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## Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era

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# Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era

JANE E. STROMSETH\*

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## I. INTRODUCTION

The end of the Cold War has inaugurated a new era in international politics. The familiar terrain of the last half century has given way to a world that is, in many ways, more complex and turbulent. Regional conflicts, civil wars, ethnic strife, genocide, and humanitarian emergencies have exploded across the globe. As crises such as those in Bosnia, Somalia, and Haiti have unfolded, the international community increasingly has looked to the United States—as the last remaining super-power—to provide leadership and resources in a broad array of conflict situations.

The United States, in turn, increasingly has chosen to use its role on the United Nations Security Council to help chart collective responses to these crises. No longer paralyzed by Cold War tensions, the fifteen-member U.N. Security Council<sup>1</sup> has authorized collective military action in a number of recent cases.<sup>2</sup> Although American forces frequently have

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1. The Security Council consists of five permanent members with veto power (the United States, Russia, France, Britain, and China), as well as 10 nonpermanent members who serve on a rotating basis. U.N. CHARTER, art. 23.

2. Examples include the collective response to Iraq's invasion of Kuwait, the collective humanitarian intervention in Somalia, and the Haiti operation. In other cases, however, member states have been reluctant to authorize or take decisive military action in the face of bitter ethnic

played the predominant role in these operations, the United States has found multilateral action to be a useful means of mobilizing resources, building consensus, and sharing the risks and costs of responding to international conflicts of various sorts.

The Security Council's repertoire of possible responses to threats to international peace and security is considerable. Under Chapter VII of the United Nations Charter, for example, the Security Council can authorize collective military action on a major scale, as it did in response to Iraq's invasion of Kuwait in 1990 and North Korea's invasion of South Korea in 1950.<sup>3</sup> In both cases, a powerful coalition of forces, led by the United States, went to battle against a substantial adversary.

At the other end of the military spectrum, the Security Council can authorize "peacekeeping" operations, in which unarmed or lightly armed forces are deployed with the consent of the parties to a conflict in order to perform tasks such as monitoring ceasefires, observing the demobilization of opposing forces, and safeguarding local stability to allow elections. While their responsibilities may vary, peacekeeping forces generally only use minimum force in self-defense, and then only as a last resort.<sup>4</sup>

In response to a number of ethnic conflicts and humanitarian emergencies in recent years, the Security Council has authorized military operations that fall somewhere between traditional peacekeeping and major combat operations. In these so-called "peace enforcement" operations, the Council has used its Chapter VII powers to authorize the use of force for certain limited purposes. In the case of Somalia, for example, the Council authorized a coalition of predominantly American forces to use "all necessary means to establish . . . a secure environment for humanitarian relief operations."<sup>5</sup> In the case of Bosnia-Herzegovina, the Council authorized the North Atlantic Treaty Organization (NATO)

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conflicts, and the Security Council instead has authorized more limited operations, as, for example, in Bosnia-Herzegovina and in Rwanda. In still other desperate cases, the Security Council has taken no action at all.

3. In both Korea and the Persian Gulf, the United States committed the preponderance of forces and exercised overall command. Whether these operations are best viewed as United Nations "enforcement actions" or as collective self-defense actions endorsed by the Security Council is a subject of some dispute. For a discussion of this issue, see Eugene V. Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense*, 85 AM. J. INT'L L. 506 (1991); Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 457-63 (1991); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, nn. 137, 266 (1993).

4. UNITED NATIONS DEP'T OF PUB. INFO., *THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING* 6-7 (2d ed. 1990)[hereinafter, *THE BLUE HELMETS*].

5. S.C. Res. 794, U.N. SCOR, 46th Sess., at 3, U.N. Doc. S/RES/794 (1992).

to use its air power to protect U.N.-designated safe areas from attack.<sup>6</sup> Such Chapter VII operations may involve forcible action against hostile parties in situations of ongoing conflict, but they generally stop short of major enforcement operations designed to defeat an adversary on the battlefield.

American armed forces have played a significant role in U.N.-authorized military actions across the entire spectrum, from major combat operations to consensual peacekeeping. With respect to Chapter VII operations, however, only before the Persian Gulf War did the President seek and obtain Congress's authorization before sending U.S. forces into combat.<sup>7</sup> In contrast, President Bush did not seek Congress's authorization before sending American troops to Somalia in Operation Restore Hope, nor did President Clinton obtain approval from Congress for subsequent combat operations against the forces of General Mohamed Aided during the second phase of the Somalia operation. President Clinton likewise did not seek congressional authorization before ordering U.S. combat forces to Haiti in a U.N.-approved operation to depose the regime of General Raul Cedras and restore President Jean-Bertrand Aristide to power. Last-minute diplomacy fortunately transformed that combat operation into a consensual one, but many members of Congress remained angry that the President deliberately bypassed Congress.<sup>8</sup> In Bosnia, American air forces have participated in NATO air strikes against Bosnian Serb military targets without express congressional authorization. President Clinton subsequently asked for the support of Congress before deploying U.S. troops to Bosnia to help enforce the Dayton peace agreement, but he did not request or obtain Congress's

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6. S.C. Res. 836, U.N. SCOR, 47th Sess., at 3, U.N. Doc S/RES/836 (1993). More precisely, this resolution authorized the United Nations Protection Force (UNPROFOR) in former Yugoslavia "to deter attacks against the safe areas," *id.* ¶ 5, and "acting in self-defence, to take the necessary measures, including the use of force, in reply to bombardments against the safe areas by any of the parties or to armed incursion into them." *Id.* ¶ 9. In addition, the Security Council in Resolution 836 decided that "Member states, acting nationally or through regional organizations or arrangements, may take, under the authority of the Security Council and subject to close coordination with the Secretary-General and UNPROFOR, all necessary measures, through the use of air power, in and around the safe areas in the Republic of Bosnia and Herzegovina, to support UNPROFOR in the performance of its mandate set out in paragraphs 5 and 9 above." *Id.* ¶ 10.

7. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3, 4 (1991). Although he obtained Congress's authorization, President Bush contended that he had the constitutional authority to launch Operation Desert Storm without congressional approval. For an analysis of the war powers disputes between the President and the Congress during the Persian Gulf conflict, see Stromseth, *supra* note 3, at 640-55.

8. Carroll J. Doherty, *President, Rebuffing Congress, Prepares to Launch Invasion*, 52 CONG. Q. 2578, 2582-83 (1994).

authorization.<sup>9</sup>

This pattern of cases raises difficult questions from the standpoint of constitutional war powers. How should we understand the Constitution's allocation of war powers between Congress and the President as it bears upon the commitment of U.S. forces to the diverse spectrum of U.N.-authorized military operations? More concretely, by vesting in Congress the power to "declare War,"<sup>10</sup> does the Constitution require Congress's approval before the President sends U.S. forces into hostilities as peace "enforcers" under Chapter VII of the U.N. Charter, or as "peacekeepers" deployed with the consent of all the parties to a conflict, or in hybrid operations that involve elements of both consent and compulsion? Or does U.N. Security Council authorization of force—pursuant to the U.N. Charter treaty—empower the President as Commander in Chief and as Chief Executive to commit American troops to U.N. operations of various sorts? Answering these questions not only involves interpreting the text of the Constitution and applying the founders' original purposes to a world very different from their own; it also involves evaluating the constitutional significance of over 200 years of historical practice and its meaning for U.N. military operations today.<sup>11</sup>

In understanding the constitutional division of war powers between Congress and the President in the U.N. context, John Hart Ely's book, *War and Responsibility*,<sup>12</sup> provides a compelling starting point. In it, Ely argues forcefully that the founders' reasons for giving Congress the power to decide whether the country should go to war remain completely relevant today. The founders wanted to ensure that any decision to declare or commence war reflected the concurrence of many people of diverse viewpoints rather than the inclinations of the President alone.<sup>13</sup> Their preference for legislative deliberation reflected a substantive judgment that war, with all its accompanying risks and hardships, should be difficult to commence. The founders also wanted the people's direct representatives in the House of Representatives to be involved in any decision to declare war. The people would bear the burden of combat—their lives and resources would be put on the line. Furthermore, their sustained support would be more likely if their representatives par-

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9. Helen Dewar & Guy Gugliotta, *Senate Backs Troops to Bosnia; House Fails to Block Funding*, WASH. POST, Dec. 14, 1995, at A1.

10. U.S. CONST. art. I, § 8, cl. 11.

11. This article is part of a larger, ongoing project in which I explore these questions in greater depth and detail.

12. JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

13. *Id.* at 3-4, 47.

anticipated in the decision to go to war.<sup>14</sup> Although the President unilaterally could not commence war, as Commander in Chief the President was empowered to conduct military operations authorized by Congress as well as to "repel sudden attacks" in emergency situations that allowed no time for advance congressional approval.<sup>15</sup> Ely argues persuasively that developments since the Constitution's ratification have not rendered the founders' animating purposes obsolete; nor has historical practice amended the Constitution's requirement that Congress must authorize wars before the country commences them.<sup>16</sup>

Since the Korean War and for much of the Cold War period, however, the President and the Congress have subverted constitutional requirements, Ely contends, in a self-interested "tacit deal" under which the President "take[s] the responsibility" for sending U.S. troops into hostilities "as long as he can make the decisions, and Congress . . . live[s] with a lack of power as long as its members don't have to be held accountable."<sup>17</sup> Under this arrangement, the President unilaterally has committed American forces to combat on a number of occasions, while Congress has reserved the right to "scold" the President after the fact if things go wrong.<sup>18</sup> This "tacit deal" serves the institutional self-interests of the President and the Congress: The President gains decision-making flexibility in matters of war and peace, while the Congress avoids having to make decisions about the use of force that are difficult and "politically risky."<sup>19</sup> In the meantime, however, the American people are deprived of a collective legislative judgment before their sons and daughters are sent into combat.

*War and Responsibility* is a critical examination of how the United States reaches, or rather fails to reach, collective national decisions about putting American forces in harm's way. In this article, I examine how collective *international* decisions regarding the use of force bear upon our national constitutional processes in the post-Cold War era. First, I discuss the central questions about the constitutional division of war powers that have arisen in the U.N. context since the Charter was ratified in 1945. Specifically, I analyze whether Security Council approval of the use of military force affects the respective war powers of Congress and the President. I also consider whether the concerns that led the founders to give Congress the power to declare war still apply

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14. *Id.* at 4-5.

15. *Id.* at 5-7.

16. *Id.* at 5-10 (rejecting the "counterargument from obsolescence" and the "counterargument from practice").

17. *Id.* at 87-88.

18. *Id.* at 54.

19. *Id.* at 52-54.

with the same force today when American troops participate in U.N. military operations ranging from major enforcement action to consensual peacekeeping. Next, I examine how the end of the Cold War rivalry is affecting Congress's institutional incentives to assert a greater role in decisions to commit American forces abroad. Focusing especially on the cases of Somalia and Haiti, I explore whether the "tacit deal" that Ely criticizes so trenchantly is likely to continue when the United States participates in U.N.-authorized military operations, or whether we can expect a greater sharing of responsibility between Congress and the President in the post-Cold War years ahead.

## II. THE U.N. CHARTER FRAMEWORK AND CONSTITUTIONAL WAR POWERS

The Senate in 1945 voted overwhelmingly to approve the United Nations Charter.<sup>20</sup> To most senators, a collective security arrangement led by the United States and its World War II allies seemed very attractive.<sup>21</sup> Both the Senate and the Truman Administration understood that the Charter gave far-reaching power to the U.N. Security Council, on which the United States would sit as a permanent member, with veto power. Chapter VII, in particular, gave the Council broad authority to determine whether "any threat to the peace, breach of the peace, or act of aggression" existed, and to recommend or decide what action to take in response.<sup>22</sup> To ensure that the Security Council had forces at its disposal to "use immediately and quickly in emergencies,"<sup>23</sup> U.N. member states agreed in Article 43 of the Charter to enter into "special agreements" with the Council placing designated national forces "on call" for the Council's use as the need arose.<sup>24</sup> Recognizing that the Security

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20. The vote was 89 to 2. 91 CONG. REC. 8190 (1945).

21. A critical factor in the Senate's support for the Charter was the strong partnership between the President and the Congress in negotiating the Charter's provisions. Indeed, two Senators (Democrat Tom Connally of Texas and Republican Arthur Vandenberg of Michigan) co-chaired the U.S. negotiating delegation, and led a sustained, bipartisan effort to explain to their colleagues why U.S. involvement in the United Nations was very much in the American interest. For a discussion of the negotiations and legislative debates surrounding the United Nations Charter, see Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991); see also *The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearings Before the Senate Judiciary Comm.*, 102nd Cong., 1st Sess. 5-27 (1991) (report of David J. Scheffer, entitled "War Powers and the U.N. Charter") [hereinafter *War Powers Hearings*]; Stromseth, *supra* note 3, at 601-14.

22. U.N. CHARTER art. 39. The Security Council could impose economic or diplomatic sanctions, *id.* art. 41, or it could authorize collective military enforcement action to restore international peace and security. *Id.* art. 42.

23. *The Charter of the United Nations: Hearings Before the Senate Comm. on Foreign Relations*, 79th Cong., 1st Sess. 127 (1945) [hereinafter *Charter Hearings*] (statement of Leo Pasvolksky, Special Assistant to the Secretary of State).

24. U.N. CHARTER art. 43.

Council might not always be able to act, or act promptly, Article 51 of the Charter affirmed a state's inherent right of individual or collective self-defense in response to an armed attack until the Security Council could take effective action.<sup>25</sup>

Congressional supporters of the United Nations understood, back in 1945, that the powers conferred upon the Security Council (and on the President who would control the U.S. vote on the Council) could have important implications for Congress's constitutional power to declare war.<sup>26</sup> In addressing the war powers issues raised by U.S. involvement in the United Nations system, proponents of an active American role sought to accommodate two concerns. First, they wanted to ensure that American forces would be available on short notice to participate in military actions approved by the Security Council. Second, they also wanted to ensure a major role for Congress in shaping American military commitments to the United Nations, especially in cases involving a large-scale mobilization of U.S. forces.<sup>27</sup> In the end, after careful debate, Congress and the President accommodated these concerns by striking a practical war powers balance, which is reflected in the United Nations Participation Act of 1945 ("UNPA").<sup>28</sup>

The UNPA authorizes the President to negotiate an Article 43 agreement with the Security Council setting forth the number and type of U.S. forces that will be available for the Council's use.<sup>29</sup> Such an agreement only takes effect, however, after Congress gives its consent "by appropriate Act or joint resolution."<sup>30</sup> By approving a special agreement, Congress effectively would give its preapproval to the President to make those designated forces available to the Security Council in U.N. military operations. Thus, the President would not need to seek Congress's specific authorization to use those forces in individual cases.<sup>31</sup> The President would need to return to Congress and obtain its authorization, however, in order to provide U.S. forces beyond those set forth in

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25. *Id.* art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security . . .").

26. For an analysis of these issues, see Stromseth, *supra* note 3, at 607-12, 614-18.

27. *Id.*

28. Pub. L. No. 79-264, 59 Stat. 619 (codified at 22 U.S.C. §§ 287-287e (1988)).

29. 22 U.S.C. § 287d (1988).

30. *Id.*

31. *Id.* § 287d ("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 for therein . . .") (emphasis added).



the agreement.<sup>32</sup>

By drawing this practical war powers line, Congress sought to give the President the ability to respond promptly to small-scale threats to the peace, but to preserve Congress's central role in cases involving large-scale mobilization of U.S. forces. As it turned out, Article 43 agreements were early casualties of the Cold War. The United States has not yet concluded a special agreement with the Security Council, nor—in the current political climate—is it likely to do so in the foreseeable future. Moreover, until the Persian Gulf War in 1991, the tensions of the Cold War largely prevented the Security Council from authorizing military enforcement action. The only two exceptions were in 1950, when the Council authorized a U.S.-led response to North Korea's invasion of South Korea<sup>33</sup> and in 1966, when the Council authorized enforcement of an embargo against Rhodesia.<sup>34</sup>

The Korea case deserves special scrutiny from the war powers standpoint.<sup>35</sup> President Truman did not seek Congress's approval either before or after he sent American troops into combat—a stance seemingly at odds with his 1945 understanding with Congress. At the time, however, few members of Congress criticized Truman. Most agreed with his judgment that the rapidly deteriorating situation in Korea required a prompt and decisive U.S. response. Further, many felt that Korea was a crucial test for the fledgling United Nations, whose success was an important goal of American foreign policy. In claiming that the President was not constitutionally required to obtain Congress's authorization to send American forces into combat in Korea, the Truman Administration advanced a number of arguments (some of which were echoed by the Bush Administration during the Persian Gulf War,<sup>36</sup> this time to a much more skeptical Congress). Two of the Truman Administration's main arguments viewed Security Council authorization of forcible action as a factor enhancing presidential power and diminishing the need for a prospective congressional role.

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32. *Id.* For an examination of the legislative history of the UNPA, see *War Powers Hearings*, *supra* note 21; Glennon, *supra* note 21, at 78-80; Stromseth, *supra* note 3, at 614-19.

33. S.C. Res. 83, U.N. SCOR, 5th Sess., at 5, U.N. Doc. S/INF/4/Rev. 1 (1950) (recommending that U.N. member states "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.").

34. S.C. Res. 221, U.N. SCOR, 21st Sess., at 5, U.N. Doc. S/RES/221 (1966) (authorizing limited forcible steps to enforce sanctions against Southern Rhodesia).

35. For an analysis of the war powers issues raised by American involvement in the U.N.-authorized military action in Korea, see Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995); Stromseth, *supra* note 3, at 620-40.

36. For a helpful discussion and critique of the main arguments advanced during the Gulf War, see Peter Raven-Hansen, *Remarks*, in AMERICAN SOC'Y INT'L L.: PROCEEDINGS OF THE 85TH ANNUAL MEETING 8-13 (1991).

### A. The Treaty "Take Care" Argument

The first of these arguments rests on the President's constitutional responsibility as Chief Executive to "take care" that the law, including U.S. treaty obligations, be "faithfully executed."<sup>37</sup> The basic claim is that the President has the duty—and the power—to faithfully execute the U.N. Charter by sending American forces into combat in military operations approved by the Security Council, regardless of their size or riskiness, without seeking the authorization of Congress.<sup>38</sup> As the Truman Administration put it: "The power to send troops abroad is certainly one of the powers which the President may exercise in carrying out such a treaty as . . . the United Nations Charter."<sup>39</sup>

But can a treaty obligate the United States (and empower the President) to send U.S. forces to war without prior congressional approval? The Constitution stands supreme to any treaty, and it is doubtful that the power to commence or declare war granted to Congress as a whole by the Constitution can be superseded by a treaty approved by the Senate alone.<sup>40</sup> The Framers explicitly rejected a proposal to vest the power to go to war in the Senate alone, despite its presumed expertise in foreign

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37. U.S. CONST. art. II, § 3 (the President "shall take Care that the Laws be faithfully executed"); *id.* art. VI ("all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

38. In considering this claim, a distinction should be drawn between the President's constitutional authority to carry out U.S. treaty obligations under the Take Care Clause, on the one hand, and the President's authority to exercise U.S. rights under international law, including treaty law, on the other. The President has the duty and the power to "take care" that U.S. treaty obligations are "faithfully executed." The exercise of U.S. rights under international law, in contrast, falls "largely within the President's foreign affairs authority" but "hardly seem[s] to be within his responsibility to see that the law, even international law, is faithfully executed." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 331 n.56 (1972). Thus, under the U.N. Charter, the President would only have "take care" power to execute obligations imposed by the treaty, such as the obligation to abide by Security Council "decisions." U.N. CHARTER arts. 25, 48. *But see infra* notes 44 to 51 and accompanying text (arguing that the U.N. Charter does not impose an obligation on states to provide combat forces in the absence of an Article 43 agreement).

39. JOINT COMM. OF THE COMMS. ON FOREIGN RELATIONS AND ON ARMED SERVICES, 82D CONG., 1ST SESS., *POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES* 20 (Comm. Print 1951).

40. For arguments why a treaty constitutionally cannot commit the country to war, see MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 192-205 (1990); Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1798-1800 (1968); *see also* S. Exec. Rep. No. 12, 95th Cong., 2d Sess. 66 (1978) ("A treaty may not declare war because the unique legislative history of the declaration-of-war clause . . . clearly indicates that the power was intended to reside jointly in the House of Representatives and the Senate."). *But see* ELY, *supra* note 12, at 14-15, for a discussion of the uncertainties regarding original intent on this issue; *see also* HENKIN, *supra* note 38, at 159-160 ("It has often been said, too, that the United States cannot declare war by treaty, only by resolution of Congress, though it is not clear why that power is denied to the treaty-makers when other enumerated powers of Congress are not.") (citation omitted).

affairs and its likely critical role in ending wars through peace treaties.<sup>41</sup> Instead, they wanted the people's direct representatives in the House involved in the important decision to declare or commence war. Later, during the Washington Administration, James Madison strenuously rejected the idea that the President could invoke treaty obligations to take the country into war "notwithstanding the express provision in the constitution, by which the legislature is made the organ of the national will, on questions, whether there be or be not a cause for declaring war."<sup>42</sup> Even Alexander Hamilton, who defended the President's authority to interpret U.S. treaty obligations and to "preserve the blessings of peace" by declaring neutrality in the war between Britain and France, agreed that "the legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility."<sup>43</sup>

Even if a treaty could obligate the United States (and empower the President) to go to war without the authorization of Congress, the United Nations Charter does not purport to do so.<sup>44</sup> The Charter empowers the

41. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand, ed. 1911) (proposal by Mr. Pickney to vest the power to make war in the Senate received no support). While the debates accompanying the Constitution's framing and ratification do not address directly the question whether a treaty can authorize war without subsequent action by Congress, my own reading of that history convinces me that the founders' decision to vest the power to go to war in both Houses of Congress, despite the Senate's expected greater expertise in matters of foreign affairs, reflected special concerns about the seriousness of this decision and the need for participation by the "people's House" both to make entry into war difficult and to ensure that the decision enjoyed broad support. These concerns, in my view, make this power different from other Article I, Section 8 powers, such as the commerce power, that have long been viewed as properly the subject of self-executing treaties. *Accord* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 780 & n.116 (1988).

42. THE LETTERS OF PACIFICUS AND HELVIDIUS 86 (J. and G.S. Gideon eds. 1845). Madison urged rigid adherence "to the simple, the received, and the fundamental doctrine of the constitution, that the power to declare war, including the power of judging of the causes of war, is *fully and exclusively* vested in the legislature." *Id.* at 89 (emphasis in original). The executive thus had no right, wrote Madison, to decide

whether there is or is not cause for declaring war; that the right of convening and informing congress, whenever such a question seems to call for a decision, is all the right which the constitution has deemed requisite or proper; and that for such, more than for any other contingency, this right was specifically given to the executive.

*Id.*

43. *Id.* at 14. Hamilton emphasized, however, that "it belongs to the 'executive power' to do whatever else the law of nations, cooperating with the treaties of the country, enjoin in the intercourse of the United States with foreign powers." *Id.*

44. Nor do the various mutual defense treaties to which the United States is a party. ELY, *supra* note 12, at 157 n.23; Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L. L. 509 (1986). The North Atlantic Treaty, for instance, provides that its provisions shall be "carried out by the parties in accordance with their respective constitutional processes." North Atlantic Treaty, Apr. 4, 1949, art. 11, 63 Stat. 2241, 34 U.N.T.S. 243. When the Senate was considering whether to give its advice and consent to this treaty, moreover, the Executive branch assured Senators that the treaty did not preempt Congress's constitutional power to declare war. Glennon, *supra*, at 530-35.

Security Council to recommend or decide to take military action to restore international peace and security,<sup>45</sup> and member states are legally obligated, under Articles 25 and 48, to carry out the Council's "decisions."<sup>46</sup> This obligation must be understood, however, in light of Article 43, which together with the surrounding articles of Chapter VII reflects an understanding that the Security Council cannot order or require a state to commit its forces to military action in the absence of an Article 43 agreement ratified according to that state's "constitutional processes."<sup>47</sup> This conclusion is reinforced by the language of Article 106,<sup>48</sup> as well as by the legislative history surrounding both the negotiation of the Charter and the Senate's decision to approve it.<sup>49</sup> As the Secretary of State explained in his 1945 report to President Truman on the U.N. Charter, "No Member of the United Nations can be called upon to supply . . . forces which are not provided for in the agreements."<sup>50</sup> Furthermore, the Senate gave its advice and consent to the U.N. Charter on the understanding that any special agreement making American forces available to the Security Council would be approved by Congress in advance.<sup>51</sup>

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45. U.N. CHARTER arts. 39, 42.

46. In Article 25, "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.* art. 25. Article 48 provides that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." *Id.* art. 48.

47. This conclusion is based on Article 43 and on inferences from other articles of Chapter VII, particularly articles 39, 42, 44, 45, 48 and 49. *Accord* Schachter, *supra* note 3, at 464-65. Other Security Council "decisions" not involving the use of armed force, in contrast, do not presuppose the existence of Article 43 agreements. Thus, the Security Council has decided to impose economic sanctions, pursuant to articles 39 and 41, on a number of occasions, and states have been legally obligated to carry out those decisions. *E.g.*, S.C. Res. 661, U.N. SCOR, 45th Sess., U.N. Doc. S/INF/46 (1990) (imposing economic sanctions on Iraq).

48. Article 106 indicates that the drafters of the U.N. Charter expected that the Security Council would exercise its enforcement powers under Article 42 using forces made available by member states in Article 43 agreements. In the meantime, the five permanent members of the Security Council would consult and voluntarily assist the Security Council in meeting its responsibilities. U.N. CHARTER art. 106.

49. Glennon, *supra* note 21, at 76-78. The U.S. Senate debates preceding U.S. ratification of the Charter reflect a widespread understanding that only by concluding a special agreement, approved by Congress, would the United States undertake specific obligations to provide forces to the Security Council for U.N. military action. At the same time, several senators argued that U.S. ratification of the treaty created an obligation on the part of the United States to enter into a special agreement of some sort. Stromseth, *supra* note 3, at 604-06, 612-14, 620 & n.117.

50. UNITED STATES DEP'T OF STATE, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 95 (1945).

51. This understanding was explicitly re-affirmed in section 6 of the United Nations Participation Act, 59 Stat. 621 ("The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of Congress by appropriate Act or joint resolution . . .").

As a practical matter, moreover, the Security Council has never ordered or required states to use force. Instead, it has recommended or authorized states to voluntarily take military action.<sup>52</sup> Thus, in Korea, the Security Council "recommended" that member states help "repel the armed attack."<sup>53</sup> After Iraq invaded Kuwait, the Security Council "decided" to impose economic sanctions,<sup>54</sup> and then "call[ed] upon" member states with maritime forces in the region to help enforce the sanctions.<sup>55</sup> The Security Council subsequently "authorized" the use of "all necessary means" to expel Iraq from Kuwait.<sup>56</sup> The Council, however, has never "decided" that states must use military force. Thus, the President has never been legally *obligated* to "execute" the U.N. Charter by committing U.S. forces to combat in a specific case.

Moreover, under the United Nations Participation Act, the President can claim no authorization from the Congress to commit U.S. forces to combat in Chapter VII operations in the absence of a special agreement approved by Congress.<sup>57</sup> The President thus must either come to Congress for specific authorization in an individual case or act within the President's own defensive powers as Commander in Chief, to which I will now turn. In sum, the President cannot "execute" the U.N. Charter without regard to the war powers of Congress.<sup>58</sup>

### B. *The "Police Action" Argument*

A second argument advanced during the Korean and Persian Gulf Wars for allowing the President to commit troops to combat without Congress's approval is that military actions authorized by the Security Council are not "war" or "acts of war" under international law, but instead are defensive "police actions" to protect international peace and security. Some officials and scholars thus have contended that the President can commit American forces to these military actions, regardless of the combat risks involved, based on his defensive powers as Com-

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52. Neither Article 39 nor Article 42 preclude the Security Council from recommending or authorizing collective military action with non-Article 43 forces.

53. S.C. Res. 83, U.N. SCOR, 5th Sess., at 5, U.N. Doc. S/INF.4/REV.1 (1950).

54. S.C. Res. 661, U.N. SCOR, 45th Sess. at 20, U.N. Doc. S/INF/46 (1990).

55. S.C. Res. 665, U.N. SCOR, 45th Sess., at 21-22, U.N. Doc. S/INF/46 (1990).

56. S.C. Res. 678, U.N. SCOR, 45th Sess., at 1, U.N. Doc. S/RES/678 (1990).

57. Section 7 of the UNPA does authorize the President, however, to deploy up to 1000 U.S. military personnel to "serve as observers, guards, or in any noncombatant capacity" in U.N. peacekeeping operations that do not involve "the employment of armed forces contemplated by chapter VII of the United Nations Charter." U.S.C. § 287d-1(a).

58. Under the War Powers Resolution, moreover, authority to introduce U.S. forces into hostilities "shall not be inferred . . . from any treaty" unless the treaty is implemented by legislation that specifically authorizes introducing U.S. forces into hostilities. 50 U.S.C. § 1547(a)(2) (1982).

mander in Chief.<sup>59</sup> Although the build-up to the Gulf War allowed plenty of time for congressional deliberation, proponents of this view argued that the President did not need Congress's authorization to send American forces into battle against Iraq.<sup>60</sup>

To claim that the President can send American troops into combat without the approval of Congress whenever the Security Council authorizes forcible action, regardless of the circumstances, size, or riskiness of the collective military action, goes too far. The fact that a U.N.-approved military action is not an "act of war" under international law does not, by itself, dispose of the constitutional question. The United Nations Charter altered the *international* categories of analysis somewhat: the Charter speaks not of "war" but of the "use of force," and it provides that forcible action is legal under international law if authorized by the Security Council or if undertaken in self-defense.<sup>61</sup> But even uses of force that are lawful under the Charter can constitute "war" for U.S. constitutional purposes (and thus require congressional approval) because of the nature and circumstances of the operation and the magnitude of the combat risks involved. Examples include the U.N.-authorized military actions to expel Iraq from Kuwait and to defend South Korea. These "police actions" involved risks and sacrifices of the sort that led the founders to give Congress the power to commence war.<sup>62</sup>

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59. President Truman and officials in both the executive and legislative branches advanced this view during the Korean War. Stromseth, *supra* note 3, at 629-30, 633-35. A number of scholars also advocated this position during the Gulf War. *E.g.* Thomas M. Frank & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth"*, 85 AM. J. INT'L L. 63, 64, 67-69 (1991).

When the President decides to risk the use of armed force in cooperation with the United Nations or other treaty partners in an effort to restore peace and end armed aggression, he is not 'initiating' a 'war' but defending the rule of law. No 'declaration of war' is necessary or appropriate in such circumstances.

*War Powers Hearings*, *supra* note 21, at 426 (statement of Robert F. Turner, Professor of Law, University of Virginia School of Law).

60. *E.g.*, Thomas M. Frank, *Declare War? Congress Can't*, N.Y. TIMES, Dec. 11, 1990, at A27 ("Congress has neither a constitutional obligation nor a right to declare war before the U.S. joins in a U.N.-sponsored police action in the Persian Gulf.").

61. For helpful discussions of the law of the U.N. Charter regarding the use of force, see ANTHONY C. AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* (1993); Louis Henkin, *Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* (1991).

62. Even those who first embraced the "police action" concept at the time of the Charter's ratification recognized that U.N. military operations involving a large mobilization of U.S. forces would implicate Congress's constitutional power to declare war. Stromseth, *supra* note 3, at 608-12 (discussing views of scholars, executive branch officials, and members of Congress).

The distinction between U.N. "police action" and "war" was first advanced in the mid-1940s by a group of legal scholars and former officials grappling with the difficult war powers issues raised by the U.N. Charter. John W. Davis et al., *Letter to the Editor*, N.Y. TIMES, Nov. 5, 1944. This letter was placed in the Congressional Record during the floor debate on the U.N. Charter. 91 CONG. REC. 8065 (1945). The authors included John W. Davis, W.W. Grant, Philip C. Jessup,

In such cases, the Security Council can hardly be seen as an adequate substitute for the kind of check on unilateral presidential action that the founders sought in Congress. While a variety of viewpoints are represented on the Council, U.S. Presidents generally have been able to exert considerable influence and obtain authorizing resolutions when they wanted to take military action. In Korea, the Persian Gulf, and Haiti, for example, the Council acted more as a rubber stamp than a constraint on presidential decisions to use force. Moreover, even if Security Council authorization is the result of a long diplomatic struggle, the democratic concerns that led the founders to give the war-commencing power to Congress are not satisfied by the vote of a body that neither represents the American people as a whole nor is politically accountable to them. Instead, the question whether the lives of American citizens should be placed at risk is for Congress to answer.

To be sure, the President as Commander in Chief clearly has the authority under the Constitution (and under Article 51 of the U.N. Charter) to repel sudden attacks against the United States and its forces. But neither original intent nor subsequent historical practice provide strong support for the claim that the President unilaterally can commit American forces to combat on a substantial scale to defend other countries or their citizens from attack, even if the Security Council has authorized the operation.<sup>63</sup> The founders distinguished between "commencing" war and "repelling" it, but nothing in the framing and ratification debates suggests that they intended the President to have the power to repel sudden attacks on countries other than the United States.<sup>64</sup> Concern at the time to avoid entangling alliances or involvement in "the commotions of

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George Rublee, James T. Shotwell, and Quincy Wright. *Id.* at 8067. They argued that the United States could place a limited number of forces at the Security Council's disposal without raising constitutional problems because "their use, while adequate to deal with minor disturbances of international peace, would not create a situation of war in either the constitutional or international sense." 91 CONG. REC. 8066 (1945). Such limited "police forces" would be analogous, they argued, to those traditionally deployed by Presidents "to protect American citizens abroad, to prevent an invasion of the territory, or to suppress insurrection." *Id.* They also recognized, however, that a substantial commitment of American forces to a U.N. operation might nevertheless constitute "war" in the constitutional sense and thus require congressional approval. *Id.* Testifying before the Senate Foreign Relations Committee in 1945, John Foster Dulles likewise contended that the war powers of Congress were not implicated "[i]f we are talking about a little bit of force necessary to be used as a police demonstration." *Charter Hearings, supra* note 23, at 655. However, "if this is going to be a large volume of force which is going to put a big drain on the resources of the United States or commit us to great and costly adventures, then the Congress ought to have a voice in this matter." *Id.*

63. Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 35-36 (Gary M. Stern & Morton H. Halperin eds. 1994).

64. *Id.* at 42-43; Note, *supra* note 40, at 1783-84.

Europe" suggest an intent to the contrary.<sup>65</sup> Nor is there a "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,"<sup>66</sup> of committing American forces to combat in defense of allies. As Professor Raven-Hansen astutely observes,

isolated interventions to shore up friendly foreign governments in distress, some of Franklin Roosevelt's initiatives in anticipation of our entry into World War II and the Korean War may supply precedents, [but] they are at once too few, too dissimilar, and too ambiguous to constitute the kind of systematic, unbroken and long-pursued practice, or to give the kind of clear notice to Congress, necessary to establish customary law.<sup>67</sup>

Nor has Congress acquiesced in any long-standing practice of unilateral presidential action to defend or rescue foreign citizens at risk.<sup>68</sup>

In exceptional cases, the President may determine that aggression short of an attack or imminent attack against the United States poses a threat to the country's security that is serious enough to warrant dispatching American forces into combat within a time frame that precludes prior approval from Congress.<sup>69</sup> In the real world, however, few U.N.-authorized military actions are likely to fall in this category. Rather, in most cases, a long diplomatic buildup will proceed Security Council approval of the use of force, making it hard to argue that emergency presidential action is required. "True emergencies" where time does not permit resort to Congress should be distinguished from the "ongoing crises" that regularly come before the Security Council for

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65. 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1836) (remarks of James Wilson). As Wilson told the Pennsylvania ratifying convention: "we . . . are not obliged to throw ourselves into the scale with any." *Id.*

66. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). As Justice Frankfurter recognized, historical practice can help to clarify ambiguous or open-ended constitutional provisions, but it cannot "supplant" clear constitutional requirements. *Id.*; *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940) ("illegality cannot obtain legitimacy through practice"). In *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981), the Supreme Court embraced Frankfurter's approach to historical practice. For a helpful discussion, see Raven-Hansen, *supra* note 63, at 31-32.

67. Raven-Hansen, *supra* note 63, at 42-43.

68. In a few cases, such as the Boxer Rebellion in China in 1900 and the U.S. intervention in the Dominican Republic in 1965, the Presidents argued that in addition to protecting American citizens, they were also protecting citizens of other countries. See A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1902, at 113-21 (James D. Richardson ed. Supp. 1903) (President McKinley's message to the Senate and House of Representatives regarding the Boxer Rebellion in China); 53 DEPT. OF STATE BULL. 19-21 (1965) (statement of President Johnson regarding the situation in the Dominican Republic). These few examples do not add up to a systematic and long-standing practice, however. Protection of Americans, moreover, was stressed as the basic reason for these actions.

69. ELY, *supra* note 12, at 6-7.



deliberation and response. If the Security Council has time to deliberate in these crises, Congress usually will too. The North Korean attack against South Korea in 1950 arguably presented a true emergency, but even in that case President Truman could have sought congressional authorization within the first few days of the attack. In the Gulf War, whether the military operation to liberate Kuwait is viewed as an exercise of "collective self-defense" approved by the Security Council in advance or as a United Nations "enforcement action," the lengthy military and diplomatic buildup to that action provided plenty of time for Congress to vote. The same was true in Haiti as well.

In short, the fact that a military operation is authorized by the United Nations—and thus is ostensibly "defensive" in nature—does not automatically mean that it falls within the President's power as Commander in Chief to "repel sudden attacks." On the contrary, each U.N. military operation must be examined individually on its facts. Some U.N. "police actions," such as those in Korea and the Gulf, involving combat on a major scale, are "war" for constitutional purposes and thus require the authorization of Congress.

### C. *Peacekeeping*

Few U.N.-authorized "police actions" entail combat of the magnitude involved in Korea or the Persian Gulf, however. Therefore the question arises whether the President needs congressional authorization to commit U.S. forces to U.N. operations that fall well short of major warfighting contingencies. Examples of such actions include, first, consensual "peacekeeping" operations that involve relatively little risk of combat, and second, Chapter VII "peace enforcement" operations in which force is used but on a limited scale. Each should be considered in turn.

Peacekeeping developed during the Cold War period as a creative technique for containing conflicts without running up against the super-power impasse on the Security Council. Although the Charter does not provide for it expressly, peacekeeping is a reasonable extension of Chapter VI's provisions for peaceful dispute resolution.<sup>70</sup> In traditional peacekeeping operations, lightly armed forces (and in some cases unarmed observers) are deployed with the consent of the parties to a conflict to undertake tasks such as monitoring ceasefires and patrolling buffer zones. In some recent cases, such as Cambodia, El Salvador, and Namibia, peacekeepers have been attached to more complex, multi-com-

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70. U.N. CHARTER ch. VI ("Pacific Settlement of Disputes"). Recognizing that peacekeeping goes beyond the express provisions of Chapter VI, a U.N. publication stated, "it is almost necessary to imagine a new 'Chapter Six and a Half.'" *THE BLUE HELMETS*, *supra* note 4, at 5.

ponent operations that go beyond ceasefire monitoring and involve tasks such as supervising elections, monitoring human rights, disarming and demobilizing former combatants, repatriating refugees, and coordinating rehabilitation assistance. In both simple and complex operations, however, peacekeepers generally are authorized to use force only in a minimum and proportionate fashion, and only in self-defense.<sup>71</sup>

Under the United Nations Participation Act, as amended in 1949, Congress authorized the President to send up to 1,000 U.S. troops to participate in U.N. peacekeeping operations.<sup>72</sup> During the Cold War period, however, the superpowers generally did not contribute troops to peacekeeping missions. As of January 1996, however, U.S. forces are playing a significant role in several peacekeeping operations. Approximately 300 U.S. forces are deployed in Macedonia under U.N. command to help deter the Balkan conflict from spreading.<sup>73</sup> In Haiti, over 2,000 U.S. troops participate in the U.N. peacekeeping operation that took over from the initial U.S.-led troop deployment restoring President Aristide to power.<sup>74</sup>

If all of the parties to a conflict (not just some of them) consent to and support establishing a Chapter VI peacekeeping operation, the chances that the peacekeeping forces will become embroiled in hostilities or face significant combat risks will be, in most cases, relatively low. The President, thus, would not require Congress's authorization under the Constitution or the War Powers Resolution to deploy U.S. troops to Chapter VI peacekeeping operations that enjoy the clear and continuing support of all parties. Such operations can be viewed as peacetime troop deployments for foreign policy purposes. Although the Constitution does not expressly allocate the power to deploy U.S. forces overseas in peacetime, the President as Commander in Chief (and chief diplomat) has engaged in a long-standing historical practice of ordering such deployments, generally with the acquiescence of Congress. Congress has concurrent constitutional power to regulate peacetime troop deployments abroad,<sup>75</sup> but for prudential reasons successive Congresses

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71. Self-defense has been defined to include defense against armed elements who attempt to prevent peacekeepers from carrying out their mandate. Adam Roberts, *From San Francisco to Sarajevo: The UN and the Use of Force*, 37 SURVIVAL 7, 14 (1995-96). For a helpful study of U.N. peacekeeping operations and practices, see THE EVOLUTION OF U.N. PEACEKEEPING: CASE STUDIES AND COMPARATIVE ANALYSIS (William J. Durch ed. 1993); see also THE BLUE HELMETS, *supra* note 4.

72. See *supra* note 57 (discussing § 7 of the UNPA).

73. Letter to Congressional Leaders Reporting on Peacekeeping Operations in the Former Yugoslav Republic of Macedonia, 30 WEEKLY COMP. PRES. DOCS. 20 (Jan. 8, 1994).

74. Letter to Congressional Leaders on Haiti, 31 WEEKLY COMP. PRES. DOCS. 452-53 (Mar. 21, 1995).

75. Congress has the constitutional power to raise, support, and regulate the military forces,

generally have been willing to allow the President considerable flexibility.<sup>76</sup>

Nonetheless, the fact that an operation can be characterized as "peacekeeping" may not always be sufficient to settle the question of presidential authority. Some peacekeeping operations, because of their unique circumstances, are more problematic cases for unilateral presidential action. The deployment of U.S. forces to Bosnia to help implement the Dayton peace accords is a case in point. On the one hand, prior congressional authorization may not have been constitutionally compelled in this case because American troops were deployed with the consent of the parties for the limited purposes of monitoring a cease-fire and separating the previously warring factions as part of a negotiated peace settlement accepted by all sides. On the other hand, the bitter history of the Bosnian conflict and the fragile nature of the peace agreement, coupled with the robust enforcement powers given to the U.S. and allied forces, argue in favor of congressional authorization. Clinton Administration officials have dealt with this dilemma, in part, by stating that while force will be used, if necessary, to compel rogue elements to comply with the agreement, the United States does not intend to become embroiled in a war in the event that the peace agreement collapses and the parties resume hostilities.<sup>77</sup> Yet the substantial commitment of combat-ready American troops and resources to such an unsettled region for an extended period of time reinforces the argument for congressional authorization.

#### D. *Peace Enforcement*

Many U.N. operations authorized by the Security Council fall into a middle category between major combat actions and consensual peacekeeping. Recent "peace enforcement" operations authorized under Chapter VII of the U.N. Charter have involved military action against hostile parties, but on a much smaller and more limited scale than in the Persian Gulf. In Somalia, for example, the Security Council authorized

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which can reasonably encompass legislative restrictions on their overseas deployment. U.S. CONST. art. I, § 8, cls. 12-14. Under the War Powers Resolution, the President must report to Congress within 48 hours when U.S. forces are introduced "into the territory, airspace or waters of a foreign nation, while equipped for combat." 50 U.S.C. § 1543(a)(2)(1988). These deployments do not, however, trigger the 60-day time clock.

76. This may be changing in the U.N. context, however. The House of Representatives has passed provisions that, if they were to become law, would severely limit U.S. involvement in U.N. peacekeeping operations. See Pat Towell, *House Votes to Sharply Rein in U.S. Peacekeeping Expenses*, CONG. Q., Feb. 18, 1995, at 535 (discussing provisions of H.R.7, the National Security Revitalization Act).

77. E.g., *The News Hour with Jim Lehrer* (PBS television broadcast, Dec. 4, 1995) (interview with Secretary of Defense William Perry).

efforts to apprehend Somali warlord Mohammed Farah Aideed, after forces loyal to him killed twenty-four Pakistani peacekeepers.<sup>78</sup> In October 1993, eighteen American soldiers died in one such effort.<sup>79</sup> In Bosnia, prior to the Dayton accords, American pilots protecting U.N. safe haven zones participated in numerous NATO air strikes against Bosnian Serb military targets. In September 1994, American combat forces were on the verge of invading Haiti, with Security Council approval,<sup>80</sup> to depose the Cedras regime and restore President Aristide to power, when last-minute diplomacy rendered the invasion a friendly one.

Whether the Constitution is best understood as requiring Congress's approval before the President commits American combat forces to U.N. "peace enforcement" operations such as these is a hard question. The answer will depend on the particular circumstances, risks, and objectives of the operation at issue. The constitutional arguments in favor of advance congressional authorization were compelling, in my view, in a case like the originally planned invasion of Haiti, in which American forces were prepared to overthrow a *de facto* regime with force.<sup>81</sup> The Declare War Clause gives Congress the power to declare or commence war, whether full-fledged war or more limited acts of war.<sup>82</sup> That the founders wanted even limited hostilities short of formally declared war to be authorized by Congress is *reinforced* by the Marque and Reprisal Clause,<sup>83</sup> which gave Congress control over limited uses of force, such as reprisals, common in the founders' day.<sup>84</sup> The founders understood both that reprisals could be a useful half-way step between

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78. S.C. Res. 837, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/837 (1993). See *infra* note 110 (discussing this resolution).

79. JOHN L. HIRSCH & ROBERT B. OAKLEY, *SOMALIA AND OPERATION RESTORE HOPE: REFLECTIONS ON PEACEMAKING AND PEACEKEEPING* 127 (1995).

80. S.C. Res. 940, U.N. SCOR, 49th Sess., at 2, U.N. Doc. S/RES/940 (1994).

81. Accord Lori F. Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58, 65-67 (1995).

82. FRANCES D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR* 17-53 (2d ed. 1986); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L. J. 672 (1972).

83. U.S. CONST. art I, § 8, cl. 11.

84. As Abraham Sofaer persuasively argues, "[t]he Constitution says Congress shall 'declare' war, and it seems unreasonable to contend that the President was given the power to 'make' undeclared war, especially since the Constitution gives Congress control of those types of military actions short of formal war commonly resorted to during that time." ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 4 (1976) (citation omitted). For thoughtful discussions of the Marque and Reprisal Clause, see Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986) [hereinafter *Covert War*]; Jules Lobel, "Little Wars" and the Constitution, 50 U. MIAMI L. REV. 61 (1995); Lofgren, *supra* note 82.

peace and war, and that they often led to war.<sup>85</sup> In Thomas Jefferson's words: "The making of a reprisal on a nation is a very serious thing . . . [which] is an act of war, and never failed to produce it in the case of a nation able to make war." Thus, "the right of reprisal [is] expressly lodged with [Congress] by the Constitution, and not the executive."<sup>86</sup> In short, the decision whether to commence even limited acts of war is for Congress to make because of the potentially serious consequences of committing the country to such action, including the risk of escalation to a wider conflict. Advance legislative deliberation, moreover, provides greater assurance of popular support for military action that places American lives and treasure at risk.<sup>87</sup>

But do many U.N. "peace enforcement" operations today, such as the efforts to apprehend Aideed in Somalia or the NATO airstrikes in Bosnia, raise the kinds of concerns or pose the kinds of risks that led the founders to give Congress the power to commence even limited acts of war? Each U.N. operation would need to be examined carefully on its facts to answer that question. Nevertheless, a few cautious generalizations can be made. First, Chapter VII "peace enforcement" operations generally will involve coercive action against hostile forces in unstable situations. Even if combat risks seem low at the outset, the chances that a conflict will escalate and that hostilities will intensify cannot always be predicted accurately. After the Somalia operation focused on apprehending Aideed, it took more American lives and a more substantial commitment of American resources than anyone in the Clinton Administration (or many in Congress) expected at the start. Second, congressional and public support for American involvement in "peace enforcement" operations generally will be critical to their success, even if they do not involve major or sustained hostilities. Most of these operations will not be completed in a few short months. Instead, they are likely to involve long-term commitments, and they will be expensive. Moreover, if the operations do not implicate core U.S. security interests, the American public will have a very low tolerance for casualties. If Presidents commit U.S. forces to such operations unilaterally without making a strong public case for U.S. involvement and obtaining legislative support, American policy will be particularly vulnerable to abrupt reversal by Congress in the face of adversity.

This does not mean that I discount the counterarguments that can be made from historical practice. On the contrary, the argument that the

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85. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1171 (1833).

86. Op. Sec'y of State (May 16, 1793) (Thomas Jefferson), *reprinted in* 7 JOHN MOORE, A DIGEST OF INTERNATIONAL LAW 123 (1906).

87. Lobel, *Covert War*, *supra* note 84, at 1089-91.

President does not require congressional approval before committing U.S. forces to those Chapter VII "peace enforcement" operations that involve minimal combat risks or escalatory potential must be taken seriously. The initial humanitarian deployment of U.S. forces to Somalia in Operation Restore Hope as it was first conceived and launched, for example, can be viewed as falling within a long-standing presidential practice, in which Congress has largely acquiesced, of deploying American forces abroad for limited protective purposes that do not involve initiating hostilities or engaging in war. The most well-established presidential practice is that of using force in a limited and self-contained manner to protect and rescue American citizens at risk abroad—a practice that is now widely accepted as falling within the President's customary authority as Commander in Chief.<sup>88</sup> Yet one must be cautious in generalizing from this historical practice because its relevance for U.N. operations is debatable in situations that involve no imminent threat to American lives or to core U.S. security interests.<sup>89</sup>

In sum, given the spectrum of U.N.-authorized military actions, the authority of the President to commit American forces without congressional approval will vary depending on the nature and risks of each operation. At one end of the spectrum are actions that clearly have the character and risks of "war" and are best understood as requiring the prior authorization of Congress. At the other end of the spectrum are Chapter VI peacekeeping operations that enjoy the consent of all of the parties and are deployed in situations posing little risk of hostilities. Although Congress may limit American involvement in such peacekeeping operations, the President has a strong argument that sending American forces to these operations falls within well-established historical patterns of presidential peacetime troop deployments. Many if not most of the U.N.-authorized operations in which the United States is likely to participate, however, will fall into the more ambiguous middle ground. These include Chapter VII "peace enforcement" operations involving hostilities, but on a limited scale. Strong constitutional arguments in

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88. Raven-Hansen, *supra* note 63, at 37-40.

89. Whether and when it is reasonable to extrapolate from the President's long-standing practice of protecting Americans to claim that the President may use limited force (with Security Council approval) to protect foreign citizens was a question debated back in 1945 when the Senate considered the U.N. Charter. Sen. Arthur Vandenberg argued that the President's long-standing practice of deploying troops abroad to protect Americans meant that he could also engage in limited "police actions" to defend foreign countries and their citizens without needing the specific approval of Congress in each case, while Senator Wheeler strongly disputed the analogy between these situations. Even Vandenberg expected, however, that the American forces used for U.N. police actions would be designated in an Article 43 special agreement that was approved by Congress. Stromseth, *supra* note 3, at 605, 610-11.

favor of congressional authorization can be made in many such cases,<sup>90</sup> but grey areas and room for disagreement admittedly will exist.

### III. POST-COLD WAR INSTITUTIONAL DYNAMICS: WILL THE "TACIT DEAL" CONTINUE?

This brings me to the second issue I would like to explore: Is Congress likely to play a greater role in decisions to commit U.S. forces abroad in the post-Cold War period, or will the "tacit deal" of unilateral presidential action and congressional "scolding rights" after the fact simply continue as before?

John Ely finds little reason to believe that the President, unprodded, will "move back in the direction of sharing responsibility" for decisions to send American forces to combat, or that Congress will show any greater willingness to accept its own responsibility to participate in such decisions.<sup>91</sup> The Persian Gulf War was authorized by Congress in advance, but Ely suggests it would be "folly" to view this as "the procedural wave of the future."<sup>92</sup> Congress's willingness to take a prospective stand (even at the eleventh hour) was influenced by several factors that made the Gulf War unique: the projected size of the conflict clearly made it a "war"; the lengthy buildup to the conflict precluded any claim that time did not permit congressional debate; and the President, by ultimately deciding to seek Congress's "support," denied Congress "the usual option of waiting until the war was over before deciding whether to approve of it."<sup>93</sup>

While the President recognized the political benefit of obtaining congressional authorization before undertaking an action posing substantial combat risks, this precedent is less likely to be followed, Ely contends, "in our now more common predictably 'quickie' wars."<sup>94</sup> Moreover, in military actions since Desert Storm, such as in Somalia and Bosnia, Ely argues, Congress and the President "reverted entirely to form" with no "conspicuous indication on anyone's part that Congress might have a role to play under either the Constitution or the War Powers Resolution."<sup>95</sup>

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90. The U.S. military operation in Haiti, as it was originally launched by the President in September 1993 before Cedras agreed to voluntarily relinquish power, was a strong case for prior congressional approval, in my judgment. *Accord* Damrosch, *supra* note 81, at 66.

91. Ely, *supra* note 12, at 52-54. Thus Ely argues in favor of enlisting the courts as "Congress-prodders" who will "remand" cases to the Congress for it to do its constitutional duty. *Id.* at 54-67.

92. *Id.* at 52.

93. *Id.* at 50-51.

94. *Id.* at 51.

95. *Id.* at 52.

Ely's description of the "tacit deal" between the President and Congress during the Cold War era is hard to dispute. He correctly identifies congressional reluctance to accept responsibility for use-of-force decisions (and not just presidential defiance) as a major factor in the decline of Congress's war powers role. But Ely's prediction that the patterns of the past are likely to continue largely as before may not bear out completely in the post-Cold War years ahead.<sup>96</sup>

For three interrelated reasons, Congress may play a more significant war powers role in the future, especially in the U.N. context. First and foremost, the dissolution of the Soviet Union and the demise of the Cold War rivalry have ushered in a new era in American foreign policy in which there is no one overarching threat. Containing communism is no longer the unifying theme of American foreign relations. In the absence of a foreign policy consensus and in the face of more ambiguous security threats, members of Congress generally will face fewer electoral risks in opposing the President's foreign policy decisions.<sup>97</sup> Accusations of being "soft on communism" or "weak on defense" will no longer constrain legislators from challenging presidential choices on defense policy or the use of force abroad.

Second, in a world no longer dominated by Cold War tensions, considerable uncertainty and disagreement exists among policy makers and among the American public at large about the nature of American interests in the world. While traditional concerns about the physical and economic security of the United States will continue at the heart of American foreign policy, as will concerns about the security of our key allies, questions about America's role in response to more indirect threats to our long-term well-being will be controversial and potentially divisive. Whether threats to core American values, such as democracy and basic human rights, merit committing American military forces in particular cases will be a question on which reasonable people will often disagree. Moreover, in cases that touch less directly on traditional American security concerns, the public will be less willing to tolerate American casualties. Congress, as a result, is likely to scrutinize such involvements closely and stand willing to challenge the President.

Third, in the face of more ambiguous and less immediate security

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96. Ely notes that the end of the Cold War may augur well for a greater judicial role. *Id.* at 54-64. He views the Cold War as an aberration from earlier patterns of joint decisionmaking, but does not explore whether the structural changes in the international system resulting from the Cold War's demise might affect the institutional interaction of Congress and the President over war powers.

97. Randall B. Ripley & James M. Lindsey, *Foreign and Defense Policy in Congress: An Overview and Preview*, in CONGRESS RESURGENT: FOREIGN AND DEFENSE POLICY ON CAPITOL HILL 3,13 (Randall B. Ripley & James M. Lindsey eds. 1993).



threats, Congress and the American public are likely to focus their attention on domestic economic priorities and to be cautious about expensive military commitments abroad that compete for scarce resources. As a result, Congress's power of the purse will give it a major role in determining U.S. involvement in costly U.N. peacekeeping and peace enforcement operations.

But critical questions remain: How precisely will Congress exert its influence? Is Congress likely to continue, as it did during the Cold War, to play a largely retrospective role, challenging Presidential decisions to deploy force after the fact, rather than insisting on a greater prospective role? Or will members of Congress in the future be more willing (and able) to share responsibility for deployment decisions? And if Congress does not vote in advance, does this simply reflect a desire to avoid accountability or are other factors also involved? A brief look at the cases of Somalia and Haiti—and the executive-legislative interactions accompanying the deployment of U.S. forces—may suggest some answers.

### A. Somalia

When President Bush decided to deploy over 20,000 American forces to Somalia in December 1992 in Operation Restore Hope to create a secure environment for delivering humanitarian relief, he did not seek congressional approval for the mission.<sup>98</sup> At the time, few in Congress argued that he should have. Most congressional leaders supported the humanitarian mission on the merits,<sup>99</sup> and few thought there was any significant risk of hostilities or war. The Senate, two months after the initial deployment, adopted a resolution by voice vote authorizing the participation of American forces in the initial U.S.-led phase of the Somalia operation.<sup>100</sup> The House did not vote for three more months.

By then, the Somalia operation had entered a second and more ambitious phase. With the Clinton Administration's strong support, the Security Council adopted Resolution 814 in late March 1993.<sup>101</sup> That resolution, adopted under Chapter VII of the Charter, authorized the

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98. Congress was not in session at the time. President Bush did meet with congressional leaders, however, on Dec. 4, a few hours before announcing his decision to the nation. *MacNeil/Lehrer Newshour: Operation Restore Hope* (PBS television broadcast, Dec. 4, 1992) (interview with Speaker of the House Thomas Foley).

99. *Id.*; Clifford Krauss, *A Few in Congress Advising Caution, or Vote, on Somalia*, N.Y. Times, Dec. 7, 1992, at A13.

100. S.J. Res. 45, reprinted in 139 CONG. REC. S1368 (daily ed. Feb. 4, 1993). The Senate joint resolution authorized the President to use U.S. armed forces to implement Security Council Resolution 794, which in turn approved the use of "all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia." *Id.*

101. S.C. Res. 814, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/814 (1993).

United Nations Operation in Somalia (UNOSOM II) to replace the U.S.-commanded operation and to engage in a number of tasks. In addition to emphasizing the disarmament of Somali factions,<sup>102</sup> the Security Council also authorized UNOSOM II to assist in the economic rehabilitation of Somalia and to promote political reconciliation and help reestablish political institutions and civil administration throughout the country.<sup>103</sup> Of the approximately 20,000 combat forces and 8000 logistics forces from various countries participating in UNOSOM II, the United States agreed to contribute about 2700 logistical forces and place them under U.N. command. President Clinton also agreed to provide a U.S. quick reaction force of about 1300 troops under U.S. command to support UNOSOM II.<sup>104</sup> Control of the Somalia operation passed from the United States to the United Nations on May 4, 1993.

After a divisive debate along party lines, the House adopted a resolution a few weeks later authorizing American participation in UNOSOM II for twelve months.<sup>105</sup> The resolution explicitly provided specific statutory authorization under the War Powers Resolution "to the extent that" any U.S. forces became involved in hostilities or imminent hostilities.<sup>106</sup> Democratic leaders in the House viewed this authorization as an important assertion of congressional prerogative; Republicans argued that Congress, instead, was giving the President a blank check in Somalia.<sup>107</sup> Disagreement on the merits of UNOSOM II also followed party lines. Democrats stressed the importance of continued American involvement in Somalia in order to consolidate and build upon the accomplishments of Operation Restore Hope; they also emphasized that U.S. forces were cutting back their role in Somalia.<sup>108</sup> Republicans voiced concern about the far-reaching objectives of the overall operation and argued that U.S. forces had accomplished their original humanita-

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102. *Id.*, § B, ¶ 7.

103. *Id.*, § A, ¶ 4.

104. HOUSE COMM. ON FOREIGN AFFAIRS, RESOLUTION AUTHORIZING THE USE OF UNITED STATES FORCES IN SOMALIA, H.R. REP. NO. 89, 103rd Cong., 1st Sess. at 2, 7 (1995) [hereinafter *House Somalia Report*]; 139 CONG. REC. H2611-12 (daily ed. May 20, 1993) (statement of Rep. Hamilton).

105. The vote was 243 to 179. 139 CONG. REC. H2764 (daily ed. May 25, 1993). Only 9 Democrats voted against the resolution, and only 3 Republicans voted for it. Gregory J. Bowens, *Somalia: House Backs Measure Allowing U.S. Role in U.N. Operations*, CONG. Q., May 29, 1993, at 1382. The text of S.J. Res. 45 is reprinted at 139 CONG. REC. H2745 (daily ed. May 25, 1993). The resolution authorized the President to use American forces in UNOSOM II for two purposes: to provide logistical support to the U.N.-led force, and to serve as a quick reaction force under U.S. operational control to respond to requests from the U.N. commander in Somalia for emergency assistance. S.J. Res. 45, § 4(a)(1)-(3).

106. *Id.* § 4(b).

107. These differences of view are set forth clearly in the majority and minority reports accompanying the House version of S.J. Res. 45. *House Somalia Report*, *supra* note 104.

108. *E.g.*, 139 CONG. REC. H2611 (daily ed. May 20, 1993) (remarks of Rep. Hamilton).

rian mission and should come home.<sup>109</sup>

Any plans to reconcile the House and Senate authorizations (and obtain Senate approval of a U.S. role in UNOSOM II) were soon eclipsed by escalating violence in Somalia beginning in June 1993. After Somali forces loyal to General Aideed killed twenty-four Pakistani peacekeepers, U.N. forces were authorized to apprehend Aideed.<sup>110</sup> As part of this effort, President Clinton deployed U.S. Army Rangers to Somalia. He did not seek Congress's approval, however, for the subsequent combat operations against Aideed's forces during the summer and early fall of 1993. Nor did the President provide Congress or the American people with a full and clear explanation of American objectives in Somalia or the likely risks ahead.

As the Somalia operation focused on capturing Aideed, its character changed and hostilities intensified.<sup>111</sup> As violence in Mogadishu increased, tensions in Washington between Congress and the executive branch mounted as well. Amid growing calls to narrow or end U.S. participation, Senator Robert Byrd, Chairman of the Senate Appropriations Committee, introduced an amendment to the defense appropriations bill in September 1993 to terminate funding for U.S. involvement in Somalia within thirty days unless Congress authorized a continued U.S. role.<sup>112</sup> Working with congressional leaders of both parties, the Clinton Administration turned back this effort. Instead, the Senate adopted a nonbinding amendment calling on the President to report by mid-October on the goals of the U.S. forces in Somalia and to seek Congress's authorization by mid-November for their continued deployment.<sup>113</sup> The House followed suit two weeks later.<sup>114</sup> Although this provision was nonbinding, Senator Byrd made it clear that he would insist on a congressional vote on November 15 and would work to termi-

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109. *E.g.*, *id.* at H2610 (remarks of Rep. Gilman); *id.* at H2609 (remarks of Rep. Solomon).

110. S.C. Res. 837, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/837 (1993). More precisely, that resolution condemned the attacks against U.N. peacekeepers, *id.* ¶ 1, and reaffirmed the Secretary-General's authority "to take all necessary measures against all those responsible for the armed attacks," including "investigation of their actions and their arrest and detention" for trial. *Id.* ¶ 5. For background on this resolution, see HIRSCH & OAKLEY, *supra* note 79, at 118. Although "[t]he resolution did not demand military action," Hirsch and Oakley argue that "there is no question that it implied a go-ahead for the military steps subsequently taken against Aideed and his senior associates." *Id.*

111. HIRSCH & OAKLEY, *supra* note 79, at 115-127.

112. Amend. No. 782 to the 1994 Defense Appropriations Act, Pub. L. No. 103-375, 108 Stat. 2658 (1993), *reprinted in* 139 CONG. REC. 11,127 (daily ed. Sept. 8, 1993).

113. Amend. No. 790, to the 1994 Defense Appropriations Act, *reprinted in* 139 CONG. REC. S11,267 (daily ed. Sept. 9, 1993), was adopted by a vote of 90 to 7. *Id.* at S11,276-77.

114. The House adopted an identical amendment on September 28 by a vote of 406 to 26. 139 CONG. REC. H7105-06 (daily ed. Sept. 28, 1993).

nate funding if the President failed to make a compelling case for a continued U.S. role.

Congress's willingness to give the President more time to make that case evaporated immediately, however, following the tragic battle on October 3-4, in which eighteen American soldiers were killed and seventy-eight wounded in a raid against Aideed's forces.<sup>115</sup> Given the already mounting congressional unease about the ill-defined Somalia operation, these American casualties crystallized public and congressional pressure to terminate American military involvement in Somalia. In the face of this pressure, the President made a preemptive move: In a speech to the nation, he narrowed the goals for American forces in Somalia and pledged to withdraw them within six months—by the end of March 1994.<sup>116</sup> The Senate responded by adopting an amendment, proposed by Senator Byrd, that narrowed the goals for U.S. forces even further and ensured their withdrawal by cutting off funding as of March 31.<sup>117</sup> The House ultimately accepted this amendment as well.<sup>118</sup> Both Houses of Congress thus finally took a joint position on Somalia, authorizing the participation of U.S. forces in UNOSOM II for up to six months in support of a limited humanitarian mission.

What conclusions can we draw from the congressional-executive interactions over Somalia? In the early months of the Somalia operation, Congress and the President seemed largely to follow the Cold War

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115. HIRSCH & OAKLEY, *supra* note 79, at 127-129.

116. President's Address to the Nation on Somalia, 29 WEEKLY COMP. PRES. DOCS. 2022, 2024 (1993). In his speech, the President articulated four missions for U.S. forces in Somalia. First and foremost, U.S. forces would "protect our troops and our bases." Second, they would "keep open and secure the roads, the port, and the lines of communication" necessary to keep food and relief supplies "moving freely throughout the country." Third, they would "keep the pressure on those who cut off relief supplies and attacked our people, not to personalize the conflict but to prevent a return to anarchy." Fourth, they would "help to make it possible for the Somali people . . . to reach agreements among themselves so that they can solve their problems and survive when we leave." Finally, Clinton's speech signaled that the U.S. and the U.N. would revive diplomatic and political initiatives in Somalia: "the solution to Somalia's problems is not a military one, it is political."

117. Amend. No. 1-42, to the 1994 Defense Appropriations Act, *reprinted in* 139 CONG. REC. S13,516 (daily ed. Oct. 14, 1993). Byrd's amendment endorsed only the first two of Clinton's objectives for U.S. forces in Somalia. Specifically, it approved the use of U.S. forces in Somalia to protect U.S. "personnel and bases," and to provide "assistance in securing open lines of communication for the free flow of supplies and relief operations." *Id.* at S13,516. The amendment also provided, with certain very limited exceptions, that "funds appropriated, or otherwise made available, in this or any other Act to the Department of Defense may be obligated for expenses incurred only through March 31, 1994, for the operations of United States Armed Forces in Somalia." *Id.*

118. The House accepted the March 31 deadline only after passing an earlier nonbinding resolution in favor of an earlier deadline of Jan. 31. For a discussion of these mixed signals, see Carroll J. Doherty, *House Sends Mixed Message Over Somalia Mission*, CONG. Q., Nov. 13, 1993, at 3139.

patterns John Ely critiques in *War and Responsibility*. The President deployed American forces to Somalia while Congress was out of session. Once Congress returned, both Houses did adopt resolutions authorizing American involvement in Operation Restore Hope; but only the House went on to address and authorize an American military role in the next phase of the Somalia operation. The Clinton Administration, in the meantime, endorsed ambitious goals for UNOSOM II at the Security Council without serious advance consultations with Congress and, later, provided only brief reports to Congress on the subsequent combat operations against Aideed.<sup>119</sup> Once hostilities in Mogadishu escalated in October 1993, however, congressional pressure forced the President (unfortunately, belatedly) to define U.S. goals in Somalia more clearly, and ultimately to bring American forces home. Had the Administration and Congress consulted more intensively about the objectives of the Somalia operation as it evolved and about the American role in it, some of the operation's drift and confusion, and some of the American casualties, probably could have been avoided.

Congress, in the end, asserted itself and used its power of the purse (for the first time since Vietnam) to terminate U.S. military involvement abroad.<sup>120</sup> The Somalia experience also led Congress to impose a more demanding set of reporting and consultation requirements for U.S. involvement in *future* U.N. operations.<sup>121</sup> The President now must provide detailed monthly reports to designated congressional committees identifying, among other things, any upcoming votes in the Security Council to authorize or modify a U.N. peacekeeping operation, any significant changes in U.S. participation, and the likely costs to the United States. These reactions to the Somalia experience were just a hint of legislative initiatives to come in the new Republican-controlled Congress. In a sense, the Somalia experience was a "wake-up call" to the United States Congress on the need to monitor more closely U.S. involvement in U.N. military operations in the post-Cold War period.

### B. *Haiti*

If Congress waited too long to assert a major role in the case of Somalia, it focused on Haiti long before the President had formulated a

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119. See, e.g., Letter to Congressional Leaders on the Situation in Somalia, 29 WEEKLY COMP. PRES. DOCS. 1060 (June 10, 1993); Letter to Congressional Leaders on Somalia, *id.* at 1216 (July 1, 1993).

120. 139 CONG. REC. S13,425 (daily ed. Oct. 14, 1993) (remarks of Sen. Byrd). By exercising its power of the purse in this way, Senator Byrd argued, Congress showed that the system of checks and balances designed by the founders worked. *Id.* at S13,432.

121. Foreign Relations Authorization Act, Pub. L. No. 103-236, § 407, 108 Stat. 448-49 (1994) (to be codified at 22 U.S.C. § 287b-4).

clear plan of action. Following the events in Somalia in October 1993, Congress began to address the possibility of U.S. military involvement in Haiti. At that time, the Security Council had authorized only a peacekeeping mission,<sup>122</sup> not the use of force to depose the Cedras regime. Even so, the Somalia experience made members of Congress aware of the risks accompanying troop deployments in situations of internal conflict. Given congressional attitudes, moreover, the President was reluctant to risk any American casualties. Thus, when an armed Haitian mob gathered on October 11 to challenge the arrival of 200 American and Canadian engineers aboard the U.S.S. *Harlan County*, the ship turned back.<sup>123</sup> At the same time, speculation that the President might decide to deploy U.S. military forces to Haiti galvanized senate Republicans to action.

In a war powers role reversal, Senator Robert Dole announced that he would introduce legislation requiring the President to obtain congressional authorization before using force in Haiti unless the President certified that American lives or vital national security interests were at risk.<sup>124</sup> When Dole ultimately decided to work with Senate Democratic leaders to cosponsor a nonbinding provision to this effect, Senator Jesse Helms introduced a binding amendment to the defense appropriations bill prohibiting the use of funds for any U.S. military operations in Haiti that were not authorized in advance by Congress, unless American citizens were in imminent danger.<sup>125</sup> Democrats and Republicans alike argued against tying the President's hands in this way "while the situation in Haiti is still evolving and before the President has fully decided on how he will respond to the crisis."<sup>126</sup> The Helms provision thus was rejected by a vote of eighty-one to nineteen.<sup>127</sup>

The Senate instead adopted the nonbinding Dole-Mitchell amendment to the defense appropriations bill.<sup>128</sup> That amendment expressed the "sense of the Congress" that funds should not be expended for U.S. military operations in Haiti unless authorized by Congress in advance or unless U.S. citizens or vital national security interests were at risk, or unless the President reported to Congress in advance of any deployment

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122. S.C. Res. 867, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/867 (1993).

123. Gregory Owens, *Haiti: The Next Showdown*, CONG. Q., Oct. 16, 1993, at 2825.

124. *Face the Nation* (CBS television broadcast, Oct. 17, 1993).

125. Proposed Amend. No. 1072 to the 1994 Defense Appropriations Act, *reprinted in* 139 CONG. REC. S13,978 (daily ed. Oct. 20, 1993).

126. 139 CONG. REC. S14,071 (daily ed. Oct. 21, 1993) (remarks of Sen. Byrd); *see also id.* at S13,988-89 (daily ed. Oct. 20, 1993) (remarks of Sen. Specter).

127. *Id.* at S14,072 (daily ed. Oct. 21, 1993).

128. *Id.*

of U.S. forces and made a number of specified determinations.<sup>129</sup> Interestingly, Senator Byrd, who had taken the lead in asserting congressional prerogatives in Somalia, was one of only two Senators to vote against the Dole-Mitchell amendment.<sup>130</sup> Byrd argued that

to try in advance to prohibit funds, and then to write so many waivers into the prohibition that the President can do virtually anything he pleases, may actually weaken the legislative branch's prerogatives, while providing little in the way of legislative guidance or intent for the President to consider in his role as Commander in Chief.<sup>131</sup>

He was prescient.<sup>132</sup>

During the summer of 1993, as diplomatic efforts to induce General Cedras to comply with the Governors Island accords and relinquish power stalemated, and as domestic criticism of Clinton's policy regarding Haitian refugees intensified, the possibility that the President might decide to intervene militarily in Haiti grew more likely. Concerned that the President might take military action without coming to Congress for its approval, Senator Gregg introduced an amendment to a pending appropriations bill similar to the earlier Dole-Mitchell amendment.<sup>133</sup> When Gregg decided to make his amendment legally binding, the Senate rejected it by a vote of sixty-five to thirty-four<sup>134</sup> and adopted a nonbinding "sense of the Congress" version instead.<sup>135</sup> A few weeks later, the Senate by a closer margin tabled a bill by Senator Dole to establish a bipartisan congressional commission to investigate the situation in Haiti and report within forty-five days on conditions there and on "appropriate policy options."<sup>136</sup>

Although the Senate repeatedly rejected provisions that would prospectively limit the President's military or diplomatic options, Demo-

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129. *Id.* at S14,036-37 (daily ed. Oct 20, 1993). The Dole-Mitchell provision ultimately became § 8147 of Pub. L. No. 103-139, 107 Stat. 1474-75 (1993).

130. 139 CONG. REC. S14,072 (daily ed. Oct. 21, 1993). The other was Sen. Hatfield.

131. *Id.* at S14,071.

132. The Clinton Administration later invoked the Dole-Mitchell amendment to argue that the President's unilateral deployment of U.S. combat forces to Haiti in September 1994 "accorded with the sense of Congress," despite the fact that only a U.N. peacekeeping operation had been authorized by the Security Council at the time the Dole-Mitchell amendment was adopted. See Letter from Assistant U.S. Att'y Gen. Walter F. Dellinger, Office of Legal Counsel, to Sens. Robert Dole, Alan K. Simpson, Strom Thurmond & William S. Cohen, Sept. 27, 1994, reprinted in 89 AM. J. INT'L L. 122 (1995); see also Walter F. Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107 (1995). For a critique of this argument, see Letter from Bruce Ackerman et al. to President William J. Clinton (Aug. 31, 1994), reprinted in 89 AM. J. INT'L L. at 128-129.

133. 140 CONG. REC. S7902 (daily ed. June 29, 1994).

134. *Id.* at S7932. The text of the rejected Gregg amendment appears *id.* at S7905.

135. *Id.* at S7931.

136. *Id.* at S8980 (daily ed. July 14, 1994). The text of the Dole amendment appears *id.* at S8879 (daily ed. July 13, 1994).

crats and Republicans alike argued that the President should seek Congress's approval before invading Haiti.<sup>137</sup> The war powers debate intensified after the Security Council, at the urging of the United States, voted on July 31, 1994 to authorize the use of force to depose the Cedras regime and restore Haiti's lawfully-elected President Aristide to power.<sup>138</sup> Three days later, the Senate unanimously passed a resolution declaring that the Security Council's authorization did not substitute for congressional approval.<sup>139</sup> Shortly thereafter, however, the Senate tabled another effort to prevent President Clinton from committing U.S. forces to Haiti without Congress's prior authorization, except in emergency situations threatening American citizens or vital national security interests.<sup>140</sup>

Although many in Congress were unconvinced that American interests in Haiti were great enough to justify placing American forces in harm's way, members on both sides of the aisle continued to oppose the idea of prospectively tying the President's hands<sup>141</sup> and thereby undercutting his negotiating leverage with the Cedras regime.<sup>142</sup> As Senator

137. *E.g.*, 139 CONG. REC. S10,663 (daily ed. Aug. 5, 1994) (remarks of Sen. Specter):

It is my view that . . . as a matter of fundamental constitutional law, where the sole authority to declare war resides in the Congress, and . . . the Senate has spoken in opposition to an invasion in Haiti, the President may not proceed on the current record without a change in circumstances or cannot proceed when Congress is in session and there is an opportunity for the President to come to Congress to get authorization as the Constitution requires.

*Id.*; see also *id.* at S10,676 (remarks of Sen. McCain) ("I believe with every bone in my body that the President should consult with Congress, should come to Congress for authorization, and should receive approval of any military action in Haiti."); *id.* at S10,677 (remarks of Sen. Byrd) ("I believe that the President should seek prior congressional approval for any military action in Haiti that does not stem from the urgent need to protect Americans living in Haiti or from some other immediate national security concern.").

138. S.C. Res. 940, U.N. SCOR, 49th Sess., at 2, U.N. Doc S/RES/940 (1994). The resolution authorized U.N. member states, under Chapter VII of the Charter,

to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement.

*Id.*

139. 140 CONG. REC. S10,433 (daily ed. Aug. 3, 1994). The amendment, which was introduced by Senators Dole, Gregg, and Helms, stated: "It is the sense of the Senate that United Nations Security Council Resolution 940 of July 31, 1994, 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." *Id.* at S10,415.

140. This amendment, introduced by Senator Specter, appears at 140 CONG. REC. S10,663 (daily ed. Aug. 5, 1994). The vote to table the amendment was 63 to 31. *Id.* at S10,678.

141. *E.g.*, *id.* at S10,666 (daily ed. Aug. 5, 1994) (remarks of Sen. McCain); *id.* at S10,675 (remarks of Sen. Robb).

142. *E.g.*, *id.* at S10,668 (remarks of Sen. Pell); *id.* at S10,677 (remarks of Sen. Byrd).



Pell put it, in order for the President to succeed in persuading the ruling junta to depart voluntarily, "the possibility of the use of force to remove the junta cannot be taken off the table or called into question. It is ironic, but true, that if military action is to be avoided, the threat of it is essential."<sup>143</sup>

Yet as the President made clear both his determination to send U.S. forces to Haiti and his unwillingness to seek prior congressional authorization, a war powers showdown was in the making. Last-minute efforts were launched in Congress to force a vote on the merits of a military intervention in Haiti.<sup>144</sup> Although some legislators supported military action to restore President Aristide to power, a majority of members of Congress of both parties did not believe that the President had made a compelling case for risking the lives of American soldiers in Haiti.<sup>145</sup> A public opinion poll taken by ABC indicated that a substantial majority of the American people opposed an invasion as well.<sup>146</sup> Over three-quarters of those surveyed also believed that the President should seek Congress's approval before taking military action.<sup>147</sup> Yet in both Houses of Congress, Democratic party leaders worked to delay a vote and avoid a likely repudiation of the President's stated policy.<sup>148</sup>

President Clinton, in the end, chose to eclipse Congress by deploying U.S. combat forces to Haiti the weekend before a restive Congress planned finally to vote on the merits of military action. Fortunately, a final diplomatic effort pursued against the backdrop of an imminent U.S. invasion secured General Cedras's agreement to relinquish power peacefully, and the planned combat operations were superseded by an agreed occupation.<sup>149</sup> These favorable developments moved the war powers debate to the back burner but did not extinguish completely the anger many in Congress felt over being side-stepped by the President.

Nevertheless, the good fortune of the Haiti operation and the avoidance of combat casualties gave the President some breathing room on

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143. *Id.* at S10,668 (remarks of Sen. Pell).

144. Representatives Skaggs, Durbin, and Boehlert cosponsored a resolution seeking a debate and vote in the House prior to an invasion. 140 CONG. REC. H9098 (daily ed. Sept. 13, 1994). In the Senate, Senators McCain and Dole attached an amendment to the nomination of a four-star general expressing the sense of the Senate that the lives of U.S. forces "not be risked in combat for the purpose of restoring" President Aristide to power. *Id.* at S12,862 (daily ed. Sept. 14, 1994).

145. Doherty, *supra* note 8, at 2582.

146. Elaine Sciolino, *Invasion of Haiti Would be Limited, Clinton Aides Say*, N.Y. TIMES, Sept. 13, 1994, at A13.

147. *Id.*

148. Doherty, *supra* note 8, at 2582; 140 CONG. REC. H9146 (daily ed. Sept. 13, 1994) (remarks of Rep. Goss).

149. The President's News Conference With President Carter, General Powell, and Senator Nunn on Haiti, 30 WEEKLY COMP. PRES. DOCS. 1803 (Sept. 19, 1994).

Capitol Hill. A Republican-sponsored resolution in the House calling for an immediate withdrawal was defeated by a vote of 205 to 225.<sup>150</sup> Also defeated was a resolution to authorize the deployment of U.S. forces in Haiti for certain limited purposes until March 1, 1995.<sup>151</sup> Both Houses of Congress instead adopted identical resolutions declaring that the President "should have sought" congressional approval and urging "prompt and orderly withdrawal" from Haiti, but setting no deadline.<sup>152</sup> These resolutions required the President to submit a report to Congress setting forth the "national security objectives" of the operation in Haiti, as well as a "detailed description of United States policy, the military mission and the general rules of engagement," and to submit monthly reports on the status and costs of the mission.<sup>153</sup>

Breaking ranks with the Democratic leadership, Representative Lee Hamilton, Chairman of the House Foreign Affairs Committee, criticized his colleagues (and the Administration) for supporting a resolution that neither authorized the deployment of U.S. troops to Haiti nor limited the scope of the operation.<sup>154</sup> Yet to other members of Congress, a vote to authorize the Haiti operation after the fact would simply reward the President for acting unilaterally.<sup>155</sup> Congress, in the end, chose to wait and see how events in Haiti unfolded,<sup>156</sup> only this time (unlike in

150. 139 CONG. REC. H11,099 (daily ed. Oct. 6, 1994). The text of this amendment, sponsored by Representative Gilman, is set forth *id.* at H11,087-88.

151. H.R.J. Res. 416, 103d Cong., 1st Sess. (1994), reprinted in 140 CONG. REC. H10,972-73 (daily ed. Oct. 5, 1994). This resolution, cosponsored by Reps. Hamilton and Torricelli, was amended, 140 CONG. REC. H11,112-13 (daily ed. Oct. 6, 1994), and ultimately defeated by a vote of 27 to 398. *Id.* at H11,121.

152. S.J. Res. 229, 103d Cong., 1st Sess. (1994), reprinted in 140 CONG. REC. S14,346-47 (daily ed. Oct. 6, 1994); 140 CONG. REC. H11,099-00 (daily ed. Oct. 6, 1994). The vote was 91 to 8 in the Senate, *id.* at S14,346, and 258 to 167 in the House, *id.* at H11,111-12.

153. *Id.* at S14,346, H11,100. The President signed these resolutions into law on Oct. 25, 1994.

154. 140 CONG. REC. H11,113-14 (daily ed. Oct. 6, 1994). Hamilton argued that "[m]embers cannot complain about no authorization beforehand, and then duck responsibility for authorization after the fact." *Id.* at H11,113.

155. *E.g.*,

I believe we would be making a fundamental mistake if, after the President has decided to use force and to put troops into Haiti, for us to then retroactively authorize that action. I think that will become a precedent for future Presidents. And I happen to believe that the President has a responsibility to come to this Congress and seek our approval before he puts the troops into the field.

*Id.* at H11,103 (remarks of Rep. Dicks); see also *id.* at H10,974 (daily ed. Oct. 5, 1994) (remarks of Rep. Gilman) ("I oppose the proposal . . . because it retroactively provides congressional authorization for the unilateral decision by the President to deploy United States Armed Forces in the occupation of Haiti. . . . Congress should move instead to call for the immediate, safe, and orderly withdrawal of United States troops from Haiti.").

156. Carroll J. Doherty, *Congress, After a Sharp Debate, Gives Clinton a Free Hand*, CONG. Q., Oct. 8, 1994, at 2895.

Somalia) Congress made sure that it would receive regular and detailed reports on the progress of the operation.

Does the Haiti experience indicate that Congress and the President are simply continuing their "tacit deal" in the post-Cold War period? The President's decision to act unilaterally (despite having ample time to build support for U.S. military action and to seek Congress's authorization) was all too reminiscent of Cold War patterns. Did Congress's failure to vote on the merits of U.S. military involvement in Haiti before (or even after) the President took action represent a continuing refusal to take responsibility for decisions to commit American forces abroad, or were other factors at work? At one level, the pattern looks awfully familiar and one can tell an "evasion of responsibility" story to explain what happened.

Yet the Haiti experience is more complex. Congress's failure to vote in advance on whether to authorize (or disapprove) the use of American force to restore the democratically-elected government to Haiti cannot be explained simply as a refusal to take a stand for which the electorate might hold it accountable. After all, opinion in Congress against the use of American force for this purpose, which seemed to be the predominant view, was consistent with public opinion polls showing that a majority of the American people were likewise unconvinced on the merits. Instead, and to a greater degree, Congress's refusal to limit the President's military options in advance reflected a widely-shared concern that Congress should not undercut the President's ability to engage in coercive diplomacy with the Cedras regime. In the fluid, ever-changing world of diplomacy, Congress wanted the President to have maximum negotiating leverage in dealing with General Cedras. Only the President, not Congress, was institutionally capable of conducting the delicate diplomacy that might, with the threat of force in the background, yield a political resolution to the conflict. These concerns contributed to Congress's decision to adopt "sense of the Congress" resolutions that urged, but did not require, the President to come to Congress before taking military action. Resolutions that would have limited funds for the use of force in Haiti (at least if certain emergency and other conditions were not met), in contrast, repeatedly were rejected (although the votes in favor increased somewhat as the prospect of military action became more concrete).

Once the President made it clear that he intended to send American troops to Haiti to depose the Cedras regime and restore President Aristide to power, sentiment in Congress in favor of a vote on the merits gained momentum. At this point, however, partisan politics combined with presidential determination to prevent that vote from happening.

The Democratic leaders in Congress were determined to avoid a direct rebuff of the President's chosen policy, and they avoided taking a vote on the eve of the invasion.<sup>157</sup> In the end, partisan politics took precedence over Congress's institutional prerogatives.

Yet the U.S. involvement in Haiti is an unfinished story, and the new Congress is likely to have little patience if things start to go wrong. In April 1995, the United Nations took charge of a peacekeeping operation in Haiti that followed the initial U.S.-led military operation. Approximately 2500 U.S. forces remained in Haiti as peacekeepers under the command of a U.S. general.<sup>158</sup> As of January 1996, the U.N. peacekeeping operation in Haiti had been quite successful. Yet by deliberately bypassing a largely skeptical Congress in deploying U.S. forces to Haiti at the outset, the President throughout this operation has had a very limited margin for error.

#### IV. CONCLUSION

If Somalia and Haiti are any guide, we can expect to see several trends at work when the United States participates in U.N.-authorized military operations in the years ahead. First, Congress will scrutinize the objectives of future U.N. operations closely, and will demand a detailed, ongoing account of their goals, costs, and benefits. Even if the President acts unilaterally in deploying U.S. forces, the anticipated congressional scrutiny that is sure to follow will have significant constraining effects. In Haiti, for example, the Clinton Administration deliberately tailored the objectives for U.S. forces narrowly, insisted that a U.S. general be placed in charge of the second phase of the operation, and did a better job than in Somalia of anticipating the challenges involved in making the transition to a U.N.-led operation. In Rwanda, the Administration held back from making any substantial force deployment and opted for a very limited and short-term humanitarian role. More generally, the Administration has taken a cautious stance in the Security Council in voting for and shaping the mandate of future peacekeeping operations.

Second, Congress will use its power of the purse more aggressively not only to limit U.S. contributions to peacekeeping in general, but also to limit U.S. involvement in ongoing conflicts, as in Somalia. In the case of Rwanda, for example, Congress made sure that the President's decision to deploy U.S. forces on a limited humanitarian mission would not lead to another Somalia by imposing a funding cut-off and stipulat-

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157. See *supra* note 148.

158. Letter to Congressional Leaders on Haiti, 31 WEEKLY COMP. PRES. DOCS. 452-53 (Mar. 21, 1995).

ing that any change in the U.S. mission from one of strict refugee relief to "peace-enforcing" or "nation-building" not be implemented without the approval of Congress.<sup>159</sup> By virtue of its power of the purse, the Congress ultimately cannot avoid taking a stand when American forces are deployed in U.N. peacekeeping or peace enforcement operations.

Third, in situations involving delicate diplomacy and ongoing efforts to resolve a conflict peacefully, as in Haiti, Congress will be reluctant to impose binding prospective limits on the President's military options. This reflects a well-founded concern about undermining the President's ability to engage in coercive diplomacy in a fluid and flexible manner. If the President fails to pursue a coherent and well-articulated policy, however, Congress will step in to fill the policy vacuum, as it did toward the end of the Somalia operation.

In the end, the United States Congress, despite its newfound assertiveness, will continue to look to the President to play the leading role in shaping U.S. foreign policy goals for the post-Cold War period. Regardless of who is in the White House, one goal of U.S. foreign policy should be to strengthen the United Nations as a valuable instrument for conflict resolution. Yet because Congress is becoming more willing to challenge the President's foreign policy choices (at least in cases that do not involve threats to core U.S. security interests), the importance of sharing responsibility for decisions to send U.S. forces into hostile situations in U.N.-authorized military operations is increasing.

In the years ahead, a continuation of the Cold War "tacit deal" in the U.N. context would deprive the American people of full deliberation by both the executive and legislative branches before American forces are placed in harm's way. A failure to secure and sustain strong domestic support for American involvement in U.N. operations also would leave American policy especially vulnerable to sudden reversal by Congress, which could undermine U.S. credibility among both our allies and our adversaries, and erode the United Nation's ability to respond effectively to the conflict at hand. Building a domestic consensus in favor of American military involvement in U.N. operations often will not be easy. But if Presidents choose to remain on executive-power autopilot, they risk unleashing a congressional counterreaction that could ultimately harm America's ability to maintain a posture of constructive international engagement in the challenging times ahead.

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159. Dep't of Defense Appropriations Act, Pub. L. No. 103-335, 108 Stat. 2659 (1994).