

University of Miami Law Review

Volume 50
Number 1 *War and Responsibility: A
Symposium on Congress, the President, and the
Authority to Initiate Hostilities*

Article 7

10-1-1995

After The Cold War: Presidential Power and the Use of Military Force

Walter Dellinger

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

Recommended Citation

Walter Dellinger, *After The Cold War: Presidential Power and the Use of Military Force*, 50 U. Miami L. Rev. 107 (1995)

Available at: <https://repository.law.miami.edu/umlr/vol50/iss1/7>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

After The Cold War: Presidential Power and the Use of Military Force

WALTER DELLINGER*

I. INTRODUCTION	107
II. A QUESTION OF PROFESSIONAL ROLE	108
III. THE LEGAL OPINION	110
A. <i>The Declaration of War Clause and the War Powers Resolution</i>	111
B. <i>Department of Defense Appropriations Act</i>	117
IV. CONCLUSION	118

I. INTRODUCTION

When President Truman sought aid to counteract Communist threats to Turkey and Greece, he called for the United States to “ ‘support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures,’ ”¹ and, in the words of Stephen Ambrose, “[i]n a single sentence . . . defined American policy for the next generation and beyond.”² For forty years, the overriding goal of American foreign policy was to prevent the spread of Communism.

The end of the Cold War has led to new responsibilities and different challenges. Today, in addition to more customary national security grounds, other reasons for deploying our forces abroad include the facilitation of humanitarian relief, as in the deployment of troops to Somalia, the promotion of stability through peace-keeping missions, as in the deployment to Macedonia, and the support of legitimate democratic governments against local threats, especially in areas where our national security interests are at stake.

In the fall of 1994, President Clinton faced a decision whether to send American forces to Haiti on a mission implicating all of these purposes—humanitarian relief, peacekeeping, and support of democratic governments—as well as pressing national security concerns. Large

* Assistant Attorney General of the United States for the Office of Legal Counsel and Professor of Law (on leave) Duke University. Although I assume sole responsibility for this article, its conclusions emerged from extensive discussions among the Deputy Assistant Attorneys General who have served with me—Dawn Johnsen, H. Jefferson Powell, Teresa Wynn Roseborough, Richard Shiffrin and Chris Schroeder—and with the outstanding senior career attorneys at OLC who have long dealt with war powers issues—Daniel Koffsky and Robert Delahunty. I am especially grateful to Dan Koffsky for his extensive work on this speech and article.

1. STEPHEN E. AMBROSE, *RISE TO GLOBALISM* 82 (7th ed. 1993) (quoting President Truman).

2. *Id.*

numbers of Haitians were periodically taking to the seas, imperiling their own lives, and straining our capacity to control our borders. Conditions in Haiti were deteriorating and the military regime was refusing to keep its promise to return power to the duly elected government. The President determined that action was required.

Although recognizing the danger inherent in the proposed mission, the President's senior military advisors concluded that it was far from clear that a demoralized and ill-equipped Haitian military, if asked to fight a futile battle in defense of an illegitimate regime lacking popular support, would provide sustained resistance to American armed forces. Paramilitary thugs with machetes had been a terrifyingly effective force against a defenseless civilian population in Haiti. They would have been substantially less formidable against troops that could call upon the support of tanks, helicopters, and warplanes. The very size of the planned American force—approximately 20,000 troops—was purposely designed to reduce significantly the likelihood of substantial combat resistance to the deployment in Haiti.

An eleventh-hour accord negotiated by former President Carter, General Colin Powell, and Senator Sam Nunn provided for the entry of United States forces, the departure of the military regime, and the restoration of Haiti's legitimate, elected government. But in the days before the agreement was reached, the President asked the Department of Justice ("Department") to determine whether he would have the legal authority to order the deployment of American troops into Haiti without the consent of the military regime and in the face of the *de facto* regime's assertion that it would forcibly resist the American intervention. The Department concluded that the President had that authority. Later, in response to a letter to the President from Senators Bob Dole, Strom Thurmond, Alan Simpson, and William Cohen, I responded with an opinion letter setting out the basis of our conclusion.³ The opinion prompted a response from ten law professors who disagreed with the conclusion we had reached.⁴ One of the ten also published a critique of the opinion.⁵

II. A QUESTION OF PROFESSIONAL ROLE

Before offering my thoughts on the professors' response and on the debate generally, I would first like to address briefly a more personal

3. Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 122-26 (1995).

4. *Id.* at 127-30.

5. Lori F. Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58 (1995).

issue concerning the professional role of an academic and the professional role of an attorney for the executive branch. I have had occasion to think about this issue often over the last few months. For some of my friends and former colleagues in academic life, one issue thought worth debating was the question of what previous positions I had personally taken on war powers questions while a law professor at Duke and what position I might have taken on the Haiti issue were I still at a university. Laurence Tribe, for example, wrote to President Clinton arguing that the anticipated deployment would be unconstitutional in the absence of prior congressional authorization, stating "I frankly see no constitutional differences between the proposed invasion of Haiti and the one in the Persian Gulf."⁶ He pointed out, as did other critics, that as a professor I had publicly taken the position that prior congressional authorization was required to render the Persian Gulf War constitutional. Professor Tribe concluded in his letter to the President that "if Mr. Dellinger were still a law professor, he would agree on this with me."⁷ The *Washington Times*, in an editorial entitled *Where Mr. Dellinger Stands and Where He Sits*, accused me of hypocrisy,⁸ and in a later editorial asked "Has Mr. Dellinger changed his views since leaving the academy?"⁹

I am by no means convinced that I would have agreed with Professor Tribe had I been a law professor. I expect that I would have seen a distinction between the planned deployment in Haiti and the sending of half a million troops into battle against one of the world's largest and best-equipped armies. Even apart from that, however, I am not sure I agree with the apparent assumption of Professor Tribe's letter and the *Washington Times* editorial—that it would be wrong for me to take a different view at the Office of Legal Counsel from the one I would have been expected to take as an academic. It might well be the case that I have actually learned something from the process of providing legal advice to the executive branch—both about the law (from the career lawyers at the Departments of Justice, State, and Defense and the National Security Council) and about the extraordinary complexity of interrelated issues facing the executive branch in general and the President in particular.

Moreover, unlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the

6. *Where Mr. Dellinger Stands and Where He Sits*, WASH. TIMES, Sept. 13, 1994, at A16.

7. *Id.*

8. *Id.*

9. *The Democrats and War Powers*, WASH. TIMES, Sept. 19, 1994, at A20.

President's legal authority to use force. Opinions of the Attorneys General and of the Office of Legal Counsel, in particular, have addressed the extent of the President's authority to use troops without the express prior approval of Congress. Although it would take us too far from the main subject here to discuss at length the *stare decisis* effect of these opinions on executive branch officers, the opinions do count for something.¹⁰ When lawyers who are now at the Office of Legal Counsel begin to research an issue, they are not expected to turn to what I might have written or said in a floor discussion at a law professors' convention. They are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions. That is not to say that prior opinions will never be reversed, only that there are powerful and legitimate institutional reasons why one's views might properly differ when one sits in a different place.

III. THE LEGAL OPINION

In any event, let me turn to the question of the President's authority to order the deployment into Haiti. In concluding that the President had that authority, the Department of Justice relied on three factors. First, the deployment would accord with the sense of Congress as set forth in the Department of Defense Appropriations Act.¹¹ That Act expressed Congress's view that funds should not be spent for military operations in Haiti, unless the President made certain findings (such as that the deployment was justified by United States national security interests) and reported those findings to Congress.¹² The President did so. Second, the War Powers Resolution,¹³ while not granting any new authority to the President, recognizes and presupposes existing Presidential power to deploy armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."¹⁴ By establishing and funding a military force capable of being sent around the globe, and declining in the War Powers Resolution or elsewhere to forbid the President's use of his statutory and constitutional powers to deploy troops into situations of risk such as Haiti, Congress left the President both the authority and the means to take such

10. Indeed, as Harold Koh, one of the signatories of the scholars' letter, argued in a recent law review article, prior opinions of the Office of Legal Counsel should count for a lot. Harold H. Koh, *Protecting the Office of Legal Counsel from Itself*, 15 *CARDOZO L. REV.* 513, 516 (1993).

11. Pub. L. No. 103-139, 107 Stat. 1418 (1993).

12. *Id.* § 8147, 107 Stat. 1418, 1474-75.

13. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (1988)).

14. 50 U.S.C. § 1543(a)(1) (1988).

initiatives. Third, the Declaration of War Clause¹⁵ did not require prior congressional approval in the circumstances at issue. Given the nature, scope, and duration of the deployment, and the consent of the legitimate government, the President could determine that the deployment would not constitute “war” within the meaning of the Clause. This made it unnecessary to address the circumstances where the President would have the constitutional authority to undertake action amounting to “war” without congressional approval.¹⁶

The ten professors who sent me the letter were unconvinced. They believed the Department’s opinion exaggerated the President’s powers. Other critics, some public, some necessarily private, conversely argued that the Office of Legal Counsel opinion placed implicit and unwarranted limits on the President’s unilateral authority to use force abroad.¹⁷ Here, I want to answer at least the professorial criticism.

A. *The Declaration of War Clause and the War Powers Resolution*

The linchpin of the professors’ letter, I believe, was an interpretation of Article I, Section 8, Clause 11 of the Constitution, which vests in Congress the power “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”¹⁸ According to the letter, this clause “grants Congress power not simply ‘to declare War,’ but also to address hostilities in situations short of war, e.g., through its power to ‘grant letters of marque and reprisal.’”¹⁹

15. U.S. CONST. art. I, § 8, cl. 11.

16. It is widely accepted, for example, that the President has authority to use military force to repel a direct attack on the United States without a congressional declaration of war. See, e.g., *Massachusetts v. Laird*, 400 U.S. 886, 893 n.1 (1970) (Douglas, J., dissenting from denial of leave of file bill of complaint); *Mitchell v. Laird*, 488 F.2d 611, 613 (D.C. Cir. 1973); *Massachusetts v. Laird*, 451 F.2d 26, 31 (1st Cir. 1971). The President’s power to use force to rescue Americans abroad is also well established. *In re Neagle*, 135 U.S. 1, 63-70 (1890) (among the President’s “rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution” is the obligation to protect American citizens abroad). In *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4186), Justice Nelson wrote that “[i]t is to [the President that] the citizens abroad must look for protection of person and of property Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the president.” *Id.* at 112; see also 55 Comp. Gen. 1081, 1084 (1976) (“the President does have some authority to protect the lives and property of Americans abroad even in the absence of specific congressional authorization”); cf. *Slaughter House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873) (including among the privileges and immunities of citizens of the United States is the right “to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government”).

17. See Lee A. Casey & David B. Rivkin Jr., *In Constitutional Interpretation, Read the Framers’ Words*, LEGAL TIMES, Oct. 3, 1994, at 24, 47.

18. U.S. CONST. art. I, § 8, cl. 11.

19. Nash, *supra* note 3, at 130.

Therefore, as the argument goes, "the totality of Congress' Article I, § 8 powers reserves to Congress alone the prerogative and duty to authorize initiation of hostilities."²⁰ The letter then adds that "it may well be that the magnitude and scope of [the planned Haiti operation] required prior congressional approval, without regard to whether the invasion plan contemplated 'war,' as that term is understood in constitutional or international law."²¹ Finally, the letter denies that "the President alone may determine that the nature, scope, and duration of a planned military deployment does not rise to the level of 'war' for which congressional approval under domestic law is constitutionally required."²²

I appreciate that the letter may reflect a range of views. Louis Henkin, for example, had earlier written that "[a]s regards hostilities 'short of war,' it may be that, *although the President can use force if Congress is silent*, Congress can forbid or regulate even such uses of force, if only on the ground that they might lead to war."²³ Perhaps a desire to enlist the support of those who take such a view accounts for the parts of the letter referring to Congress' "power . . . to address" hostilities short of war and examining the applicability of the term "war" to the planned operation in Haiti. At any rate, the approach suggested by these parts of the letter fundamentally conflicts with the approach suggested by the letter's statement that the Constitution "reserves to Congress alone the prerogative and duty to authorize initiation of hostilities,"²⁴ apparently whether or not those hostilities amount to "war."

The letter seems to argue that the Declaration of War Clause should be read to cover the full range of instances where United States forces engage in hostilities short of war. The late Robert Cover once said that the language "life, liberty, or property" in the Due Process Clause could have been interpreted (although the Supreme Court chose not to do so) in the same way we interpret the phrase "heaven and earth" in the Bible: the language is intended to cover everything, and asking whether there is something other than "heaven" or "earth" is to miss the whole point. According to the professors' letter, the Declaration of War Clause should be interpreted in just this way. By specifying that Congress is to declare war, grant letters of marque and reprisal, and make rules for captures on land and water, the argument goes, Constitution gives Congress alone the power to initiate all hostilities, whether or not those hostilities amount to "war" or involve "letters of marque and reprisal" or concern "captures on land and water."

20. *Id.*

21. *Id.*

22. *Id.*

23. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 103 (1972) (emphasis added).

24. Nash, *supra* note 3, at 130.

The issue, I must emphasize, is not whether the Declaration of War Clause empowers Congress to regulate uses of force short of war. I assume that the Clause, together with the Necessary and Proper Clause and the power over appropriations, confers broad (though not limitless) authority on Congress to pass legislation governing such uses of force. Nevertheless, no one, to my knowledge, has argued that Congress *had* prohibited the planned operation in Haiti. Even if Congress has the power to “address hostilities in situations short of war,” Congress had not exercised such power in this case. The scholars’ letter, therefore, must be arguing that the conferral on Congress of power to declare war and grant letters of marque and reprisal forbids the President from initiating hostilities, even short of war, and even when Congress has not acted.

For three reasons, I believe this interpretation of the law is not convincing. First, this broad reading of the Clause would lead to the conclusion that even deployments not resulting in hostilities require the prior approval of Congress, but such a conclusion would conflict with a well-accepted understanding of the President’s powers. Second, the broad reading does not accord with historical practice of presidential initiation of hostilities short of war. Third, the broad reading conflicts with the considered judgment of the Congress itself.

First, the President has the well-recognized power to deploy and redeploy United States forces. By a network of legislation, Congress has created a large standing army and given the President the means to send that force all over the world. As Attorney General (later Justice) Robert Jackson wrote, “the President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.”²⁵

Deployments may carry far more risks and be far more consequential than the granting of letters of marque and reprisal. President Roosevelt’s deployments before the United States entered World War II could have brought us into that conflict sooner. Since World War II, we have maintained large forces in Europe, knowing that any attack by the nations of the Warsaw Pact would cause immediate American casualties and threaten the world with nuclear war. Deployments may or may not be so risky that, in the words of the War Powers Resolution, “imminent

25. *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 61-62 (1942).

involvement in hostilities is clearly indicated by the circumstances," but even where the involvement is not "imminent," the danger may be great. If the Declaration of War Clause conferred on Congress *alone* not only the power to declare war and grant letters of marque and reprisal but also to initiate *all* uses of armed forces in between those two points on the continuum, we would expect that Congress alone could order such deployments. But past and current practice does not support such a claim, and the letter from the professors does not, and could not, make such a broad claim.

Once we accept the President's authority to deploy troops, and recognize that deployments may be far more consequential than a letter of marque and reprisal, the argument that the Declaration of War Clause requires specific congressional approval for any potential engagement in hostilities short of war falls. The Clause does not cover "heaven and earth." It covers what it says it covers—declarations of war, letters of marque and reprisal, and rules for capture. The anticipated deployment in Haiti was not a rule for capture, it was not a letter of marque and reprisal, and it was not, in our view, an invasion that amounted to "war" within the meaning of the Declaration of War Clause.

The constitutional analysis of presidential and congressional power in this area, therefore, must be directed to identifying the meaning of the constitutionally-prescribed threshold—"war"—rather than elaborating upon a requirement that Congress approve the initiation of any "hostilities"—a term found in the War Powers Resolution but not in the Declaration of War Clause. Furthermore, because the President orders the deployment of troops, he must decide in the first instance whether a planned operation would be within his authority or whether it would be "war" in a constitutional sense. The President, along with his legal advisers, necessarily must determine whether he is obliged to seek congressional approval.

Second, over the course of our history, Presidents have repeatedly engaged the country's armed forces in hostilities short of war without prior authorization by Congress. There has been a long, and ultimately sterile, debate about precisely how many times Presidents have used force without congressional approval and whether any of these instances were "wars" in the constitutional sense. Those who seek to limit presidential action argue that "most of these instances were relatively minor uses of force."²⁶ But even if this criticism of prior presidential action is valid, it concedes my point: if the question is whether the President has any authority, absent congressional approval, to initiate hostilities *short*

26. See, e.g., MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 80 (1990) (footnote omitted).

of war, the historical record presents numerous instances in which Presidents have done just that. This does not necessarily mean that a President, where Congress has not spoken, could send one-half million troops against an entrenched foe, let alone do so in defiance of a congressional prohibition. It does mean, however, that practice over the course of our history does not support reading the Declaration of War Clause as denying to the President the authority to initiate *any* hostilities short of war.

In the Haiti opinion, the Department was not addressing a decision to commit troops in a large-scale battle. Indeed, the closest analogues for the deployment into Haiti were prior instances where the President used his own authority to order American troops to occupy territory at the invitation of the legitimate government, into circumstances of some risk but without an expectation of real resistance. For example, in 1940, after Denmark fell to Germany, President Roosevelt ordered United States troops to occupy Greenland, a Danish possession, pursuant to an agreement between the United States and the Danish Minister in Washington. In 1941, pursuant to an agreement with the Prime Minister of Iceland, United States troops occupied that country as well. More recently, at the request of President Corazon Aquino in 1989, President Bush authorized military assistance to the Government of the Philippines, which was quelling an attempted coup. Thus, the President's power to take the action contemplated in Haiti was firmly rooted in long historical practice. As the opinion said, "[s]uch a pattern of Executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, 'evidences the existence of broad constitutional power.'"²⁷

We did *not* suggest in the Haiti opinion that the United States cannot be said to engage in "war" whenever it deploys troops into a country at the invitation of that country's legitimate government. Rather, we believe that a "war" does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of "war." The Haiti opinion states that the President, in deciding whether he needed to seek congressional authorization before deploying troops, was entitled to take into account not only the anticipated nature, scope, and duration of the deployment, but also the

antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment. Indeed, it was the President's hope, since vindicated by the event, that the Haitian military leadership would agree to

27. Nash, *supra* note 3, at 126 (citation omitted).

step down before exchanges of fire occurred. Moreover, . . . other aspects of the planned deployment, including the fact that it would not involve extreme use of force, as for example preparatory bombardment, were also relevant to the judgment that it was not a 'war.'²⁸

Third, the proposition that the President has authority to undertake hostile actions short of war without congressional approval has not just been the view of the executive branch. Congress itself has implicitly endorsed it. The War Powers Resolution, passed after long debate and representing the most serious congressional pronouncement on issues of war and peace in the past half-century, simply makes no sense unless the President, at the least, can initiate some hostilities short of war without prior congressional approval. The Resolution provides that if the President "introduce[s]" United States armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,"²⁹ he must withdraw those forces in sixty days, unless Congress approves continued engagement.³⁰ If the President does not have some authority to introduce troops into hostilities short of war without congressional authorization, the War Powers Resolution has nothing to operate upon.

In pointing this out, I am not arguing that the War Powers Resolution itself authorizes such uses of force. The Resolution itself says that it does not grant such an authorization.³¹ I am arguing instead that our mutual understanding of the President's constitutional and statutory powers should be informed by what Congress, in this critical pronouncement, understood those powers to be. As to uses of force short of war, the Constitution draws no clear line between presidential and congressional power. It is wholly legitimate, in trying to discern where such a boundary might be, to look to the practices and decrees of the two contending branches. Where the legislative and executive branches agree, as the War Powers Resolution indicates they do on the existence of presidential power to initiate at least some hostilities short of war, it takes more boldness than I have to deny that power altogether.³²

In a thoughtful article challenging the Department's legal opinion, Lori Fisler Damrosch argued that

28. *Id.* (footnote omitted).

29. 50 U.S.C. § 1543(a)(1) (1988).

30. 50 U.S.C. § 1544(b) (1988).

31. 50 U.S.C. § 1547(d) (1988).

32. As the opinion noted, this Administration has not yet had to face the difficult constitutional issues raised by the provision of the War Powers Resolution, 50 U.S.C. § 1544(b), that requires withdrawal of forces after 60 days involvement in hostilities, absent congressional authorization.

the [War Powers Resolution] does not create or assume authority in the President to introduce troops into hostilities without congressional approval, but it does provide a procedural framework for responding to hostilities initiated *by others*, as in the case of attacks on U.S. forces deployed outside the United States. In other words, the [War Powers Resolution's] time periods become relevant where hostilities have erupted not because the President took a premeditated and unauthorized decision to initiate them, but because another party has attacked U.S. troops deployed overseas in a noncombatant or defensive posture³³

This argument, however, conflicts with the language of the War Powers Resolution. The Resolution starts a sixty-day clock when "United States Armed Forces *are introduced* . . . into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."³⁴ Professor Damrosch would limit the Resolution to situations where United States forces are not "introduced" at all, but are already in place. The Resolution will not bear such a constricted interpretation.

B. *Department of Defense Appropriations Act*

As I noted, the Department's opinion focused on three factors, and I have now covered two of them—that the planned deployment would not have been a "war" in the constitutional sense and would have been consistent with the understandings embodied in the War Powers Resolution. The final factor is the sense of the Congress, expressed in the Department of Defense Appropriations Act, that funds not be spent for military operations in Haiti unless the President made certain findings and reported them to Congress. The letter from the professors argues that the sense-of-Congress provision does not expressly authorize anything and that, in any event, implied congressional authorization for warmaking is insufficient. It further argues that the provision was passed when President Aristide might have returned under the Governors Island agreement and was aimed at the "limited peacekeeping" then contemplated. Thus, the provision could not be relied upon in the changed factual circumstances months later.³⁵ Professor Damrosch expanded on this argument, contending that "the most that section 8147 [of the Department of Defense Appropriations Act] can be taken to authorize is the kind of limited peacekeeping that was actually contemplated in the fall of 1993, not the major change in concept that moved to the policy agenda only in the summer of 1994."³⁶

33. Damrosch, *supra* note 5, at 64.

34. 50 U.S.C. § 1543(a)(1) (emphasis added).

35. Nash, *supra* note 3, at 128-29.

36. Damrosch, *supra* note 5, at 61.

The language of the provision, however, was ample to cover the planned deployment in 1994. Section 8147, after all, referred to the "United States military operation in Haiti."³⁷ Furthermore, even if an implied authorization to fight a "war," by itself, might not carry much weight, I have already explained why the deployment into Haiti would not have been a "war" in the constitutional sense. In these circumstances, it was entirely fair to rely upon the sense-of-Congress provision.³⁸

IV. CONCLUSION

The analytical approach to the use of force reflected in the Haiti opinion has been subject to a variety of criticisms. While some in the academic community were disappointed with what they saw as the permissiveness of the opinion, some of my colleagues in government found fault with what they perceived to be its restrictiveness. The opinion implicitly acknowledges that there are significant limitations on the President's ability to deploy our military forces into hostilities by imposing the requirement that he make specific determinations about the scope, nature, and duration of the deployment before deciding that it falls within his constitutional authority to act without congressional authorization.

Admittedly, this approach means that we must be more cautious about making dogmatic judgments as to the constitutionality of proposed uses of force. Admittedly, this approach is more tied to facts than other approaches. Admittedly, this approach recognizes that these are gray, rather than black and white, issues. Nonetheless, it best strikes the proper balance between the President's powers as Commander-in-Chief and Congress' power to declare war. Additionally, it formalizes the important role that custom and practice must play in divining the reach of Presidential power in this area.

Today we must understand the constitutional division of authority between the President and Congress with respect to the use of the armed forces in light of evolving modern day realities concerning the multi-varied uses of military force. Numerous factors, including our wealth,

37. Section 8147, 107 Stat. at 1474.

38. Some of the participants in the University of Miami Symposium who strongly support the 1973 War Powers Resolution defend the wisdom of having Congress, by a determination made more than two decades ago, control current military activities in circumstances that could not then have been foreseen. In light of this, some of their criticism of our reliance on section 8147 of the Defense Appropriations Act struck me as somewhat ironic. Faced with an actual legislative act of Congress, they seemed to wave it away with the suggestion that Congress did not really mean what it said and, in any event, it was "way back" in October 1993 that Congress had addressed the issue of the use of military forces in Haiti.

the security of our borders, the spread of democracy, and the reduction of tension between the United States and other major powers, have freed our military forces to play a significant role in the protection of a broader range of national security interests. This means that our military is being utilized in ways unknown to, and unforeseen by, the framers. That is not to say that the principles important to the framers in setting the balance between the President and Congress cannot inform the constitutional choices that must be made today, or that we must ignore more than two hundred years of interaction between Presidents and Congresses on these questions. Quite the contrary. In asking the President to examine the nature and effect of his intended actions, and not just whether the actions constitute "war" as it was understood in colonial times, we remain true to the purposes of reserving to Congress' judgment whether to commit the nation to "[t]he violent destruction of life and property incident to war"³⁹ while respecting the broad and necessary powers afforded the President as Commander-in-Chief.

39. THE FEDERALIST NO. 8, at 61 (Alexander Hamilton) (Charles A. Beard ed., 1948).