

SIDESTEPPING CONGRESS: PRESIDENTS ACTING UNDER THE UN AND NATO[†]

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The most striking transformation of the war power over the past fifty years is the extent to which Presidents seek authority not from Congress but from international and regional institutions, particularly the United Nations and the North Atlantic Council. Although this pattern violates the U.S. Constitution and the legislative intent of the UN and NATO, and represents an effort through the treaty process to strip from the House of Representatives its constitutional role in matters of war, the trend is unmistakable and continues its course with little interruption from Congress or the courts.

Truman in Korea, Bush in Iraq, Clinton in Haiti and Bosnia—in each instance a President circumvented Congress by relying either on the UN or NATO. President Bush also stitched together a multilateral alliance before turning to Congress at the eleventh hour to obtain statutory authority. Each exercise of power built a stronger base for unilateral presidential action, no matter how illegal, unconstitutional, and undemocratic. The attitude, increasingly, is not to do things the right way in accordance with the Constitution and our laws but to do the “right thing.” It is an attitude of autocracy, if not monarchy. How long do we drift in these currents before discovering that the waters are hazardous for constitutional government?

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I. CONSTITUTIONAL PRINCIPLES

When the Framers assembled in Philadelphia in 1787 to draft the Constitution, existing models of government in Europe placed the war power and foreign affairs solely in the hands of the king. John Locke and William Blackstone, whose models of government exerted a powerful influence on the Framers, assigned war powers and foreign policy exclusively to the executive branch. Matters of treaties, ambassadors, raising and regulating fleets and armies, and other actions over war and peace were vested in the king.¹

Throughout the debates at Philadelphia and in the state ratifying conventions, delegates expressly rejected the monarchical power over external relations. At the Philadelphia convention, Charles Pinckney said he was for "a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, to wit an elective one."² John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace."³ James Wilson endorsed a single executive but "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislature nature. Among others that of war & peace &c."⁴ Edmund Randolph worried about executive power, calling it "the foetus of monarchy."⁵

A lengthy speech by Alexander Hamilton articulated his principles of government. Although later associated with vigorous and independent presidential power, he too jettisoned the British model of executive prerogatives in foreign affairs and the war power. After admitting that in his "private opinion he had no scruple in declaring . . . that the British Govt. was the best in the world,"⁶ he nonetheless discarded the Blackstonian and Lockean models. He proposed that the President would have "with the advice and approbation of the Senate" the power of making treaties, the Senate would have the "sole power of declaring war," and the President would be authorized to have "the direction of war when authorized

1. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 1-2 (1995).

2. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 64-65 (Max Farrand ed., 1937).

3. *Id.* at 65.

4. *Id.* at 65-66.

5. *Id.* at 66.

6. *Id.* at 288.

or begun."⁷ He repeated those principles in his private writings, as in *Federalist No. 69* and *Federalist No. 75*.

At the Philadelphia convention, the delegates recognized the need for the President to take certain emergency actions of a defensive nature. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year. Madison and Elbridge Gerry moved to insert "declare" for "make," leaving to the President "the power to repel sudden attacks."⁸

Reactions to the Madison-Gerry amendment underscore the limited grant of authority to the President. Pierce Butler wanted to give the President the power to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it." Roger Sherman objected: "The Executive shd. be able to repel and not to commence war."⁹ Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war."¹⁰ George Mason spoke "agst giving the power of war to the Executive, because not [safely] to be trusted with it; . . . He was for clogging rather than facilitating war."¹¹

Similar statements were heard at the state ratifying conventions. In Pennsylvania, James Wilson expressed the prevailing sentiment:

[That the system of checks and balances] will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.¹²

In North Carolina, James Iredell contrasted the limited powers of the President with those of the British monarch. The king of Great Britain was not only the Commander in Chief "but has power, in time of war, to raise fleets and armies. He has also authority to

7. Farrand, *supra* note 2, at 292.

8. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 318-19 (Max Farrand ed., 1937).

9. *Id.* at 318.

10. *Id.*

11. *Id.* at 319.

12. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836-45).

declare war." The President, however, "has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands."¹³ In South Carolina, Charles Pinckney assured his colleagues that the President's powers "did not permit him to declare war."¹⁴

The duty to repel sudden attacks represented a narrow grant of power. It permitted the President to protect the mainland of the United States and troops stationed abroad, but the authority to take actions beyond defensive operations was reserved to Congress. John Bassett Moore, a noted scholar of international law, described the limited power available to the President:

There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.¹⁵

The constitutional framework adopted by the Framers for the war power is remarkably clear in its basic principles. The authority to initiate war lay with Congress. The President could act unilaterally only in one area: to repel sudden attacks. Anyone who scans the war-power provisions of the Constitution is likely to agree with Taylor Reveley that "the text tilts decisively toward Congress."¹⁶ Over the past two centuries, a number of incidents were invoked by Presidents and their supporters to expand the President's potential for *making* war over the formal power of Congress to *declare* war. Various "life and property" actions and the stretching of the concept of "defensive war" were taken to justify unilateral executive authority. These actions, for the most part, were of modest scope.¹⁷ The major military actions were declared by Congress

(the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II) or authorized by Congress (the Quasi-War against France, the Barbary Wars, and the Vietnam War).¹⁸

Of much greater concern are the military operations conducted by Presidents after World War II, particularly when justified under the supposed authority of the UN Charter and mutual security treaties. Nothing in the history of the UN or NATO implies that Congress gave the President unilateral power to wage war. The legislative histories of those treaties show no such intent. Yet Presidents now almost routinely invoke those instruments to initiate military operations.

II. UNITED NATIONS CHARTER

The UN Charter was drafted against the backdrop of the disaster of the Versailles Treaty and President Woodrow Wilson's determination to make foreign policy without Congress. When he submitted the treaty to the Senate on July 10, 1919, he attached to it the Covenant of the League of Nations. The Covenant provided for an assembly (giving each member nation an equal voice) and a council (consisting of representatives from the United States, Great Britain, France, Italy, Japan and four other nations elected by the assembly). Members pledged to submit to the League all disputes threatening war and to use military and economic sanctions against nations that threatened war.

Senator Henry Cabot Lodge (R-Mass.) offered a number of "reservations" to protect American interests. The second of fourteen reservations concerned the congressional prerogative to decide questions of war:

The United States assumes no obligation to preserve the territorial integrity or political independence of any other country or to interfere in controversies between nations—whether members of the league or not—under the provisions of article 10, or to employ the military or naval forces of the United States under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or

13. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 107 (Jonathan Elliot ed., 1836-45).

14. *Id.* at 287.

15. 5 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 196 (1944).

16. W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 29 (1981).

17. See FISHER, *supra* note 1, at 13-69.

18. See *id.* at 17-18, 24-34, 41-44, 54-57, 63-69, 115-18.

naval forces of the United States, shall by act or joint resolution so provide.¹⁹

Wilson opposed the Lodge reservations, claiming that they "cut out the heart of this Covenant" and represented "nullification" of the treaty.²⁰ His earlier writings had advocated that international negotiations should be handled exclusively by the President, without any legislative involvement. The President would then throw the treaty on the Senate, which would have no other alternative but to grant its approval to avoid embarrassment to the nation. According to Wilson, the President "need disclose no step of negotiation until it is complete, and when in any critical matter it is completed the government is virtually committed. Whatever its disinclination, the Senate may feel itself committed also."²¹

Wilson's strategy in presenting the Treaty of Versailles to the Senate as a *fait accompli* marked an abysmal failure. The Senate rejected the treaty in November 1919 and again in March 1920. Decades later, in the midst of World War II, allied nations took steps to create a world organization. Wilson's dismal experience remained part of the collective memory. In the meetings that led to the United Nations, the predominant view was that any commitment of U.S. forces to a world body would require prior authorization by both Houses of Congress. That attitude is reflected in the debates over the UN Charter, the UN Participation Act of 1945, and the 1949 amendments to the UN Participation Act.

The creation of the United Nations progressed through several steps, including the Ball Resolution, the Connally and Fulbright Resolutions, and meetings at Dumbarton Oaks in 1944 and in San Francisco in 1945. On March 16, 1943, Senator Joseph Hurst Ball (R-Minn.) introduced a resolution calling for the formation of the United Nations. Joined by Senators Lister Hill (D-Ala.), Harold Burton (R-Ohio), and Carl Hatch (D-N.M.), the bipartisan nature of the resolution commanded respectful attention. However, the brief Senate debate on the Ball Resolution said nothing about which branch of government would commit U.S. troops.²²

On the day that Senator Ball introduced his resolution, Walter Lippmann wrote an article on the Senate's role in giving advice and consent to treaties. Lippmann had long been identified as a defender of foreign policy formulated by elites and executive officials. However, he now urged that President Wilson's mistake with the Treaty of Versailles not be repeated. Ways and means had to be found of "enabling the Senate to participate in the negotiations."²³ By associating the Senate "continually with the President before and during the momentous negotiations that have to be undertaken," the two branches would be "restoring the Senate to the place intended for it by the authors of the Constitution."²⁴

A resolution introduced by Congressman J. William Fulbright (D-Ark.) also supported the concept of a United Nations. Congressman Hamilton Fish (R-N.Y.) proposed that the resolution end with the language "favoring participation by the United States therein *through its constitutional processes*."²⁵ Fish explained that the additional language meant that any commitment to join the United Nations, made either by agreement or by treaty, "must go through in a constitutional way, either by a two-thirds vote of the Senate or by the approval of the entire Congress."²⁶ He warned that a number of members of Congress were prepared to oppose the Fulbright Resolution because they "are afraid that some secret commitments will be entered into and that the Congress will be by-passed, and that the Constitution will be ignored."²⁷

The House passed the Fulbright Resolution, as introduced, 252 to 23.²⁸ The following day it voted again, after adding the language "through its constitutional processes," and this time the margin was 360 to 29.²⁹ The House action sharply challenged the Senate's presumed monopoly to define foreign policy for the legislative branch. The debate pointed out that both Houses had acted on the declaration of war for World War II, voted funds to sustain it, and conscripted American soldiers to fight the battles.³⁰ Recalling the Senate's role in rejecting the Treaty of Versailles, Con-

23. Walter Lippmann, *Advice and Consent of the Senate*, WASH. POST, Mar. 16, 1943, at 26, reprinted at 89 CONG. REC. 2032 (1943).

24. *Id.*

25. 89 CONG. REC. 7646-47 (1943) (emphasis added).

26. *Id.* at 7647.

27. *Id.*

28. *See id.* at 7655.

29. *See id.* at 7728-29.

30. *See* 89 CONG. REC. at 7705 (statement of Congressman Richards).

19. 58 CONG. REC. 8777 (1919).

20. 63 THE PAPERS OF WOODROW WILSON 451 (Arthur S. Link ed., 1990); 64 THE PAPERS OF WOODROW WILSON 47, 51 (Arthur S. Link ed., 1991).

21. WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 77-78 (1908). For a similar philosophy, see WOODROW WILSON, CONGRESSIONAL GOVERNMENT 233-34 (1885).

22. 89 CONG. REC. 2030-31 (1943).

gressman Mike Monroney (D-Okla.) said he was "unwilling to surrender to 33 Members of the Senate, one-third of that body, the life or death veto over the security of future generations of Americans."³¹

The Senate ignored the Fulbright Resolution, even though as a concurrent resolution (H. Con. Res. 25) it required joint action by the Senate. Instead, the Senate considered a Senate resolution (S. Res. 192) that merely needed its own action. This resolution, the Connally Resolution, included the phrase "through its constitutional processes" to prevent the President from joining the United Nations without explicit congressional support.³² Congressional action meant the "powers of Congress"—both Houses, not just the Senate.³³ A few Senators thought of congressional action as the treaty process, thereby excluding the House,³⁴ but the majority of Senators recognized that international commitments (in this case joining the United Nations) could be made either by treaty or by a majority of each House voting on a bill or joint resolution.³⁵

The final version of the Connally Resolution, approved eighty-five to five, provided that the United States, "acting through its constitutional processes," joined in the establishment of an international authority with power to prevent aggression. The final paragraph states that any treaty made to effect the purposes of the resolution shall be made only with the concurrence of two-thirds of the Senate.³⁶ Senator Robert Taft (R-Ohio) said that the requirement for Senate action was added because of the fear that the President "has shown some indications of a desire to do by executive agreement things which certainly in my opinion ought to be the subject of a treaty."³⁷

Little was said during this lengthy debate about congressional controls over the use of American troops in a UN action. Senator Claude Pepper (D-Fla.) opposed any delegation of Congress's war-declaring power to an international body but believed that it would

31. *Id.* at 7706.

32. *Id.* at 9187 (statement of Senator Willis).

33. *Id.* at 8662 (reading by the legislative clerk).

34. *See id.* at 9187 (statement of Senator Willis); *id.* at 9189 (statement of Senator Brooks); *id.* at 9205 (statement of Senator Wherry).

35. *See* 89 CONG. REC. at 9207 (Senator Hayden).

36. *See id.* at 9222.

37. *See id.* at 9101. The Supreme Court has recognized that the word "treaty" in a statute does not necessarily mean an international agreement requiring the advice and consent of the Senate. *See Weinberger v. Rossi*, 456 U.S. 25 (1982).

be permissible for American troops to be used, without prior congressional approval, as a "police force" to combat aggression in small wars.³⁸ This loose notion of a "police action" would be later exploited by the Truman administration as a legal pretext for engaging in full-scale war against North Korea without congressional approval. Truman was a member of the Senate when Pepper made that remark.

The United States, the United Kingdom, the Soviet Union, and China met at Dumbarton Oaks, in Washington, D.C., to give further definition to an international organization. Legal specialists who monitored these meetings speculated on the procedures for going to war. Edwin Borchard later surmised: "Constitutionally, the plan seems to assume that the President, or his delegate, without consulting Congress, the war-making and declaring authority, can vote for the use of the American quota of armed forces, if that can be limited when the 'aggressor' resists."³⁹ Two weeks after the end of the conference at Dumbarton Oaks, President Roosevelt delivered an address in which he anticipated that Congress would grant the President advance approval for responding to military emergencies. He did not claim inherent executive power. In acting militarily, the President needed congressional authority through an enabling statute:

The Council of the United Nations must have the power to act quickly and decisively to keep the peace by force, if necessary. A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the town hall and call a town meeting to issue a warrant before the felon could be arrested.

It is clear that, if the world organization is to have any reality at all, our representatives must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act.⁴⁰

After Roosevelt's death, President Truman sent a cable from Potsdam stating that all agreements involving U.S. troop commitments to the United Nations would first have to be approved by

38. *See* 89 CONG. REC. at 8742-43.

39. Edwin Borchard, *The Dumbarton Oaks Conference* 39 AM. J. INT'L L. 97, 101 (1945).

40. 11 DEP'T ST. BULL. 448 (1945).

both Houses of Congress.⁴¹ Borchard also believed that the Constitution required approval by both Houses, not merely the Senate.⁴²

A different perspective was offered by six specialists in international law, writing to *The New York Times*. Recognizing the risks to congressional prerogatives, they backed independent presidential authority:

It is doubtless true that Congress will feel a certain hesitancy in permitting the President, acting through the Security Council, to engage even a small policing force in international action because it will fear that this might commit the United States to further military action and thus might impair the discretion of Congress in respect to engagement in 'war.'⁴³

Yet they suggested that Presidents in the past had wielded broad discretion in the use of military force and had frequently acted without explicit congressional authority. The American constitutional system, they said, relied heavily on sensitive political judgments by the President: "Congress has always been dependent upon the good faith of the President in calling upon it when the situation was so serious that a large-scale use of force may be necessary."⁴⁴

Negotiations over the UN continued at the conference in San Francisco in 1945, attended by fifty nations and lasting nine weeks. Unlike Woodrow Wilson's handling of the Versailles Treaty, half of the eight-member U.S. delegation came from Congress. The House was represented equally with the Senate: Senators Tom Connally (D-Tex.) and Arthur H. Vandenberg (R-Mich.) and Representatives Sol Bloom (D-N.Y.) and Charles A. Eaton (R-N.J.).⁴⁵ John Foster Dulles, later to be Secretary of State under President Eisenhower, told the Senate Foreign Relations Committee in 1945 that in the past he had "some doubts as to the wisdom of Senators participating in the negotiations of treaties." After his experience at

the San Francisco conference, he said, those doubts "were dispelled."⁴⁶ He might also have acknowledged the participation of members of the House.

Procedures were developed to permit the United Nations to employ military force to deal with threats to peace, breaches of the peace, and acts of aggression. All UN members would make available to the Security Council, "on its call and in accordance with a special agreement or agreements," armed forces and other assistance for the purpose of maintaining international peace and security. The agreements, concluded between the Security Council and member states, "shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." Given the variety of governmental systems among the member states, each nation had to determine for itself the meaning of "constitutional processes." For the United States, would approval have to be granted by Congress, the President, or the two branches acting jointly?

From July 9 to July 13, 1945, the Senate Foreign Relations Committee held hearings on the UN Charter. Leo Pasvolosky, a special assistant to the Secretary of State, was asked whether Congress would have ultimate control over the special agreements to use armed force. He replied: "That is a domestic question which I am afraid I cannot answer."⁴⁷ Senator Vandenberg volunteered that, in his opinion, the President would not need "the consent of Congress to every use of our armed forces."⁴⁸

In testimony at the Senate hearings, John Foster Dulles stated that the procedure for special agreements would need the approval of the Senate acting through the treaty process. It could not be done unilaterally by the President. That view, he said, was shared by the entire U.S. delegation.⁴⁹ Senator Connally agreed with that assessment.⁵⁰ Senator Walter F. George (D-Ga.) suggested that congressional approval could be by statute, involving both Houses, but Dulles disagreed: "The procedure will be by treaty—agreements submitted to the Senate for ratification."⁵¹ Senator Eugene Millikin (R-Colo.) tried to distinguish between "policing powers" (to be

41. See Edwin Borchard, *The Charter and the Constitution*, 39 AM. J. INT'L L. 767, 767-68 (1945).

42. See *id.* at 770-71.

43. Letter, N.Y. TIMES, Nov. 5, 1944, at 8E (signers of the letter: John W. Davis, W.W. Grant, Philip C. Jessup, George Rublee, James T. Shotwell, and Quincy Wright).

44. *Id.*

45. See *The Charter of the United Nations, Hearings Before the Senate Committee on Foreign Relations*, 79th Cong. 197 (1945) [hereinafter *UN Hearings*].

46. *Id.* at 644.

47. *Id.* at 299.

48. *Id.* at 645-46.

49. See *id.* at 645-46.

50. See *UN Hearings*, *supra* note 46, at 646.

51. *Id.* at 652.

exercised exclusively by the President) and "real war problems" (reserved for congressional action).⁵² Dulles agreed that minor actions could be left purely to the President: "If we are talking about a little bit of force necessary to be used as a police demonstration, that is the sort of thing that the President of the United States has done without concurrence by Congress since this Nation was founded."⁵³

Dulles's belief that special agreements would be acted upon by the Senate to the exclusion of the House was challenged sharply during Senate floor debate. Senator Scott Lucas (D-Ill.) argued that the agreements required action by both Houses and cited constitutional passages giving to the entire Congress the power to raise and support armies and to make rules for the government and regulation of the land and naval forces.⁵⁴ Decisions to declare war and to appropriate funds for the military required action by both Houses. Several Senators also disagreed with Dulles that only Senate action was needed to approve a special agreement.⁵⁵

Senator Vandenberg decided to reach Dulles by phone and ask him to clarify his position. Dulles explained that when the issue surfaced during the hearings, he thought the question was between unilateral action by the President (through executive agreement) versus the retention of congressional control (which Dulles assumed was Senate action on treaties). The central point he wanted to make, he said, was that "the use of force cannot be made by exclusive Presidential authority through an executive agreement." On that matter he was confident. As to whether Congress should act by treaty or by statute he was less certain.⁵⁶

During Senate debate, Harlan Bushfield (R-S.D.) said he objected, "and I still object, to a delegation of power to one man or to the Security Council, composed of 10 foreigners and 1 American, to declare war and to take American boys into war." Such a proposal "is in direct violation of the Constitution." Congress could

52. *Id.* at 654.

53. *Id.* at 655; see also Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 607-12 (1993) (analyzing police actions versus war).

54. See 91 CONG. REC. 8021 (1945).

55. See *id.* at 8021-24 (Senators McClellan, Hatch, Fulbright, Maybank, Overton, Hill, Ellender, and George).

56. See *id.* at 8027-28.

not delegate such a power "even if we desired to do so."⁵⁷ Senator Burton Wheeler (D-Mont.) felt strongly on the same point:

If it is to be contended that if we enter into this treaty we take the power away from the Congress, and the President can send troops all over the world to fight battles anywhere, if it is to be said that that is to be the policy of this country, I say that the American people will never support any Senator or any Representative who advocates such a policy; and make no mistake about it.⁵⁸

President Truman, aware of this debate on which branch would control the sending of U.S. forces to the United Nations, wired a note from Potsdam to Senator Kenneth McKellar on July 27, 1945. Truman pledged without equivocation: "When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them."⁵⁹ On this request that "Congress" legislate, Senators understood clearly that Congress "consists not alone of the Senate but of the two Houses."⁶⁰ Backed by this assurance from Truman, the Senate supported the UN Charter by a vote of eighty-nine to two.⁶¹

With the Charter approved, Congress had to decide the meaning of "constitutional processes." What procedure was necessary, under the U.S. Constitution, to bring into effect the special agreements needed to contribute American troops to UN military actions? That decision was left to the UN Participation Act of 1945.

III. THE UN PARTICIPATION ACT

The UN Charter states that whenever there is a threat to peace, breach of the peace, or act of aggression, the UN Security Council may decide under Article 41 to recommend "measures not involving the use of armed force." If such actions are inadequate, Article 42 provides that all UN members shall make available to the Security Council—in accordance with special agreements—armed forces and other assistance. These agreements would spell out the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be pro-

57. *Id.* at 7156.

58. *Id.* at 7988.

59. 91 CONG. REC. at 8185.

60. *Id.* (statement of Senator Donnell).

61. See *id.* at 8190.

vided. Each nation would ratify these agreements "in accordance with their respective constitutional processes."

Without the slightest ambiguity, Section 6 of the UN Participation Act states that the agreements "shall be subject to the approval of the Congress by appropriate Act or joint resolution."⁶² The agreements between the United States and the Security Council would not result from unilateral executive action, nor would they be brought into force only by the Senate acting through the treaty process. Consummation of the agreements required action by both Houses of Congress. Section 6 includes two qualifications:

The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and pursuant to such special agreement or agreements the armed forces, facilities, or assistance provided therein: Provided, That nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.⁶³

The first qualification means that once the President receives the approval of Congress for a special agreement, he does not need subsequent approval from Congress to provide military assistance under Article 42. Congressional approval is needed for the special agreement, not for subsequent implementations of that agreement. The second qualification clarifies that nothing in the UN Participation Act is to be construed as congressional approval of other agreements attempted by the President.

In short, the qualifications did not eliminate or weaken the need for congressional approval. Presidents could commit armed forces to the United Nations only after Congress gave its explicit consent. At every step in the legislative history of the UN Participation Act, these elementary points are underscored and reinforced.

In his appearance before the House Committee on Foreign Affairs, Under Secretary of State Dean Acheson agreed that only after the President receives the approval of Congress is he "bound

62. United Nations Participation Act of 1945, Pub. L. No. 264, 59 Stat. 621, § 6 (1945).

63. *Id.*

to furnish that contingent of troops to the Security Council; and the President is not authorized to furnish any more than you have approved of in that agreement."⁶⁴ When Congresswoman Edith Rogers (R-Mass.) remarked that Congress "can easily control the [Security] Council," Acheson quickly voiced his agreement: "It is entirely within the wisdom of Congress to approve or disapprove whatever special agreement the President negotiates."⁶⁵ Congressman John Kee (D-W. Va.) wondered whether the qualifications in Section 6 permitted the President to provide military assistance to the Security Council without consulting or submitting the matter to Congress. Acheson reassured Kee that nothing in the qualifications permitted the President to circumvent Congress. No special agreement, Acheson said, could have any "force or effect" until Congress approved it:

This is an important question of Judge Kee, and may I state his question and my answer so that it will be quite clear here: The judge asks whether the language beginning on line 19 of page 5, which says the President shall not be deemed to require the authorization of Congress to make available to the Security Council on its call in order to take action under article 42 of the Charter, means that the President may provide these forces prior to the time when any special agreement has been approved by Congress.

The answer to that question is "No," that the President may not do that, that such special agreements refer to the special agreement which shall be subject to the approval of the Congress, so that until the special agreement has been negotiated and approved by the Congress, it has no force and effect.⁶⁶

The same type of understanding appears in other parts of the legislative history of the UN Participation Act. In reporting the bill, the Senate Foreign Relations Committee looked forward to a shared, coequal relationship between the President and the Congress:

64. *Participation by the United States in United Nations Organization: Hearings Before the House Committee on Foreign Affairs*, 79th Cong. 23 (1945).

65. *Id.*

66. *Id.* at 25-26.

Although the ratification of the Charter resulted in the vesting in the executive branch of the power and obligation to fulfill the commitments assumed by the United States thereunder, the Congress must be taken into close partnership and must be fully advised of all phases of our participation in this enterprise. The Congress will be asked annually to appropriate funds to support the United Nations budget and for the expenses of our representation. It will be called upon to approve arrangements for the supply of armed forces to the Security Council and thereafter to make appropriations for the maintenance of such forces.⁶⁷

The Senate Foreign Relations Committee further noted that "all were agreed on the basic proposition that the military agreements could not be entered into solely by executive action."⁶⁸ Despite this clear record in the committee report, Senators Connally and Taft in floor debate agreed that in "certain emergencies" the President and the Security Council might be able to act without first obtaining authority from Congress.⁶⁹ These observations are interesting, but they do not change the statutory requirement in Section 6 that special agreements must be approved in advance by "appropriate Act of joint resolution." Instead, Connally and Taft suggested that the President might act militarily through UN channels without activating the special agreement mechanism. They were reflecting the issue raised at the San Francisco conference and in congressional debate whether the President might become involved in "police actions" without first coming to Congress for authority.

Connally continued to entertain the idea that special agreements could be acted on by the Senate alone, without involvement by the House. For example, he agreed with Senator Kenneth Wherry (R-Neb.) that special agreements could be made by treaty.⁷⁰ A Senator offered an amendment to authorize the President to negotiate a special agreement with the Security Council solely with the support of two-thirds of the Senate.⁷¹ Senator Vandenberg argued strongly against the amendment:

67. S. REP. NO. 79-717, at 5 (1945).

68. *Id.* at 8.

69. See 91 CONG. REC. 10,965-66 (1945).

70. See *id.* at 10,974.

71. See *id.* at 11,296.

If we go to war, a majority of the House and Senate puts us into war. . . . The House has equal responsibility with the Senate in respect of raising armies and supporting and sustaining them. The House has primary jurisdiction over the taxation necessities involved in supporting and sustaining armies and navies, and in sustaining national defense.

. . . [The Senate Foreign Relations Committee] chose to place the ratification of that contract in the hands of both Houses of Congress, inasmuch as the total Congress of the United States must deal with all the consequences which are involved either if we have a war or if we succeeded in preventing one.⁷²

Vandenberg prevailed. The great majority of Senators understood that the Constitution vested the war-making power in both Houses of Congress. The amendment was rejected handily, fifty-seven to fourteen.⁷³ As noted in a recent article, without an Article 43 agreement "nothing in the Senate debates on the ratification of the United Nations Charter or the United Nations Participation Act may be read to authorize the President's war power beyond those previously understood to be within the Constitution."⁷⁴

In debate on the UN Participation Act, the House also underscored its coequal role in authorizing military activities. The House Foreign Affairs Committee believed that it "is eminently appropriate that the House as a whole pass upon these agreements under the constitutional powers of the Congress."⁷⁵ Once the bill left the committee and was debated on the floor, Congressman Sol Bloom (D-N.Y.) drew upon his experience at the San Francisco conference to explain why it was crucial for the House to share with the Senate the decision to authorize special agreements: "The position of the Congress is fully protected by the requirement that the military agreement to preserve the peace must be passed upon by Congress before it becomes effective. Also, the obligation of the United States to make forces available to the Security Council does

72. *Id.* at 11,301.

73. See *id.* at 11,303.

74. Charles E. Edgar, *United States Use of Armed Force Under the United Nations . . . Who's In Charge?*, 10 J.L. & POL'Y 299, 337 (1994).

75. H.R. REP. NO. 79-1383, at 7 (1945).

not become effective until the special agreement has been passed upon by Congress."⁷⁶

Congress amended the UN Participation Act in 1949 to permit limited initiatives by the President, while retaining legislative control over significant and large-scale military activities. The amendment allows the President to provide military forces to the United Nations for "cooperative action." Presidential action under this provision is subject to stringent conditions: U.S. forces can serve only as observers and guards, can perform only in a noncombatant capacity, and cannot exceed 1,000 in number.⁷⁷ When the President provides these troops he shall assure that they not involve "the employment of armed forces contemplated chapter VII of the United Nations Charter."⁷⁸ As of January 31, 1996, there were 769 U.S. troops under UN control pursuant to the 1949 amendment: 11 in the Middle East, 15 in Iraq-Kuwait, 30 in Western Sahara, 290 in Macedonia, 419 in Haiti, and 4 in the Georgia republic.⁷⁹

IV. THE NATO TREATY

In addition to citing the UN Charter and Security Council resolutions as grounds for using American troops in military operations, Presidents regard mutual security treaties as another source of authority. The same problem of defining "constitutional processes" under Article 43 of the UN Charter arises with language in mutual security treaties. For example, the NATO treaty of 1949 provides that an armed attack against one or more of the parties in Europe or North America "shall be considered an attack against them all."⁸⁰ The treaty further provides that, in the event of an attack, the member states may exercise the right of individual or collective self-defense recognized by Article 51 of the UN Charter and assist the country or countries attacked by taking "such action as it deems necessary, including the use of armed force." Article 11 of the treaty states that it shall be ratified "and its provisions carried out by the Parties in accordance with their respective constitutional

76. 91 CONG. REC. 12,267 (1945).

77. 63 Stat. 735-36, § 5 (1949).

78. *Id.*

79. See Marjorie Ann Browne, *United Nations Peacekeeping: Issues for Congress*, CRS [Congressional Research Service] Issue Brief, Order Code IB90103, Feb. 16, 1996, at 6.

80. 63 Stat. 2244, Art. 5 (1949).

processes."⁸¹ The Southeast Asia Treaty ("SEATO") of 1949 avoids the language of "an attack upon one is an attack upon all" but is similar to NATO in the sense that it states that the treaty "shall be ratified and its provisions carried out by the Parties in accordance with their respective constitutional processes."⁸²

First, it is well recognized that the concept in mutual security treaties of an attack on one nation being an attack on all does not require from any nation an immediate response. Each country maintains the sovereign right to decide such matters by itself. As noted in the Rio Treaty of 1947, "no State shall be required to use armed force without its consent."⁸³ During debate on the Rio Treaty, Senator Connally, chairman of the Foreign Relations Committee, noted: "It is left to the discretion and wish of each of the nations to adopt such measures as it may approve in carrying out the obligation to assist the victim of the attack."⁸⁴

This general principle applies as well to NATO. During hearings in 1949, Secretary of State Dean Acheson told the Senate Foreign Relations Committee that it "does not mean that the United States would automatically be at war if one of the other signatory nations were the victim of an armed attack. Under our Constitution, the Congress alone has the power to declare war."⁸⁵ He and Senator Connally engaged in this exchange:

THE CHAIRMAN: [I]t is up to each country to determine for itself, is it not, what action it deems necessary to restore the security of the Atlantic Pact area?

Secretary ACHESON: There is no question about that, Senator. That is true.⁸⁶

During these hearings, Acheson gave the same response to Senator Vandenberg, who asked whether there was anything in the treaty "which will lead automatically to a declaration of war on our part." Acheson replied: "No, sir." Vandenberg pressed the issue: "The answer, of course, is unequivocally 'No.'" Acheson gave the desired response: "Unequivocally 'No.'"⁸⁷ In 1951, dur-

81. *Id.* at 2246.

82. 6 U.S.T. 84, Art. IX.2 (1945).

83. 62 Stat. 1703, Art. 20 (1947).

84. 93 CONG. REC. 11,124 (1947).

85. *North Atlantic Treaty (part I): Hearings Before the Senate Committee on Foreign Relations*, 81st Cong. 11 (1949).

86. *Id.* at 21.

87. *Id.* at 25.

ing Senate hearings on NATO, Acheson again acknowledged that the treaty does not compel any nation "to take steps contrary to its convictions, and none is obligated to ignore its national interests."⁸⁸

These parts of the legislative history establish that NATO does not give the President any type of unilateral authority in the event of an attack. What does the treaty mean when it says that its provisions shall be "carried out by the Parties in accordance with their respective constitutional processes"? To what extent is Congress involved in implementing the treaty?

To some extent NATO is tied to understandings of presidential power under the UN Charter. In reporting the NATO treaty, the Senate Foreign Relations Committee pointed out that the provisions of the defense pact "are expressly subordinated to the purposes, principles, and provisions of the United Nations Charter."⁸⁹ If the President lacks unilateral powers under the UN Charter, he lacks it under NATO and other mutual security treaties. That he lacks unilateral powers either under the UN Charter or NATO should be obvious from the fact that both are international treaties entered into by way of a presidential proposal and Senate advice and consent. The President and the Senate cannot use the treaty procedure to strip the House of Representatives of its prerogatives over the use of military force.

In the words of one scholar, the provision in the NATO treaty that it be carried out according to constitutional processes was "intended to ensure that the Executive Branch of the Government should come back to the Congress when decisions were required in which the Congress has a constitutional responsibility."⁹⁰ The NATO treaty "does not transfer to the President the Congressional power to make war."⁹¹

The legislative histories of other mutual security treaties make the same point. Senator Walter George said this about SEATO: "The treaty does not call for automatic action; it calls for consultation. If any course of action shall be agreed upon or decided upon,

88. *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Committee on Foreign Relations and Armed Services*, 82d Cong. 85 (1951).

89. S. EXEC. REP. NO. 81-8, at 8 (1949).

90. Richard H. Heindel et al., *The North Atlantic Treaty in the United States Senate* 43 AM. J. INT'L L. 633, 649 (1949).

91. *Id.* at 650.

then that course of action must have the approval of Congress, because the constitutional process is provided for."⁹² The Johnson administration, both through President Johnson and the Legal Adviser to the State Department, relied on SEATO as legal justification for the Vietnam War, but their arguments had to equate "constitutional processes" with unilateral presidential decisions.⁹³

The War Powers Resolution of 1973 clarifies the effect of mutual security treaties. Authority to introduce U.S. forces into hostilities shall not be inferred "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing" the introduction of American troops.⁹⁴ The Senate Foreign Relations Committee explained that this provision is to "ensure that both Houses of Congress must be affirmatively involved in any decision of the United States to engage in hostilities pursuant to a treaty."⁹⁵

During debate on the North Atlantic Treaty the Senate considered, and rejected, an amendment that would have required Congress to give explicit and advance approval before the President could use armed force. Senator Arthur Watkins offered this reservation to the treaty:

The United States understands and construes article V of the treaty as follows:

That the United States assumes no obligation to restore and maintain the security of the North Atlantic area or to assist any other party or parties in said area, by armed force, or to employ the military, air, or naval forces of the United States under article V of any article of the treaty, for any purpose, unless in any particular case the Congress, which under the Constitution, has the sole power to declare war or authorize the employment of the military, air, or naval forces of the United States, shall by act or joint resolution so provide.⁹⁶

92. 101 CONG. REC. 1051 (1955).

93. See LYNDON BAINES JOHNSON, *THE VANTAGE POINT* 42, 48-50, 356 (1971); see also *The Legality of United States Participation in the Defense of Viet-Nam*, 54 DEP'T ST. BULL. 474, 480-81, 485 (1966).

94. 87 Stat. 558, § 8(a) (1973).

95. S. REP. NO. 93-220, at 26 (1973).

96. 95 CONG. REC. 9806, 9898 (1949).

Eighty-four Senators voted against this reservation, with only eleven Senators in favor.⁹⁷ One cannot conclude from this vote that the President has unilateral authority to use armed force without congressional approval. The vote merely signals that an overwhelming majority of Senators found the language unacceptable. A rejected Senate amendment does not change the meaning of the Constitution or the NATO treaty, nor can it nullify the prerogatives of the House of Representatives.

In legislative history, a negative vote on a proposal does not endorse the opposite policy. For example, Senator Watkins offered another reservation, which gained only eight votes with eighty-seven Senators opposed:

The United States further understands and construes article 5 to the effect that in any particular case or event of armed attack on any other party or parties to the treaty, the Congress of the United States is not expressly, impliedly, or morally obligated or committed to declare war or authorize the employment of the military, air, or naval forces of the United States against the nation or nations making said attack, or to assist with its armed forces the nation or nations attacked, but shall have complete freedom in considering the circumstances of each case to act or refuse to act as the Congress in its discretion shall determine.⁹⁸

Defeat of this reservation does not mean that the United States has an express or moral obligation to use military force in the event of an attack on a member of NATO. Such an interpretation would completely contradict the legislative history of NATO. Each nation retains sovereign power to decide for itself when and how to intervene militarily. Senators voted down this second reservation because they did not want to advertise too brightly what is, in fact, the unquestioned understanding of the executive and legislative branches. They did not want to indicate a weakening or softening of U.S. resolve. Said Senator Connally: "Any reservation is intended to water down and dilute the treaty or to destroy it, if that can be done. That is the purpose of the so-called reservations."⁹⁹ Other Senators were concerned that the second reservation by Senator Watkins would give some encouragement to military ambitions by

97. See *id.* at 9916.

98. *Id.* at 9901; see *id.* at 9916 (Senate vote).

99. *Id.* at 9903.

the Soviet Union: "Moscow will keep the peace only so long as we are strong enough to stay her covetousness."¹⁰⁰

V. TRUMAN IN KOREA

With treaty and statutory safeguards supposedly in place to protect congressional prerogatives, President Truman nonetheless sent U.S. troops to Korea in 1950 without ever seeking or obtaining congressional authority. On June 26, he announced that the UN Security Council had ordered North Korea to withdraw its invading forces to positions north of the 38th parallel and that "in accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate this serious breach of the peace."¹⁰¹

On the following day, Truman announced that North Korea had failed to cease hostilities and to withdraw to the 38th parallel. He summarized the UN action in this manner: "The Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution. In these circumstances I have ordered United States air and sea forces to give the [South] Korean Government troops cover and support."¹⁰² He said that all members of the United Nations "will consider carefully" the consequences of Korea's aggression "in defiance of the Charter of the United Nations" and that a "return to the rule of force in international affairs" would have far-reaching effects. The United States, he said, "will continue to uphold the rule of law."¹⁰³

In announcing his determination to uphold the rule of law in international affairs, Truman undermined the rule of law at home by unilaterally invoking force under the banner of the United Nations without seeking congressional authority. This step violated the statutory language and legislative history of the UN Participation Act, including Truman's own assurance from Potsdam that he would first obtain the approval of Congress before sending U.S. forces to a UN action. How was this possible? He simply ignored the special agreements that were to be the guarantee of congressional control.

100. *Id.* at 9908 (Senator Jenner).

101. PUB. PAPERS 491 (1950).

102. *Id.*

103. *Id.* at 492.

Several legal problems accompanied Truman's action. First, he did not comply with the intent and language of the UN Participation Act. It could be argued that Truman was required to enforce the UN Charter as a treaty, just as he is obliged under the Constitution to carry out any statute, since the term "Laws" includes treaties as well as statutes.¹⁰⁴ But the Security Council resolution did not obligate the President, or the United States, to take any particular action. Furthermore, Truman was not at liberty to carry out a Security Council resolution if such action would violate the Constitution. Treaties may not be construed to "extend so far as to authorize what the Constitution forbids."¹⁰⁵

President Truman exploited the UN machinery in part because of a fluke: the Soviet Union had absented itself from the Security Council during these two crucial votes. It is difficult to argue that the President's constitutional powers vary with the presence or absence of Soviet delegates to the Security Council. As Robert Bork noted in 1971, "the approval of the United Nations was obtained only because the Soviet Union happened to be boycotting the Security Council at the time, and the President's Constitutional powers can hardly be said to ebb and flow with the veto of the Soviet Union in the Security Council."¹⁰⁶

The Truman administration pretended that it was acting pursuant to UN authority. On June 29, 1950, Secretary of State Acheson claimed that all U.S. actions taken in Korea "have been under the aegis of the United Nations."¹⁰⁷ Aegis is a fudge word, meaning shield or protection. Acheson used the word to suggest that the United States was acting under the legal banner of the United Nations, which was never the case. He said that President Truman had done his "utmost to uphold the sanctity of the Charter of the United Nations and the rule of law," and that the administration was in "conformity with the resolutions of the Security Council of June 25 and 27, giving air and sea support to the troops of the Korean government."¹⁰⁸

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

105. *Geofroy v. Riggs*, 133 U.S. 258, 267 (1889); see also Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573, 1597 (1994).

106. Robert H. Bork, *Comments on the Articles on the Legality of the United States Action in Cambodia*, 65 AM. J. INT'L L. 79, 81 (1971).

107. 23 DEP'T ST. BULL. 43 (1950).

108. *Id.* at 46.

The fact is that President Truman committed U.S. forces to Korea before the Council called for military action. General Douglas MacArthur was immediately authorized to send supplies of ammunition to the South Korean defenders. On June 26, Truman ordered U.S. air and sea forces to give South Koreans cover and support.¹⁰⁹ After Acheson had summarized the military situation for some members of Congress at noon on June 27, Truman exclaimed: "But Dean, you didn't even mention the U.N!"¹¹⁰ Later that evening the Security Council passed the second resolution. In his memoirs, Acheson admitted that "some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution."¹¹¹ After he left the presidency, Truman was asked whether he had been willing to use military force in Korea without UN backing. He replied, with customary bluntness: "No question about it."¹¹²

President Truman did not seek the approval of members of Congress for his military actions in Korea. As Acheson suggested, Truman might have wished only to "tell them what had been decided."¹¹³ Truman met with congressional leaders at 11:30 A.M. on June 27, after the administration's policy had been established and implementing orders issued.¹¹⁴ He later met with congressional leaders to give them briefings on developments in Korea without ever asking for authority.¹¹⁵ Some consideration was given to presenting a joint resolution to Congress to permit legislators to voice their approval, but the draft resolution never left the administration.¹¹⁶

It has been argued that President Truman consulted in good faith with Congress and was told that he could act without legislative authority. He reached Senator Connally by phone and asked whether he would have to ask Congress for a declaration of war if he decided to send American forces to Korea. Connally offered this

109. PUB. PAPERS 529 (1950).

110. GLENN D. PAIGE, *THE KOREAN DECISION* 188 (1968).

111. DEAN ACHESON, *PRESENT AT THE CREATION* 408 (1969); see also Edwin C. Hoyt, *The United States Reaction to the Korean Attack: A Study of the Principles of the United Nations Charter as a Factor in American Policy-Making*, 55 AM. J. INT'L L. 45, 53 (1961).

112. MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 276 (1973).

113. 7 FOREIGN RELATIONS OF THE UNITED STATES 182 (1976).

114. See *id.* at 200-02.

115. See *id.* at 257.

116. See *id.* at 282-83 nn. 1-2, 287-91.

advice: "If a burglar breaks into your house, you can shoot at him without going down to the police station and getting permission. You might run into a long debate by Congress, which would tie your hands completely. You have a right to do it as commander-in-chief and under the U.N. Charter."¹¹⁷

It is frivolous to argue that the President can satisfy statutory, treaty, and constitutional obligations by touching base with a Senator and getting a green light, especially from someone like Connally, whose positions were repeatedly repudiated by the Senate and Congress. Independent of these interesting phone conversations, we have to analyze statutes, treaties, the Constitution, and the structure of government to determine the legality of presidential actions.

Similarly, it is argued that President Truman acted properly because Senate Majority Leader Scott Lucas, who served on the Foreign Relations Committee and played an active role during the 1945 debates on the UN Charter and the UN Participation Act, saw no need for Congress to authorize the intervention in Korea. When President Truman asked congressional leaders whether he should present to Congress a joint resolution expressing approval of his action in Korea:

[Lucas] said that he frankly questioned the desirability of this. He said that things were now going along well. . . . He said that the President had very properly done what he had to without consulting the Congress. He said the resolution itself was satisfactory and that it could pass. He suggested as an alternative that the President might deliver this message as a fireside chat with the people of the country. . . . He thought that only Senator Wherry had voiced the view that Congress should be consulted. Many members of Congress had suggested to him that the President should keep away from Congress and avoid debate.¹¹⁸

Again, certainly an interesting comment by the Senate Majority Leader, but nothing Lucas could say in private or in public could alter the text and intent of the Constitution, the UN Charter, and the UN Participation Act. Truman had no authority to alter those documents and neither did Lucas.

117. Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the 'Imperial President' Myth*, 19 HARV. J.L. & PUB. POL'Y 533, 567 (1996).

118. *Id.* at 574-75.

Even if a case could be made that the emergency facing Truman in June 1950 was so fast-moving and perilous that it was incumbent upon him to act promptly without first seeking and obtaining legislative authority, nothing prevented him from returning to Congress at the earliest opportunity and asking for a supporting statute or retroactive authority. John Norton Moore has made this point: "As to the suddenness of Korea, and conflicts like Korea, I would argue that the President should have the authority to meet the attack as necessary but should immediately seek congressional authorization."¹¹⁹ In a genuine (not a contrived) emergency, a President may have to act without congressional authority, trusting that the circumstances are so urgent and compelling that Congress will endorse his actions and confer a legitimacy that only Congress, as the people's representatives, can provide.¹²⁰

President Truman tried to justify his actions in Korea by calling it a "police action" rather than a war. That argument was suspect from the start and deteriorated as casualties mounted. On June 29, 1950, at a news conference, he was asked whether the country was at war. He responded that "We are not at war."¹²¹ Asked whether it would be more correct to call the conflict "a police action under the United Nations," he agreed with this softball question by saying that "is exactly what it amounts to."¹²² On July 13, at another news conference, he again called the Korean War a "police action."¹²³

Efforts by Truman and Acheson to characterize the Korean War as some sort of police action taken pursuant to a Security Council resolution would never wash. The UN exercised no real authority over the conduct of the war. Other than token support from a few nations, it remained an American war—measured by troops, money, casualties, and deaths—from start to finish. The Security Council requested that the United States designate the commander of the forces and authorized the "unified command at its discretion to use the United Nations flag."¹²⁴ Truman designated General MacArthur to serve as commander of this so-called

119. John N. Moore, *The National Executive and the Use of the Armed Forces Abroad*, 21 NAVAL WAR C. REV. 28, 32 (1969).

120. See FISHER, *supra* note 1, 38-39, 187.

121. PUB. PAPERS 504 (1950).

122. *Id.*

123. *Id.* at 522.

124. *Id.* at 520.

unified command.¹²⁵ Nothing the Security Council passed could have obligated the United States to do anything other than what it considered necessary and desirable under its own reading of national interest.

Although Truman and Acheson continued to avoid the designation of war for the fighting in Korea, federal courts had no difficulty in calling a spade a spade. A federal court noted in 1953: "We doubt very much if there is any question in the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war."¹²⁶

VI. BUSH IN IRAQ

In response to Iraqi President Saddam Hussein's invasion of Kuwait on August 2, 1990, President George Bush sent several hundred thousand troops to Saudi Arabia. Initial troop deployments served a defensive purpose, but as the size of the American force climbed to 500,000 soldiers, an offensive capability emerged.

Instead of seeking authority from Congress, Bush created a multinational alliance and encouraged the Security Council to authorize the use of military force. The strategic calculations have been recorded by James A. Baker, III, who served as Secretary of State in the Bush administration. Baker realized that military initiatives by Reagan in Grenada and Bush in Panama reinforced in the international community the impression that American foreign policy followed a "cowboy mentality." In response to these concerns, Bush wanted to assemble an international political coalition. Baker notes: "[F]rom the very beginning, the President recognized the importance of having the express approval of the international community if at all possible."¹²⁷ There was no comparable need to obtain the express approval of Congress.

125. See *id.*

126. *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420, 425 (S.D. Cal. 1953); see also *Gagliormella v. Metropolitan Life Ins. Co.*, 122 F. Supp. 246 (D. Mass. 1954); *Carius v. New York Life Ins. Co.*, 124 F. Supp. 388 (D. Ill. 1954); A. Kenneth Pye, *The Legal Status of the Korean Hostilities*, 45 GEO. L.J. 45 (1956).

127. JAMES A. BAKER, III, *THE POLITICS OF DIPLOMACY* 304 (1995).

On November 20, Bush said he wanted to delay asking Congress for authorization until after the Security Council considered a proposed resolution supporting the use of force against Iraq.¹²⁸ On November 29, the Security Council passed Resolution 678, authorizing all member states to use "all necessary means" to force Iraqi troops out of Kuwait. All necessary means included military action. To avoid war, Iraq had to withdraw from Kuwait by January 15, 1991.¹²⁹ The Security Council resolution granted "the most sweeping authorization to engage in warfare under U.N. sponsorship since the 1950 Korean war."¹³⁰ Although the Security Council "authorized" each nation to act militarily against Iraq, the resolution did not *compel* or *obligate* member nations to participate. States agree to use force pursuant to their own constitutional systems and judgments about national interests.¹³¹ The Security Council "has never required states to use force; it has simply authorized or recommended that they do so."¹³²

Following the Security Council vote to use military force against Iraq, Professor Thomas Franck of the New York University Law School wrote an article for *The New York Times*, arguing that a congressional declaration of war is "inapplicable to U.N. police actions."¹³³ He claimed that the UN Charter "does not leave room for each state, once the Council has acted, to defer compliance until it has authority from its own legislature." The legislative histories of the UN Charter and the UN Participation Act do not support Franck's position. Congress did not forfeit its war power to the Security Council or to the President. It is also misleading to call the Security Council resolution on Iraq a "U.N. police action." It was a military action dominated by the United States, assisted by a number of allies.¹³⁴

128. See *Bush Is Said to Want U.N. Assent on Force Before Seeking Hill's*, WASH. POST, Nov. 21, 1990, at A14.

129. See *U.N. Vote Authorizes Use of Force Against Iraq*, WASH. POST, Nov. 30, 1990, at A1.

130. *Id.*

131. See Matthew D. Berger, *Implementing a United Nations Security Council Resolution: The President's Power to Use Force Without the Authorization of Congress*, 15 HASTINGS INT'L & COMP. L. REV. 83, 88-89 (1991).

132. Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 896 (1996).

133. Thomas M. Franck, *Declare War? Congress Can't*, N.Y. TIMES, Dec. 11, 1990, at A27.

134. See John M. Hillebrecht, *Letter*, N.Y. TIMES, Dec. 29, 1990, at 22.; see also Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85

In a subsequent article, Franck explained in greater detail why there was no need to include Congress in the war against Iraq. He acknowledged that the purpose of the war-declaring clause "was to ensure that this fateful decision did not rest with a single person."¹³⁵ From that premise Franck reasoned that there was no necessity for congressional involvement. The Framers' intent was fully satisfied by the UN action: "The new system vests that responsibility in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power. This Council is far less likely to be stampeded by combat fever than is Congress."¹³⁶ Of course the veto power of the United States in the Security Council is wielded by the President's representative, not Congress. Moreover, there is no basis for arguing that whenever we discover a complex, multi-member body like the UN, the constitutional functions of Congress may be set aside. Nor is the legitimacy of an authorizing body to be measured by its capacity for resisting "combat fever." Under that analysis, the votes of the UN Security Council in June 1950 could be dismissed as illegitimate purely because of prompt action.

Secretary of Defense Dick Cheney testified before the Senate Armed Services Committee on December 3, 1990, that President Bush did not require "any additional authorization from the Congress" before attacking Iraq.¹³⁷ The reference to "additional authorization" implies that UN action was sufficient. Cheney referred to the President's authority as Commander in Chief, and then noted: "[G]iven the authorization, the vote—not authorization but certainly the vote by the United Nations in support of that effort, that the President is within his authority at this point to carry out his responsibilities."¹³⁸ The UN action, he said, made congressional action not only unnecessary but counterproductive:

As a general proposition, I can think that the notion of a declaration of war to some extent flies in the face of what we are trying to accomplish here. And what we are trying

AM. J. INT'L L. 74 (1991).

135. Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: 'The Old Order Changeth,'* 85 AM. J. INT'L L. 63, 74 (1991).

136. *Id.*

137. *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Committee on Armed Services*, 101st Cong. 701 (1990).

138. *Id.* at 702.

to accomplish is to marshal an international force, some 26, 27 nations having committed forces to the enterprise, working under the auspices of the United Nations Security Council.¹³⁹

From a legal standpoint, "auspices" is as muddy and as disingenuous as Acheson's "aegis."

Secretary of State Baker, agreeing that President Bush did not need congressional approval to order troops into combat, counseled that sending hundreds of thousands of soldiers into battle "with the possibility of significant casualties, but *without* legislative imprimatur, could well prove to be a Pyrrhic victory." He feared that if Bush did not obtain congressional approval, "we would be unable to sustain an attack on Saddam from a practical political standpoint and might have to settle for a policy of containment."¹⁴⁰

The Justice Department argued in court that President Bush could order offensive actions against Iraq without seeking advance authority from Congress.¹⁴¹ This sweeping interpretation of presidential war power was systematically rejected by the court before holding that the case was not ripe for judicial interpretation. The Justice Department maintained that definitions of the war power were left to the elected branches, not the judiciary. The court declined to adopt that theory:

[If the President] had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive. Such an "interpretation" would evade the plain language of the Constitution, and it cannot stand.¹⁴²

A similar point has been made by other scholars: "[T]he 'this isn't war' argument would simply eliminate by definitional fiat the constitutional role of Congress as the voice of the American people, even in cases like Korea and the Persian Gulf involving combat by American soldiers on a major scale."¹⁴³

139. *Id.* at 703.

140. BAKER, *supra* note 126, at 334.

141. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990).

142. *Id.* at 1145.

143. Jane E. Stromseth, *Treaty Constraints: The United Nations Charter and War Powers*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CUR-*

On January 8, 1991, President Bush asked Congress to pass legislation supporting the UN position, particularly Security Council Resolution 678 authorizing the use of all necessary means.¹⁴⁴ The next day reporters asked whether he needed a resolution from Congress. His reply: "I don't think I need it. . . . I feel that I have the authority to fully implement the United Nations resolutions."¹⁴⁵ The legal crisis was avoided on January 12 when Congress authorized President Bush to take offensive actions against Iraq. In signing the bill, Bush indicated that he could have acted without congressional authority:

As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution.¹⁴⁶

Notwithstanding this remark at the signing ceremony, the bill he signed expressly authorized him to act militarily against Iraq. A signing statement does not alter the contents of a public law.

After the war was over, Bush offered his views on presidential power during a speech given at Princeton University. Of his ability to take the country to war without congressional authority he had no doubt: "Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf war."¹⁴⁷ A more mean-spirited attitude toward Congress appears in a speech Bush gave in Texas during the 1992 campaign. He said that some people asked why he could not bring the same kind of purpose and success to domestic policy as he did to the war in Iraq. His answer: "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait. That's the reason."¹⁴⁸

RENT PERSPECTIVES 93 (Gary M. Stern & Morton H. Halperin eds., 1994).

144. 1 PUB. PAPERS 13-14 (1991).

145. *Id.* at 20.

146. *Id.* at 40.

147. *Id.* at 497.

148. 1 PUB. PAPERS 995 (1992-93).

In one of his last addresses, Bush used a speech at West Point to explain his theory of presidential war power. Referring to President Washington's warning of the dangers of "entangling alliances," and saying that he was right at that point in history, Bush said that what was "entangling" in Washington's day "is now essential."¹⁴⁹ Congress had a "constitutional role to play" in these involvements, but apparently more to offer support rather than authority. Presidential leadership "involves working with the Congress and the American people to provide the essential domestic underpinning if U.S. military commitments are to be sustainable."¹⁵⁰ The word authority appears only in reference to international organizations. Both in Iraq and in Somalia, U.S. forces were "acting under the full authority of the United Nations."¹⁵¹

VII. CLINTON IN HAITI

A June 4, 1993, statement by President Clinton announced "a high priority to return democracy to Haiti and to return its democratically elected President, Jean-Bertrand Aristide, to his office."¹⁵² Toward that end, his administration was committed to working with international organizations, including the Organization of American States ("OAS") and the United Nations, "to increase the pressure on the Haitian military, the de facto regime in Haiti and their supporters."¹⁵³ A month later, the Clinton administration described the details of the Governors Island accord, promising Aristide's return to Haiti, again reflecting the work of the OAS and the UN.¹⁵⁴

As part of an effort to restore Aristide to power, Clinton decided in October to send about six hundred U.S. soldiers to Haiti. The operation was part of a UN-brokered agreement to force Haiti's military leaders to resign by October 15.¹⁵⁵ The operation proved to be embarrassing to the Clinton administration when a group of armed civilians prevented a contingent of 193 U.S. troops and 25 Canadians from landing.¹⁵⁶ The retreat in the face of tiny Haiti

149. 2 PUB. PAPERS 2229 (1992-93).

150. *Id.* at 2230.

151. *Id.*

152. 1 PUB. PAPERS 810 (1993).

153. *Id.* at 811.

154. See *The Governor's Island Accord: A Victory for Diplomacy and Democracy in Haiti*, DEP'T ST. DISPATCH, July 26, 1993, at 525.

155. See *Despite Dispute, Troops Head to Haiti*, WASH. POST, Oct. 9, 1993, at A1.

156. See *Haitians Block U.S. Troop Arrival*, WASH. POST, Oct. 12, 1993, at A1, A14.

was widely interpreted as a humiliation to the United States. A policy shift followed. President Clinton now implied that he might have to use military force. On October 15 he ticked off the telltale signs of an impending U.S. intervention: "First, there are about 1,000 American citizens living in Haiti or working there. Second, there are Americans there who are helping to operate our Embassy. Third, we have an interest in promoting democracy in this hemisphere."¹⁵⁷

By late July 1994, rumors circulated about an imminent Security Council resolution authorizing an invasion of Haiti. Dante Caputo, the United Nations' special envoy to Haiti, wrote a "confidential" memo to UN Secretary General Boutros Boutros-Ghali describing political calculations within the Clinton White House. This memo, which found its way into the *Congressional Record*, states that Clinton's advisers believed that an invasion of Haiti would be politically desirable because it would highlight for the American public "the President's decision making capability and the firmness of leadership in international political matters."¹⁵⁸

On July 31, the Security Council adopted a resolution "inviting" all states, particularly in the region of Haiti, to use "all necessary means" to remove the military leadership in that island.¹⁵⁹ The idea of using the UN as a source of authority for presidential military actions prompted debate in the Senate, which passed a resolution stating the sense of the Senate that the Security Council resolution "does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution (Public Law 93-148)." This Senate amendment passed by a vote of one hundred to zero.¹⁶⁰

At a news conference on August 3, President Clinton once again denied that he needed support or authority from Congress to invade Haiti: "Like my predecessors of both parties, I have not agreed that I was constitutionally mandated to get it."¹⁶¹ In a nationwide televised address on September 15, he told the American public that he was prepared to use military force to invade

Haiti, referring to the UN resolution of July 31 and his willingness to lead a multinational force "to carry out the will of the United Nations."¹⁶² No mention at all of the will of Congress.

The public and a substantial majority of legislators assailed the planned invasion. Criticized in the past for currying public favor and failing to lead, Clinton now seemed to glory in the idea of acting against the grain. He was determined to proceed with the invasion: "But regardless [of this opposition], this is what I believe is the right thing to do. I realize it is unpopular. I know it is unpopular. I know the timing is unpopular. I know the whole thing is unpopular. But I believe it is the right thing."¹⁶³ Where was the consideration that it was the legal thing, the authorized thing, the constitutional thing?

Clinton emphasized the need to keep commitments: "I'd like to mention just one other thing that is equally important, and that is the reliability of the United States and the United Nations once we say we're going to do something."¹⁶⁴ Who is the "we"? It was not Congress or the American public. It was a commitment made unilaterally by the executive branch acting in concert with the United Nations.

An invasion of Haiti was not necessary. President Clinton sent former President Jimmy Carter to negotiate with the military leaders in Haiti. They agreed to step down to permit the return of Aristide. Initially, nearly 20,000 U.S. troops were dispatched to occupy Haiti and provide stability.¹⁶⁵ House and Senate debates were strongly critical of Clinton's insistence that he could act militarily against Haiti without legislative authority. A resolution was introduced to provide retroactive authorization for the use of U.S. armed forces in Haiti, but that proposal failed.¹⁶⁶ A remark by Senator Max Baucus, Democrat of Montana, reflected the attitude of many legislators: "The President did not seek my approval for occupying Haiti. And he will not get my approval now."¹⁶⁷ Both Houses passed legislation stating that "the President should

157. 2 PUB. PAPERS 1755 (1993).

158. 140 CONG. REC. H6433 (daily ed. July 28, 1994).

159. U.N. Authorizes Invasion of Haiti, WASH. POST, Aug. 1, 1994, at A1.

160. See 140 CONG. REC. S10,415-33 (daily ed. Aug. 3, 1994).

161. 2 PUB. PAPERS 1419 (1994).

162. *Id.* at 1559.

163. *Id.* at 1551.

164. *Id.* at 1549.

165. See Clinton Halts Invasion as Haiti Leaders Agree to Quit; U.S. Forces Land Today, WASH. POST, Sept. 19, 1994, at A1.

166. See 140 CONG. REC. H10,973 (daily ed. Oct. 5, 1994); see also 140 CONG. REC. H1121 (daily ed. Oct. 6, 1994).

167. 140 CONG. REC. S14,343 (daily ed. Oct. 6, 1994).

have sought and welcomed Congressional approval before deploying United States Forces to Haiti."¹⁶⁸

VIII. CLINTON IN BOSNIA

In concert with the United Nations and NATO, the United States participated in humanitarian airlifts into Sarajevo and helped enforce a "no-fly zone" (a ban on unauthorized flights over Bosnia-Herzegovina). In a number of statements in 1993, President Clinton indicated that he would have to seek the support and authorization from Congress before ordering air strikes. At a news conference on May 7 he stated: "If I decide to ask the American people and the United States Congress to support an approach that would include the use of air power, I would have a very specific, clearly defined strategy. . . ."¹⁶⁹ At that same news conference he switched the word *support* to *authority*: "I assure you today that if I decide to ask for the authority to use air power from the Congress and from the American people. . . ."¹⁷⁰ In another exchange with reporters, on September 8, he said he would support U.S. participation along with other NATO nations in Bosnia, but added:

Of course in the United States, as all of you know, anything we do has to have the support of the Congress. I would seek the support of the Congress to do that. . . . if we can get the Congress to support it, then I think we should participate. . . . [Military action in Bosnia] has to be able to be enforced or, if you will, be guaranteed by a peacekeeping force from NATO, not the United Nations but NATO. And of course, for me to do it, the Congress would have to agree.¹⁷¹

On October 20, he wrote to Senators George Mitchell (D-Me.) and Bob Dole (R-Kans.) that he "would welcome and encourage congressional authorization of any military involvement in Bosnia."¹⁷²

However, also during October, President Clinton repeatedly objected to legislative efforts to restrict his military options. He said he opposed any amendment "that affects the way our military

168. United States Policy Towards Haiti, Pub. L. No. 103-423, 108 Stat. 4358, § 1(b) (1994).

169. 1 PUB. PAPERS 594 (1993).

170. See *id.*

171. 2 PUB. PAPERS 1455 (1993).

172. *Id.* at 1781.

people do their business, working with NATO and other military allies," or any amendment that "unduly restricted the ability of the President to make foreign policy."¹⁷³ He did not think "we should have an amendment which would tie the President's hands and make us unable to fulfill our NATO commitments."¹⁷⁴ As with Haiti and the United Nations, "our" commitments would be decided by the President, not by Congress. When asked whether he would veto legislation that contained an amendment requiring him to ask and get the consent of Congress before using troops in Haiti and Bosnia, his answer rambled but implied that Congress existed to provide advice, not authority, and that the crucial decision for using force had to be left to the President:

All I can tell you is that I think I have a big responsibility to try to appropriately consult with Members of Congress in both parties—whenever we are in the process of making a decision that might lead to the use of force. I believe that. But I think that, clearly, the Constitution leaves the President, for good and sufficient reasons, the ultimate decisionmaking authority. . . . [T]he President must make the ultimate decision, and I think it's a mistake to cut those decisions off in advance.¹⁷⁵

President Clinton continued to be "fundamentally opposed" to any statutory provisions that "improperly limit my ability to perform my constitutional duties as Commander-in-Chief."¹⁷⁶ Amendments regarding "command and control" of U.S. forces "would insert Congress into the detailed execution of military contingency planning in an unprecedented manner. The amendment would make it unreasonably difficult for me or any President to operate militarily with other nations when it is in our interest to do so—and as we have done effectively for half a century through NATO."¹⁷⁷ For that half-century, NATO had never used military force.

In 1994, Clinton threatened air strikes against Serbian militias in Bosnia. There were no further statements about seeking authority from Congress. Decisions to use air power would be taken in response to UN Security Council resolutions, operating through

173. *Id.* at 1763.

174. *Id.* at 1764.

175. *Id.* at 1768.

176. 2 PUB. PAPERS 1770 (1993).

177. *Id.*

NATO's military command. Clinton explained: "the authority under which air strikes can proceed, NATO acting out of area pursuant to U.N. authority, requires the common agreement of our NATO allies."¹⁷⁸ In other words, he would seek the agreement of England, France, Italy and other NATO allies, but not Congress.

NATO air strikes began in February 1994 and were followed by additional strikes in April, August, and November. NATO continued to conduct limited air strikes during the first half of 1995, but in July the war took a more serious turn when Bosnian Serb forces overran the UN-designated "safe area" of Srebrenica, forcing nearly 30,000 civilians to flee and trapping 430 Dutch peacekeepers. At the end of August, NATO carried out the war's biggest air raid.¹⁷⁹

On September 1, 1995, President Clinton explained to congressional leaders the procedures followed for ordering air strikes in Bosnia. The North Atlantic Council ("NAC") "approved" a number of measures and "agreed" that any direct attacks against remaining safe areas would justify air operations as determined "by the common judgment of NATO and U.N. military commanders." The NATO air strikes that began on August 29, 1995, were pursuant "to the NAC's decision of August 1, 1995."¹⁸⁰ Clinton said he authorized the actions "in conjunction with our NATO allies to implement the relevant U.N. Security Council resolutions and NATO decisions."¹⁸¹ On September 12, he regarded the bombing attacks as "authorized by the United Nations."¹⁸²

The next escalation of U.S. military action was Clinton's decision to introduce ground forces. At a news conference on October 19, Clinton engaged in this give-and-take with reporters:

Q: Would you go ahead, then, and send the troops, even if Congress does not approve?

The President: I am not going to lay down any of my constitutional prerogatives here today. I have said before and I will say again, I would welcome and I hope I get an

178. 1 PUB. PAPERS 186 (1994).

179. See *NATO Bombs Serbs in War's Biggest Air Raid*, WASH. POST, Aug. 30, 1995, at A1; see also *NATO Continues Extensive Bombing Across Bosnia; Serbs Remain Defiant*, WASH. POST, Aug. 31, 1995, at A1; *NATO Jets Hit Serbs Again; Bad Weather Curtails Raids*, WASH. POST, Sept. 1, 1995, at A1.

180. 31 WEEKLY COMP. PRES. DOC. 1473 (Sept. 1, 1995).

181. *Id.* at 1474.

182. *Id.* at 1553.

expression of congressional support. I think it's important for the United States to be united in doing this. . . . I believe in the end, the Congress will support this operation.¹⁸³

Clinton's letter to Senator Robert C. Byrd on October 19 also invited "an expression of support by Congress."¹⁸⁴ White House press secretary Michael McCurry said that President Clinton would not be legally bound by anything Congress did, and "if the president ever felt he had to act as commander in chief to protect American interests he would do it," even without Congress's approval.¹⁸⁵ In a letter to Speaker Newt Gingrich on November 13, Clinton continued to avoid any suggestion that he needed authorization from Congress before sending U.S. ground forces to Bosnia. He told Gingrich:

I will submit a request for a Congressional expression of support for U.S. participation in a NATO-led Implementation Force ["IFOR"] in Bosnia promptly if and when the parties have initialed an agreement that I consider to be a genuine agreement and after I have reviewed the final NATO operational plan.¹⁸⁶

Acting on what he considered sufficient authority under Article II of the Constitution and under NATO, Clinton ordered the deployment of 20,000 American ground troops to Bosnia without obtaining authority or support from Congress. Other forces in Croatia, Hungary, and surrounding countries would increase the U.S. troop commitment beyond 30,000. The debate over the Bosnia commitment was peculiar. Regardless of whether a national interest ever existed, the mere fact that Clinton decided to intervene created, by itself, a national interest. And that is not because he convinced Congress and the public that it was in America's interest to send troops. Far from it. A national interest somehow emerged independent of the merit or substance of Clinton's policy or the likely value or injury to the United States. The prevailing argument was that any effort to renege on his decision, however misguided the policy, would undermine the credibility of the United States, the presidency, and NATO.

183. *Id.* at 1878.

184. 141 CONG. REC. S15,393 (daily ed. Oct. 20, 1995).

185. *President to Ask for Bosnia Vote*, WASH. POST, Oct. 21, 1996, at A22.

186. 141 CONG. REC. H13,228 (daily ed. Nov. 17, 1995).

This is a remarkable theory. Whenever Presidents act unilaterally to bind the nation—financially and militarily—subsequent challenges to their action are ill-advised and unacceptable. Instead of debating national policy and building a consensus, we bow to a President's initiative. Through such means we undermine representative democracy. No doubt the credibility of the presidency and NATO were at stake in Bosnia, but so is the credibility of Congress, the Constitution, and our system of checks and balances. The relative success of the deployment in Bosnia does not justify taking additional steps toward autocracy, or monarchy, in foreign affairs.¹⁸⁷

In his address to the nation on November 27, 1995, explaining the deployment of U.S. ground troops to Bosnia, Clinton said that the mission would "help stop the killing of innocent civilians, especially children, and at the same time, to bring stability to Central Europe, a region of the world that is vital to our national interests. It is the right thing to do."¹⁸⁸ This parallels Clinton's justification for invading Haiti: it was the right thing, even if not the legal thing. On December 6, having approved the NATO operation plan for sending ground troops to Bosnia, Clinton said he "will be requesting an expression of support from the Congress."¹⁸⁹ The support never came.

On December 21, Clinton expected that the military mission to Bosnia "can be accomplished in about a year."¹⁹⁰ A year later, on December 17, 1996, Clinton extended the troop deployment for another eighteen months.¹⁹¹ He approved NATO's operation plan for the Stabilization Force (SFOR) as the successor to IFOR and welcomed NATO's decision to approve the plan and the "Activation Order that will authorize the start of SFOR's mission."¹⁹² The Security Council had "authorized" member states to establish the follow-on force on December 12, 1996.¹⁹³

187. See Louis Fisher, *The Bosnia Commitment: Binding the United States by Unilateral Executive Action*, LEGAL TIMES, Mar. 11, 1996, at 22-23.

188. See 31 WEEKLY COMP. PRES. DOC. 2060 (1995).

189. *Id.* at 2145.

190. *Id.* at 2216.

191. See 32 WEEKLY COMP. PRES. DOC. 2525 (1996).

192. *Id.* at 2524 (emphasis added).

193. See *id.*

IX. CONCLUSIONS

The scope of the President's war power, conducted through multilateral operations, was broadcast with great clarity by the Clinton administration in a May 1994 policy paper. The basic theme: the President leads, Congress follows. The section devoted to the relationship between the executive and legislative branches calls only for "periodic consultations with bipartisan Congressional leaders on foreign policy engagements that might involve U.S. forces, including possible deployments of U.S. military units in UN peace operations."¹⁹⁴ Another White House policy paper, ambitiously titled "A National Security Strategy of Engagement and Enlargement" (February 1995), sets forth the basic principles for employing military force. While there is mention of seeking "support" and participation from Congress and having the President engage in regular consultation with legislators, no thought is given to obtaining *authority* from Congress before dispatching armed forces.¹⁹⁵

As a means of diminishing, or extinguishing, the constitutional role of Congress in matters of going to war, it would be difficult to top these position papers. A regular series of meetings and briefings with key congressional leaders are sufficient gestures to satisfy the constitutional test, according to the Clinton administration. Whether through the UN, NATO, or multinational alliances, international and regional organizations can apparently authorize presidential military actions. From 1988 to 1994, the annual cost for UN peacekeeping operations grew from \$230 million to \$3.6 billion.¹⁹⁶

Will Congress, and the American people, accept this subordinate, second-class role for the legislative branch? Shall the crucial question of taking the country from a state of peace to a state of war be left to the President and his immediate advisers? A recent study identifies the proper constitutional principles:

194. *The Clinton Administration's Policy on Reforming Multilateral Peace Operations*, DEP'T ST. PUB. 10,161, May 1994, at 14.

195. See THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT iii, 2, 13, 17 (1995).

196. See James Kitfield, *Not-So-United*, NAT'L J., Jan. 11, 1997, at 70.

Congress is the only organ of the United States government which may commit United States forces to actual or potential combat. Authorization is given by majority votes from both houses of Congress; under no circumstance is the judgment of another body, including the Security Council, a valid substitute for the judgment of Congress.¹⁹⁷

A more central, and constitutional, role for Congress is envisioned in a congressional report that accompanied supplemental funds to pay for peacekeeping operations initiated by the Clinton administration. President Clinton requested \$2.5 billion in supplemental funds for fiscal 1995 to cover unanticipated costs for peacekeeping, peace enforcement, and humanitarian assistance "in and around" Somalia, Rwanda, Iraq, Bosnia, Haiti, Cuba, and Korea. Many of those operations, as with Rwanda, Bosnia, and Haiti, had been taken unilaterally by the executive branch without ever seeking congressional approval. Some of them, as with Haiti and Bosnia, were initiated in the face of active congressional opposition. In supplying the supplemental funds, Congress noted that these missions "all mark significant departures from previous emergency deployments of American forces." The conferees on this supplemental appropriations bill offered their "strong belief" that military deployments "in support of peacekeeping or humanitarian objectives both merit and require advance approval by the Congress."¹⁹⁸

However, in the same year that Congress announced the proper constitutional principles for funding military operations, debate in the House of Representatives on another matter communicated a drastically reduced role for Congress. An amendment to repeal the War Powers Resolution, retaining only the provisions for consultation and presidential reports to Congress, failed by the narrow margin of 201 to 217.¹⁹⁹ It appeared that almost half of the House was willing to let the President initiate military activities, subject only to consultation and reporting requirements.

The Framers assumed that in a system of separation of powers, each branch would protect its prerogatives and fight off encroachments. The Framers' design has worked well on many fronts, but not in the use of military force. Presidents advance ambitious theories of executive prerogative without triggering a serious check

from the Congress or the judiciary. It is not merely a matter of Congress being weakened. Public control and democratic values, operating through Congress as the representative branch, are also degraded. For supporters of democratic systems and deliberative procedures, our present course should be a source of genuine alarm.

197. Edgar, *supra* note 73, at 337.

198. H.R. REP. NO. 104-101, at 25 (1995).

199. See 141 CONG. REC. H5655-74 (daily ed. June 7, 1995).