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When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law

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WHEN RESPONSIBILITIES COLLIDE: HUMANITARIAN INTERVENTION, SHARED WAR POWERS, AND THE RULE OF LAW

Dawn Johnsen*

ABSTRACT

The use of military force to respond to a foreign humanitarian crisis raises profound legal questions, especially when force is not authorized by the U.S. Congress or the U.N. Security Council. President Clinton’s use of air strikes in Kosovo, President Obama’s use of air strikes in Libya, and his threat of force following Syrian President Assad’s use of chemical weapons against the Syrian people all responded to powerful humanitarian needs—but serious questions about their legality remain. Drawing upon these case studies, Professor Harold Koh proposes a framework that would find some such interventions lawful, even without congressional or Security Council authorization—and even for periods that exceed the sixty-day limit Congress has imposed through the War Powers Resolution. Professor Koh’s proposal would expand presidential war powers and diminish congressional constraints.

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Relevant to this Article, I served as the Acting Assistant Attorney General (AAG) of the Department of Justice’s Office of Legal Counsel (OLC) (1997–1998) and before that as a Deputy AAG (1993–1996). I am deeply grateful to Marty Lederman, Bill Marshall, and Jeff Powell for helpful comments on this Article. I also thank them and others with whom I served at OLC, for insights and guidance shared in countless conversations over the years. I thank especially, for their outstanding service and example, David Barron, who served as the acting AAG of OLC at the start of the Obama Administration, and Walter Dellinger, AAG of OLC at the start of the Clinton Administration and mentor and inspiration to me and many others. Thanks also to Curtis Bradley (the host) and the other participants in the October 2016 Duke–Yale Roundtable on “President Obama’s War Powers Legacy.” I am grateful as well to my excellent research assistants Kathleen Cullum, Samantha von Ende, Emily Kile, Benjamin Cole, and Marie Forney, and to the impressive Houston Law Review staff, especially Chief Articles Editor Trenton David.
Professor Koh and I agree on many fundamentals: the basic scope of the President's constitutional authority to initiate the use of force, the constitutionality of the sixty-day clock, the government's duty to explain the legal basis for its major actions, and the vital need for U.S. leadership to address humanitarian crises including, in extreme circumstances, the lawful use of military force. This Article contends, however, that Koh's proposed legal standards do not satisfy the U.S. Constitution's framework of shared war powers as implemented by Congress, an analysis aided by application of Justice Robert Jackson's three-zone *Youngstown* framework. Most important, I believe Koh misreads the War Powers Resolution to exempt humanitarian interventions that otherwise clearly would constitute "hostilities." A humanitarian motivation no more exempts a use of force than would a counterterrorism motivation.

This Article concludes by looking beyond the legality of humanitarian interventions to the general standards and processes that guide government lawyers who advise the Executive Branch. During the Obama Administration, extreme partisan obstruction has prevented congressional action on important issues. Unilateral presidential action within the President's authority can be an appropriate response, but not so the calls to loosen standards to allow presidential action of "reasonable" or "plausible" legality. The George W. Bush Administration's excessive assertions of war powers to justify unlawful counterterrorism policies reveal the potential risks of a lowered standard, as well as of a shift toward greater presidential war powers. Short-term challenges even as compelling as humanitarian crises and terrorism must not blind us to the long-term costs of undermining rule-of-law values and our constitutional balance of powers.

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I. SUMMARY OF RESPONSE

This Houston Law Review Symposium on “War Powers and Humanitarian Interventions” examines a pressing issue of our day—one that threatens to persist, with continuing tragic consequences. It is a special privilege to respond to Professor Harold Koh, whom I have had the good fortune to count as a friend and mentor for thirty years, since he joined the Yale Law School faculty while I was a student. Over that time, our professional paths have crossed in government, academia, and advocacy on difficult issues of presidential power, the rule of law, and government lawyering. All of those roles and issues are manifest in Professor Koh’s 2015 Frankel Lecture and subsequent article, in which he seeks to develop a comprehensive legal framework to govern U.S. humanitarian interventions in the twenty-first century. A core challenge, as he describes it, is how to reconcile fundamental domestic and international legal constraints on the use of force with the laudable humanitarian impulse behind the Responsibility to Protect, or R2P, movement. R2P seeks to establish “[t]he idea . . . that under international law, human rights-respecting countries have a legal responsibility to take action, which under certain extreme and limited circumstances can justify their intervening abroad to prevent needless civilian slaughter.”

Professor Koh’s article builds on his past writings but is striking for its emphasis on the role of law, not as a vehicle to

1. Harold Hongju Koh, The War Powers and Humanitarian Intervention, 53 Hous. L. Rev. 971 (2016) [hereinafter Koh, Humanitarian Intervention]. This Article responds to Professor Koh’s lecture and a slightly earlier version of his article and thus does not directly address his responses to this Article.

2. Id. at 976. The R2P movement was “universally endorsed at the 2005 World Summit and then re-affirmed in 2006 by the U.N.” Responsibility to Protect, U.N. REGIONAL INFO. CTR., http://www.unric.org/en/responsibility-to-protect?layout=default (last visited Apr. 20, 2016). R2P is characterized by three pillars: 1) the state bears the primary responsibility for protecting its own populations from “genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement”; 2) the international community has a responsibility to assist states in fulfilling the first pillar; and 3) the international community has a responsibility to respond if the state “is manifestly failing to protect its populations.” Office of the Special Adviser on the Prevention of Genocide, The Responsibility to Protect (Apr. 16, 2014), http://www.un.org/en/prevent genocide/adviser/responsibility.shtml. R2P emphasizes that the international community should help states through “diplomatic, humanitarian, and other peaceful means,” in accordance with the Charter of the United Nations; the U.N. Security Council will only consider the use of military force in situations where those peaceful means prove inadequate. GLOB. CTR. FOR THE RESPONSIBILITY TO PROTECT, 2008 PARLIAMENTARY HEARING AT THE UNITED NATIONS: ABOUT THE RESPONSIBILITY TO PROTECT 1–2 (2008), http://www.ipu.org/spiz-e/unga08/a1.pdf (quoting G.A. Res. 60/1, 2005 World Summit Outcome, ¶ 139 (Oct. 24, 2005)). Professor Koh’s proposal is aimed at permitting the use of force by the United States for humanitarian purposes in some extreme cases without congressional or U.N. Security Council approval.
constrain overreaching presidents who would do harm, but as an impediment to well-meaning presidents who would do good. Law powerfully affects presidents and public policy in both of these ways, and Professor Koh has written extensively about the former: the rule of law—international, constitutional, and statutory law, as well as methods of enforcement—as a countervailing force against tendencies toward excessive and harmful unilateral presidential action. His seminal book The National Security Constitution took on that issue in the context of the Iran–Contra controversy. Professor Koh subsequently applied his “National Security Constitution” to other contexts, most notably the Bush Administration’s post-9/11 counterterrorism policies.

In this return performance in the Frankel Lecture series, Professor Koh is more concerned with what can be seen as the flip side, and in some sense the downside, of what he describes as an “absolutist” approach to the rule of law. When law stands as an obstacle to humanitarian intervention in contexts as compelling as threatened genocide, “[h]ow can we reconcile the tension between this humanitarian impulse and the legal constraints imposed by current rules of U.S. and international law?” He asks, “[H]ow,” Professor Koh asks, “can we support the progressive development of international law by promoting a norm of humanitarian intervention that our country can internalize in a way that spurs the positive face of American Exceptionalism?” He defines “the doctrine of ‘humanitarian intervention’” as addressing when “force [may] be used to protect human rights or prevent humanitarian disasters without a Security Council resolution.” He proposes changes in both domestic and international legal understandings that would give the United States greater ability to engage in humanitarian interventions in the absence of traditionally required


7. Id. at 976.

8. Id. at 974.

9. Id. at 975.
authorizations from the U.N. Security Council or from Congress, by instead allowing unilateral presidential action.\textsuperscript{10}

In this Article, I take issue with Professor Koh on some aspects of his proposed framework, most fundamentally with his proposed reading of the War Powers Resolution. I want to begin, however, by affirming the value of his project and acknowledging the problem he addresses. As 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."\textsuperscript{11} Professor Koh's proposals reflect his valuable public service as the Legal Adviser to former

\textsuperscript{10} Professor Koh argues that R2P is the "newly legitimate moral minimum of global order" which, under international law, is "premised on the notion that authority, to be legitimate, must be effective at guaranteeing protection, and that the failure to protect a population is a factual matter that can be determined by the international community." \textit{Id.} at 1007–08 (citations and internal quotation marks omitted). Thus, he argues, the protection of humanitarian values should not be vulnerable to one U.N. Security Council country's veto in all cases. Under his proposed framework, countries that elect to intervene despite a veto would be able to plead an affirmative defense that would permit "an ex post exemption from legal wrongfulness." \textit{Id.} at 1010 (emphasis omitted). He proposes a six-factor test for evaluating such a claim, with the following three factors mandatory:

(1) If a humanitarian crisis creates consequences significantly disruptive of international order—including proliferation of chemical weapons, massive refugee outflows, and events destabilizing to regional peace and security—that would likely soon create an imminent threat to the acting nations (which would give rise to an urgent need to act in individual and collective self-defense under U.N. Charter Article 51);

(2) a Security Council resolution were not available because of persistent veto; and the group of nations that had persistently sought Security Council action had exhausted all other remedies reasonably available under the circumstances, they would not violate U.N. Charter Article 2(4) if they used

(3) limited force for genuinely humanitarian purposes that was necessary and proportionate to address the imminent threat, would demonstrably improve the humanitarian situation, and would terminate as soon as the threat is abated. \textit{Id.} at 1011. Under his proposed final three factors, a claim would be strengthened if the nations demonstrate:

(4) that the action was collective, e.g., involving the General Assembly's Uniting for Peace Resolution or regional arrangements under U.N. Charter Chapter VIII;

(5) that collective action would prevent the use of a per se illegal means by the territorial state, e.g., deployment of banned chemical weapons; or

(6) would help to avoid a per se illegal end, e.g., genocide, war crimes, crimes against humanity, or an avertable humanitarian disaster, such as the widespread slaughter of innocent civilians, for example, another Halabja or Srebrenica.

To be credible, the legal analysis of any particular situation would need to substantiate each of these factors with persuasive factual evidence of:

(1) Disruptive Consequences likely to lead to Imminent Threat; (2) Exhaustion; (3) Limited, Necessary, Proportionate, and Humanitarian Use of Force; (4) Collective Action; (5) Illegal Means; and (6) Avoidance of Illegal Ends. \textit{Id.} (citations omitted).

\textsuperscript{11} \textit{Id.} at 976.
Secretary of State Hillary Clinton, where he dealt with the heart-wrenching realities of humanitarian disasters that disrupted and threatened countless lives. He opined then, not as we do today as academics, but as a top official whose advice informed U.S. foreign policy. President Barack Obama described his support for certain humanitarian interventions when accepting the Nobel Peace Prize: “I believe that force can be justified on humanitarian grounds, as it was in the Balkans, or in other places that have been scarred by war.” At a time when our daily news includes a global refugee crisis and terrorist threats, the case for meaningful U.S. leadership and engagement is compelling.

So too, though, is the need for the government to respect domestic and international legal constraints on the form that leadership takes and especially on the use of force. This Article addresses the U.S. domestic law framework for humanitarian interventions; Professor Ashley Deeks, Professor Koh’s former State Department colleague, responds insightfully regarding relevant international law. My assessment of legal constraints on the sorts of humanitarian interventions Professor Koh advocates is reminiscent of the respective roles we filled in the government when, for example, the State Department’s Legal Adviser and the Counsel to the President would ask the Department of Justice’s Office of Legal Counsel (OLC) to review the legality of action under consideration by the President.

This leads me to a general caveat to my response: Where one sits in the government matters greatly, as does the perspective one adopts as a commentator. Professor Koh put it well in describing his role as Legal Adviser:

Some government lawyers have the privilege for example, of giving regular advice to a particularly prominent client or pleading particular cases before a particular court. But the Legal Adviser must shift back and forth constantly between four rich and varied roles: which I call counselor, conscience, defender of U.S. interests, and spokesperson for international law.

13. See generally Ashley Deeks, Multi-Part Tests in the Jus Ad Bellum, 53 HOUS. L. REV. 1035 (2016). Although Professor Deeks is responding regarding questions of international law, I will note that questions of international and domestic law overlap in the important sense that treaties, including the U.N. Charter, are among the laws that the Constitution obligates the President to take care are faithfully executed.
The role I served in government, as a Deputy Assistant Attorney General and later the Acting Assistant Attorney General heading OLC, did bring the privilege of a focus on law: OLC traditionally bears the responsibility for providing presumptively authoritative legal advice to guide the President and others within the Executive Branch on pressing and difficult issues. In Part IV, I consider the relevance of roles to government lawyering, which informs some of the differences in emphasis Professor Koh and I have chosen in this Symposium. Like Professor Koh, I am influenced by and will reference past experiences, although now of course we speak only for ourselves.

Professor Koh’s concern with the legal impediments to desirable humanitarian interventions leads him to call for and to engage in “creative lawyering” to avoid legal obstacles to the use of force.\(^{15}\) I will emphasize instead that regardless of the desirability of R2P generally or of any particular humanitarian intervention as a matter of policy—of basic humanity and morality—our constitutional system significantly constrains how our Nation may implement that policy. Although presidents possess relatively broad legal authorities with regard to war and national security, the Constitution distributes relevant powers between Congress and the President—and for good reason. This intentional design of shared powers is aimed at erecting barriers to “spilling American blood and treasure”\(^{16}\) by preventing presidents from taking the country to war without compelling reason and broad support.\(^{17}\)

The President is the Commander in Chief of the armed forces.\(^{18}\) Congress’s relevant authorities include the power to declare war, to raise and support the armed forces, and to make rules to govern and regulate the armed forces.\(^{19}\) A central set of congressionally imposed constraints on presidential action is found in the War Powers Resolution, which regulates the President’s commitment of U.S. forces “into hostilities, or into situations where imminent involvement in hostilities is clearly

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16. The phrase “American blood and treasure” often is used to characterize what is at stake, at least in fundamental part, in committing the nation to armed conflict. President Obama used the phrase in his final State of the Union address. Address Before a Joint Session of the Congress on the State of the Union, 2016 DAILY COMP. PRES. DOC. 6 (Jan. 12, 2016), https://www.gpo.gov/fdsys/pkg/DCPD-201600012/pdflDCPD-201600012.pdf.

17. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 772 (1997) (“The Founders gave Congress the power to start war because they believed that Presidents, out of a desire for personal glory, would be too prone to war.”).


indicated by the circumstances." Most constraining is the "sixty-day clock," which requires presidents to withdraw U.S. forces from hostilities within sixty days unless Congress has authorized the use of force (with exceptions for emergencies, including a possible thirty-day extension). Presidents typically have respected these provisions, even when they have not conceded that they must. President Richard Nixon vetoed the War Powers Resolution on the grounds that it interfered with presidential authority, but Congress overrode his veto. Unless the sixty-day clock is unconstitutional—and Professor Koh and I agree that, on its face, it is not—or unless and until Congress repeals it, presidents must comply, even in contexts in which it seems outdated or bad policy.

Professor Koh organizes his consideration of humanitarian intervention around three major incidents from the Clinton and Obama Administrations. In the interventions in both Kosovo (1999) and Libya (2011), presidents initiated the use of military force without congressional authorization, which raised the question of whether they had the constitutional authority to do so. The unilateral nature of the use of force also prompted questions about compliance with the War Powers Resolution when the sixty-day mark approached—specifically, whether congressional authorization was necessary to continue the use of force. His third case study involves President Obama's 2013 decision to refrain from the use of force in Syria, in response to Syrian President Bashir al-Assad's use of chemical weapons against his own people, when Congress failed to authorize the use of force.

Professor Koh seeks to build on Kosovo and Libya as precedents to develop a theory of broader presidential authority to

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21. Id. § 1544(b).
23. See CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 640 (2015) [hereinafter SAVAGE, POWER WARS] ("There is an oddly widespread myth that every president since Nixon has declared this limit to be unconstitutional. This is simply false.... [T]he Carter administration's Office of Legal Counsel in 1980 concluded that the clock was a constitutional limit on presidential power, and no subsequent administration has revoked that memorandum opinion. For the most part, the issue has not arisen.") (citations omitted)); Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 186 (1980). For an example of an inaccurate description of precedent, see Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 159–61 (2002) [hereinafter Iraq OLC Opinion] ("[E]very President has taken the position that [the WPR] is an unconstitutional infringement by the Congress on the President's authority as Commander-in-Chief.").
act unilaterally to initiate and continue the use of force for humanitarian ends in situations like Syria—that is, without otherwise required congressional authorization or U.N. Security Council approval. With regard to domestic law, he argues that neither Congress's constitutional responsibility to declare war nor the War Powers Resolution should be interpreted to constrain presidents from initiating or continuing the use of U.S. military force for humanitarian interventions that satisfy his proposed criteria. More generally, Professor Koh advocates creative lawyering for reinterpreting existing legal constraints to empower presidents to respond to these humanitarian crises, and I agree that not only advocates, but government lawyers should be creative in developing lawful approaches to achieve the president's policy ends. I disagree, however, with his legal assessment in several important respects.

Our disagreements may be made clearer in light of our fundamental points of agreement regarding the applicable legal analysis. Professor Koh and I both endorse the constitutional framework used by Presidents Clinton and Obama respecting the initiation of the use of military force, which looks to the “nature, scope, and duration” of a military deployment to determine if congressional authorization is constitutionally required. This framework recognizes presidential authority to deploy armed forces even in some actual or threatened “hostilities,” as that term is used in the War Powers Resolution, as long as the hostilities do not amount to “war” in the constitutional sense. The Clinton/Obama approach to the “initiation” stage finds strong precedent in a 1970 opinion issued by then-OLC Assistant Attorney General William Rehnquist in the context of hostilities in South Vietnam and Cambodia. This approach, however, remains contested: some deny this extent of presidential authority (including some members of Congress) and others claim far greater presidential authority (including the intervening Bush Administration). Professor Koh and I also agree that, at the continuation stage, the Obama Administration (with Professor Koh as its primary

24. See supra note 10 (quoting six-factor test).
was right to accept the constitutionality of the War Powers Resolution’s sixty-day clock.

In assessing the legality of particular future humanitarian interventions, our substantial disagreements may prove more to the point. The Kosovo, Libya, and Syria precedents, in my view, do not provide presidents with more than minimal support, at either the initiation or continuation stages, for unilateral military action undertaken for humanitarian ends. In particular, I believe the Obama Administration was wrong in its conclusion that the air strikes in Libya did not constitute hostilities under the War Powers Resolution and therefore were not subject to the sixty-day clock. Professor Koh’s Senate testimony made a strong and appropriately narrow case to the contrary that emphasized its very limited precedential value.29 I believe that this argument is ultimately unpersuasive and that future administrations should not rely on it and certainly should not extend it to other circumstances. Regarding Kosovo, the lack of any public explanation of the legality of the initial use of force greatly undermines its precedential value. The OLC opinion on the continuation of air strikes past sixty days, on the other hand, provides a balanced and thorough analysis and, to my mind, is correct in its conclusion that Congress authorized the hostilities through very specific appropriations. But that opinion emphasized that its conclusion was highly fact-specific and therefore is unlikely to apply in many future circumstances. In any event, the opinion is premised on a recognition that hostilities existed and thus provides no help for Professor Koh’s new theory for reading into the War Powers Resolution a humanitarian exemption to the definition of hostilities.

Professor Koh’s new proposal, which if correct would advance his humanitarian objectives far more effectively, is of far greater concern to me than our disagreement concerning Libya. His humanitarian exemption would sweep far more broadly than his carefully limited contemporaneous argument for why the air strikes in Libya did not rise to the level of hostilities. He now proposes an interpretation of the War Powers Resolution that would allow humanitarian interventions that satisfy his criteria to exceed the sixty-day clock without congressional authorization even when they otherwise would constitute “hostilities”: to allow presidents unilaterally to


29.   *Id.*
employ "a level of force that undeniably exceeds 'hostilities'" in order to pursue certain humanitarian ends.30 My analysis of the War Powers Resolution therefore focuses on Professor Koh's far more consequential new proposal, which I believe rests on an impermissible reading of the statute, but that analysis is relevant as well to our disagreement over the meaning of "hostilities" as applied to the Libyan air strikes.

Also of great concern to me are possible implications beyond the contexts that Professor Koh addresses. The public discussion of the legal advice that informed the Libyan military intervention has brought into view basic questions about the nature of the government lawyer's role in advising the President and other decision-makers. Central to this debate is New York Times reporter Charlie Savage's account that, at the time, Professor Koh's advice on Libya was sharply contested within the Obama Administration.31 Typically OLC would be the ultimate source of advice on the legality of a major, questionable use of force such as this (informed by other lawyers including those at the Departments of Defense and State). Most significant, Savage reports that Attorney General Eric Holder and OLC believed that Professor Koh's view was not the best interpretation of the War Powers Resolution.32 In any particular instance, the President clearly possesses the authority to make the final call about which legal analysis seems correct and will inform action, but in fact (and for good reason) presidents almost always follow the legal interpretations of the Department of Justice—and the Attorney General rarely overrules OLC. Thus, if public reports are accurate, the process in the case of Libya was highly unusual.33

31. SAVAGE, POWER WARS, supra note 23, at 635-49.
32. Id.
33. Bauer since has speculated about the desirability of changing both the standard and the process. See Bob Bauer, Power Wars Symposium: The Powers Wars Debate and the Question of the Role of the Lawyer in Crisis, JUST SECURITY (Nov. 18, 2015, 9:15 AM), https://www.justsecurity.org/27712/powers-wars-debate-question-role-lawyer-crisis/. Other commentators have reacted in the opposite direction, by advocating the creation of new institutional sources of more reliable constraints on overreaching presidents. Professor Bruce Ackerman, for example, saw Libya as further evidence, similar to the Bush Administration's failure to comply with legal limits, that OLC is not up to the job; he called for the creation of a "Supreme Executive Tribunal." Bruce Ackerman, Lost Inside the Beltway: A Reply to Professor Morrison, 124 HARV. L. REV. F. 13, 37-39 (2011). I agree with Professor Trevor Morrison's response, which powerfully analyzed both the shortcomings in Professor Ackerman's proposal and the value in adhering to traditional OLC standards and processes. See Trevor W. Morrison, Constitutional Alarmism, 124 HARV. L. REV. 1688, 1707-31 (2011) (book review); Trevor W. Morrison, Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation, 124 HARV. L. REV. F. 62 (2011) [hereinafter Morrison, Libya, Hostilities, and OLC].
Savage also reports that the advice Professor Koh and Counsel to the President Bob Bauer provided the President was premised on a substantive standard different than the traditional search for the correct view of the law: Savage initially describes the legal standard they used instead (as reported by unnamed sources) in terms of “legally available,” “credible,” or “defensible.” 34 Bob Bauer has contested Savage’s use of the phrase “legally available” as an inaccurate description of the standard he in fact used, explaining further that he believes it is “a standard that is fatally ambiguous.” 35 Professor Koh describes his legal advice on Libya as “solid” and premised on what he believed was “lawful to argue.” 36 Regarding their Libya advice to the President, he quotes Bauer as writing to him: “I believed it to be a reasonable, good faith interpretation . . . .” 37

We thus now know that “legally available” was not a term used in formulating advice actually given to the President with regard to Libya. But “lawful to argue” and, even more, “reasonable” are also terms that may suggest a more lenient standard than the traditional one, which OLC’s current guidelines describe for its lawyers as “an honest and accurate appraisal of applicable law” and the “best understanding of what the law requires,” even if that advice will constrain desired policies and actions. 38 The OLC guidelines also note that this standard is central to rule-of-law values in that some presidential actions, such as the use of military force, are unlikely ever to be subject to judicial review; therefore, the underlying legal position is not simply something for the government “to argue” but “may effectively be the final word on the controlling law.” 39 OLC differs from a court, however, in that “OLC will, where possible and appropriate, seek to recommend lawful alternatives to Executive Branch proposals that it decides would be unlawful.” 40

In the midst and in the wake of the Libya controversy, commentators have suggested that perhaps the standard for

35. Bauer, supra note 33.
37. Id. at 993 (quoting E-mail from Bob Bauer to Harold Hongju Koh, Sterling Professor of Int’l Law, Yale Law Sch. (Mar. 4, 2016, 8:07 AM EST) (on file with Houston Law Review)).
39. Id.
40. Id. at 2.
legality should be lowered for at least some very important presidential action. Even though President Obama did not act on this view in the Libya situation, Professor Koh himself has invoked, in other settings, the legitimacy of action based on what a legal advisor thinks is a “legally available” option.\footnote{See, e.g., Harold Hongju Koh, \textit{A False Choice on Guantánamo Closure}, \textit{Just Security} (Nov. 2, 2015, 12:05 PM), https://www.justsecurity.org/27298/false-choice-guantanamo-closure/ (using the term legally available to discuss President Obama’s options in the closing of Guantánamo); Jack Goldsmith, \textit{Koh on Koh}, \textit{Lawfare} (June 23, 2011, 6:26 AM), https://www.lawfareblog.com/koh-koh (excerpting speech by Professor Koh in which he comments that a government lawyer must “defend his client’s right to choose legally available options”).} Bauer has proposed consideration of the following standard: “On these most pressing national security policy issues, the complex balancing of relevant considerations, including legal issues, should allow for strong, reasonable or plausible legal theories to be good enough.”\footnote{Bauer, supra note 33; see also Richard Pildes, \textit{Power Wars Symposium: What Role Should Law Play in Areas of Vital National and International Affairs?}, \textit{Just Security} (Nov. 13, 2015, 10:37 AM), https://www.justsecurity.org/27583/role-should-law-play-areas-vital-national-international-affairs/ (“I am not belittling the law by asserting that Presidents do whatever they want. I am suggesting instead, as a normative matter, that perhaps in some contexts of high national and international stakes, including use of force, law should be a factor taken into account, but not an absolute trump.”); id. (“To a ‘legal absolutist’ . . . [a] law is a law is a law. But if we think law should be one factor, though not an absolute trump, in a President’s decision-making calculus on these exceptional matters concerning international relations and use of force, the fact that [the War Powers Resolution] . . . creates a de facto policy without Congress actually deciding that should be our policy might legitimately play a role in that calculus.”).} I believe that to lower the measure of legality to “reasonableness,” “plausibility,” or “legal availability” would risk encouraging governmental officials to push the envelope on acceptable legal practice. These and other formulations that would lower the bar for assessments of legality would expand presidential power in unpredictable and potentially harmful directions, particularly if combined with a displacement of OLC’s traditional role in favor of a more flexible and open system of multiple sources of legal advice.

Evaluation of both sets of issues—the legal framework for humanitarian interventions and the standards and processes that govern legal analysis that informs Executive Branch action—benefits greatly from supplementing Professor Koh’s Clinton and Obama Administration precedents with those of the intervening Bush Administration. In the months and years after 9/11, the
Bush Administration did not properly interpret or respect congressional limits on some counterterrorism policies, most notably with regard to governmental interrogation and surveillance, and it clearly failed to follow traditional standards and processes in evaluating the legality of these policies. The positions of the early Bush Administration starkly illustrate the dangers of inadequately constrained presidential war powers. Their consideration helps avoid an overly rosy view of the benefits of lowering the rule-of-law bar to unilateral presidential military action, whether to prevent terrorism or genocide, based on "plausible" and "reasonable" legal arguments. Principled interpretations of presidential authority of course must apply across administrations. The value of checks on presidents may be best appreciated by considering their application to officeholders we fear may seek to abuse power, not those we trust to exercise it wisely.

In that light, one core concern must be the legitimacy and efficacy of limiting principles. For example, 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? Professor Koh argues that Congress had Vietnam, not humanitarian interventions, in mind when in 1973 it enacted the War Powers Resolution, but Congress similarly did not have in mind the use of force to respond to post-9/11 terrorism. If plausible, but not best, interpretations of legal limits may authorize humanitarian interventions, could they not also authorize future counterterrorism or other measures intended by the president to protect American lives, but not authorized by Congress (as current measures are)? A great many positions in difficult and debatable areas of law are not patently implausible or unreasonable. Even if a principle could be fashioned somehow to limit newly authorized unilateral presidential authority to the context of humanitarian interventions, the line separating humanitarian and other vital measures will not always be clear. Finally, these concerns are heightened in situations in which presidents and other

43. Numerous commentators and government officials have explored these failures, some of which are referenced throughout this Article. See generally Jack Goldsmith, The Terror Presidency (2007).

44. In discussing the potential risks of a change in international legal understanding, Professor Koh notes the possibility that "in the future, other less-humanitarian-minded states can cite President Obama's 2013 threat to put their own broad spin on the legal interpretation, using the murky concepts of humanitarian intervention and R2P for their own self-interested purposes." Koh, Humanitarian Intervention, supra note 1, at 1003.
policymakers will be especially eager to take action and the question of policy may be reduced to one of legality.

Recent proposals for aggressive approaches to presidential authority reflect a certain understandable frustration in the face of what Professor Koh observes is “a uniquely toxic U.S. domestic political environment, where interbranch cooperation has been almost entirely stalemated.”46 This suggests a possible basis for attempting to distinguish the Obama Administration from others. President George W. Bush, for example, did not face anything approaching the sort of partisan-driven congressional obstruction and hostility that President Obama has confronted. Indeed, particularly in its early years, the Bush Administration actively avoided working with Congress for the very purpose of expanding understandings of presidential power. President Obama, by contrast, has sought to work with Congress but has struggled with exceptional congressional dysfunction on a range of vital issues, from war to basic global economic stability. Commentators have suggested the possibility that extraordinary times may give rise to extraordinary rules: what can be seen as Congress’s failure to live up to its constitutional responsibilities might justify—in effect, create—greater-than-usual presidential authority to act unilaterally as a form of “constitutional self-help.”46 To the extent the calls are for exercising presidential authority to its limit, they are unobjectionable as a matter of law and instead raise issues of policy, even when the policies are deeply controversial. Congressional intransigence also may be relevant to prudential norms of interbranch cooperation and actually weigh in favor of presidents choosing to exercise the full extent of their authorities. To the extent that the calls instead are for exceeding what otherwise would be recognized as limits on presidential authority, they should be seen as a version of claims of emergency powers made throughout difficult times in U.S. history, including in defense of torture and other counterterrorism measures, but ultimately rejected as destabilizing and unconstitutional.47

45. Id. at 974.
47. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 649–50 (1952) (Jackson, J., concurring) (“The appeal, however, that we declare the existence of inherent powers ex necessitate to meet an emergency asks us to do what many think would be wise,
To be clear, Professor Koh does not argue for special presidential authority based on emergency powers. Nor is he hypothesizing emergencies in which Congress lacks time to act and the president feels compelled to violate a law for a far greater good, in the hopes of after-the-fact absolution. Nor is he addressing only close cases in which no single correct legal interpretation exists. Instead, he proposes a general framework for humanitarian interventions that includes reading into the War Powers Resolution a special exception that I believe simply does not exist.

Professor Koh emphasizes that his “main goal has been to open debate, not to end it,” which is laudable and needed. My main goal is to encourage the continued debate to move in directions that keep in the forefront the integrity of the rule of law and, to embrace one of Professor Koh’s formulations, “to guide lawful humanitarian intervention, in a way that promotes exceptional American leadership in human rights, while adhering to the constitutional ground rules that govern the war powers.”

Part II of this Article sets the stage with discussion of constitutional structure and Justice Jackson’s seminal opinion in Youngstown Sheet & Tube Co. v. Sawyer. Part III responds to Professor Koh’s case studies of Kosovo, Libya, and Syria and his proposed reinterpretation of our domestic legal framework in favor of expanded presidential authority to initiate and continue humanitarian interventions without congressional authorization. Part IV concludes with observations, informed by my own experiences, about the role of government lawyers, especially within OLC, in upholding the rule of law as a constraining force on presidential action.

II. FRAMEWORKS: JUSTICE JACKSON IN YOUNGSTOWN AND HAROLD KOH’S “NATIONAL SECURITY CONSTITUTION”

Echoing a theme of his 1990 book The National Security Constitution, Professor Koh observes that, on matters of war and national security policy, “our current political system gives the President incentives to overreach, Congress incentives to acquiesce, and the courts incentives to defer.” Before I respond

although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies.

49. Id. at 974–75.
50. Youngstown, 343 U.S. at 634 (Jackson, J., concurring).
51. See Koh, National Security Constitution, supra note 3, at 117–49.
52. Koh, Humanitarian Intervention, supra note 1, at 974.
to his analysis of the Clinton and Obama precedents and his new proposal, I will employ this useful framing of the tendencies of the respective constitutional actors to review some essential aspects of shared war powers. This frame also brings quickly to mind examples from the Bush Administration that further inform a desirable legal framework for humanitarian interventions—but that I believe weigh against the extent to which Professor Koh's proposal would allow for unilateral presidential authority to deploy the military.

We certainly have observed throughout U.S. history examples of the tendency of presidents to overreach, Congress to acquiesce, and courts to defer. These tendencies can reflect the relative competencies of the branches—for example, when Congress and the courts lack the Executive Branch's knowledge, expertise, or abilities—but they also can undermine the rule of law and the constitutional balance of powers. The Bush Administration's actions following the 9/11 terrorist attacks on the United States should serve as a cautionary tale. A bipartisan consensus has emerged that the Bush Administration adopted inappropriately ends-driven legal analyses, sometimes kept secret from the public and even Congress, that enabled the violation of federal statutes, including interrogations to the point of torture and domestic surveillance absent court orders. This extraordinary recent national experience confirms the necessity of effective checks from all three branches—Congress, the courts, and within the Executive Branch—to counter presidential overreach in the exercise of war powers.

First, with regard to Congress: Yes, Congress often acquiesces, but sometimes it does not. When Congress does legislate to impose constitutional limits, presidents must respect those limits, even when they obstruct the President's ability to pursue important national security or humanitarian objectives. Consider the statutes that should have constrained the Bush Administration's interrogation and surveillance practices.


Consider also federal statutes that have constrained President Obama's ability to close Guantanamo\textsuperscript{55} to the detriment of very important humanitarian and national security objectives—and the calls for President Obama to act to close Guantanamo notwithstanding those statutes in his final year in office.\textsuperscript{56} Consider also the reemergence in the 2016 presidential campaign of calls for waterboarding and other unlawful governmental action by candidates seeking to succeed President Obama.\textsuperscript{57} In light of the increasing role statutes play in the conduct of war, former OLC Acting Assistant Attorney General (now Judge) David Barron and former OLC Deputy Assistant Attorney General (now Professor) Martin Lederman go so far as to “disclaim the traditional assumption that Congress has ceded the field to the President when it comes to war.”\textsuperscript{58} They make a compelling case, particularly in the context of the use of military force to combat terrorism, and they contend further that “the Commander in Chief increasingly

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\textsuperscript{58} 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, 693 (2008).
confronts disabling statutory restrictions even in conducting conventional military operations abroad.” However Congress’s role is best characterized, Congress has addressed both its own tendency to acquiesce and the President’s tendency to overreach through the War Powers Resolution: The reporting requirements and, even more, the sixty-day clock respond to these tendencies by generally imposing a time limit on a broad range of military deployments that presidents might undertake unilaterally.

Second, the courts: Yes, courts often give great deference to the Executive Branch on issues of war, but sometimes they do not. The Court’s rejection in Youngstown Sheet & Tube Co. v. Sawyer of President Truman’s seizure of the nation’s steel mills during the Korean War is the classic example. Particularly in light of the deference they typically receive on issues of war and national security, presidents should pay close attention when the Court does speak—and not just to comply in the narrowest possible sense. The Court demanded President George W. Bush’s attention by rejecting his request for extreme deference to some of his central post-9/11 policies, thereby rebuffing his efforts at presidential overreach and helping to restore constitutional balance. More generally, as Professor Stephen Vladeck has observed, “courts faced with civil suits seeking remedies against allegedly unlawful government surveillance, detention, interrogation, rendition, and watch-listing, among myriad other initiatives, have refused to provide relief”; courts have employed eleven doctrines to avoid reaching the merits of such cases, with “the effect of both (1) leaving some of the most important statutory and constitutional questions about the permissible scope of U.S. counterterrorism policies unanswered; and (2) failing to provide a meaningful deterrent against the future recurrence of some of the most troubling abuses of the past decade and a half.” The federal

59. Id. at 692.
63. Stephen I. Vladeck, The Demise of Merits-Based Adjudication in Post-September 11 National Security Litigation 1 (Jan. 1, 2016) (unpublished manuscript) (on file with author). For an example of a rare federal appellate ruling to the contrary of this trend, which would have allowed a Bivens claim alleging harm from torture to proceed, see Vance v. Rumsfeld, 653 F.3d 591 (7th Cir. 2011), rev’d en banc, 701 F.3d 193 (7th Cir. 2012). The U.S. Court of Appeals for the Seventh Circuit sitting en banc, however, reversed the panel’s thoughtful ruling, with an unnecessarily broad ruling that was
courts are at least as likely to avoid resolving direct war powers disputes that challenge the unilateral authority of the President to initiate or continue military action. Although the Bush Administration undoubtedly falls at an extreme, the Executive Branch, across parties and administrations, tends energetically to avoid both judicial review and the alternative of acknowledging its mistakes.

Finally, the Executive Branch: Because Congress acquiesces and courts defer on matters related to war and national security, effective checks from within the Executive Branch are vital to presidential compliance with legal constraints. Even absent the threat of a court order, presidents and other governmental actors must comply with applicable law. This requires reliable legal advice given in terms of what the law actually requires, not of litigation risk or what the other two branches effectively will check. As I discuss in greater detail in Part IV, traditional standards and processes, which afford OLC special responsibility in this regard, generally have proven effective.

Supreme Court Justice Robert Jackson’s well-known concurring opinion in *Youngstown* articulated the definitive three-zone framework for analyzing the relative authorities of Congress and the President on war powers and other issues that entail shared constitutional authority. Professor Jeff Powell eloquently expressed why this framework is widely esteemed and applied not only by courts, but also by Executive Branch lawyers when advising on proposed action:

> The perspective that Justice Robert Jackson laid out in his *Youngstown* opinion expresses, more faithfully and with greater moral and political wisdom than any other, the American constitutional vision as that vision must be lived out in executing the most difficult of governmental responsibilities: the protection of the safety of the Republic.

To summarize briefly, Justice Jackson observed that the extent of presidential power often depends upon whether Congress has spoken to an issue and also is subject to change with future congressional action. “When the President acts pursuant to an exceedingly deferential to the government. See Vance v. Rumsfeld, 701 F.3d 193 (7th Cir. 2012).

64. See, e.g., Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000), affg 52 F. Supp. 2d 34 (D.D.C. 1999) (granting the government’s motion to dismiss for lack of standing in a case brought by several members of Congress who claimed that President Clinton’s use of military force in Kosovo violated both the Constitution and the War Powers Resolution).

65. See *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

express or implied authorization of Congress, his authority is at its maximum . . . ." 67 When the President acts in a way "incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." 68 And in between, where Congress has been silent, is the "zone of twilight" in which presidents often may act unilaterally, but only until Congress speaks to the issue. 69 The Bush Administration's failure to take account of this framework, or even to cite Youngstown, was one common ground for scathing criticism of its early interrogation opinions. In effect, those classified opinions asserted that, even at its "lowest ebb," the President's authority as Commander in Chief overrode the federal statute banning torture. Compounding that error, the Bush Administration withheld from Congress the legal analyses that informed and justified noncompliance with congressional commands, and even the very fact of the noncompliance, which obviated the possibility of a response until the opinions were leaked. 70

Professor Koh and I both, of course, embrace Youngstown's firmly established vision of shared powers and reject the Bush Administration's extreme view of preclusive presidential power, expressed most strongly in the first years following 9/11. Our disagreement about the reach of the War Powers Resolution may be described in Youngstown terms: Under what circumstances does Congress's enactment of the sixty-day clock move unilateral presidential humanitarian interventions from the middle "zone of twilight" (in which presidents often possess authority to act unilaterally) to the "lowest ebb" zone (typically fatal to presidential action)? The choice between these two zones is frequently a source of dispute, as it was in Youngstown itself: the dissenting Justices who would have upheld President Truman's seizure of the steel mills did not dispute Congress's ultimate authority to override him. 71 President Truman actually notified Congress and stood ready to comply with a new statute. 72 When it applies, the sixty-day clock is a framework provision that responds to the problem of congressional inaction on war powers by in effect moving the President into the third zone without the need for additional, more specific congressional legislation.

67. Youngstown, 343 U.S. at 635 (Jackson, J., concurring).
68. Id. at 637.
69. Id.
70. See Secret Law and the Threat to Democratic and Accountable Government: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 7–9 (2008) (statement of Professor Dawn E. Johnsen, Professor, Indiana University School of Law—Bloomington) [hereinafter Johnsen, Secret Law Testimony].
71. See Youngstown, 343 U.S. at 701–02 (Vinson, J., dissenting).
72. Id. at 583 (majority opinion).
Another relevant aspect of the “lowest ebb” zone: Justice Jackson rejected the argument that presidents possess constitutional or extraconstitutional “emergency” powers that, in extreme cases such as war, may justify action that otherwise would be unlawful.73 His analysis, however, allows for the possibility of circumstances in which presidents may take action “incompatible with the expressed or implied will of Congress” when the statute conflicts with the President’s constitutional powers or otherwise is unconstitutional on its face or in a particular application.74 The Supreme Court illustrated this principle in 2015 in Zivotofsky v. Kerry by applying the “shared power” approach of the Youngstown framework even as it held that the case presented a rare “lowest ebb” question in which the President’s exclusive recognition authority allowed him to act on his view that no country possessed sovereignty over Jerusalem, notwithstanding a federal statute directly to the contrary.75

How best to analyze such circumstances of “unconstitutional” statutes is itself a complex question, about which I have written elsewhere76 and also have helped provide legal advice while at OLC.77 Prominent examples from the last three Administrations are illustrative. When President Clinton believed Congress had violated constitutional rights and undermined national security by requiring him, in one provision in the National Defense Authorization Act of 1996,78 to fire anyone in military service who tested HIV-positive, President Clinton did not rest on preclusive authority to violate the statute. Rather, he announced that his Administration would not defend the law in court and, with that, he convinced Congress to repeal the directive.79

73. See id. at 649–51 (Jackson, J., concurring).
74. See id. at 637–38.
75. See Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095 (2015). The case involved a longstanding controversy between presidents and Congress in which presidents from both political parties asserted the preclusive authority that the Court recognized. See Emily Kile, Note, Executive Branch Fact Deference as a Separation of Powers Principle, 92 IND. L.J. (forthcoming 2016).
79. See H.R. 2959, 104th Cong. (1996); Johnsen, Presidential Non-Enforcement, supra note 76, at 54–55.
followed this precedent in successfully refusing to defend the Defense of Marriage Act.\textsuperscript{80} Notably, both of these examples involved the potential for courts to have the final say in ongoing or threatened litigation. The Bush Administration is an outlier in this regard, as David Barron and Marty Lederman powerfully document in their exhaustive historical review of comparable presidential assertions of “lowest ebb” constitutional war powers.\textsuperscript{81} The Bush Administration asserted preclusive powers to act contrary to statutes in various forms: in often-classified legal opinions, in legal briefs, and in an unprecedented number of “signing statements” in which President Bush declared statutory provisions in conflict with his overly expansive views of his own authorities even as he was signing them into law.\textsuperscript{82}

The Obama Administration did not follow the Bush Administration’s lead in broadly asserting preclusive war powers. With regard to Libya, arguably the Obama Administration’s greatest legal controversy of true merit, it did not assert that an overriding presidential authority rendered the War Powers Resolution unconstitutional. It did not even make a constitutional avoidance or emergency powers argument, facial or as applied. It did not challenge the constitutionality of the sixty-day clock. Instead, it found the War Powers Resolution inapplicable by concluding (in my view, wrongly) that the air strikes did not constitute hostilities.\textsuperscript{83} This determination identified the President’s action as falling in the zone of twilight rather than the lowest ebb zone, but it did so on narrow reasoning based on a confluence of factors that it implied might not recur, at least not often.

Professor Koh now makes a more sweeping argument to limit application of the sixty-day clock, which again can be framed helpfully in \textit{Youngstown} terms. He argues that we should accept “the bitter truth” that the War Powers Resolution is “increasingly obsolete” and, for various reasons, bad policy, even beyond humanitarian interventions.\textsuperscript{84} My response will remain focused on

\begin{itemize}
  \item \textsuperscript{81} See generally Barron & Lederman, supra note 58; David J. Barron & Martin S. Lederman, \textit{The Commander in Chief at the Lowest Ebb—A Constitutional History}, 121 HARV. L. REV. 941 (2008).
  \item \textsuperscript{83} Koh Libya Testimony, supra note 28, at 54–55.
  \item \textsuperscript{84} Koh, \textit{Humanitarian Intervention}, supra note 1, at 1020.
\end{itemize}
law, but I will note that, although I see merit in his critique, I think he too quickly dismisses the value of requiring presidents "to keep their interventions short." Justice Jackson's framework helps in evaluating Professor Koh's proposed framework. Youngstown would say that the Constitution actually requires what Professor Koh describes as the "first-best" course: Congress must amend the War Powers Resolution in order to exempt any otherwise-covered interventions. Professor Koh appropriately advocates in favor of alternative approaches to new legislation, and his proposals join others, such as the War Powers Consultation Act pending before Congress. Because the current Congress is highly unlikely to act any time soon, however, Professor Koh also has crafted a new interpretation of the current statute that, in Youngstown terms, seeks to move certain humanitarian interventions that otherwise would constitute "hostilities" from the "lowest ebb" to the "zone of twilight." Where applicable, his proposed exemption would effectively nullify Congress's effort to deal with its own tendency toward inaction through the sixty-day clock. It would allow the President to continue with the use of force unless and until Congress passed new legislation targeted at the specific intervention, which would be subject to presidential veto. This would greatly empower presidents to act unilaterally, and for indefinite periods of time.

III. HUMANITARIAN INTERVENTION UNDER PRESIDENTS CLINTON AND OBAMA

Professor Koh closely considers three case studies, involving Kosovo, Libya, and Syria, in support of his ambitious project to develop a legal regime more favorable to humanitarian interventions at a time when congressional authorization (given likely inaction) or U.N. Security Council approval (given a likely veto) will be difficult to achieve. He concludes that this precedent is "mixed." In my view, these and other precedents are inadequate to support Professor Koh's proposed framework when considered from the perspective of U.S. constitutional and statutory constraints on the initiation and continuation of the use of military force.

85. Id. at 1020.
86. Id. at 1020–21.
88. Koh, Humanitarian Intervention, supra note 1, at 998 ("After Libya, the Russians made it clear that they intended to veto similar Security Council resolutions, making impossible a Security Council-authorized intervention in Syria.").
89. Id. at 1003.
A. Initiation

Of his three examples, Syria seems better viewed not as precedential but as, in Professor Koh’s view, aspirational. He considers here not U.S. military action against ISIL in Syria (which relies upon existing congressional authorization), but President Obama’s “red line” threat to respond militarily to Syrian leader Assad’s use of chemical weapons against civilians in August 2013. The New York Times reported a legal rationale given by an Obama Administration official in favor of presidential authority to proceed unilaterally: the Counsel to the President referenced “the ‘important national interests’ of limiting regional instability and of enforcing the norm against using chemical weapons.”90 In the end, President Obama stepped back when authorization was not forthcoming, and subsequent reports suggest this decision was based on the conclusion that he lacked authority to proceed alone.91 That seemed to me to be the correct response. Regardless, this one vague statement regarding authority to initiate the use of military force certainly does not establish meaningful precedent. Professor Koh’s aim is to create a legal framework that would allow for a different outcome, in favor of humanitarian interventions in just such circumstances.

Clinton Administration precedent provides the principal support for the Obama Administration’s initiation of air strikes in Libya, as well as for Professor Koh’s broader effort to build on Libya toward a more general theory of unilateral presidential authority to commit the nation to the use of force in humanitarian interventions. I was one of several OLC lawyers, at the time serving as a deputy to Assistant Attorney General Walter Dellinger, who worked on articulating what Professor Koh and others aptly describe as “the Dellinger approach.” In the context of proposed humanitarian military actions—first at the request of and to restore the elected President of Haiti (1994)92 and later as part of a NATO peacekeeping effort in Bosnia (1995)93—OLC opined that whether a particular military deployment requires congressional authorization depends in large measure on whether it is “war” in the constitutional sense. This determination in turn depends on the “nature, scope, and duration” of the proposed

action. Similarly, the Nixon Administration’s OLC, in an opinion by then-Assistant Attorney General William Rehnquist, distinguished “armed conflict short of ‘war’” from military deployments that under “constitutional practice must include executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale.” 94 Both Dellinger and Rehnquist also addressed the preliminary requirement that the President’s action serve a national interest adequate to support the use of force. Traditionally, commonly invoked and accepted interests include defense of the nation against enemy attack and the protection of the lives of Americans abroad. 95

Numerous scholars, government officials, and other commentators have addressed whether this or some other general approach is correct. The literature on when the President may commit U.S. forces absent congressional authorization is legion. In recent years, leading commentators have observed the utility of characterizing the range of views as falling along a spectrum that includes three principal categories, with the Dellinger approach somewhere in the middle of the spectrum of views. 96 I will summarize briefly.

At either end of the spectrum are approaches that are more easily described and applied, with outcomes more predictably in favor of either Congress or the President. John Hart Ely detailed perhaps the most widely respected and cited version of the strong pro-congressional authority view in his 1993 book War and Responsibility. 97 The constitutional text enumerates Congress’s

94. Vietnam OLC Opinion, supra note 27.

95. Id. at 326; Haiti OLC Opinion, supra note 26, at 176 & n.3. Rehnquist constructed the following three categories to describe historical practice regarding presidential exercise of the Commander in Chief power, the first two of which address the initial deployment of U.S. armed forces:

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

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

(c) Authority to conduct or carry on armed conflict once it is instituted, by making and carrying out the necessary strategic and tactical decisions in connection with such conflict.

Vietnam OLC Opinion, supra note 27, at 326.


sole authority to declare war, and the War Powers Resolution recognizes only very limited exceptions in cases of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."98

In the wake of the 9/11 terrorist attacks, the Bush Administration repeatedly asserted a strong presidential authority position at the other end of the spectrum: Although the Constitution gives Congress sole authority to declare war, presidents may unilaterally choose to make war—even a traditional full-scale ground war—without a declaration.99 President Bush importantly did obtain congressional authorizations to use military force post-9/11100 and in Iraq,101 but maintained that he was not constitutionally required to do so and that he could have gone to war in both Iraq and Afghanistan without prior authorization.102

The Dellinger approach to presidential authority to initiate military operations is highly fact-dependent, and in this respect it contrasts sharply with the other two. It thus is susceptible to both principled disagreement and deliberate manipulation by presidents and their lawyers who at times—as in Libya—will have strong incentives to conclude against "war" in the constitutional sense. It also seems to attract less fervent supporters, with the exception of lawyers who served at OLC during the Clinton and Obama Administrations. Notable among the supporters is

98. 50 U.S.C. § 1541(b)-(c) (2012). Assistant Attorney General Dellinger, in responding to criticism of his Haiti opinion, offered this succinct and evocative description of the strong pro-Congress view, which also is interesting for its use of the term "hostilities":

The late Robert Cover once said that the language "life, liberty, or property" in the Due Process Clause could have been interpreted (although the Supreme Court chose not to do so) in the same way we interpret the phrase "heaven and earth" in the Bible: the language is intended to cover everything, and asking whether there is something other than "heaven" or "earth" is to miss the whole point. . . . By specifying that Congress is to declare war, grant letters of marque and reprisal, and make rules for captures on land and water, the argument goes, [the] Constitution gives Congress alone the power to initiate all hostilities, whether or not those hostilities amount to "war" or involve "letters of marque and reprisal" or concern "captures on land and water."


Professor Jeff Powell, who insightfully applies Justice Jackson's "constitutional vision" to support the Dellinger approach, and Professor Marty Lederman, who explains that he is "partial to this 'third way,'" which "establishes the relevant historical baseline against which to measure the case of Syria." Professor Koh and I agree that this "third way" Dellinger approach has the virtue of being correct.

With regard to the initiation of hostilities in Kosovo, the Clinton Administration failed to provide any legal opinion or analysis of any kind to support the initiation of air strikes. Public justifications came from the State Department (not the Department of Justice) and avoided the legality of the intervention, which the Independent International Commission on Kosovo concluded was, as a matter of international law, "illegal but legitimate." OLC did not provide public constitutional analysis, nor has anyone suggested that OLC was consulted.

Professor Koh describes this lack of public legal analysis as an "outrageous" violation of a "Duty to Explain" and bemoans the lost opportunity to provide a strong precedent for future humanitarian interventions: "Don't we invariably strive to state the rules and principles that make that conduct lawful?... Is there any circumstance where in seeking social change, we do not try to legalize the conduct in which we think we are allowed to engage??" I agree that the Executive Branch bears a responsibility to provide a public explanation for such controversial and consequential action. That should include an accurate, balanced assessment of all potentially applicable legal

103. Powell, supra note 66, at 232-33.  
104. Lederman, supra note 96 ("[T]he Clinton/Obama 'third way'—a theory that has in effect governed, or at least described, U.S. practice for the past several decades... is best articulated in Walter Dellinger's OLC opinions on Haiti and Bosnia... I am partial to this 'third way,' at least in contrast to the two more categorical views... [and] assum[e] this 'third way' view... establishes the relevant historical baseline against which to measure the case of Syria... ").  
105. See Indep. Int'l Comm'n on Kosovo, The Kosovo Report 4 (2000), http://reliefweb.int/sites/reliefweb.int/files/resources/6D26FF98119644CFCC1255989005CD392-thekosovereport.pdf. As Professor Deeks notes, "Rather than cite elements and assert the legality of intervention, the United States set out political facts that supported the legitimacy of the intervention." Deeks, supra note 13, at 1060 (citing Press Briefing by James P. Rubin, Assistant Sec'y of State for Pub. Affairs (Mar. 23, 1999), http://www.hri.org/news/usalstd/1999/99-03-23.std.html); see also Michael J. Matheson, Justification for the NATO Air Campaign in Kosovo, 94 AM. SOC'Y INT'L L. PROC. 301, 301 (2000) (Matheson, the Acting Legal Adviser to the State Department, described the NATO justification as "a pragmatic... basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the Alliance if misused by others.").  
constraints. I would note that the phrases “try to legalize the conduct” and “seeking social change,” particularly when read in context, suggest something different than the government simply providing an explanation of why the conduct, in fact, was lawful (entirely appropriate, I hasten to add, for academic commentary and advocacy for social change).

With regard to the government’s position at the time on the Kosovo air strikes, Professor Koh seems surprisingly confident that a persuasive explanation of actual authority existed or could have been crafted—or, in any event, that President Clinton and his counsel believed that the action was consistent with constitutional and international law. Further, I would disagree that it always is better “to legalize the conduct” undertaken, including for reasons Justice Jackson gave in dissent in Korematsu v. United States and many commentators since have cited in resisting arguments to “legalize” other unlawful but desirable emergency actions, most prominently torture in the hypothetical “ticking time bomb” scenario: “The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.”107 Along these lines, former State Department Acting Legal Adviser Michael Matheson has explained that the lack of any proffered legal reasoning for Kosovo was intentional, reflecting “a shared concern that the chosen justification not weaken international legal constraints on the use of force.”108 Although Professor Koh acknowledges this risk,109 he does seek to use President Clinton’s unilateral use of force in Kosovo as a precedent for future humanitarian actions. I believe to the contrary, that the lack of public explanation at the initiation stage should be recognized (as it may have been intended) as greatly undermining any precedential value of this intervention for domestic law purposes.

With regard to the Libya air strikes, the Obama Administration consulted with OLC prior to taking what was a controversial and close case of unilateral action.110 OLC appropriately provided a lengthy public opinion in which it detailed reasoning for the conclusion that the air strikes as then

108. Matheson, supra note 105, at 301 (“Consequently, NATO decided that its justification for military action would be based on the unique combination of a number of factors that presented itself in Kosovo, without enunciating a new doctrine or theory.”).
contemplated would not amount to constitutional “war” and could proceed without prior congressional authorization. The opinion strongly affirmed the Dellinger approach and will stand as an important precedent for that approach.

Some of the extensive criticism the OLC Libya opinion provoked, however, will bear on future efforts to apply it, especially to humanitarian interventions. The opinion has been fairly criticized for applying the Dellinger precedent without acknowledging the ways in which it actually asserted broader presidential authority than was the case in Haiti and Bosnia. I will highlight four contested aspects of the Libya opinion that may be particularly relevant to future humanitarian interventions. First, as Professor Jack Goldsmith explained at the time, the military engagements in Haiti and Bosnia were consensual operations in ways the Libya intervention clearly was not: Dellinger “gave considerable weight” to the consensual, peacekeeping nature of those operations, while the Libya operation involved “a coercive force.”

Second, the OLC Libya opinion actually does not rely directly upon a humanitarian interest of the type asserted by the R2P movement and Professor Koh. To do so would have been highly controversial. The interests the opinion does cite—regional stability and support for the U.N. Security Council’s credibility and effectiveness—are themselves controversial.

Third, the Libya opinion relies upon historical practice to suggest congressional acquiescence in unilateral initiations of this sort, without adequate attention to Congress’s responses to those incidents. Professor Koh characterizes congressional acquiescence sweepingly:

As a historical matter, I would argue that Congress has largely acquiesced in this interpretation, which has led us to the position where prior congressional approval is required to initiate large scale foreign conflicts like Iraq in

111. Id.
112. Id.
2003, but not to initiate a more limited intervention of constrained nature, scope, and duration.\textsuperscript{117} I believe this misinterprets Congress's position. Professors Curt Bradley and Trevor Morrison, among other scholars, persuasively argue in support of a quite modest claim to the contrary: "[I]f one's approach to historical practice focuses on claims of institutional acquiescence, mere recitations of operationally similar past uses of force should not suffice."\textsuperscript{118} They suggest that Congress's actual response to Kosovo, among other incidents, undermines a claim of congressional acquiescence. Moreover, a claim of congressional acquiescence seems odd when presidents do not even agree. As I have explained, immediately between President Clinton and President Obama's adoption of the "third way," President Bush reverted to the absolutist claim—one the George H.W. Bush Administration also asserted—of unconstrained presidential authority to "make" war.\textsuperscript{119} Certainly, actual practice strongly supports the Dellinger approach, but the three branches and the two political parties have not all agreed—and the position of future presidents is far from certain. Most powerfully, the War Powers Resolution itself stands as a rejection of the claim of acquiescence, including in Congress's express statement of purpose.\textsuperscript{120}

Finally, in both the Haiti and Bosnia opinions, Assistant Attorney General Dellinger considered as relevant to "war" in the constitutional sense the loss of not only American lives, but of any lives. Specifically, Dellinger considered the "antecedent risk that United States forces would . . . suffer or inflict substantial

\textsuperscript{117.} Koh, Humanitarian Intervention, supra note 1, at 978.

\textsuperscript{118.} Bradley & Morrison, supra note 116, at 466; see also Michael J. Glennon, The Cost of "Empty Words": A Comment on the Justice Department's Libya Opinion, HARV. NAT'L SECURITY J. (Apr. 14, 2011, 2:57 PM), http://harvardnsj.org/2011/04/the-cost-of-empty-words-a-comment-on-the-justice-departments-libya-opinion-2/ ("A practice of constitutional dimension must be regarded by both political branches as a juridical norm; the incidents comprising the practice must be accepted, or at least acquiesced in, by the other branch. In many of the precedents that provide the 'historical gloss' on which OLC so heavily relies, Congress objected."). See generally Alan B. Morrison, The Sounds of Silence: The Irrelevance of Congressional Inaction in Separation of Powers Litigation, 81 GEO. WASH. L. REV. 1211 (2013). For a more general discussion of the use of historical practice by OLC in assessing questions of presidential power, see Curtia A. Bradley & Trevor W. Morrison, Presidential Power, Historical Practice, and Legal Constraint, 113 COLUM. L. REV. 1097 (2013). Bradley and Morrison also consider the particular case of Libya and conclude that whether or not its controversial actions were legal, the Obama Administration's cared about complying with applicable legal constraints and its "context-specific approach may make it harder for future administrations to generalize from the Libya episode." Id. at 1149.

\textsuperscript{119.} See Iraq OLC Opinion, supra note 23; Terrorist Nations OLC Opinion, supra note 99.

\textsuperscript{120.} See infra note 141 (quoting 50 U.S.C. § 1541 (2012)).
casualties as a result of the deployment.'"121 The Libya opinion's analysis of the nature, scope, and duration of operations that amounted to constitutional "war" focuses on the risk only to American troops.122 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 the War Powers Resolution (or both).123 Not to consider foreign casualties inflicted by U.S. forces would seem especially perverse in the context of humanitarian interventions. In addition to the moral imperative behind valuing all human lives taken, the United States' reputation and standing in the world depends dearly on this factor.

B. Continuation

With regard to the continuation of hostilities, I believe that the War Powers Resolution's sixty-day clock, properly read after Kosovo and Libya, remains a significant legal obstacle for the continuation of military action initiated by presidents unilaterally for humanitarian purposes. Professor Koh concludes to the contrary:

The three case studies I have reviewed show that there are too many ambiguities in how that statute is to apply in humanitarian intervention cases. As time goes by, Congress will simply have to find a better way to force collective expression of its views regarding humanitarian intervention by considered affirmative action in specific cases, not through deliberately ambiguous inaction.124

I will not engage in a comprehensive analysis of the War Powers Resolution, on which the commentary is voluminous, but will offer some observations that run counter to Professor Koh's broad assertion. I do not believe either his interpretation of "hostilities" in

121. Haiti OLC Opinion, supra note 26, at 179; accord Bosnia OLC Opinion, supra note 26, at 331.
122. Libya OLC Opinion, supra note 26, at 8 ("This standard generally 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.").
123. See, e.g., Louis Fisher, Military Operations in Libya: No War? No Hostilities?, 42 PRESIDENTIAL STUD. Q. 176, 181–82 (2012) ("According to the analysis by the Obama administration, if the United States conducted military operations by bombing at 30,000 feet, launching Tomahawk missiles from ships in the Mediterranean, and using armed drones, there would be no 'hostilities' in Libya (or anywhere else) under the terms of the War Powers Resolution, provided that U.S. casualties were minimal or nonexistent. Under that interpretation, a nation with superior military force could pulverize another country—including the use of nuclear weapons—and there would be neither hostilities nor war.").
the context of Libya or, more important, his proposed new interpretation in favor of a humanitarian intervention exception to the reach of “hostilities” is the best reading of the War Powers Resolution.

Again, the argument for new or amended framework legislation is strong. Absent that, Professor Koh’s conclusion that Congress must act affirmatively in order to halt humanitarian action that otherwise would constitute “hostilities” runs counter to the text and purpose of the War Powers Resolution. This law serves as a framework statute to obviate the need for “affirmative action in specific cases,” to require reporting and then cessation after the clock expires. The text alone clearly refutes his broader argument for a humanitarian exemption where hostilities are present (a point to which I will return). The legislative “plan” and history arguably would be relevant to determining whether a particular proposed intervention involves the introduction of military forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.” 125 The statute does not define that phrase, which gives presidents and proponents of broad unilateral presidential authority at least the appearance of a basis for arguing that the drafters left some discretion to presidents as to what constitutes “hostilities.” Strong evidence also exists, however, to the contrary to suggest (as does the text) that the drafters meant the term to apply expansively to constrain presidents.126 For example, the House Report states that “[t]he word hostilities was substituted for the phrase armed conflict during the subcommittee drafting process because it was considered to be somewhat broader in scope.” 127 The drafters also may have left the term undefined simply because they did not agree about its scope. Although Congress enacted the requirements in the wake of the Vietnam War, “colloquies in hearings suggested that some of the sponsors of the [War Powers Resolution] could not agree, even after the fact, about when hostilities began in Vietnam.” 128 In any event, virtually all agree that “hostilities” is substantially more expansive than “war” in the constitutional sense.

125. 50 U.S.C. § 1541(c) (2012).
128. Morrison, supra note 127, at 236.
The continuation of air strikes in Kosovo provides absolutely no support for the continuation of any future humanitarian intervention past the sixty-day mark in the absence of congressional action. The Clinton Administration actually conceded that the Kosovo air strikes constituted "hostilities," and therefore the precedent is inapposite to the Obama Administration's contrary conclusion with regard to Libya. More to the point, the Clinton Administration determined that Congress authorized the hostilities before expiration of the sixty-day clock; the Obama Administration had no such argument. OLC issued its written opinion in 2000, but the opinion states that it memorialized advice given contemporaneous to the Kosovo action in May 1999.

Whether OLC reached the correct conclusion in its Kosovo opinion is a close question, and the opinion concedes as much. This is especially true given the War Power Resolution's provision generally seeking to reject an appropriation as adequate to authorize continuation of hostilities. The OLC Kosovo opinion, however, provides a close analysis of a complicated series of legislative actions and statutory principles, including the fundamental rule that one Congress may not bind a subsequent Congress. In my view, the opinion is a model of rigorous analysis and forthright acknowledgment of strong arguments counter to its conclusion. I believe on the very particular facts, OLC properly concluded that Congress had approved the continuation of hostilities in Kosovo through appropriation measures. OLC certainly was correct to recognize that one Congress may not bind a subsequent Congress and that the key question was whether Congress had been sufficiently clear to authorize the continued air strikes. This conclusion, however, is appropriately narrow and does not provide any support for the continuation of air strikes in Libya or for Professor Koh's far broader claims. Again, OLC's analysis is premised on a recognition that the air strikes constituted hostilities.

With regard to the continuation of air strikes in Libya past the sixty-day mark, like most commentators, I disagreed at the time and remain unconvinced by the argument that the air strikes in Libya did not constitute "hostilities" within the meaning of the

130. Id. at 365.
131. Id. at 327.
132. Id. at 339–40.
133. Id. at 341–44.
War Powers Resolution.  More detailed reports of internal conflict have emerged that suggest the Departments of Justice and Defense advised that the air strikes did constitute hostilities, but that Professor Koh was instrumental in supporting President Obama's conclusion to the contrary. Also at the time, I disputed attempts to equate Libya with unlawful Bush Administration actions—in violation of federal statutes—based on flawed, classified OLC opinions. It was highly significant for the Obama Administration to accept the constitutionality of the War Powers Resolution and not even proffer an interpretation based on the avoidance of constitutional difficulties, as the Bush Administration routinely had in numerous, varied contexts, based on radical theories of presidential authority. Moreover, Professor Koh's careful Senate testimony emphasized the "unusual confluence" of factors and stated that "[h]ad any of these elements been absent in Libya, or present in different degrees, a different legal conclusion might have been drawn."

Primarily through Professor Koh's testimony, the Obama Administration appropriately put its detailed argument before

135. Charlie Savage, 2 Top Lawyers Lose Argument on War Power, N.Y. TIMES (June 18, 2011), http://nyti.ms/18PMZRP.
137. See Koh Libya Testimony, supra note 28, at 7–11. His testimony described the following four factors:

First, the nature of the mission is unusually limited. By Presidential design, U.S. forces are playing a constrained and supporting role in a NATO-led, multinational civilian protection mission charged with enforcing a Security Council resolution.

Second, the exposure of our Armed Forces is limited. From the transition date of March 31 forward, there have been no U.S. casualties, no threat of significant U.S. casualties, no active exchanges of fire with hostile forces, no significant armed confrontation or sustained confrontation of any kind with hostile forces.

Third, the risk of escalation here is limited. In contrast to the U.N.-authorized Desert Storm operation, which presented over 400,000 troops, the same order of magnitude as Vietnam at its peak, Libya has not involved any significant chance of escalation into a full-blown conflict characterized by a large U.S. ground presence, major casualties, sustained active combat, or an expanding geographic scope.

And fourth and finally, . . . we are using limited military means, not the kind of full military engagements with which the War Powers Resolution is primarily concerned. . . . The violence U.S. Armed Forces are directly inflicting or facilitating after the handoff to NATO has been modest in terms of its frequency, intensity, and severity.

Id. at 8.
Congress and the American public, as was necessary to stimulate evaluation of the Obama Administration's action and reasoning. This is reminiscent of other times when presidents have taken unilateral action of highly contestable legality—most notably, President Truman's seizure of the steel mills—\textsuperscript{138} and did so openly, with express notice to Congress and concession that Congress possessed ultimate authority to resolve the question. The Libya hostilities interpretation has not survived scrutiny. A consensus has emerged that the Obama Administration's interpretation was not the best interpretation of the law.\textsuperscript{139} If we as a nation remain true to that consensus in future analogous circumstances, the process of democratic deliberation enabled by the Obama Administration's dialogue will have worked.

Professor Koh now seeks to expand his argument beyond the reach of his narrow Libya Senate testimony\textsuperscript{140} to support a reading of the War Powers Resolution that would exclude from its reach a far broader range of humanitarian interventions. This new argument essentially is for reading the "plan" behind the War Powers Resolution to create an exception for humanitarian interventions even when they otherwise clearly constitute "hostilities." Again, I endorse as the appropriate course Professor Koh's advocacy in the alternative of a legislative fix to what he views as deeply problematic on policy grounds. The Obama Administration's position at the time of the Libya air strikes could have been strengthened by advocating strongly for such a specific proposal.

Congress expressly stated its purpose in enacting the War Powers Resolution as follows:

\begin{quote}
It is the purpose of this chapter to . . . insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.\textsuperscript{141}
\end{quote}

\textsuperscript{138} See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
\textsuperscript{139} See, e.g., Fisher, supra note 123, at 181; Savage, supra note 135.
\textsuperscript{140} Koh Libya Testimony, supra note 28, at 9.
\textsuperscript{141} 50 U.S.C. \S\ 1541(a) (2012); see also 50 U.S.C. \S\ 1541(b) (citing congressional authority under the Necessary and Proper Clause); 50 U.S.C. \S\ 1541(c) ("The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States . . . ").
This stated purpose aims broadly to limit unilateral presidential military action. Professor Koh, to the contrary, cites the Supreme Court’s statement in King v. Burwell that “[a] fair reading of legislation demands a fair understanding of the legislative plan” to suggest that the War Powers Resolution’s prevailing legislative plan is limited to one of “No More Vietnams.” Many actual and imagined military operations that are not “More Vietnams”—from the current extensive operations against ISIL (which rest upon existing congressional authorization) to hypothetical military force to destroy another nation’s unlawful nuclear capabilities—clearly constitute hostilities within the reach of the statute. Even accepting his premise of the War Powers Resolution as primarily intended as a “No More Vietnams” statute, motivated by a desire to prevent “undeclared creeping wars that start and build before Congress or the public are fully aware,” Congress chose to write the law broadly and without regard to the reason behind the military intervention. The War Powers Resolution’s legislative purpose and plan clearly aim to reach “hostilities” and limit them to sixty days, regardless of the impetus—humanitarian, counterterrorism, to prevent a nuclear attack—behind the military force in question.

A closer look at the law at issue in King v. Burwell further undermines Professor Koh’s argument. The Affordable Care Act is distinguishable from the War Powers Resolution in numerous relevant ways, including its sheer size, intricacy, and less clear and discrete purpose. King required looking to the broader, complex legislative plan in order to avoid an absurd result. The War Powers Resolution is a relatively short and straightforward statute plainly aimed at limiting unilateral presidential interventions.

Koh offers two hypotheticals to support his contention that the legislative plan of the War Powers Resolution implicitly accepts fact-specific exceptions to the sixty-day durational limit. First, he posits a city statute that directs the mayor to “keep school open every day.” When a hurricane makes all roads impassable

143. Koh, Humanitarian Intervention, supra note 1, at 991.
144. KOH, NATIONAL SECURITY CONSTITUTION, supra note 3, at 39.
145. Moreover, at least some consideration was given to the fact the law would reach “humanitarian relief missions.” See, e.g., 119 CONG. REC. 24, 532–34 (1973) (statement of Sen. Goldwater) (asking whether the War Powers Resolution requirements would extend to humanitarian missions); 119 CONG. REC. 25,054 (1973) (statement of Sen. Javits) (“If 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.”).
146. Koh, Humanitarian Intervention, supra note 1, at 1023.
and the mayor closes the schools, the broader legislative plan reveals an implicit exception in a situation of factual impossibility. Professor Koh also uses a personal example of having violated a parking restriction that imposed a one-hour time limit during the emergency situation of his wife’s labor. Both analogies are inapt: There was no hurricane or childbirth in the Libya context that might have provided an impossibility justification, and of course that was not the basis for the Obama Administration’s argument in Libya. And we certainly cannot assume analogous facts will exist in all future humanitarian interventions, to merit a general humanitarian intervention exception.

Beyond that, the hypotheticals ignore the fact that the War Powers Resolution speaks directly to impossibility and exigent circumstances. The sixty-day clock is itself an acknowledgment of nuanced factual situations that may result in the President’s limited use of the military for sixty days, and the statute further permits an additional thirty days in cases of “unavoidable military necessity.” It also states that any use of the military must be terminated after sixty days unless Congress “is physically unable to meet as a result of an armed attack upon the United States.”

Thus, the War Powers Resolution takes account of the potential rationales Professor Koh cites for an exception to allow continuation beyond sixty days without congressional authorization—impossibility, emergency, necessity—and its very object also clearly contemplates them.

In sum, Professor Koh’s argument for a humanitarian exception, far more than his advice regarding Libya, misreads the War Powers Resolution in ways fundamentally at odds with the law’s text, purpose, and “plan.” The presence or absence of hostilities does not turn on the reason behind the use of military force—and in any event, no rational basis would exist for an exception for humanitarian but not counterterrorism measures. The President’s unilateral initiation of air strikes in Libya came close to the line of war. Whether it crossed that line is the subject of fair dispute, as described above, but such criticisms apply with greater force to whether the continuation of air strikes beyond sixty days constituted “hostilities” even if not “war.” Congress clearly used the term hostilities or imminent hostilities to denote military force of a nature significantly less than war, in order to promote Congress’s broad involvement in the prolonged use of military force. For example, lives taken from those who are not

147.    Id. at 1013–14.
149.    Id.
U.S. military or citizens, and the threat of such loss, must be a factor in making the hostility determination. Moreover, even if the air strikes in Libya at the end of sixty days had diminished to the point that they no longer constituted hostilities, any future air strikes of sufficient magnitude in other contexts will meet the definition of hostilities, whether undertaken for humanitarian, counterterrorism, or some other objective. The War Powers Resolution cannot sensibly be read otherwise.

IV. BEYOND HUMANITARIAN INTERVENTIONS: GOVERNMENT LAWYERING AND THE RULE OF LAW

Although I disagree with Professor Koh's suggested reading of the War Powers Resolution, I embrace his effort to promote U.S. leadership in the advancement of humanitarian ends and in particular his emphasis on the need for transparency and clarity in the legal justifications behind U.S. military interventions: "As a matter of domestic law, we need to develop a war powers approach to humanitarian intervention that is consistent with a 'shared power' vision of constitutional checks and balances and makes more explicit what kinds of humanitarian interventions Congress will or will not accept and for how long." To those who take up Professor Koh's call, I advise caution against allowing hard cases of desired humanitarian interventions to harm rule-of-law values. We should take special care not to empower presidents to respond to humanitarian crises with military force without congressional authorization in ways that would diminish the guiding force of the rule of law, well beyond matters of humanitarian interventions.

The principle that presidents must act within the law is well settled, but the devil can lie in the details. Professor Koh and I both have written and worked on this large subject, as have many other former Executive Branch lawyers. I will not summarize that literature here, but will supplement it with some anecdotal observations that chronologically draw upon experiences Professor Koh and I have shared, as they relate to the standards and processes of government lawyering. This concluding section goes beyond Professor Koh's proposals and beyond humanitarian interventions to consider the potential

150. Koh, Humanitarian Intervention, supra note 1, at 1032.

151. Most directly relevant is Professor Trevor Morrison's excellent analysis and defense of OLC's traditional role in the context of the Obama Administration's use of force in Libya. Morrison, Libya, Hostilities, and OLC, supra note 33; see also Goldsmith, supra note 43; Symposium, Executive Branch Interpretation of the Law, 15 CARDOZO L. REV. 21 (1993); Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 ADMIN. L. REV. 1303, 1316 (2000); Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 MICH. L. REV. 676 (2005).
implications of suggestions to change those standards and processes in two respects: first, to allow presidents to act on merely plausible or “available” legal interpretations rather than on the best view of legal constraints, and second, to substitute a wider and flexible group of government lawyers for OLC’s traditional role as the source of legal advice to guide major Executive Branch action. I instead urge adherence to OLC’s traditional role and best practices.

Professor Koh actually helped to introduce me to OLC and Executive Branch lawyering in November 1992. I worked for presidential candidate Bill Clinton and then on his transition team, helping to prepare for the transfer of power from President George H.W. Bush. My transition team assignment was to review OLC, an office not widely known at the time and about which I knew little. Before the Bush-era torture opinions brought the office notoriety, OLC kept a low public profile as it provided presumptively authoritative legal advice to the President and throughout the Executive Branch. Within the government OLC was highly esteemed, and recent former heads included Chief Justice William Rehnquist, Justice Antonin Scalia, and later-Solicitor General Theodore Olson.

One of my first calls was to Professor Koh, who had worked at OLC as a career lawyer during the Reagan Administration. Professor Koh was characteristically generous with his time as he explained OLC’s proud tradition of accurate legal interpretation, undistorted by policy objectives, and described the internal processes he believed best fostered that tradition. I remember his emphasis also on the need for transparency both in the substantive legal advice OLC provides and in the processes that govern OLC. Shortly after our conversations, Professor Koh published an essay expressing similar views:

OLC has developed certain informal procedural norms designed specifically to protect its legal judgments from the winds of political pressure and expediency that buffet its executive branch clients . . . both to protect its independence and to ensure that the Office will pursue . . . a “court-centered” or “independent authority” model of government lawyering instead of the “opportunistic” model of a private lawyer.152

His essay called for strengthening those commitments and processes.153

In many conversations during the transition with congressional offices and others with experience with OLC, I heard consistent themes of respect for OLC but a desire for greater transparency. Those who at the time served in the leadership of George H.W. Bush's OLC emphasized their commitment to advice based on the premise of best interpretations of applicable law, not merely plausible or reasonable legal theories, and they highlighted instances when they had told the President or other Executive Branch officials "no." Although they disagreed with the extent to which some critics had called for transparency from OLC, they attributed a decade-long lag in releasing opinions to resource priorities and described an extensive "publication project" aimed at reviewing all of the Bush Administration's opinions for possible release by the end of the Administration.

Shortly thereafter, I was privileged to serve in the Clinton Administration as a Deputy to Walter Dellinger and later, when Dellinger served as Acting Solicitor General, as the Acting Assistant Attorney General heading OLC, under the leadership of Attorney General Janet Reno. We strove to follow the Office's best traditions, which included saying "no" when the law did not permit a proposed action, but working to develop lawful alternatives to achieve desired policies. Through frequent interactions, lawyers in the White House Counsel's office and in other agencies brought extremely useful perspectives and expertise, but they understandably advocated from their different roles. We sometimes encountered entirely appropriate and often helpful pushback from political and career lawyers alike—especially if we adopted a narrower view of authority than a previous administration on questions of war and national security, and generally as we strove for greater transparency. My experience with the Haiti and Bosnia opinions reinforced the value of OLC's role, which I believe was important to the Clinton Administration's adoption of the "third way" Dellinger framework.

Speaking of his own work in the State Department, Professor Koh has noted that where he sat in government mattered: "At the time [of the Kosovo air strikes,] I was acting not as a government lawyer, but as a human rights policy official within the U.S. government."154 On other occasions as well, he has addressed the differing roles of OLC lawyers (who focus on best legal interpretations at some remove from policy pressures) and general

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153.  *Id.* at 523.
counsels of Executive Branch departments and agencies who “must shift back and forth constantly between . . . rich and varied roles.”155 Assistant Attorney General Dellinger also spoke to the importance of roles when his issuance of the Haiti opinion prompted some former academic colleagues to accuse him of hypocrisy, alleging that “Professor Dellinger” would not have written that opinion.156 Dellinger wrote that he was not sure what he would have thought if writing as an academic, but that his position at OLC mattered, particularly because it entailed the responsibility and benefits of considering Executive Branch precedent and expertise.157

Under longstanding tradition and practice, OLC’s advice is presumptively authoritative and rarely rejected. Ultimately, however, presidents possess the clear authority to rely on legal advice from any source, including their own. In my experience during the Clinton Administration, the Executive Branch never took action that contradicted OLC legal advice. This is complicated by the fact that, on some questions, there is not one correct interpretation, and on occasion, multiple interpretations will be equally legitimate. President Clinton’s legal views (as well as those of other Executive Branch lawyers) sometimes appropriately did inform close and unsettled questions. In any event, for presidents to make informed, principled, lawful decisions—including determinations regarding which legal positions to accept—they need accurate, balanced, honest appraisals of the law. Presidents then may act on their own legal views, which may include a desire to help shape the development of the law in a principled direction.158

During the Bush Administration, Professor Koh and I both, from our vantage points of former Executive Branch officials in legal academia, sharply criticized some counterterrorism measures that did not comply with the law and were enabled by inappropriate legal advice that deviated greatly from traditional standards and processes. The Bush Administration’s stance on the use of military force—that Congress’s power to “declare” war did not preclude the President’s unlimited authority to “make” war without congressional authorization—was but one component of a much broader effort to expand presidential powers, particularly early in the Administration.159 Even in some instances when the

156. See Dellinger, supra note 98, at 109.
157. Id. at 109–10.
158. See Johnsen, Faithfully Executing the Laws, supra note 53, at 1586–95.
159. For detailed accounts of this effort to expand preclusive executive authority and to exert inappropriate pressure on OLC for support, which OLC sometimes provided directly counter to accurate legal appraisals, see GOLDSMITH, supra note 43; CHARLIE
Bush Administration could have obtained congressional authorization, it strove instead to set precedent that the President could act alone.

In response to the leaking of OLC's legal advice on the legality of torture, Professor Koh joined me at Indiana University for a symposium on "War, Terrorism and Torture: Limits on Presidential Power in the 21st Century," where he provocatively asked: "Can the President Be Torturer in Chief?" As part of that symposium, eighteen former OLC lawyers and I published a set of principles aimed at restoring OLC's traditional role and avoiding a recurrence of the flawed legal reasoning OLC offered to justify noncompliance with the statutory ban on torture, which included an extreme view of the President's overriding Commander in Chief power. The very first of ten principles describes a standard for legal advice based on accurate and not merely plausible legal interpretations. Other principles detail the internal processes that traditionally have supported the first principle. The principles describe important ways in which OLC functions differently than a court—for example, by advising on lawful alternative means of achieving policy ends and by considering Executive Branch legal precedent. But the principles are premised on the fact that a standard that would allow merely plausible or reasonable arguments to guide presidential actions would be inconsistent with the President's constitutional oath and obligation to faithfully execute the laws. They also help make clear that a shift in responsibilities away from OLC to other lawyers in the Executive Branch would not appropriately serve the President or promote the rule of law.


162. Former OLC Assistant Attorney General Randolph Moss explained:

[If] the Constitution and relevant statutes are best construed to preclude a proposed policy or action, it is largely irrelevant whether a reasonable argument might be made in favor of the legality of the proposal. . . . A reasonable argument might diminish the political cost of the contemplated action and it might avoid embarrassment in the courts, but it cannot provide the authority to act.

Moss, supra note 151, at 1316.
I will not detail the principles here but will highlight one additional norm they endorse, one that poses special challenges in the context of national security: transparency. The early Bush Administration's failure in some instances to notify the public or even Congress when it acted inconsistently with statutory commands worked in special and profound ways to undermine democratic values. Professor Koh has provided strong leadership, consistently across administrations, to encourage transparency and accountability, and I have sought to do the same.163

At this writing, during President Obama's last months in office, a heated debate rages over aspects of the Obama Administration's exercise of war, national security, and other presidential powers—fueled by attention to the precedent that will be set for the next Administration, as well as Charlie Savage's extraordinary books on presidential power: Power Wars,164 on the Obama Administration, and Takeover: The Return of the Imperial Presidency, on the Bush Administration.165 Savage opens Power Wars with an analysis of a prevalent question: Does change or continuity better describe a comparison between the Bush and Obama Administrations? The answer depends in part on whether one is looking at the beginning or end of the Bush Administration, because, in the interim, substantial change resulted from pressures from multiple sources: the courts, Congress, political and career officials within the Executive Branch, nongovernmental organizations, and domestic and international public opinion. Within the Bush Administration, for example, Assistant Attorney General Jack Goldsmith and Deputy Attorney General James Comey insisted on legal compliance against tremendous pressures to the contrary in 2003 and 2004, most dramatically when they both raced the Counsel to the President, Alberto Gonzales, to the bedside of an extremely ill Attorney General John Ashcroft in order to uphold advice that a counterterrorism program did not comply with the law.166

163. See, e.g., Johnsen, Secret Law Testimony, supra note 70; Confirmation Hearing on the Nomination of Michael B. Mukasey to be Attorney General of the United States: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 210–12 (2007) (statement of Professor Dawn E. Johnsen, Professor, Indiana University School of Law—Bloomington); Johnsen, Faithfully Executing the Laws, supra note 53. I also worked with other former Executive Branch lawyers to help draft the bipartisan OLC Reporting Act. OLC Reporting Act of 2008, S. 3501, 110th Cong. (2008).

164. SAVAGE, POWER WARS, supra note 23; see also sources cited supra note 42.

165. See generally SAVAGE, TAKEOVER, supra note 159.

166. See Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?, Hearing Before the S. Comm. on the
Savage insightfully adds that one's view also depends on the criteria by which one is judging: whether the focus is on the substance of policies with regard to civil liberties or on the legality of those policies, which he describes as a "civil liberties critique" versus a "rule-of-law critique."\(^{167}\) I believe that change, and not continuity, better characterizes the Obama Administration when assessed with regard to the rule of law and our constitutional system of checks and balances. I believe history will judge the early years of the Bush Administration as an extraordinary and harmful deviation from the norm of historical presidential practice and the Obama Administration as a vital course correction, the lasting nature of which will depend upon whether the restoration of the rule of law endures in the coming presidential administrations.

From his first days in office, President Obama outlined a fundamentally different approach to the role of law on questions of war and national security. Where the early Bush Administration emphasized unilateral and preclusive presidential war powers, the Obama Administration emphasized the shared nature of war powers and pledged respect for legal limitations on executive action. I had the privilege of serving on President Obama's transition team, reviewing OLC (as I had during the Clinton transition) and also advising on the drafting of Executive Orders that President Obama issued in his first days. President Obama barred the use of extreme interrogation methods, directing compliance with the Geneva Conventions and the Army Field Manual and ordering the closure of secret black sites overseas.\(^{168}\) He disavowed and later made public Bush-era OLC memoranda on the legality of harsh interrogation methods. He announced his preference to prosecute suspected terrorists in civilian Article III courts and his intent to close Guantanamo within a year.\(^{169}\) In a speech in his first months in office, President Obama said:

> [W]e must [fight terrorism] with an abiding confidence in the rule of law and due process, in checks and balances and accountability... [T]he decisions that were made over the last 8 years established an ad hoc legal approach for fighting terrorism that was neither effective nor sustainable, a framework that failed to rely on our legal

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\(^{167}\) SAVAGE, POWER WARS, supra note 23, at 47.


traditions and time-tested institutions and that failed to use our values as a compass.\textsuperscript{170}

Guantanamo remains open due to congressionally enacted limits blocking the President’s ability to close it.\textsuperscript{171} The fact that President Obama has complied with these restrictions is a powerful example of his adherence to law against policy preferences. Savage’s book describes examples of OLC and other lawyers working diligently to help craft lawful policies. Generally, President Obama has grounded his assertions of war powers in authorities conferred by Congress rather than claims of inherent, unilateral constitutional authority.\textsuperscript{172} For example, his Department of Justice changed its position in the pending Guantanamo habeas litigation: the government would rely solely upon congressional authorization to use military force rather than an expansive view of the President’s constitutional authority, and it would interpret that authorization as “necessarily informed by principles of the laws of war.”\textsuperscript{173} The Obama Administration also appropriately respected limits on desired policies by stepping back in Syria when congressional authorization was not forthcoming, accepting the constitutionality of the War Power Resolution’s sixty-day clock, seeking a new and limited authorization against ISIS,\textsuperscript{174} and not sending a single additional detainee to Guantanamo or using war detention authority in the United States. Finally, OLC adopted “guiding principles” that are very similar to the ten principles I worked with former OLC lawyers to draft during the Bush Administration, and that direct OLC lawyers as follows:

“OLC must provide advice based on its best understanding of what the law requires—not simply an advocate’s defense of the contemplated action . . . . OLC seeks to provide an

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\item[	extsuperscript{172}.] See Remarks at the National Archives and Records Administration, supra note 170, at 691, 697–98.
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accurate and honest appraisal of applicable law, even if that appraisal will constrain the Administration’s or an agency’s pursuit of desired practices or policy objects.”

Savage’s account also describes several highly controversial legal positions adopted by the Obama Administration, almost all of which seem to me either correct or, at a minimum, principled legal positions taken on close and unclear questions of law seemingly within the President’s prerogative to take—at least until further resolved by the courts. Libya stands out for me as most clearly wrong. My other principal disagreement with the Obama Administration on war and national security issues concerns its inadequate transparency at times. One principal example is the Administration’s prolonged refusal to release a detailed legal analysis or account of the processes that governed its use of targeted killings with drones. The redacted OLC opinion ultimately made public seemed a meticulous and persuasive analysis, in the best OLC traditions, but its release came much too late.

I will end with a special call for bipartisan progress on one particular issue: the U.S. Senate should end its use of partisan objections, unrelated to the merits of particular individuals, to refuse to confirm future presidents’ nominees to head OLC. I served as an acting head of OLC in the Clinton Administration because the Senate would not confirm President Clinton’s nominee, Beth Nolan, who later served as his Counsel. President Obama nominated me to return to head the office, but the Senate refused to vote on my nomination for more than a year. Former OLC Assistant Attorney General Jack Goldsmith notes that OLC has had a Senate-confirmed Assistant Attorney General for only about five of the last twenty-one years. This is an astounding fact for an office entrusted with advising the President on the legality of vital issues including war and national security, as well as generally with helping to ensure that the Executive Branch is guided by the rule of law. Republican Senators’ refusal even to consider President Obama’s nomination to the U.S. Supreme

175. See Memorandum from David J. Barron, supra note 38, at 1.
176. See Johnsen, Power Wars Symposium, supra note 42.
Court does not bode well. Perhaps the outset of a new Administration will provide a more promising time to reestablish traditions of civility and responsibility in carrying out constitutional duties.

I do not have any creative solution to painful stalemates or frustrating dysfunction except to keep at it—keep talking and demanding that elected representatives and their appointed officials properly fulfill their constitutional functions. Even when one party or one branch of government acts irresponsibly for partisan reasons, adherence to the rule of law is what our Constitution demands. To quote Justice Jackson in his wise opinion in Youngstown: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."¹⁷⁹

We must not allow short-term challenges, even as compelling as humanitarian crises and terrorism, to blind us to the long-term costs of undermining rule-of-law values. Traditional and hard-earned best practices in advising presidents about applicable legal constraints can help keep our focus properly on the long run.