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# A Whole Text Reading of the War Powers Clauses: Why the Constitution's Text Obviates Esoteric War Powers Debates and Encourages Policy Flexibility and Democratic Accountability

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# A Whole Text Reading of the War Powers Clauses: Why the Constitution’s Text Obviates Esoteric War Powers Debates and Encourages Policy Flexibility and Democratic Accountability

ANTONIO F. PEREZ\*

The question this panel was asked to debate is whether the President had “the power to use force in Syria without Congressional approval.” But power is one thing and authority is another. The president may have the “power,” a usurpation of which would be punishable through impeachment for “high Crimes and Misdemeanors.”<sup>1</sup> Stated this way, the gravity of the question becomes clear, and prudence commands a close review of the potential grounds for concluding the President—had he gone forward with the course of action he threatened in the event President Assad crossed the President’s “Red Line” and used chemical weapons against his own people—would have been liable to impeachment. I don’t think so, as a close review of our Constitution’s text and structure should make clear. Indeed, a close review of the whole text makes the President’s authority to threaten or use force rather clear, establishing a default position that the President can act in the absence of express limitations imposed by Congress under the powers available to him. So the ground I would take to answer the question makes it a rather easy call.

Textualists have long debated the original meaning of the “Declare War” Clause,<sup>2</sup> primarily focusing on the original understanding of the text in light of the technical understanding of lawyers (including international lawyers), then resorting to related language in the Constitutional text, followed by history from the drafting convention and the ratification history of the states.<sup>3</sup> These textual-

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\* Professor of Law, The Columbus School of Law, The Catholic University of America; A.B., Harvard University; J.D., Columbia Law School. This paper is a lightly-footnoted and modestly expanded version of my presentation at the Georgetown Journal of Law & Public Policy Symposium’s panel on Executive War Powers, Syria, and President Obama’s “Red Line”—Did President Obama Have the Power to Use Force in Syria without Congressional Approval? Many thanks go to the editors of the Georgetown Journal of Law & Public Policy for a splendid symposium and to Professor Wallace, one of my interlocutors in this debate. A friendly disagreement is a happy experience: good for the soul, and one we ought to model more frequently. Indeed, our disagreement is quite narrow. Both of us would respect the text, rather than allow history of some variant of living constitutionalism to change our Constitution. We simply disagree about what that the text means. But I would take the view that neither of us suffers from the need to carry a burden of persuasion, particularly when that burden is based on historically-grounded assumptions. It’s the best reading of the text that should prevail. © 2014, Antonio F. Perez.

1. U.S. CONST., art. II, § 4.

2. *Id.*, art. I, § 8, cl. 11.

3. Compare John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [The Original Understanding]; and *War and the Constitutional Text*, 69 CHI. L. REV. 1639 (2002) [Constitutional Text] (advancing the pro-executive view); with Michael Ramsey, *Textualism and War Power*, 69 U. CHI. L. REV. 1543 (2002) [Textualism], and *Text*

ist debates turn ultimately on the precise meaning of the word “declare”—with the pro-executive position judging that it means only a change in legal relations, rather than an authorization to use force<sup>4</sup>; while the pro-congressional, textualist position reads “declare” to mean an expression of intention manifest through either a formal declaration or through the use of force itself, thus giving Congress alone the power to authorize a use of force.<sup>5</sup> These debates, it seems to me, read the text initially from the “declare War” clause rather than starting with the whole text in which the “declare War” clause is found. These textualist methods thus make an easy question rather hard; starting with ambiguity in the word “declare,” they resort to subsidiary methods of interpretation based on guesses as to an esoteric original public meaning. Thus, the door is further opened to reliance on precedential, historical reasoning when esoteric original meaning is necessarily debatable—when plain language original public meaning would be clear and beyond debate.

The whole text approach, in contrast, provides a clear and convincing explanation. Indeed, the text, read as a whole, permits only one conclusion, obviating resort to additional sources. Thus it would be unnecessary to debate technical understandings of original public meaning that the “People” would never have considered. Thus also it would be unnecessary to rely on subsequent history and practice—such as the Office of Legal Counsel’s Libya Opinion’s recent parsing of the meaning of precedents for unilateral Executive action,<sup>6</sup> which has been viewed as problematic even by those who accept in principal the use of history and precedent.<sup>7</sup>

That said, it is possible that pragmatic or functional justifications could matter; namely, that clear presidential authority serves the national security interest in an Age of Terror and Weapons of Mass Destruction, when credible threats of military action are necessary to deter adversaries, is a legal justification for reading the text to give the president plenary authority to initiate, and therefore threaten, the use of force. These pragmatic considerations could even

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*and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002) [Text] (advancing the pro-congressional view).

4. See Yoo, *The Original Understanding*, *supra* note 3, at 242–49 (describing the declaration as performing a “judicial function”).

5. See Ramsey, *Text*, *supra* note 3, at 1590–96 (relying principally on Locke’s reference to “declaration by word or action”); but see Yoo, *Constitutional Text*, *supra* note 3, at 1651–54 (arguing that the context for this remark is Locke’s discussion of the pre-political state of nature rather than the allocation of governmental war powers).

6. See Memorandum Opinion from Caroline D. Krass, Principal Deputy Assistant Att’y Gen., Office of Legal Counsel, to the Att’y Gen., Authority to Use Military Force in Libya (Apr. 1, 2011) [OLC Libya Memorandum], available at <http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf> (last visited June 9, 2014).

7. See Curtis Bradley and Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 466 (2012) (“These precedents would seem to offer little if any support to the OLC’s acquiescence-based claims in its Libya opinion”); and Michael J. Glennon, *The Cost of “Empty Words”: A Comment on the Justice Department’s Libya Opinions*, HARV. NAT’L SEC. J.F. 1 (2011).

reinforce a plain text interpretation to further the Constitution's overarching purpose of "providing for the common defense."<sup>8</sup> But functional arguments alone, whose currency will vary over time, would, if taken seriously, require amendment of the Constitution to override inconsistent textual requirements to accord with modern politico-military realities. Moreover, pragmatic arguments at the level of constitutional purpose risk encouraging resort in constitutional analysis to elite knowledge of history and elite judgments of functional considerations in national security decision-making, as well as functional arguments that, however well-intentioned, merely mask attempts to assert as constitutional entitlements the ordinary power-seeking political objective of institutions of government, in this case the Congress. Rather, by enabling the President to act and burdening Congress with responsibility for enacting constraining legislation, debate will shift, as it did in the case of Syria, towards the prudence and morality of specific decisions, as judged by the People's elected representatives and ultimately, therefore, the People themselves.

But, before sketching out a view that begins with the plain meaning of the whole text, let me explain why originalist modes of constitutional interpretation based on esoteric knowledge serve only to complicate what should be a simple question.

#### POTENTIAL LIMITS ON PRESIDENTIAL POWER

Esoteric knowledge, even for textualists, seems to have played an important role in interpretation of the "declare War" clause. The usual suspect for limiting the grant of Executive power to use force only to "repelling sudden attacks" on the United States is the debate at the Constitutional Convention. But *Madison's Notes*, recording this debate, were not available to the public for at least a generation, and certainly not during the ratification debates.<sup>9</sup> Therefore, nothing about this debate forms part of the common understanding of the Constitution, which was proposed and ratified by "Conventions" of the States,<sup>10</sup> not the State legislatures, which purport to speak for "The People of the United States,"<sup>11</sup> not their intelligentsia. So this source of information cannot form part of the original public meaning of the Constitution.

A second candidate offered for limiting Presidential power has been Original Intent gleaned from the ratification process. This approach relies principally on

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8. U.S. CONST., pmbl.

9. See HENRY GILPIN, *THE PAPERS OF JAMES MADISON* (1940), available at [http://en.wikipedia.org/wiki/The\\_Papers\\_of\\_James\\_Madison#cite\\_note-Gilpin-4](http://en.wikipedia.org/wiki/The_Papers_of_James_Madison#cite_note-Gilpin-4).

10. See U.S. CONST., art. VII; see generally GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* (1969) (discussing the role of "Conventions" as direct expression of popular will). The text of Article VII further makes clear that the Constitution itself was "done in Convention by the Unanimous Consent of the States . . ." The language marries a claim of direct popular representation, "Convention," in the act of proposing a new Constitution with the "consent" of existing political authorities, the "States."

11. See U.S. CONST., pmbl.

a source of evidence that was before New Yorkers and some other states,<sup>12</sup> although by no means a supermajority of the people of all the states—namely, Alexander Hamilton’s essay in No. 69 of *The Federalist Papers*. Here, Hamilton stated that the “Commander-in-Chief” Power of the President “would amount to nothing more than the supreme command and direction of the military . . . while that of the British King extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies—all of which by the Constitution under consideration would appertain to the legislature.”<sup>13</sup>

But this language is not self-defining. It refers only to the Commander-in-Chief Power, does not mention the Executive Power, leaves undefined the meaning of “supreme command and direction,” and does not explain what it means to “appertain to the legislature.” Hamilton’s failure to refer explicitly to the Executive Power plainly leaves the door open to an argument based on the implications of Article II’s cession to the President of all “the Executive Power” of the United States, as compared to Article I’s cession of only the legislative powers “herein granted” to the Congress.<sup>14</sup> Hamilton himself made good use of this textual difference in the first major constitutional controversy concerning foreign relations law to argue that President Washington, possessing fully the external powers of the United States, had plenary authority to construe the Treaty of Alliance with France so as not to impair his authority to proclaim U.S. neutrality in the war between Britain and France.<sup>15</sup> Moreover, originalists prepared to resort immediately to the esoteric knowledge of the elite members of a founding generation might look to political theorist John Locke’s definition of the Executive Power to include the so-called “federative” (or foreign relations power), which in turn included the power to use force.<sup>16</sup> Hamilton’s silence in *The Federalist Papers* as to the Executive Power left open precisely the argument he later made in the Neutrality Debate. But one does not need to explore this elite-centered argument if one can see that Hamilton’s essay in *The Federalist Papers*, properly construed, simply parses the text to note the truism that the Congressional powers enumerated in Article I of “declaring war” and “raising” and “regulating” the armed forces, as legislative powers, are beyond

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12. John Yoo also draws attention to the failure of proponents of the Constitution to defend it against charges of facilitating domestic tyranny through unchecked war powers, not on the basis of Congress’s power to “Declare War” but rather on Congress’s power to restrict appropriations. See Yoo, *Original Understanding*, *supra* note 3, at 279–86 (especially in the critical Virginia ratifying convention debate). But there is no reason to believe use of negative pregnant reasoning in one state debate, or even several, could reflect a common understanding of the “People” in the same way that the Federalist Papers could have informed nation-wide debate on the wisdom and meaning of the proposed Constitution.

13. See THE FEDERALIST, No. 69, 418 (Rossiter ed., 1961) (emphasis in the original).

14. Compare U.S. CONST., art. II, § 1, cl. 1 with Article I, § 8.

15. See Alexander Hamilton, PACIFICUS, No. 1, *reprinted* in BRADLEY & GOLDSMITH, FOREIGN RELATIONS LAW CASES AND MATERIALS 14–15 (3rd ed. 2009).

16. See Yoo, *Original Understanding*, *supra* note 3, at 199–200 (citing and discussing John Locke, THE SECOND TREATISE OF GOVERNMENT, paras. 143–45 (J.W. Gough ed., 3d ed. 1966)).

the residuum of non-legislative powers contained in the Executive Power and the Commander-in-Chief Power.<sup>17</sup>

#### THE TEXT READ AS A WHOLE

It has been suggested that the whole text of the Constitution supports the view that Congress's power to "declare War" necessarily does not refer to the power to use force. The argument that the "declare War" clause does not refer to the use of force has turned on the special meaning of the word "declare" according to international law publicists, and it has also turned on evidence in the Constitution in other contexts concerning the use of the term "waging" or "levying" war. Therefore, it is argued, failure to do so in the "declare War" clause necessarily implies a meaning other than authorization to use force, or "engage in" or "levy" war.<sup>18</sup> While this argument has some force, it seems to be advanced only to refute alternative interpretations of the meaning of "declare." Moreover, it reasons from the use of the term "war" in other constitutional contexts—federalism and individual rights—that provide only strained analogies to the context in which the "declare War" power is found. It is better to focus on that narrower context, the set of clauses that immediately surround the "declare War" clause, to locate its meaning.

But it is unnecessary to explore the original public meaning of the Constitution on this question, since the plain text fully establishes this President's plenary power to use force. Commentators have noted that the "declare War" phrase is immediately followed by powers to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and War."<sup>19</sup> "Letters of

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17. When the Congress plays a role in Executive functions, such as the Senate's role in treaty-making or appointment of executive officers, it specifies Congress's role in Article II rather than Article I. *See* U.S. CONST., art. II, § 2. Viewing the Treaty Power as essentially federative or executive, rather than legislative, makes clear why Article VI must further specify that treaties are also "supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Similarly, when the President performs acts that may have immediate legislative effects, the Constitution explicitly provides the President with that authority. Indeed, it is for this reason that the President is expressly granted the power to "receive Ambassadors and other public Ministers." U.S. CONST., art. 2, § 3. Otherwise, the Executive Power, which does not ordinarily include the power to create a domestic legal right or duty would not provide the basis for Presidential action to respect the diplomatic and consular immunities against otherwise applicable federal or state law.

18. *See* Yoo, *Constitutional Text*, *supra* note 3, at 1670 (discussing Article I, Section 10's use of "engage in War" and Article III's use of "levying War"). With respect to Article I, Section 10's prohibition on the States' "engaging in War, unless actually invaded or in such imminent Danger as will not admit of delay," Yoo explicitly makes clear that he is drawing on arguments constructed to defend the treaty interchangeability doctrine. *See id.*, at 1668, n.79 (citing Myres S. McDougal and Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*: I, 54 *YALE L. J.* 181, 205 (1945)). But that argument addresses the requirement of a Senate super-majority as a substitution for House participation in federal law-making, not Congressional participation in the Executive Power. And it seems clear that reference to "levying War" supplies a conduct element that would be necessary to define the crime of treason. U.S. CONST. art. III, § 3.

19. U.S. CONST., art. I, § 8, cl. 11.

Marque and Reprisal” were authorizations for U.S. private parties, thus engaging in privateering, to engage lawfully in acts that otherwise would be considered piratical activity against the citizens or vessels of other nations,<sup>20</sup> a practice subsequently abolished under international law beginning with the Declaration of Paris of 1856 following the Crimean War.<sup>21</sup>

But the powers that preface these powers are what make clear that the “declare War” power and the subsequently enumerated powers are legislative; they are necessary to facilitate the adjudication of individual rights under international and municipal law relating to war. The immediately preceding clause enabling Congress to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations,”<sup>22</sup> supplies the context for the meaning of the “declare War” power, the “Letter of Marque and Reprisal” power, and the power to make “Rules concerning Captures on Land and Water.” Private violence not authorized by letters of marque or reprisal could constitute piracy under the law of nations, making one clause *in pari materia* with the other. And the “define and punish” clause is, in turn, preceded by the Congressional power to “constitute Tribunals inferior to the supreme Court.”<sup>23</sup> Together, these clauses provide a kind of cryptographic key to understanding the “declare War” clause and its brethren.

Taken as a whole, these clauses create a unified legislative scheme enabling Congress to create mechanisms for the application and adjudication of the laws of war and, where appropriate, to modify its effects. First, the Constitution enables the Congress to create a judiciary capable of adjudicating the substantial caseload that might flow from law of war cases, since the state militias and privateers at sea are expected to form the first line of national defense. Next, the scheme enables the Congress to prescribe precise rules governing “offences against the law of nations,” including piratical private use of force, violations of neutrality obligations, and violations of the laws of war by U.S. military personnel when not otherwise privileged by the law of war. It then enables Congress to make the determination of legislative fact that a state of war exists, to “declare War,” thus enabling it to resolve legislatively judicial doubts as to whether the legal rights and duties as provided in the laws of war attend for public officers, and separately to enable private persons to benefit from immunities available under the law of war through “Letters of Marque and Reprisal.” The scheme then allows Congress to control and further specify the scope of the delegation of public authority to private persons to make war by enabling Congress to “make Rules” further regulating such “Captures on Land and War”—indeed, enabling Congress to vary from the default international law

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20. See Bradley & Goldsmith, *supra* note 20, at 22; see also Yoo, *Constitutional Text*, *supra* note 3, at 1667–68.

21. STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 98 (2000).

22. U.S. CONST., art. I, § 8, cl. 10.

23. U.S. CONST., art. I, § 8, cl. 9.

rules that would otherwise govern upon a declaration or letter of marque or reprisal. In sum, because all the preceding and following clauses refer to Congressional legislative power, the context makes clear that the power to “declare” war is also a legislative power. Accordingly, the power to enact laws that affect private rights and responsibilities can thus be adjudicated by the tribunals of the United States. The effect of the power is to provide a determination that the powers of war that would otherwise flow from making war, such as the power for agents of the executive to confiscate enemy or other property, would be granted to the President.<sup>24</sup>

This reading must acknowledge the potential in theory for the domestic use of war power to invade private rights without express congressional authorization.<sup>25</sup> But the law-constraining character of these clauses does not grant the president anything more than the authority to exercise the powers made available by international law, subject to express congressional revision; and the text immediately thereafter, as if in recognition of the possibility, provides the Congress with the means to attenuate, if not eliminate, this danger. As Hamilton argued in *The Federalist*, No. 69, Congress is granted the power to “raise and support Armies,” albeit with the limitation that “no Appropriation of Money to that Use shall be for a longer term than two Years,”<sup>26</sup> a limitation that does apply to the power to “provide and maintain a Navy.”<sup>27</sup> The temporal limit on appropriations for an Army, which can serve as a vehicle for the invasion of private rights when war is declared, but failure to impose a temporal limitation on the Navy, which plainly could not compel submission of a populace during the Founding Era, suggests that the appropriations power in the text plainly enables the Congress to address the danger of the domestic effects of plenary Executive authority. Congress is given, in the next set of clauses, power to “make Rules for the Regulation or the land and naval forces,”<sup>28</sup> and to “call[] forth the Militia to execute *the laws* of the Union,”<sup>29</sup> in order to further enable it to prevent the military’s use for tyrannical domestic purposes. Thus, the normal and natural reading of the whole text evidences a single design to enable the Congress to constrain the President’s exercise of his Executive Power through the Congress’s power to legislate and appropriate.

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24. See *Brown v. United States*, 12 U.S. 110 (1812) (Justice Marshall, for the majority, and Justice Story, dissenting, merely debating on the construction to be given to a Declaration of War as to the extent to which Congress intended legislatively to confer such powers to the Executive Branch).

25. This danger is clearly at the heart of opposition to plenary presidential power. See, e.g., *Youngstown Sheet & Tube C. v. Sawyer*, 343 U.S. 579 (1952) (addressing the domestic effects of the unilateral assertion of Executive war-making authority in the largest and most sustained use of force in U.S. history not authorized other than by congressional appropriations).

26. U.S. CONST., art. I, § 8, cl. 12.

27. *Id.*, art. I, § 8, cl. 13.

28. *Id.*, art. I, § 8, cl. 14.

29. *Id.*, art. I, § 8, cl. 15 (emphasis added).



## CONGRESS'S ROLE AND OTHER POTENTIAL MODERN LIMITS ON EXECUTIVE POWER

Practice confirms that the *ex ante* limitations of the War Powers Resolution [the WPR] have been ineffective in regulating Presidential use of force.<sup>30</sup> Indeed, the WPR has been viewed by the Executive Branch over the years as unconstitutional or as even granting authority to the Executive to deploy U.S. forces for limited periods even in the absence of congressional authorizations.<sup>31</sup> As the text foreshadows, in modern practice, the appropriations power is the means by which Congress can disable a President hell-bent on the use of force in a manner inconsistent with the interests of the United States.<sup>32</sup> In short, current practice observes the patterns foreseen in the Constitutional text.

But in the absence of congressional conditions on the use of appropriate funds, coupled with the absence of a Congressional Declaration or other statutory authorization granting similar legislative authority for the President to do what might otherwise be illegal, the question could arise whether the President's use of force is cabined by international law as part of the law of the United States. And so it has been argued.<sup>33</sup> In the current context, one might argue that the U.S.'s use of force against Syria for its use of chemical weapons against its own people violated the U.N. Charter's prohibition on any "use of force against the territorial integrity or political independence of any state,"<sup>34</sup> without Security Council authorization under Chapter VII of the Charter or in the exercise of the "inherent right of self-defense if an armed attack occurs against a Member of the United Nations."<sup>35</sup> If so, the question becomes whether the President is empowered under his Article II powers to ignore that international law or risk impeachment for doing so.

But this objection will also usually founder. Most recently, the Supreme Court has made clear that the U.N. Charter is not self-executing domestic law

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30. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), 50 U.S.C.A. §§ 1551-46.

31. Sections 4(a) of the WPR presupposes Presidential authority, absent a declaration of war, to introduce U.S. forces "into hostilities," albeit under Section 5, only for limited periods without further Congressional ratification and subject to override, which would seem to be unconstitutional given the President's plenary authority. In addition, Section 8(a) purports to establish a rule of interpretation that would forbid later Congresses from repealing the WPR through implication, such as by appropriations statutes that do not provide specific authorization. Plainly, if the Constitution contemplates the exercise of Congressional authority by means of the ordinary use of appropriations statutes to regulate Presidential use force, Section 8(a)'s attempt to alter the relevant constitutional standards for the interpretations of congressional appropriations statutes is also unconstitutional, as arguably foreseen by Section 8(d)(1) of the WPR, which provides that the WPR is not "intended to alter the Constitutional authority of the Congress or of the President . . ." *Id.*

32. *See* Richard F. Grimmett, Cong. Research Serv., RL33532, War Powers Resolution: Presidential Compliance 13, 14 (2012), available at <http://www.fas.org/sgp/crs/natsec/RL33532.pdf>.

33. *See, e.g.*, Charles Lofgren, *War-making under the Constitution: The Original Understanding*, 81 YALE L. J. 672 (1972) (concerning the asserted illegality of the Vietnam War).

34. U.N. CHARTER, Art. 2(4).

35. *Id.*, Arts. 41-42 and 51.

under Article VI of the Constitution,<sup>36</sup> even though the Constitution provides that treaties are “the Supreme Law of the Land.”<sup>37</sup> And, even if the UN Charter’s prohibition, literally construed, barred U.S. action, it is in the nature of international law that a treaty’s meaning may change in accordance with changing circumstances and the parties’ subsequent practice, thus deviating from its text.<sup>38</sup> Moreover, the President is entitled to deference in treaty interpretation as to the meaning of the U.N. Charter (or other potentially applicable treaties), which further reduces the possibility of U.S. noncompliance (albeit at the risk of establishing a precedent that a treaty means less than what it appears to mean).<sup>39</sup> And, although the question is highly debated and hyper-technical,<sup>40</sup> the President may well sometimes find it necessary to breach the Charter (or some other treaty) when U.S. national security interests so require, and accept international responsibility for breach of treaty, yet still take the position that the remedy for that breach should come in the form of alternative relief, such as compensation for damage done by the use of force, rather than specific performance, meaning the cessation of hostilities.<sup>41</sup>

Insofar as the International Court of Justice has concluded that the U.N. Charter’s Article 2(4) prohibition is now part of customary international law,<sup>42</sup> if customary international law were to limit the President under the Supremacy Clause, this theoretical possibility might impose a limit on the President’s duty under his oath, and the “take Care” power, and his duty to “faithfully execute” the laws and the Constitution of the United States.<sup>43</sup> But the President could safely rely on the fact that this proposition has never been fully established as a matter of U.S. law. Moreover, the very nature of customary international law requires the admission of the possibility that it can change through state practice, and the exercise of Presidential authority to use force in the Syrian case might be the paradigm case for the emergence of a humanitarian intervention exception. Indeed, this rationale was asserted publicly by the

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36. See *Medellin v. Texas*, 552 U.S. 491 (2008).

37. U.S. CONST., art. VI, cl. 2.

38. See VIENNA CONVENTION ON THE LAW OF TREATIES, Art. 31(3)(b), May 22, 1969, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331. Although the U.S. is not party to the treaty, for reasons beyond the scope of this essay, it is regularly cited in U.S. courts as the basis for treaty interpretation generally.

39. See, e.g., *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (consistent with Executive Branch guidance, interpreting the Vienna Convention on Consular Relations not to require re-trial of a foreign national death penalty prisoner initially denied consular access by U.S. state authorities).

40. See, e.g., JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES OF STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 191–235 (2002) (discussing various modes of relief for internationally wrongful acts).

41. See *The Corfu Channel [U.K. v. Albania]* (Assessment of Compensation), I.C.J. Reports 244 [1949] (awarding the U.K. monetary compensation for the destruction of British destroyers by Albanian mines).

42. See *Military and Paramilitary Activities in and Against Nicaragua [Nicaragua v. U.S.]*, (Merits), I.C.J. 14 [1986] (deeming the U.N. Charter’s prohibition on the use of force to be part of customary international law).

43. U.S. CONST., art. II, §§ 1, 3.

United Kingdom as the basis for its determination that a limited use of force in Syria would not have been unlawful.<sup>44</sup> Thus, both under the Charter and customary international law, it is no longer certain that a use of force pursuant to the so-called “Responsibility to Protect” would have been internationally unlawful, much less subject to sanctions.<sup>45</sup>

#### CONSTITUTIONAL DEFAULT RULES IN THE EVENT OF POLITICAL AND MORAL DOUBT

Finally, although beyond the scope of my legal argument, our debate raised important questions about constitutional interpretation and its relation to prudence, morality and self-government. What if the text were unclear? In the absence of a clear textual answer, what should be the default position in constitutional interpretation? The use of force is a serious matter. False positives, uses of force that are undesirable, must be weighed against the risk of false negatives, failures to use force when use of force would be appropriate. A position that requires advance congressional authorization for use of force reduces false positives, but a position that favors executive discretion subject to congressional override reduces false negatives. Moreover, the credible threat to use force may in many cases obviate force itself. One famous Roman envoy prevented a Syrian invasion of Egypt by quite literally drawing a “line in the sand” and daring the Syrian King to cross that line at the price of war with Rome.<sup>46</sup> Thus, in the world in which we live today, given the emergence of weapons of mass destruction, threats to United States that once seemed distant have become fearfully immediate.

In the case of Syria, then, the tragedy of the President’s “red line” might not be that the assertion of a “red line” was unconstitutional or imprudent, but rather that the failure to carry through on the threat seriously damaged American credibility throughout the globe, inviting aggression by adversaries,<sup>47</sup> and

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44. See Chemical Weapon Use by Syrian Regime—UK Government Legal Position, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/235098/Chemical-weapon-use-by-Syrian-regime-UK-government-legal-position.pdf) (last visited June 9, 2014).

45. See Kenneth Anderson, *Legality of Intervention in Syria in Response to Chemical Weapon Attacks*, *ASIL Insights* (Volume 17, Issue 21) (Aug. 30, 2013), available at <http://www.asil.org/insights/volume/17/issue/21/legality-intervention-syria-response-chemical-weapon-attacks> (last visited June 9, 2014); see also Evan Perez, *Obama looks to Congress to bolster legal case for Syria strike*, CNN US, Sept. 2, 2013, <http://www.cnn.com/2013/09/02/us/obama-syria-legal-issues/> (describing range of opinion, including Executive Branch legal advice, that the President’s proposed course of action would not violate international law) (last visited June 9, 2014).

46. See Roff Smith, *Red Line*, NATIONAL GEOGRAPHIC DAILY NEWS, Sept. 4, 2013, available at <http://news.nationalgeographic.com/news/2013/09/130904-red-line-syria-obama-chemical-weapons-sarin-gas/> (reporting Roman origins of the phrase in the confrontation between the Roman envoy Popilius and the Seleucid King Antiochus IV).

47. See Leslie H. Gelb, *Obama Must Show He’ll Use Military Means to Deter Russia in Ukraine*, THE DAILY BEAST, Mar. 30, 2014, <http://www.thedailybeast.com/articles/2014/03/30/obama-must-show-he-ll-use-military-means-to-deter-russia-in-ukraine.html>.

undermining the confidence of allies,<sup>48</sup> throughout the world. When the President is authorized to use force, false negatives can be minimized; when Congress can employ its appropriations power to prohibit use of force, false positives can be minimized. In either case, public justification for using force or not using force should focus on considerations of prudence in the particular case rather than institutional prerogative. While policy objections should never masquerade as claims of unconstitutionality, it is necessary to recognize the controlling facts that would argue for amending our Constitution to ensure that the President has precisely the authority he or she needs in current circumstances to ensure the survival of the nation. As suggested by former Secretary of State and Chief Justice Charles Evans Hughes, albeit in another context, emergency does not create power but it does “furnish the occasion for its exercise.”<sup>49</sup>

Yet, it was suggested during the Georgetown Symposium that the United States, as an exceptional nation, should employ a default rule of pacifism, which would be furthered by construing the “declare War” clause to disable the President from acting, except in a narrow set of cases, without advance congressional authorization. The argument drew from Plato’s justly famous account of Socrates’s debate with Gorgias, a teacher of rhetoric—that one should prefer to “suffer injustice” rather than “to do injustice.”<sup>50</sup> But Gorgias, the rhetorician, was the teacher of Meno, a family friend of Anytus,<sup>51</sup> one of the three accusers who ultimately brought Socrates to his death.<sup>52</sup> Gorgias, Anytus and Athens lived, but Socrates accepted suicide rather than defy the law and morals of Athens. He avoided “returning” injustice with injustice.<sup>53</sup>

A free man or woman may choose to suffer injustice rather than do injustice, but a political leader is responsible to a political community, and the morality of individual choice is not as easily translatable, as some might think, to the morality of collective action.<sup>54</sup> Political leaders acting for the community may not be free to impose martyrdom on those to whom they are politically responsible. Quite possibly, the irony of Plato’s account is that Socrates himself had something to learn from Gorgias and Anytus. In any event, the suggestion that the U.S. Constitution requires political leaders acting for citizens to require

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48. See Helene Cooper and Martin Fackler, *U.S. Response to Crimea Worries Japan’s Leaders*, N.Y. TIMES, Apr. 5, 2014, [http://www.nytimes.com/2014/04/06/world/asia/us-response-to-crimea-worries-japanese-leaders.html?\\_r=0](http://www.nytimes.com/2014/04/06/world/asia/us-response-to-crimea-worries-japanese-leaders.html?_r=0).

49. See *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934).

50. See PLATO, GORGIAS, in *THE COLLECTED DIALOGUES OF PLATO INCLUDING THE LETTERS* 229, 251–2 paras. 469–70 (Edith Hamilton & Huntington Cairns eds. 1961) [THE DIALOGUES].

51. See PLATO, MENO, in *THE DIALOGUES*, *supra* at 353, 375, para. 90.

52. See PLATO, APOLOGY, in *THE DIALOGUES*, *supra* at 3, 9–10 para. 23.

53. See PLATO, CRITO, in *THE DIALOGUES*, *supra* at 27, 34, para. 49 (“So one ought not to return a wrong or an injury to any person, whatever the provocation is.”).

54. See MAX WEBER, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 77 (G.H. Gerth & C. Wright Mills eds. 1946) (arguing that political decision-making requires following an “ethic of responsibility” rather than an “ethic of ultimate ends”).

those citizens to suffer, rather than commit injustice to protect such citizens, raises complicated moral questions that cannot possibly have been answered in the drafting and ratification of our Constitution. I would let the people decide; otherwise, our Constitution truly might be a “suicide pact.”<sup>55</sup>

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55. *See Terminiello v. City of Chicago*, 69 S. Ct. 894, 912, 937 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”).