

Unforeseen Consequences: The Constitutionality of Unilateral Executive R2P Deployments and the Need for Congressional and Judicial Involvement

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The role that the Responsibility to Protect (“R2P”) played in the United States’ decision to intervene in Libya in 2011 received wide coverage in academic and policy circles. While the Executive Branch’s legal justification for taking action in Libya without Congressional authorization was not premised solely on humanitarian grounds, R2P is a key plank in President Obama’s foreign policy. Other commentators have discussed the role of R2P in international law, but a major domestic legal question remains: does the President have the power to unilaterally deploy military forces on R2P missions with no direct U.S. national security interests at stake? This Note argues that though past unilateral Executive deployments of military force were justified primarily on U.S. national security interests, due to (1) the evolution of the President’s national security powers, and (2) the President’s ability to define “the national interest,” the Executive has the constitutional power to send U.S. military forces into harm’s way on purely humanitarian missions without the consent of Congress. Yet unilateral deployments may produce unintended consequences, as seen in Africa and Syria after the Libyan intervention. In light of these events, this Note lays out a proposed solution to constrain the President’s ability to conduct such unilateral missions: Congress must pass legislation to check the Executive’s ability to conduct R2P deployments, and the judiciary must be willing to enforce such legislation.

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I. INTRODUCTION

In 2011, President Barack Obama ordered the U.S. military to provide logistical and combat support for NATO forces to conduct a series of strikes against Colonel Muammar Quaddafi's regime in Libya without Congressional authorization.¹ According to the Department of Justice's Office of Legal Counsel ("OLC") and State Department Legal Advisor Harold Koh, the President possessed the power to order the involvement of U.S. military forces in combat situations in Libya without Congressional approval because (1) important national security interests were at stake; and (2) this intervention did not rise to the threshold of a "war" for Constitutional purposes.² The two important national security interests Koh cited were (a) maintaining the credibility of the United Nations ("U.N.") Security Council, and (b) preserving regional stability.³ While discussing what "preserving regional stability" meant, the President stated that a humanitarian crisis would ensue without U.S. intervention.⁴

Keying in on the role that humanitarian purposes played in the U.S. decision to intervene in Libya and subsequent U.N. Security Council debates over the situation in Libya, scholars hailed or decried the Libyan intervention as the fruition of the Obama Administration's effort to promote the Responsibility to Protect (commonly, "R2P") Principle.⁵ R2P is shorthand for the emerging

1. See Barack Obama, U.S. President, Address to the Nation on the Intervention in Libya (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya>.

2. *Libya and War Powers: Hearing Before the S. Comm. On Foreign Relations*, 112th Cong. 7–40 (2011) [hereinafter "Libya Hearing"] (statement of Harold Koh, Legal Advisor, U.S. Dep't of State); Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011) [hereinafter "Libya Memo"].

3. Libya Hearing, *supra* note 2, at 8 (statement of Harold Koh, Legal Advisor, U.S. Dep't of State).

4. President Barack Obama, *48-Hour War Powers Resolution Notification to Congress for Libyan Intervention* (Mar. 21, 2011).

5. Bruce Jentleson, *The Obama Administration and R2P: Progress, Problems and Prospects*, 4 GLOBAL RESPONSIBILITY TO PROTECT 399 (2012); Saira Mohamed, *Taking Stock of the Responsibility to Protect*, 48 STAN. J. INT'L L. 319 (2012); Michael Doyle, *The Folly of Protection*, FOREIGN AFFAIRS (Mar. 20, 2011), available at <http://www.foreignaffairs.com/articles/67666/michael-w-doyle/the-folly-of-protection>; Stewart Patrick, *Libya and the Future of Humanitarian Intervention*, FOREIGN AFFAIRS, (Aug. 26, 2011), available at <http://www.foreignaffairs.com/articles/68233/stewart-patrick/libya-and-the-future-of-humanitarian-intervention?page=show>; Michael Walzer, *The Case Against Our Attack*, NEW REPUBLIC, (Mar. 20, 2011), available at <http://www.newrepublic.com/article/world/85509/the-case-against-our-attack-libya>;

international consensus in favor of supporting humanitarian intervention when a state fails to protect its own people, thereby forfeiting its sovereign rights.⁶ While the exact role R2P played in decision-making around Libya is unknown to anyone outside of the Executive branch, the President's 2010 National Security Strategy is seen in the international community as an American endorsement of R2P.⁷

Although Presidential War Powers have expanded since the framing of the Constitution, the adoption of the extra-territorial principle of the Responsibility to Protect by a U.S. President presents a new question of whether the Executive has the inherent constitutional authority to unilaterally deploy U.S. military forces in any role — e.g., logistical, advisory, combat, etc. — into a foreign conflict which poses no direct security risk to the United States, motivated by purely humanitarian grounds, and without Congressional authorization. The legitimacy of taking such an action is not uniformly accepted, and some U.S. Senators have publicly indicated that they do not believe the President has such power.⁸ As Senator James Webb said during a Senate hearing over the Libyan intervention, “the most unusual part of this decision [to intervene] was . . . the use by a President of a very vague standard that he or she can unilaterally inject military force into situations around the world based on a vague standard of humanitarian assistance. We have not seen that before.”⁹

This Note begins in Part II by placing R2P in context, and describing how the Obama Administration has pushed the U.S. government towards enforcing and promoting the Responsibility to Protect. In Part III the Note looks at the evolution of unilat-

Jayshree Bajoria, *Libya and the Responsibility to Protect*, COUNCIL ON FOREIGN RELATIONS (Mar. 24, 2011); Steven Groves, *Obama Wrongly Adopts U.N. Responsibility to Protect to Justify Libyan Intervention*, HERITAGE FOUND. (Mar. 31, 2011), available at <http://www.heritage.org/research/reports/2011/03/libya-intervention-obama-wrongly-adopts-un-responsibility-to-protect>. See also THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT XI (2011), available at <http://responsibilitytoprotect.org/ICISS%20Report.pdf> [hereinafter ICISS Report].

6. See generally 2005 World Summit Outcome, G.A. Res. 60/1, ¶¶ 138–39, U.N. Doc. A/RES/60/1 (Oct. 24, 2005) (articulating the international commitment).

7. *National Endorsements of Responsibility to Protect*, INT'L. COAL. FOR THE RESPONSIBILITY TO PROTECT (Feb. 3, 2011), [http://responsibilitytoprotect.org/RtoP%20National%20level\(2\).pdf](http://responsibilitytoprotect.org/RtoP%20National%20level(2).pdf).

8. Libya Hearing, *supra* note 2, at 28 (statement of Sen. James Webb).

9. *Id.*

eral Presidential deployments of military force since the Vietnam War, and finds that up through the Bush Administration, unilateral Presidential exercises of military power were based upon the President's defensive war powers and his foreign relations primacy; recognizing the power of the President as the Commander in Chief and sole organ of the federal government to defend U.S. lives, property, and treaty obligations. Set against this background, this Note makes a descriptive claim and a normative one. Because the President prescribes what is in "the national interest," and war powers are defined through the gloss that the historical practice of the political branches gives them, the evolution of unilateral executive use of military force indicates that the President has the constitutional authority to deploy U.S. military forces for purely humanitarian reasons.¹⁰ Yet if the President possesses this immense power, this in turn creates a host of problems, which are discussed briefly in Part IV. Therefore, as this Note argues in Part V, Congress should revamp the War Powers Resolution and pass legislation similar to Senator Webb's 2012 Humanitarian Intervention bill. Additionally, courts should stop relying on justiciability doctrines to dodge adjudicating war powers questions, and enforce Congressional legislation circumscribing the President's war power.

II. THE RESPONSIBILITY TO PROTECT AND U.S. FOREIGN POLICY

Beginning in April 1994, a mass genocide in Rwanda led to the deaths of over 800,000 people.¹¹ As the U.N. Human Rights Council stated in the aftermath of Rwanda, "[p]olicymakers in . . . the United States and at the United Nations were aware of the preparations for massive slaughter and failed to take the steps

10. See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002); John C. Yoo, *War and Constitutional Texts*, 69 U. CHI. L. REV. 1639 (2002); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996).

11. *Genocide in Rwanda*, U.N. HUMAN RIGHTS COUNCIL, http://www.unitedhumanrights.org/genocide/genocide_in_rwanda.htm (last visited Oct. 12, 2013).

needed to prevent it . . . [e]ven after it had become indisputable that what was going on in Rwanda was a genocide.”¹² Disgust with the international community’s response to the Rwandan genocide, along with failures to respond quickly to other ethnic crises in Somalia, the Balkans, and other hotspots, led to the formulation of the Responsibility to Protect Principle, or R2P.¹³ As defined by the 2005 U.N. Outcome Summit on R2P, and formulated by the U.N. Secretary General’s 2009 Order on Implementing R2P, the international commitment to R2P stands on three pillars:

- (1) The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
- (2) The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
- (3) The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations.¹⁴

Accordingly, all states have the responsibility to intervene in another sovereign state’s affairs to prevent humanitarian catastrophes, even if doing so would require an armed military intervention.¹⁵ The responsibility to intervene is present at all times and in all situations, even when an intervening state has no direct interests at stake in the humanitarian crisis or its outcome.¹⁶ For example, under the R2P regime, if a small sovereign state on another continent faced a pending humanitarian crisis in the midst of a civil war, the United States as an international actor

12. *Id.*

13. Edward Luck, *R2P — A Short History*, UNITED NATIONS REGIONAL INFORMATION CENTRE FOR WESTERN EUROPE, <http://www.unric.org/en/responsibility-to-protect/26981-r2p-a-short-history>.

14. *The Responsibility to Protect*, U.N. OFFICE OF THE SPECIAL ADVISOR ON THE PREVENTION OF GENOCIDE, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Oct. 12, 2013). See also 2005 World Summit Outcome, *supra* note 6, at ¶¶ 138–39.

15. See ICISS Report, *supra* note 5.

16. 2005 World Summit Outcome, *supra* note 6, at ¶¶ 138–39.

would have the responsibility to intervene to end the crisis even if there were no direct U.S. security or economic interests at stake in the civil war.¹⁷ R2P does not call for intervention only in the case of mass genocides; rather, under the U.N.'s formulation, it includes interventions to "help protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity."¹⁸ While this would seem to narrow the number of times R2P missions are required, in actuality these open-ended, and often politically-motivated, categories do the opposite.¹⁹

The United States did not initially embrace the R2P doctrine. "Under the [George W.] Bush administration, both the Pentagon and the State Department were intensely wary of signing up to anything that might bind them to take draconian action in the name of humanity."²⁰ There were several reasons for this stance, including skepticism of the U.N., fear of R2P missions being co-opted by a foreign state's own political machinations, and the view that "[t]he U.S. military exists to protect and defend American citizens and their interests, not the world's."²¹ The Bush Administration instead embraced a policy of voluntary intervention if such action was found necessary.²²

17. See Mohamed, *supra* note 5, at 320–21.

18. See MICHAEL DOYLE, THE FOLLY OF PROTECTION, FOREIGN AFFAIRS (Mar. 20, 2011), available at <http://www.foreignaffairs.com/articles/67666/michael-w-doyle/the-folly-of-protection>.

19. For instance, if intervention is required in the case of war crimes, then perhaps the international community should have intervened in Iraq and Afghanistan since President George W. Bush, Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld and their legal advisers Alberto Gonzales, David Addington, William Haynes, Jay Bybee and John Yoo were tried in absentia and convicted in Malaysia in May 2012 of war crimes in connection with the War on Terror. These charges have since been referred to the International Criminal Court, where action has yet to be taken. See Yvonne Ridley, *Bush Convicted of War Crimes in Absentia*, FOREIGN POLICY JOURNAL (May 12, 2012), available at <http://www.foreignpolicyjournal.com/2012/05/12/buh-convicted-of-war-crimes-in-absentia/>; Patrick Goodenough, *Bush, Cheney Face Torture and War Crimes 'Charges' in Mock Trial*, CNS NEWS (May 8, 2012) <http://cnsnews.com/news/article/bush-cheney-face-torture-and-war-crimes-charges-mock-trial>.

20. Theresa Reinold, *The United States and the Responsibility to Protect: Impediment, Bystander, or Norm Leader?*, 3 GLOBAL RESPONSIBILITY TO PROTECT 61, 66 (2011); *Responsibility to Protect; An Idea Whose Time Has Come and Gone*, ECONOMIST, Jul. 25, 2009, available at <http://www.economist.com/node/14087788>.

21. Scott Nason, *Misguided Responsibility?*, HERITAGE FOUND. (Apr. 9, 2011) available at <http://blog.heritage.org/2011/04/09/misguided-responsibility/>. See also Steven Groves, *The U.S. Should Reject the Responsibility to Protect*, HERITAGE FOUND. (May 1, 2008), available at <http://www.heritage.org/research/reports/2008/05/the-us-should-reject-the-un-responsibility-to-protect-doctrine>.

22. Groves, *supra* note 21, at "Current U.S. Policy."

Under the Obama Administration, however, R2P has become a component of U.S. foreign policy. The first U.S. government action that brought R2P into the wheelhouse of American foreign policy came just prior to the 2008 elections. The Genocide Prevention Task Force — an organization jointly convened by the U.S. Institute of Peace, the U.S. Holocaust Memorial Museum, and the American Academy of Diplomacy — “urge[d] America’s 44th president to demonstrate at the outset that preventing genocide and mass atrocities is a national priority.”²³ The Task Force also suggested that the next President “develop and promulgate a government-wide policy on preventing genocide and mass atrocities . . . create a standing interagency mechanism for analysis of threats and consideration of appropriate action . . . [and] strengthen global efforts to prevent mass atrocities and genocide.”²⁴

The Obama Administration seized on the Task Force’s recommendations, and translated them into a broader elevation of R2P as a national interest, via three key documents. First, Presidential Study Directive 10 (“PSD-10”) on Mass Atrocities declares mass atrocity prevention to be a “core national security interest and core moral responsibility.”²⁵ PSD-10 directed the establishment of an interagency Atrocities Prevention Board (“APB”), made up of government officials across multiple federal agencies, and tasked the APB to meet regularly to identify and address atrocity threats.²⁶ The APB is also ordered to “consider the recommendations of relevant bipartisan and expert studies, including the recommendations of the bipartisan Genocide Prevention Task Force” in developing U.S. policy.²⁷ The APB first met on

23. MADELINE E. ALBRIGHT & WILLIAM S. COHEN, GENOCIDE PREVENTION TASK FORCE, PREVENTING GENOCIDE: A BLUEPRINT FOR U.S. POLICYMAKERS xvi (2008), <http://www.usmmm.org/m/pdfs/20081124-genocide-prevention-report.pdf>. For a more in-depth summary of R2P developments in the U.S., see CDR Ivan G. Carlson, Bridging the Ends and Means of the Responsibility to Protect: An Opportunity for U.S. Leadership (May 24, 2012) (National Defense University, unpublished M.A. thesis).

24. ALBRIGHT & COHEN, *supra* note 23, at 111.

25. *Presidential Study Directive on Mass Atrocities*, 2011 DAILY COMP. PRES. DOC. 1 (Aug. 4, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities> [hereinafter “Presidential Study Directive”].

26. *Id.* See also Sarah Margon, *Obama Announces Atrocities Prevention Board: ‘Sovereignty Is Never A License To Slaughter Your Own People’*, THINK PROGRESS (Apr. 23, 2012) <http://thinkprogress.org/security/2012/04/23/469559/obama-atrocitiies-prevention-board/?mobile=nc>.

27. *Presidential Study Directive*, *supra* note 25.

April 23, 2012, and its first Director was Samantha Power, now the U.S. Ambassador to the U.N., who once wrote that America had a “duty to act” to prevent any foreign genocide.²⁸

The second document is the 2010 National Security Strategy (“NSS”). The NSS states that “[t]he United States and all member states of the U.N. have endorsed the concept of the Responsibility to Protect.”²⁹ The NSS continues that “[i]n the event that prevention fails, the United States will work both multilaterally and bilaterally to mobilize diplomatic, humanitarian, financial, and — in certain instances — *military means to prevent and respond to genocide and mass atrocities*.”³⁰ The inclusion of R2P in the National Security Strategy is seen by the international community as a signal from the Obama Administration that embracing R2P is in the national interest of the U.S.³¹

Third, the Mass Atrocity Response Operations (“MARO”) Project, a joint project between Harvard’s Kennedy School of Government and the U.S. Army War College, has “developed a conceptual framework for MARO, explaining the underlying common elements and unique challenges of a MARO compared to other types of military operations.”³² The outcome of the Project is the MARO Handbook, which senior Department of Defense, Department of State, National Security Council, and other Administration officials have utilized in table-top exercise simulations.³³ Following publication of the MARO handbook, mass atrocity response was incorporated into Army Training and Doctrine Command publications, and the 2010 Department of Defense Quad-

28. Office of the Press Secretary, *Fact Sheet: A Comprehensive Strategy and New Tools to Prevent and Respond to Atrocities*, THE WHITE HOUSE (Apr. 23, 2012) <http://www.whitehouse.gov/the-press-office/2012/04/23/fact-sheet-comprehensive-strategy-and-new-tools-prevent-and-respond-atro>; Laura Secor, *Turning a Blind Eye*, N.Y. TIMES, Apr. 14, 2002, available at <http://www.nytimes.com/2002/04/14/books/turning-a-blind-eye.html?pagewanted=all&src=pm>; SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* 512 (2002).

29. OFFICE OF THE PRESIDENT OF THE UNITED STATES, *THE NATIONAL SECURITY STRATEGY* 48 (2010).

30. *Id.*

31. See *National Endorsements*, *supra* note 7.

32. *Project Purpose and History*, MASS ATROCITY RESPONSE OPERATIONS PROJECT, <http://www.hks.harvard.edu/centers/carr/programs/mass-atrocity-response-operations/about/project-purpose-and-history> (last visited Oct. 15, 2013).

33. See *id.*

rennial Review.³⁴ In addition to these documents and actions, the President and members of his administration have made public pronouncements supporting the concept of R2P multiple times. President Obama's 2009 Nobel Peace Prize Address discussed the role that militaries can play to protect vulnerable populations.³⁵ Later, the President stated that "I believe that force can be justified on humanitarian grounds. . . . Inaction tears at our conscience and can lead to more costly intervention later. That's why all responsible nations must embrace the role that militaries with a clear mandate can play to keep the peace."³⁶ In 2009, then-U.N. Ambassador Susan Rice stated that the U.S. took its responsibility to protect civilians from violations of international law "seriously."³⁷ Assistant Secretary of State Andrew Shapiro labeled "the prevention of mass atrocities and genocide as a core national security interest of the United States."³⁸ And on April 23, 2012, President Obama said that "national sovereignty is never a license to slaughter your own people," as he discussed the creation of the APB.³⁹ These public comments are only a small sampling of public Obama Administration support for R2P. Additionally, the placement of R2P proponents, such as Susan Rice and Samantha Power in senior U.S. defense and foreign relations posts signals the President's support for the doctrine.⁴⁰

Under the Obama Administration, the concept of R2P has become a core national interest. This interest was given as one of the reasons for the Libyan intervention, but is this a legally legitimate interest that, by itself, gives the President the power to unilaterally deploy military forces into a hostile conflict?

34. *Id.* See also, Kimberly Johnson, *Genocide Prevention for Dummies*, FOREIGN POLICY, Apr. 7, 2011, available at http://www.foreignpolicy.com/articles/2011/04/07/genocide_prevention_for_dummies?page=0.1

35. See Mohamed, *supra* note 5, at 332. See also President Barack Obama, Remarks by the President at the Acceptance of the Nobel Peace Prize (Dec. 10, 2009) (transcript available at www.whitehouse.gov/the-press-office/remarks-presidentacceptance-nobel-peace-prize).

36. John Fenzel, *R2P: The New Obama Doctrine*, GEORGETOWNER, Feb. 21, 2012, available at <http://www.georgetowner.com/articles/2012/feb/21/r2p-new-obama-doctrine/>.

37. *Id.*

38. Andrew Shapiro, Assistant Sec'y of State, Remarks to the U.S. Inst. of Peace (Feb. 27, 2012), available at <http://london.usembassy.gov/forpol104.html>.

39. Alicia M. Cohn, *Obama: 'National Sovereignty Never a License to Slaughter Your People'*, THE HILL (Apr. 23, 2012), available at <http://thehill.com/blogs/blog-briefing-room/news/223033-obama-national-sovereignty-is-never-a-license-to-slaughter-your-people>

40. See Fenzel, *supra* note 36; Groves, *supra* note 21.

III. THE LEGAL DEVELOPMENT OF PRESIDENTIAL WAR POWERS SINCE THE VIETNAM WAR AND R2P

The President's legal justification for unilaterally ordering U.S. military forces involvement in the 2011 Libyan Civil War was that important national security interests were involved — one of which was a humanitarian interest — and that the level of U.S. involvement in Libya did not meet the War Powers Resolution threshold for hostilities requiring Congressional authorization.⁴¹ Thus the legal justification proffered for Libya is not explicitly based on R2P — it only references humanitarian purposes. But, in order to determine whether the President has the inherent constitutional authority to go a step further and unilaterally deploy U.S. military forces into a conflict solely for humanitarian reasons in a R2P mission, this section analyzes Executive branch justifications for unilateral deployments since the Vietnam War and passage of the War Powers Resolution. Next, this section examines the framework for judging the legality of unilateral Presidential deployments. Finally, this section concludes with a discussion of why the evolution of unilateral Executive deployments gives the President the power to send troops abroad on R2P missions without Congressional authorization.

As an initial comment, this Note assumes that the scope of the President's power as the Chief Executive, Commander-In-Chief, and the "sole organ of the nation in its external relations"⁴² provides the President with the constitutional authority to unilaterally employ military force without Congressional approval in certain circumstances — a proposition that is contested by some.⁴³ Yet this contested view is relied on herein because, as the OLC

41. See Libya Hearing, *supra* note 2, at 8 (statement of Harold Koh, Legal Advisor, U.S. Dep't of State); Libya Memo, *supra* note 2, at 26.

42. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936).

43. As Chief Justice Taney wrote on behalf of the Court in 1850:

His duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.

Fleming v. Page, 50 U.S. 603, 615 (1850).

wrote in 1980, “[o]ur history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.”⁴⁴

A. VIETNAM AND THE WAR POWERS RESOLUTION

The Vietnam War serves as the starting point in this analysis for two reasons. First, though Presidents had unilaterally deployed military forces abroad since the time of President George Washington without any Congressional authorization, according to a 2002 study by the Congressional Research Service, all of these unilateral deployments were premised on defending U.S. national security interests in U.S. lives, property, or treaty obligations.⁴⁵ For example, the history of Executive interventions pre-Vietnam is replete with retaliatory raids on pirate strongholds, military excursions in Central America for economic reasons, retaliation against natives for harsh treatment of American sailors, actions to enforce treaty obligations, and Cold War interventions against Soviet-aligned revolutionaries.⁴⁶ Similarly, a study introduced into the Congressional Record during the debate over the War Powers Act cited 199 instances of U.S. military activities undertaken abroad without a formal declaration of war from 1798 to 1972, all of which involved interests including American lives, property, and treaty issues.⁴⁷ However, this 1972 study includes military actions authorized through appropriations bill or treaties, and not only unilateral Executive fiat, so the actual number of unilateral Presidential interventions is much lower.⁴⁸ Taken together, these two studies show that even before Vietnam, there was a long history of unilateral Presidential deployments of military forces, though none were conducted purely for humanitarian missions. Thus, Vietnam serves as a good starting point for ex-

44. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980).

45. See generally RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R41677, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2010 13–31 (2011).

46. *Id.* This Note identifies Cold War posturing as an interest in U.S. lives or treaty obligations because the fear at the time was that if one state fell to the Soviets, then U.S. lives at home and abroad would be endangered.

47. See 119 CONG. REC. 25066 (chronological list of 199 military hostilities without congressional approval) (appendix entered by Sen. Barry Goldwater).

48. *Id.*

amining the development of Presidential war powers in humanitarian contexts.

Second, the legal justification for America's involvement in Vietnam were grounded in a theory of Executive power which has been repeated in OLC opinions on unilateral Presidential deployments up through the 2011 Libyan intervention.⁴⁹ This view on inherent Presidential war powers, along with the legal ramifications the War Powers Resolution introduced, created the framework for current Executive legal justifications of unilateral deployments.

1. *The Meeker Memo and Historical Gloss*

Though Congress never declared war on North Vietnam, Congressional authorization for the military effort came from the Tonkin Gulf Resolution, continued appropriations for the war, and SEATO Treaty obligations.⁵⁰ However, Leonard C. Meeker, then the State Department Legal Advisor, argued publicly that even without Congressional authorization or treaty obligations, Lyndon Johnson had the inherent power as the President to conduct the war unilaterally.⁵¹ Meeker's arguments for the existence of this inherent Presidential power were premised on (1) the President's Article II powers as both the Commander-in-Chief and the sole organ of government in foreign relations; (2) the President's Article II defensive war powers, which were involved in Vietnam because conflicts abroad can implicate homeland defense; and (3) since the signing of the Constitution, President's had sent American forces abroad 125 times without Congressional authorization, which added gloss to the distribution of power between the Executive Branch and Congress.⁵² Of importance for the modern legal framework on unilateral Executive deployments is not the widely accepted view that the President has unilateral defensive war powers, but rather that this unilateral war power can be tied to defending U.S. interests abroad, and that the power

49. Office of the Legal Adviser, U.S. Dep't of State, *The Legality of United States Participation in the Defense of Viet-Nam*, 75 YALE L.J. 1085, 1100-01 (1966).

50. *Id.* at 1085-1100.

51. *Id.* at 1100-01.

52. *Id.*

can be altered over time based on the gloss that Presidential and Congressional practice add.

The view that the practices of the political branches in national security and foreign relations adds gloss to their separate and shared constitutional powers is found in *Youngstown Sheet & Tube Company v. Sawyer*, where Justice Frankfurter wrote that:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making it as it were such exercise of power part of the structure of our government, may be treated as a gloss on ‘Executive Power’ vested in the President by § 1 of Art. II.⁵³

Justice Jackson’s much-cited three-category *Youngstown* framework aligns with Frankfurter’s view; for instance, in Category One, where Congressional approval of a Presidential action is explicit or implicit — which can be signaled through Congressional acquiescence to an executive action — Presidential actions are “supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”⁵⁴

Supporting and relying on the *Youngstown* framework, the Supreme Court in *Dames & Moore v. Regan* upheld President Carter’s authority to suspend claims pending in American courts, finding that Congressional acquiescence gave implicit approval.⁵⁵ The Court, in *Haig v. Agee*, utilized the same customary law view of Presidential national security powers.⁵⁶ As Harold Koh wrote in 1990, “the relationship of Congress’s power to declare war and the President’s authority as Commander in Chief and Chief Executive has been clarified by two hundred years of practice . . . [and] historical precedent serves as quasi-constitutional ‘custom’

53. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

54. *Id.* at 637.

55. See *Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981). See also Maj. Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1160–61 (2001).

56. See, e.g., Chester H.L. Hutchinson, *Al-Bihani v. Obama & Congressional Testimony on Targeted Killings: Evaluating Custom As A Source of Law in the War on Terror*, 31 ST. LOUIS U. PUB. L. REV. 579, 599 (2012).

in foreign affairs.”⁵⁷ Just as Meeker argued for President Johnson that the practice of the political branches alters their powers, every OLC opinion on unilateral Presidential deployments since Vietnam has included the added gloss theory.⁵⁸

2. *The War Powers Resolution*

Following the Vietnam War, in order to “fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities,” Congress passed the War Powers Resolution (“WPR”) in 1973.⁵⁹ The WPR acts as a Congressional hurdle which Presidents are supposed to clear before deploying any military forces abroad in certain circumstances.⁶⁰ One of those circumstances discussed during the Senate hearings on the proposed War Powers Resolution was “humanitarian missions.”⁶¹ Senator Barry Goldwater asked his colleagues during the hearings whether “humanitarian missions” were covered by the WPR’s requirements.⁶² Senator Jack Javits, one of the principal sponsors of the bill, replied that “[i]f such missions involve the Armed Forces of the United States in hostilities or in situations where their imminent involvement is clearly indicated by the circumstances, the war powers bill does indeed and quite properly apply.”⁶³ Thus, the WPR’s requirements were contemplated to be

57. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995) (citing HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 70–71 (1990)). See also, Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 848–54 (1994); Hutchinson, *supra* note 56, at 615.

58. See, e.g., Proposed Deployment of United States Armed Forces into Bosnia, *supra* note 57. One important note is that the view that *Youngstown* controls national security evaluations on the Separation of Powers is contested. For instance, a proponent of Presidential power could argue that *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), controls national security questions and *Youngstown* does not apply. For arguments over which of six permutations of the *Youngstown* and *Curtiss-Wright* views controls, see Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 12 (2000).

59. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(a) (2006)).

60. *Id.*

61. 119 Cong. Rec. 25051 (1973) (statement of Sen. Barry Goldwater).

62. *Id.*

63. 119 Cong. Rec. 25054 (daily ed. Jul. 20, 1973) (statement of Sen. Jacob K. Javits).

required for any deployment of U.S. military forces on a humanitarian mission where hostilities may be involved.

Under the WPR, as required by 50 U.S.C. § 1541, the President may “introduce United States Armed Forces into hostilities . . . pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”⁶⁴ However, subsequent Presidential administrations and Congresses have both agreed that these three categories are not exclusive, and the President may have authority to introduce U.S. armed forces into hostilities outside of these situations.⁶⁵ The WPR continues in § 1542 to require that

[t]he 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, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.”⁶⁶

If within sixty calendar days of the start of hostilities Congress has not authorized a deployment of military force, the President must withdraw troops.⁶⁷ But by giving the President a sixty-day window to order a deployment before Congressional authorization is required, the WPR implicitly recognizes the President’s power to unilaterally engage forces abroad for up to the initial sixty days.⁶⁸ As Presidential administrations have argued since the WPR became law, the WPR’s “structure . . . recognizes and presupposes the existence of unilateral presidential authority

64. 50 U.S.C. § 1541(c).

65. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 (1994).

66. 50 U.S.C. §§ 1542–43 (2006).

67. 50 U.S.C. § 1544(b) (2006). The sixty-day window can be extended to ninety days pursuant to a Presidential request. *Id.*

68. *See, e.g.*, Overview of the War Powers Resolution, 8 Op. O.L.C. 271 (1984) (Grenada); Proposed Deployment of U.S. Armed Forces into Bosnia, *supra* note 57 (Bosnia); Authority to Use U.S. Military Forces in Somalia, 16 Op. O.L.C. 6 (1992) (Somalia).

to deploy armed forces' into hostilities or circumstances presenting an imminent risk of hostilities."⁶⁹

B. LIBYA AND THE OBAMA ADMINISTRATION'S LEGAL FRAMEWORK

The Meeker view on Presidential powers and the WPR's constraints, set the baseline for modern Executive war powers. For subsequent unilateral deployments, under the theory that past practices between the political branches in national security affairs defines the political branches respective powers, according to the OLC, the framework for deciding whether a unilateral Presidential deployment of troops abroad is legally justified or not:

turns on two questions: first, whether United States operations [abroad] would serve sufficiently important national interests to permit the President's action as Commander in Chief and Chief Executive and pursuant to his authority to conduct U.S. foreign relations; and second, whether the military operations that the President anticipated ordering would be sufficiently extensive in "nature, scope, and duration" to constitute a "war" requiring prior specific congressional approval under the Declaration of War Clause.⁷⁰

1. *Does the Nature, Scope, and Duration of a Conflict Rise to the Level of Hostilities?*

The second prong of the test examines the scope, nature and duration of a conflict, asking whether a deployment of military force amounts to "hostilities" under the WPR such that it triggers the requirement for Congressional authorization. Analyzing a trigger is critical here because since the passage of the WPR, both Congress and the President have stated that not every use or deployment of military forces rises to the level of hostilities covered

69. Libya Memo, *supra* note 2, at 8 (citing Deployment of United States Armed Forces into Haiti, *supra* note 65).

70. Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Att'y General, Authority to Use Military Force in Libya 10 (Apr. 1, 2011).

by the Resolution.⁷¹ Immediately following passage of the WPR, a 1975 Executive Branch opinion on the definition of hostilities said that “hostilities” do not include situations where the:

nature of the mission is limited . . . situations that do not “involve the full military engagements with which the Resolution is primarily concerned”; where the exposure of U.S. forces is limited . . . [or] involving “sporadic military or paramilitary attacks on our armed forces” in which the overall threat faced by our military is low; and where the risk of escalation is therefore limited.⁷²

Similarly, according to a 1984 OLC opinion, as early as the Ford Administration the Executive Branch “took the position that ‘hostilities’ meant a situation in which units of our armed forces are ‘actively engaged in exchanges of fire.’”⁷³ So from the time the WPR became law, the Executive Branch has attempted to carve out an exception for deployments that do not meet the definition of hostilities under the WPR, and thus, do not require approval from Congress.

Indeed, since the enactment of the WPR, the Executive Branch has argued that various unilateral Presidential deployments have not risen to the WPR threshold of hostilities. For example, in 1994 the Executive Branch argued that the WPR was only meant to capture “major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use troops to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.”⁷⁴ Therefore the OLC argued that a President had the power to deploy 20,000 peacekeepers for a limited duration of time to Haiti since the risk of armed conflict was low.⁷⁵ Discussing the Bosnia engagement in 1995, the OLC stated that President Clinton’s unilateral deployment of forces and assets were Constitutional because the “deployment is intended to be a limited mission . . . [it] is reasonably possible that little or no re-

71. See, e.g., Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, *supra* note 44.

72. Libya Memo, *supra* note 2, at 14.

73. Overview of the War Powers Resolution, *supra* note 68.

74. Deployment of United States Armed Forces into Haiti, *supra* note 65, at 176.

75. *Id.*

sistance to the deployment will occur . . . [and] it is not likely that the United States will find itself involved in extensive or sustained hostilities.”⁷⁶ Also, the Bosnia mission did not include “significant bodies of military personnel.”⁷⁷ Congress apparently agreed with these views, because it did not oppose these unilateral deployments, and under *Youngstown*, acquiescence signals agreement.⁷⁸ Additionally, the judicial branch has accepted the Executive’s view on what constitutes “hostilities”: in *Dellums v. Bush*, the District Court for the District of Columbia held that congressional authorization for deployments was only required where “the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat.”⁷⁹

Since a “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidences the existence of broad constitutional power’” in this area of law, the proposition that minor engagements do not trigger the WPR is now a quasi-constitutional custom — meaning that even if the drafters of the WPR did not imagine Presidential deployments of thousands of troops without Congressional authorization, the President now has the constitutional authority to do this.⁸⁰ Thus in Libya, the Obama Administration reiterated the distinction between full military encounters and more constrained operations, stating that “intermittent military engagements” did not require Congressional approval, and the definition of hostilities “will be satisfied only by prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.”⁸¹ Because the Libyan intervention was limited to an air campaign, the risk of U.S. forces being injured or killed was low. Similarly, the risk of escalation of the campaign would also be minimal, and the scope of U.S. involvement limited to en-

76. Proposed Deployment of United States Armed Forces into Bosnia, *supra* note 57.

77. *Id.*

78. See Corn, *supra* note 55, at 1160–61.

79. Brief for Plaintiffs-Appellants, *Campbell v. Clinton*, No. 99-5214, 1999 WL 34834287 (D.C. Cir. June 29, 1999).

80. Memorandum Opinion, *supra* note 70, at 5.

81. Libya Hearing, *supra* note 2, at 14 (statement of Harold Koh, Legal Advisor, U.S. Dept of State); Authority to Use Military Force in Libya, 35 Op. O.L.C. 8 (2011).

forcing a no-fly zone and protecting civilians.⁸² Therefore, according to the Obama administration, this engagement did not reach the level of action requisite to implicate hostilities under the WPR.⁸³

2. *Is a U.S. Interest Implicated?*

In the aftermath of Vietnam, Presidents continued to rely on the theory that U.S. lives, property, or treaty obligations were the only U.S. national interests that gave rise to a President having the power to unilaterally deploy force. In 1975, the Executive Branch interpreted actions not requiring Congressional authorization as *only* including: (1) rescuing Americans; (2) rescuing foreign nationals where doing so facilitates the rescue of Americans; (3) protecting U.S. Embassies and legations; (4) suppressing civil insurrection in the United States; (5) implementing and administering the terms of an armistice or cease fire designed to terminate hostilities involving the United States; and (6) carrying out the terms of security commitments contained in treaties.⁸⁴

Specific instances of unilateral deployments in this period included the 1976 evacuation of U.S. citizens by the military from Lebanon, which was premised on citizens' physical safety.⁸⁵ In response to the Iran Hostage Crisis in 1979, the OLC found that the President could take unilateral actions against Iran because "[i]t is well established that the President has the constitutional power as Chief Executive and Commander-in-Chief to protect the lives and property of Americans abroad."⁸⁶ In a 1980 memo for the President, the OLC again stated that "Presidents have repeatedly employed troops abroad in defense of American lives and property."⁸⁷ In 1981, the unilateral deployment of military advisors in a non-combat role in El-Salvador to advise government forces against Marxist rebels was premised on a threat to U.S.

82. Authority to Use Military Force in Libya, *supra* note 81, at 13.

83. *Id.*

84. *Hearings on War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, Before the House Comm. on International Relations*, 94th Cong., 1st. Sess. (Part VI) 90 (1975).

85. Overview of the War Powers Resolution, *supra* note 68.

86. Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, *supra* note 44, at 187.

87. *Id.*

national security and economic interests in Central America.⁸⁸ These same interests were relied on for unilateral Presidential deployments up through the Bush Administration and the attacks of September 11, 2001. In 2002, John Yoo, writing for the Bush Administration, argued that “[t]he Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 attacks, but who, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas.”⁸⁹

3. *Humanitarian Deployments*

It is thus settled practice, given repeated Congressional acquiescence, that unilateral Executive deployments to protect U.S. lives, property, and treaty obligations are constitutional and permitted under the WPR, so long as the hostilities threshold is not met. However, outside of the standard legal justification for unilateral Executive deployments, there have also been statements in more recent OLC opinions that suggest the President has the power to deploy troops for any U.S. “interest,” which could include humanitarian reasons. One such argument came about in relation to U.S. military actions in Somalia in 1992.

At the beginning of its legal analysis on the Somalian deployment, the OLC concluded “that the President can reasonably determine that the proposed mission is necessary to protect the American citizens already in Somalia,” which satisfies a traditional interest giving the President power to deploy troops without Congressional authorization.⁹⁰ Additionally, the OLC found implicit Congressional authorization in the Horn of Africa Recovery and Food Security Act.⁹¹ But, Attorney General William P. Barr went further in his analysis by stating that:

88. Overview of the War Powers Resolution, *supra* note 68; Maj. Paul P. Cale, *The United States Military Advisory Group in El Salvador, 1979–1992*, SMALL WARS J. (1996).

89. Robert J. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL’Y 488, 516–17 (2002).

90. See Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 16 Op. O.L.C. 8, 19 (1992).

91. *Id.* at 13.

I further conclude that [the President has] the authority to use [U.S.] military personnel *to protect Somalians and other foreign nationals in Somalia*. You have authority to commit troops overseas without specific prior Congressional approval “on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.” 40 Op. Att’y Gen. 58, 62 (1941) (Jackson, A.G.). See also 53 Dep’t St. Bull. 20 (1965) (President Lyndon Johnson ordered the United States military to intervene in the Dominican Republic “to preserve the lives of American citizens and citizens of a good many other nations . . .”).⁹²

On its face, the quoted precedent from the 1940 and 1965 deployments seems to suggest that two past unilateral Executive deployments also endorsed humanitarian interventions. However, neither of these cited precedents were actually premised on humanitarian purposes. First the 1940 Memo from then-Attorney General Robert Jackson said that while the Lend-Lease Act could serve as Congressional authorization for the President to authorize American training of British pilots, the President’s inherent Commander-in-Chief powers also allowed him to aid the training of the military of a friendly state against an enemy state.⁹³ Jackson continued that the President’s “authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the *safety of the country*.”⁹⁴

Regardless of the selective use of precedent, when the OLC followed up on Attorney General Barr’s argument in its own legal opinion, it stated that “[n]or is the President’s power strictly limited to the protection of American citizens in Somalia,” because interventions in 1900 in China and 1965 in the Dominican Republic “extended to the protection of foreign nationals . . . and other non-United States citizens.”⁹⁵ Yet this analysis was as flawed as Attorney General Barr’s argument because President McKinley’s intervention in China during the Boxer Rebellion was

92. Auth. to Use United States Military Forces in Somalia, *supra* note 68, at 6 (emphasis added).

93. Training of British Flying Students in the United States, 40 Op. Att’y Gen. 58, 1941 WL 1878, at 59 (1941).

94. *Id.* at 62 (emphasis added).

95. Authority to Use U.S. Military Forces in Somalia, *supra* note 68, at 11.

done to protect U.S. citizens threatened by the Boxers.⁹⁶ But, in an area of the law where custom shapes the distribution of power between the political branches, since Congress acquiesced to the Somalian mission, this operation was a foot in the door for Presidents to claim that humanitarian interests justified a unilateral Presidential deployment of military force.

The next step in legitimizing humanitarian justifications for unilateral deployments came in 1994. In an opinion on the unilateral Executive deployment of U.S. forces to Haiti, Assistant Attorney General Walter Dellinger stated that one of the characteristics supporting the President's power to deploy troops in this situation was that "war does not exist" in situations where "United States troops are deployed at the invitation of a fully legitimate government."⁹⁷ While the Haiti intervention was also premised under other national security interests — including defending America's borders and enforcing its treaty obligations — using Dellinger's "invitation" justification, it follows that if a host government invites the U.S. to intervene for a purely humanitarian mission, then the President could unilaterally deploy troops since this would not be a "war."⁹⁸

In 1995, the Clinton Administration, relying on the precedent of its 1994 Haitian intervention, argued that the president's "authority has long been recognized as extending to the dispatch of armed forces outside of the United States . . . for the purpose of protecting American lives or property or *American interests*."⁹⁹ Here, the bifurcation of "American interests" from the traditional justification for unilateral Executive interventions is important, because the President defines what the national interest is. The Bush Administration relied on this same logic in 2004, citing the 1995 Bosnia Opinion's statement that "[t]he President also may

96. *Ready to Send Troops*, N.Y. TRIBUNE (June 17, 1900), available at <http://chroniclingamerica.loc.gov/lccn/sn83030214/1900-06-17/ed-1/seq-1/?words=READY+SEND+TROOPS>; *Walter LaFeber: The Boxer Rebellion*, PBS, http://www.pbs.org/wgbh/amex/1900/filmmore/reference/interview/lafeber_boxerrebellion.html.

97. Deployment of United States Armed Forces into Haiti, *supra* note 65.

98. *Id.*

99. Training of British Flying Students in the United States, *supra* note 93, at 62 (emphasis added).

determine that [a] deployment is necessary to protect American foreign policy interests.”¹⁰⁰

Thus the Executive’s view of what interests are necessary for a unilateral Presidential deployment of force in the 1992, 1995, and 2004 OLC opinions moved away from the traditional view of being solely American lives, property, or treaty obligations to including both humanitarian concerns and blanket assertions of “American interests.” As former Secretary of Defense Leon Panetta has said, the President has the power to unilaterally deploy the military to “protect our national interests.”¹⁰¹ What exactly these “national interests” include, Panetta could not give a specific answer to, because it is up to the President to decide.

4. *Libya*

In its legal analysis of the 2011 Libyan intervention, the OLC argued that “the President has the power to commit United States troops abroad [and] to “take military action for the purpose of protecting important national interests.”¹⁰² The important national interests given were promoting regional stability by (1) preventing a humanitarian crisis and (2) encouraging other democratic uprisings, while also maintaining the credibility of the U.N. Security Council.¹⁰³ While the credibility of the Security Council can be tied to American treaty commitments, the humanitarian portion of the regional stability interest is similar to the reasoning given in the 1992 Somalia OLC opinion.¹⁰⁴

Humanitarian interests have now been cited as a national interest in OLC justifications for unilateral Executive deployment powers multiple times in recent years.¹⁰⁵ Though such assertions have always been given alongside other traditional interests at

100. Memorandum Opinion from Jack L. Goldsmith III, Assistant Att’y Gen., Office of Legal Counsel, to the Counsel for the President, Deployment of United States Armed Forces to Haiti 3 (Mar. 17, 2004).

101. Matt Cover, *Panetta: Obama Can Unilaterally Use Military to Protect ‘National Interests’*, CNS NEWS (June 13, 2011, 9:53 AM), <http://www.cnsnews.com/news/article/panetta-obama-can-unilaterally-use-military-protect-national-interests>.

102. Libya Memo, *supra* note 2, at 6.

103. *Id.* at 10.

104. Compare Libya Memo, *supra* note 2, at 10–12, with Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, *supra* note 90, at 19.

105. See, e.g., Goldsmith, *supra* note 100 (discussing humanitarian priorities and intervention).

stake in unilateral deployments, these arguments create a “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties” of citing humanitarian issues as a national interest.¹⁰⁶ Thus, humanitarian interventions have become a legitimate national interest which can justify unilateral military deployments by the President, since Congress has repeatedly acquiesced to such claims.¹⁰⁷ Given the evolution of what interests provide the President the power to conduct unilateral deployments, is it possible for the Executive to label R2P a national interest which enable the President to unilaterally deploy military force?

C. PURE R2P MISSIONS

The President likely has the power to deploy U.S. military forces on R2P missions where no economic interests, treaty obligations, or American lives are at stake. Looking at the first prong of the unilateral deployment framework — that an interest is implicated — three circumstances prove that R2P is a legitimate national interest. First, President Obama called R2P a U.S. national interest, and past Executive justifications have, as discussed above, stated that the President can deploy military force for any national interest.¹⁰⁸ Second, humanitarian purposes, having been cited since 1992 as interests included in unilateral Executive deployments, have two decades of historical gloss to support their inclusion as a U.S. national interest which provide the President with a unilateral war power.¹⁰⁹ Third, recent history suggests that if the President cites R2P as the sole national interest at stake in a unilateral Presidential deployment, Congress is not likely to prevent him or her from deploying those forces. Indeed, Congress has done nothing since the WPR to try and

106. Deployment of United States Armed Forces into Haiti, *supra* note 74, at 175.

107. See Authority to Use Military Force in Libya, *supra* note 70. See also, Bruce Ackerman & Oona Hathaway, *The Death of the War Powers Act*, WASHINGTON POST, May 17, 2011, available at http://www.washingtonpost.com/opinions/death-of-the-war-powers-act/2011/05/17/AF3Jh35G_story.html.

108. See *infra* Part III.B.

109. See *supra* Part III.A.

stem the accumulation of power in the Executive to unilaterally deploy troops at the President's will for any interest he cites.¹¹⁰

For the second prong of the unilateral deployment legal framework, it is doubtful that a R2P deployment would require large enough deployments of U.S. military forces to trigger a constitutional war. The mission in Haiti required 20,000 troops, while Kosovo involved bombings that "severely damaged Yugoslavia's military and industrial capacity" and inflicted significant casualties and hardships on Yugoslavia's civilian population.¹¹¹ Yet these events did not rise to the level of hostilities under the WPR, so it is entirely possible that a limited R2P deployment for a short duration would similarly not trigger hostilities under the modern view of the WPR, and thus allow the President to unilaterally deploy military forces. As an example of how large a peacekeeping force on a R2P mission may be, the African Union Mission in Somalia, which is charged with stopping the civil war in Somalia, consists of only 17,731 troops.¹¹²

Thus both prongs of the unilateral deployment power framework are met for R2P missions, empowering the President to deploy U.S. forces on purely humanitarian missions. However, during hearings over the Libyan intervention, not all members of Congress signaled a willingness to acquiesce and let the President unilaterally deploy troops for humanitarian reasons. Senator Webb stated that the:

historically acceptable conditions under which a President can unilaterally order the military into action are clear. If our country or our military forces are attacked; if an attack, including one by international terrorists, is imminent and must be pre-empted; if treaty commitments specifically compel us to respond to attacks on our allies; if American citizens are detained or threatened; if our sea lanes are interrupted, then — and only then — should the President or-

110. Eric Posner, *Why Congress Played No Role in the Libya Intervention*, VOLOKH CONSPIRACY (Mar. 21, 2011, 8:22 AM), <http://www.volokh.com/2011/03/21/why-congress-played-no-role-in-the-libya-intervention/>.

111. Brief for Plaintiffs-Appellants, *Campbell v. Clinton*, No. 99-5214, 1999 WL 34834287 (D.C. Cir. June 29, 1999).

112. Patrick Worsnip, *U.N. Council Approves Increase in AU Somalia Force*, REUTERS (Feb. 22, 2012, 12:53 PM), <http://www.reuters.com/article/2012/02/22/ozatp-somalia-un-idAFJ0E81L0CF20120222>.

der the use of military force without first gaining the approval of the Congress.¹¹³

Senator Corker went on the record with similar views to Senator Webb during Harold Koh's testimony over the Libyan intervention.¹¹⁴ Nine other members of Congress also stated that deployments for humanitarian purposes required Congressional authorization.¹¹⁵

Nevertheless, the voices of a minority of the 535 members of the Congress who oppose the President's view of the balance of power between the branches should not be viewed as resistance from the Congress as a whole. Congress allowed the Libyan intervention to proceed, and did not push back against the view that humanitarian interventions are a U.S. national interest which gives the President unilateral deployment power — so the Libya deployment precedent added a gloss on the power which the President possesses to deploy U.S. military forces. Senator Webb seemed to realize this when he said the

logic used by this Administration to intervene in Libya on the basis . . . of 'humanitarian intervention' . . . and the precedent it has set, now requires us to accept one of two uncomfortable alternatives. Either we as a legislative body must reject this . . . or we must accept a redefinition of the very precepts upon which this government was founded.¹¹⁶

Without formulating any meaningful rejection of the President's course of action, Congress is accepting a "redefinition" of what interests allow the President to unilaterally deploy the military.

113. 158 Cong. Rec. S2989,2999 (daily ed. May 9, 2012) (statement of Sen. James Webb).

114. Libya Hearing, *supra* note 2, at 22–25 (statement of Sen. Robert Corker).

115. Ilya Somin, *Does U.S. Military Action Against Gaddafi Require Congressional Authorization?*, VOLOKH CONSPIRACY (Mar. 20, 2011, 5:36 PM), <http://www.volokh.com/2011/03/20/does-the-libya-intervention-require-congressional-authorization/>.

116. 158 Cong. Rec. S2989,2999 (daily ed. May 9, 2012) (statement of Sen. James Webb).

IV. INHERENT PROBLEMS FOLLOWING FROM R2P MISSIONS

But if the President is now empowered to unilaterally deploy military force on R2P missions, a variety of problems may arise due to the second and third order effects of such missions. Some of the problems include using limited resources for R2P missions in an age of austerity, the impact R2P missions will have on the military, and becoming enmeshed in struggles where the long term impacts are unknown. While there are certainly other problems that U.S. involvement in R2P missions could create, this section is not intended to be an all-encompassing survey of potential future problems. Rather, it is meant to serve as a brief warning to illustrate that Congress should stop acquiescing to Presidential unilateral deployments, and play a role in determining if such deployments are worth their costs.

A. LIMITED RESOURCES IN AN AGE OF AUSTERITY

The first problem which R2P missions could create is the cost of such missions. We live in an era of large federal deficits and national debt,¹¹⁷ and in response to these pressing fiscal issues, members of government have called for cuts to federal spending.¹¹⁸ One area that has already seen cuts, and faces more reductions, is the defense budget.¹¹⁹ This past year, in response to these anticipated constraints, former Secretary of Defense Leon Panetta ordered military commanders to slash \$52 billion from their operating budgets on January 11, 2013.¹²⁰ Yet while defense budgets are reduced, the proportion of defense spending that will go towards healthcare and veterans benefits is set to

117. See e.g., *Federal Deficit Cut, But Tops \$1 Trillion for Fourth Year*, NBC NEWS WIRE SERVICES (Oct. 13, 2012, 5:18 AM), <http://www.nbcnews.com/business/federal-deficit-cut-tops-1-trillion-fourth-year-1C6445038#>; U.S. DEBT CLOCK, <http://www.usdebtclock.org/> (last visited Mar. 21, 2013).

118. CONGRESS OF THE UNITED STATES CONGRESSIONAL BUDGET OFFICE, CHOICES FOR DEFICIT REDUCTION (2012).

119. MICHAEL O'HANLON, RIGHT-SIZING DEFENSE BUDGET CUTS, BROOKINGS INST. (2013); Brian Slattery, *Military Readiness at a Tipping Point*, HERITAGE FOUND. (Jan. 17, 2013, 10:42 AM), <http://blog.heritage.org/2013/01/17/military-readiness-at-a-tipping-point/>.

120. Stephen Feller, *Panetta Orders \$52B in Cuts to Defense Budget*, NEWSMAX (Jan. 24, 2013, 9:46 PM), <http://www.newsmax.com/Newsfront/panetta-cuts-defense-budget/2013/01/10/id/470934>.

increase steadily over the coming decades.¹²¹ So to balance spending priorities, a recent RAND study suggests cutting back the military's operations tempo abroad.¹²²

Additionally, calls to cut the size of the military have been made. Michael O'Hanlon of the Brookings Institution recently proposed a reduction in the number of active duty military personnel by 100,000 service members.¹²³ A 2011 RAND study similarly called for a reduction to the Army's overall force structure (active and reserve components), as did the 2010 Sustainable Defense Task Force Report, and a CATO Institute report suggested a dramatic reduction in the size of the active duty Army to only 360,000 troops.¹²⁴ The Army is already set to fall over five years to 490,000 service member from a peak of 570,000, and the Marines are to drop to 182,000 from 202,000 service members, but further cuts will be required according to testimony Secretary of Defense Chuck Hagel delivered this summer.¹²⁵

Yet in the face of calls for a reduced operations tempo and smaller force structure, the global problem of failed and failing states is not going away.¹²⁶ So there will be a continuing need for R2P missions, which will have to be conducted by a smaller military operating on a smaller budget. For instance, with cuts and an ongoing war in Afghanistan, there are calls for America to intervene in Syria in the name of R2P.¹²⁷ One estimate put the size of the Syrian military at 280,000 soldiers, so any R2P intervention there would require a force larger than the one in Afghani-

121. OFFICE OF THE UNDERSECRETARY OF DEFENSE (COMPTROLLER), NATIONAL DEFENSE BUDGET ESTIMATES: FOR FY 2013 68 (2013), available at http://comptroller.defense.gov/defbudget/fy2013/FY13_Green_Book.pdf.

122. Stuart E. Johnson, Irv Blickstein, *Big Defense Cuts Are Coming, Regardless of the Fiscal Cliff*, RAND (Dec. 28, 2012), <http://www.rand.org/blog/2012/12/big-defense-cuts-are-coming-regardless-of-the-fiscal.html>.

123. O'Hanlon, *supra* note 119.

124. CARTER C. PRICE ET AL., WHERE MIGHT THE U.S. ARMY BUDGET GO, AND HOW MIGHT IT GET THERE? 17 (2011); SUSTAINABLE DEFENSE TASK FORCE, DEBTS, DEFICITS, AND DEFENSE, A WAY FORWARD VII (2010); BENJAMIN FREIDMAN AND CHRISTOPHER PREBLE, CATO INSTITUTE, A PLAN TO CUT MILITARY SPENDING 2 (2010).

125. Thom Shanker, *Hagel Gives Dire Assessment of Choices He Expects Cuts to Force on Pentagon*, N.Y. TIMES, July 31, 2013, at A11.

126. U.S. JOINT FORCES COMMAND, CHALLENGES AND IMPLICATIONS FOR THE FUTURE JOINT FORCE 35 (2008).

127. Steven A. Cook, *It's Time to Think Seriously About Intervening in Syria*, THE ATLANTIC, Jan. 17, 2012, available at <http://www.theatlantic.com/international/archive/2012/01/its-time-to-think-seriously-about-intervening-in-syria/251468>.

stan currently.¹²⁸ With a smaller military and a continued need for R2P missions, soldiers would face repeated deployments. But the last decade of repeated deployments have led to a drop in the military's ability to retain its best junior officers; a rise in military suicides;¹²⁹ significant family stress and uncertainty; and a number of other negative consequences.¹³⁰

B. JUDGING SECOND AND THIRD ORDER EFFECTS

The biggest inherent problem in R2P missions is that it is exceedingly hard to judge what the second and third order effects of any deployment will be. Executive decision makers are notoriously unable to judge what the outcome of an intervention will be. For example, in Afghanistan the CIA armed the forerunners of Al Qaeda; in Somalia the U.S. intervention led to "Black Hawk Down"; Iraq turned into a raging insurgency rather than an instant democracy; and now there is a rise in violence in the Sahel due to America's Libyan intervention.¹³¹ According to former CIA Director Michael Hayden, the Obama Administration:

went into Libya for reasons that seemed very powerful for some people at the time, almost all of them humanitarian, perhaps without a true or deep appreciation for what the secondary and tertiary effects of overthrowing Gadhafi would be. . . . This was always the story we saw in those cell phone videos of oppressed and oppressor, but there were other stories going on too, other narratives — East vs. West in Libya, tribal disputes in Libya, eastern Libya being home

128. Khaled Yacoub Oweis, *Syria's Army Weakened by Growing Desertions*, REUTERS (Jan. 13, 2013, 6:42 PM) <http://www.reuters.com/article/2012/01/13/us-syria-defections-idUSTRE80C2IV20120113>.

129. See, e.g., SAYCE FALK & SASHA ROGERS, JUNIOR MILITARY OFFICER RETENTION: CHALLENGES AND OPPORTUNITIES (2011) (Policy Analysis Exercise, Harvard Kennedy School of Government), available at http://www.foreignpolicy.com/files/fp_uploaded_documents/Falk-Rogers%20PAE%2003-11%20vF.pdf; Augusto Ruiz, *Suicide in the Military*, CENTER FOR DEPLOYMENT PSYCHOLOGY, <http://deploymentpsych.org/topics-disorders/suicide> (last visited Oct. 12, 2013).

130. JAMES HOSEK ET AL., HOW DEPLOYMENTS AFFECT SERVICEMEMBERS XVI (2006).

131. Benjamin Valentino, *The True Costs of Humanitarian Intervention: The Hard Truth About a Noble Notion*, FOREIGN AFF., Nov./Dec. 2011, at 60; Senator Ron Paul, *The Libya fiasco and the folly of intervention*, THE HILL (Sept. 14, 2012, 3:27 PM), <http://thehill.com/blogs/congress-blog/foreign-policy/249545-the-libya-fiasco-and-the-folly-of-intervention>.

of the Islamic Libyan fighting group. . . . All these subplots were always out there and once you shatter the old society, these subplots become far more powerful and now we are seeing the results of that: Loss of control, portable air missiles, weapons from Libya being used to grab the northern half of Mali away from the Malian government, which is a good friend of the U.S.¹³²

Hayden is not the only person to tie the Libyan intervention to the current unrest in Mali, or to the Benghazi attacks.¹³³

The radicalization of the Syrian civil war is further evidence of the unintended consequences of U.S. interventions overseas. While the Syrian opposition may have begun as a Syrian movement, the opposition is now dominated by foreign fighters, including Iraqis who fought as part of the Islamic State of Iraq and Libyans from Ansar al-Sharia.¹³⁴ These fighters learned their trade-craft fighting against American soldiers, and are now part of an opposition which any R2P mission would end up helping.

Why would American leaders be unable to see these second and third order effects of interventions? Perhaps this is because whenever outside, uninvolved states embroil themselves in internecine conflicts, they fall into three traps:

First, the leadership that replaces the former regime finds that it cannot rule because it has not been able to mobilize the support to win on its own, and, as in Iraq, civil strife follows the liberating invasion. The new leadership finds itself in the second trap when it can only remain in power thanks to ongoing foreign support. As a result, it renders the coun-

132. Jack Kenny, *Intervention in Libya Led to Attack on U.S. Consulate, Ex-CIA Chief Says*, THE NEW AM. (Sep. 13, 2012, 2:00 PM), <http://www.thenewamerican.com/usnews/foreign-policy/item/12835-intervention-in-libya-led-to-attack-on-us-consulate-ex-cia-chief-says>.

133. Patrick J. Buchanan, *The Mali Blowback*, AM. CONSERVATIVE (Jan. 18, 2013), <http://www.theamericanconservative.com/articles/the-mali-blowback/>; Matthew Feeney, *America's Libyan Intervention is Now Fueling an African Humanitarian Crisis*, POLICYMIC (Mar. 17 2012), <http://www.policymic.com/articles/5555/america-s-libyan-intervention-is-now-fueling-an-african-humanitarian-crisis>.

134. Bill Gertz, *U.S.: Al-Qaeda Linked Group Behind Benghazi Attack Trains Jihadists for Syrian Rebel Groups*, WASHINGTON FREE BEACON (Aug. 28, 2013, 5:00 AM), <http://freebeacon.com/u-s-al-qaeda-linked-group-behind-benghazi-attack-trains-jihadists-for-syrian-rebel-groups/>; Liz Sly, *Foreign Extremists' Footprint in Syria Growing*, WASHINGTON POST, Oct. 1, 2013, at A16.

try a client state rather than a free nation. The third trap occurs when the leadership learns that it can only govern as the previous dictator did — by force. The liberating invaders are thus responsible not only for the monetary and human costs of the invasion but for having produced a civil war, a colony, or one more tyranny with a new ideological label attached.¹³⁵

While the problems described in this section are certainly not the only challenges posed by R2P interventions, they serve as a warning for what a future of unilateral R2P interventions could entail. So how could these problems be averted, while still giving the government the ability to deploy military force if it is truly needed to defend America or its interests? One possible solution is to bring the other two branches of the federal government into decision-making on R2P deployments, to enable them to serve as a check on the President which validates that such deployments are worth their cost in U.S. blood and treasure.

V. A PROPOSED SOLUTION TO UNILATERAL R2P DEPLOYMENTS

In order to better weigh whether a R2P mission is worth the potential cost, the President's ability to unilaterally deploy the military on R2P missions must be constrained to give the Legislative Branch a voice on such deployments. Not every R2P intervention is bad — perhaps U.S. intervention in Rwanda could have saved hundreds of thousands of lives. But every R2P situation will be different, and will present unique scenarios and risks. So rather than giving total power to one person and his advisors to commit the U.S. to intervention in another sovereign state's affairs, Congress — the branch whose members are elected to directly represent the people — should serve as a check over whether American lives should be risked for R2P deployments.

As discussed in Section III, the extent of the political branches powers in national security and foreign affairs are decided by custom and historical practice.¹³⁶ If Congress were to pass a bill restricting the President's ability to unilaterally deploy military

135. Doyle, *supra* note 18.

136. See *infra* Part III.A.

force on R2P missions, it would effectively block this power, because “as a matter of constitutional law, the President and the Congress share authority to respond to national security issues. The President does not possess exclusive authority to act, and Congress has the constitutional right to participate, in the national security process.”¹³⁷ Yet Congress has not passed such a bill and it has increasingly been distanced from the national security decision-making process, perhaps because of “(1) the executive’s incentive and ability to act quickly and decisively; (2) Congress’s own acquiescence due to poorly drafted statutes, inadequate legislative tools, and a lack of political will; and (3) the judiciary’s acquiescence to unilateral assertions of presidential power.”¹³⁸

Thus to serve as a check on deployments for R2P missions, Congress should exercise its national security powers and pass a bill prohibiting the President from unilaterally deploying military forces on R2P missions. In May 2012, in response to the Libyan intervention, Senator James Webb introduced one such bill, his “Humanitarian Intervention” Bill. The Bill would have required the President to obtain congressional approval before using military force for humanitarian or peacekeeping operations, while also requiring debate on such a request begin within days, and a vote “in a timely manner.”¹³⁹ Webb introduced this bill because “[w]e would be facing the exact same constitutional challenges [over humanitarian interventions] no matter the party of the president. In fact, unless we resolve this matter, there is no doubt that we someday will.”¹⁴⁰

A bill similar to Webb’s would act as a check on hasty Executive decision-making by giving Congress a voice, yet would also allow for a speedy U.S. response if needed under its timely debate procedures. This is the type of solution Congress should enact. Congress is given a role under both the Constitution and the WPR in authorizing humanitarian interventions, as Senator

137. Todd D. Peterson, *The Law and Politics of Shared National Security Power—A Review of the National Security Constitution: Sharing Power After the Iran-Contra Affair* by Hongju Koh, 59 GEO. WASH. L. REV. 747, 748–49 (1991).

138. *Id.*

139. Carlos Muniz, *Senate Bill Looks to Close ‘Loophole’ in White House’s War Powers*, THE HILL (May 9, 2012), <http://thehill.com/blogs/floor-action/floor-speeches/226455-senate-bill-looks-to-close-loophole-in-white-hous.es-war-powers-#ixzz2Hh5djeDf>.

140. *Id.*

Javits explicitly stated during debate over the WPR, and passing legislation similar to the Webb bill would enable Congress to fulfill that role. The added check of Congress also helps to avoid the problems discussed in Part IV by interjecting a fresh perspective from both parties into a decision-making process that, if left to the Executive alone, could be overtaken by the singular view of the President and the peculiarities of that office.

But even if Congress passed legislation similar to Webb's Humanitarian Intervention Bill, to ensure an actual check on the President, Courts must be willing to uphold and enforce such legislation. Yet, courts often duck war powers questions under various justiciability and standing doctrines.¹⁴¹ For example, during President Clinton's unilateral intervention in Kosovo, members of Congress brought suit claiming that when President Clinton's deployment of troops extended past the sixty-day window with no authorization from Congress he had violated the WPR.¹⁴² But despite facing a clear violation of the text of the WPR, the court dismissed the suit for lack of standing under the theory that unless a Congress member's voting power has been totally eviscerated, their remedy is to utilize the political process, not the courts.¹⁴³ Recently, a federal district court judge in Washington, D.C., dismissed a similar War Powers violation suit by members of Congress over the Libyan intervention.¹⁴⁴ In *Kucinich v. Obama*, the District Court Judge went so far as to state that "the Court finds it frustrating to expend time and effort adjudicating the re-litigation of [this] settled question[] of law" that a member of Congress lacks standing to challenge a Presidential violation of the WPR.¹⁴⁵ When Senator Lee asked Harold Koh during his Senate testimony over Libya if Congress could maintain a war powers suit over the Libyan intervention in light of modern, judge-made justiciability doctrines, Koh responded "I think it is highly unlikely that it would be justiciable. There was in the Vietnam era a number of famous cases, *Holtzman v. Schlesinger*, where some cases did get into court. But the general pattern of

141. See generally Louis Fisher, *Judicial Review of the War Power*, 35 PRESIDENTIAL STUD. Q. 466 (2005).

142. *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000) (citing the District Court opinion for the same case).

143. *Id.*

144. *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011)

145. *Id.* at 115 n.4.

the case law since then has been that these suits have been dismissed on some preliminary ground.”¹⁴⁶

Therefore, to ensure that any legislation restricting the Executive’s ability to conduct unilateral R2P missions is actually enforced, courts should be willing to adjudicate war and foreign affairs powers issues, especially when they are facial violations of the WPR. As Judge Tatel put it in *Clinton v. Campbell*, judges handle complex constitutional questions all of the time, why should national security questions be any different?¹⁴⁷ Courts are able to tell what war is; they did so in *Bas v. Tingy*, *The Prize Cases*, and various Vietnam War suits.¹⁴⁸ When ruling on these issues, courts are not judging the wisdom of interventions, only their legality, and courts have a responsibility to the people to be the final arbiter of the law.¹⁴⁹ To enable courts to play their role, any humanitarian intervention legislation should include a provision explicitly providing individual Congress members standing to challenge Presidential unilateral deployments. Harold Koh once agreed with these solutions as a proper means to check a President’s national security powers.¹⁵⁰ According to Koh, Congress [should] adopt an omnibus framework statute to give itself greater control over the national security process and national security decisions made under that framework should be “fully subject to judicial review.”¹⁵¹

R2P missions present many possible dangers. While no past unilateral deployment has ever been premised solely on humanitarian interests, due to the evolution of unilateral Presidential deployments and the concomitant acquiescence of Congress to this practice, if the President chose to deploy troops in the name of R2P, he would be legally justified in doing so. Therefore, to ensure that a President does not rashly involve American soldiers in a mission that leads to deadly consequences, Congress should restrain the President’s ability to unilaterally conduct R2P mis-

146. Libya Testimony, *supra* note 2, at 32 (statement of Harold Koh, Legal Advisor, U.S. Dep’t of State) (citing *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973)).

147. *Campbell*, 203 F.3d at 37 (Tatel, J., concurring).

148. *Id.* at 38 (discussing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *The Prize Cases*, 67 U.S. (2 Black) 635, 66 (1862); *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973)).

149. *Id.* at 41.

150. Peterson, *supra* note 137, at 748 (discussing HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990)).

151. KOH, *supra* note 150, at 6, 148. *See also* Peterson, *supra* note 137, at 748.

sions. But in order to ensure a legislative restraint is actually enforced, courts must modify their justiciability doctrines and be willing to weigh in on national security cases, which are no harder to judge or more abstract than other issues courts deal with on a daily basis.