Professor Paust's most recent op-ed "War Powers and Executive Authority in the Libya Conflict" appeared on the JURIST website.


**War Powers and Executive Authority in the Libya Conflict**

JURIST Guest Columnist Jordan Paust of the University of Houston Law Center says that the War Powers Resolution does not limit the president's options in Libya due to his constitutional authority and international obligations...

President Obama has decided that the US will continue to participate with other NATO members in military actions authorized by the UN Security Council in Resolution 1973 (March 17, 2011), which "[a]uthorizes Member States ... to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in" Libya. The Security Council has authority to authorize such measures under Articles 39 and 42 of the UN Charter in response to "any threat to the peace, breach of the peace, or act of aggression."

In this instance, the Council has decided that attacks on and continued threats to civilians and civilian populated areas in Libya "continues to constitute a threat to international peace and security" and the Council has decided to authorize all such protective measures, including the creation of a no-fly zone. The Security Council's decision to authorize force is therefore binding on members under Articles 25 and 48 of the Charter, but because it merely authorizes force and does not require members to engage in such enforcement measures, each member has some discretion whether to join.

Although the US use of force in compliance with the Security Council resolution is permissible under international law, is President Obama's continued use of force also permissible under our Constitution without special congressional approval? In my view, the answer is clearly yes.

Some have argued that US participation after 90 days violates the War Powers Resolution, but even a quick read of the congressional resolution demonstrates that this is not correct. First, one should note that Section 2(c) of the Resolution (setting forth its "Purpose and Policy") merely speaks to the powers of the President as Commander-in-Chief and does not address the constitutionally-based powers of the President as the Executive under Article II, Section 1, of the Constitution. Additionally, it does not address the constitutionally-based duty and concomitant authority of the President under Article II, Section 3, to "take Care that the Laws be faithfully executed." As the Executive with power and authority to execute laws, and especially with the unavoidable mandate that the President "shall take Care that the Laws be faithfully executed," and given the fact that treaties of the United States (such as the UN Charter) are supreme federal laws, it is evident that the President has constitutionally-based authority to faithfully execute US
competencies under the Charter outside of the President's independent authority as Commander-in-Chief.

In any event, the War Powers Resolution contains its own set of limitations. One of these is found in Section 8(b), which allows members of the armed forces of the United States "to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established" previously "and pursuant to the United Nations Charter or any treaty ratified by the United States prior to" the War Powers Resolution. NATO is a relevant treaty-based organization, although whether its "high-level military" command was previously established for purposes of the statute or, for interpretive purposes, is merely established for each specific operation may lead to disagreement.

Another set of limitations is contained in Section 8(d)(1), which assures in pertinent part that "[n]othing in this joint resolution is intended to alter the constitutional authority of ... the President, or the provisions of existing treaties." As mentioned, the President's authority involves the Executive power as well as the concomitant duty and authority faithfully to execute the laws, such as treaties of the United States. Execute is nearly the very name of Executive and, in any event, execute is encompassed within its meaning. The War Powers Resolution was not meant to alter these forms of constitutional authority and, as constitutionally-based presidential power, a mere federal statute or joint resolution could not do so.

Moreover, the War Powers Resolution is expressly intended to not alter the provisions of existing treaties and, therefore, it was not intended to alter provisions of the UN Charter or the North Atlantic Treaty establishing NATO. With respect to treaty law, in this instance the President has chosen on behalf of the United States to accept and execute the authorization contained in the UN Security Council resolution and engage in enforcement measures with respect to Libya. In so doing, the President has faithfully executed provisions of the UN Charter, including an outcome of that treaty's continued functioning (e.g., the Security Council resolution and its legal authorization which are also last in time vis-a-vis the War Powers Resolution, constituting prevailing law). Faithfully executing the treaty is part of the President's constitutionally unavoidable duty expressed in mandatory "shall" language and, more generally, this duty involving compliance with and faithful execution of a treaty of the United States happened to be of fundamental concern to the Founders and Framers.

Jordan Paust is the Mike & Teresa Baker Law Center Professor at the University of Houston Law Center and has extensive experience in international law. Professor Paust is one of the most cited law professors in the US and has published over 170 articles, book chapters, papers and essays addressing treaty law, customary international law, and the incorporation of international law into US domestic law.