials set forth the following considerations for interventions, even in the absence of a Security Council resolution:

- (i) there is convincing evidence, generally accepted by the international community as a whole, of extreme humanitarian distress on a large scale, requiring immediate and urgent relief;
- (ii) it must be objectively clear that there is no practicable alternative to the use of force if lives are to be saved; and
- (iii) the proposed use of force must be necessary and proportionate to the aim of relief of humanitarian need and must be strictly limited in time and scope to this aim (i.e. the minimum necessary to achieve that end and for no other purpose).²¹⁰

207. See Koh, *supra* note 43, at 1014.

208. *Id.*

209. *Id.*

210. Letter from the Rt. Hon. Hugh Robertson MP, U.K. Minister of State, Foreign & Commonwealth Office, to the Rt. Hon. Sir Richard Ottaway MP, U.K. House of Commons (Jan. 14, 2014) (on file with author); see also Ashley Deeks, Commentary, *Multi-Part Tests in the Jus Ad Bellum*, 53 HOUS. L. REV. 1035, 1058 (2016).

Koh has his own benchmarks. In his view, in situations where a humanitarian crisis threatens consequences “significantly disruptive of international order,” which would soon lead to “imminent threats” to the state(s) considering intervening, and all other remedies have been exhausted or are unavailable, including a Security Council resolution due to a persistent veto by one of the P5, “*limited force for genuinely humanitarian purposes* that was necessary and proportionate to address the imminent threat [would be acceptable because it] would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated.”²¹¹ Koh goes on to say that any case for intervention would be strengthened to the extent that intervening states could demonstrate that they were acting collectively and that such action was necessary to prevent the use of per se illegal means, such as chemical weapons, or would help prevent a per se illegal end, such as genocide or other mass slaughter.²¹² Koh’s criteria appear to be narrower than the British version because they, in an echo of PDD 25, tie any attempt to intervene to a threat to the intervening country’s own national security.

Both of these proposals are written with an eye toward defending a state’s action to the rest of the international community. However, there is no reason that the principles they enunciate—that (1) action should only come after other alternatives have been exhausted, (2) action must be limited and proportional to prevent or bring to a close serious human rights abuses, and (3) it is better if intervention is undertaken by a group, rather than a single state acting alone—cannot be used as guideposts by a domestic audience judging the righteousness of a president’s choice to intervene.

Koh argues that most legitimate humanitarian interventions are unlikely to rise to the level of “hostilities” for purposes of the WPR and, therefore, do not even implicate that law.²¹³ However, even beyond that question, the guidelines suggested by Robertson and Koh provide standards by which to judge a presidential decision to engage in humanitarian intervention: How serious is the humanitarian risk? Is there an

211. Koh, *supra* note 43, at 1011 (emphasis in original).

212. *See id.*

213. *See id.* at 1015–16.

impending threat to American interests if nothing is done? Has the administration attempted to engage international institutions and/or close allies? Do the actions appear to be proportionate and restrained in scope and duration? If the president's actions do not measure up, then Congress can make use of its own authority, whether by refusing to fund the intervention or by using its investigative powers to attempt to discern if the president has less-than-humanitarian motives in play. If the president knows ahead of time that his administration will be forced to answer for its actions, this should discourage adventurism dressed up as humanitarian intervention. Thus, even a system that allows for presidential authority to initiate humanitarian intervention is not a blank check. Finally, it is important to note that while working with a group of allies may be useful and increase the perceived legitimacy of any intervention, the United States is not just any country when it comes to commencing action. Power asserts that American "leadership will be indispensable in encouraging U.S. allies" to engage in humanitarian interventions.²¹⁴ If the president is constrained too much, then other countries may not pick up the slack, with consequences that will reverberate throughout the international community.

Conclusion

Interbranch fights related to military affairs have been with us since the beginning of the Republic. Academic debates over the meaning of the declare war clause of the Constitution continue as well. It is not clear how much these debates tell us about uses of force, not for military conquest or defense, but in the name of preventing or ending serious human rights abuses. Humanitarian interventions, in terms of their length and casualty levels, may be commensurate with the more limited

214. See POWER, *supra* note 138, at 513 (explaining that similarly, even though Professor Johnsen is wary of reading the WPR in a way to allow for Presidents to initiate humanitarian interventions without congressional assent, she writes that "[a]s a matter of policy, I embrace both the motivation behind the R2P movement and the United States' special responsibilities to respond to humanitarian crises, including through interventions that involve the use of military force in 'extreme and limited circumstances.'"); Johnsen, *supra* note 202, at 1069 (internal citation omitted).

uses of military force that presidents have engaged in throughout American history. However, they do not resemble the sorts of defensive engagements or responses to emergency situations that even the proponents of the restrictive viewpoint would acknowledge as legitimate exercises of presidential power, irrespective of a grant of congressional authorization.

It is proposed here that presidents be given at least some flexibility to initiate military action in the name of humanitarian intervention. While any decision to use military force brings risks with it, using the military for humanitarian purposes presents less of a hazard to our constitutional order. Such actions tend to be of short duration and, as a result, involve less threat to American life. When it comes to the issue of presidential power, they do not provide the same “achieving glory” incentives with regard to public opinion that other forms of military action have typically presented to the president. Thus, there is less reason to fear that authority to engage in humanitarian intervention will be abused by the Commander in Chief. Though, to the extent that this is a concern, we can look to the sorts of standards suggested by Koh and Robertson as means of judging the legitimacy of presidential action in this arena to limit the chance that presidents will abuse their power. In light of all of this, and in light of the terrible cost of inaction in places like Rwanda and the former Yugoslavia, we should be willing to live with some presidential freedom to use military force to respond to serious human rights abuses.