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## LESSONS FROM THE SWORDBEARERS: THE EVOLVING PARADIGM OF THE UNITED STATES' MILITARY PARTICIPATION IN UNITED NATIONS' OPERATIONS

*Christopher H. Lytton*<sup>†</sup>

In the third century before Christ, the Samnites succeeded in trapping a large Roman army in the Claudine forks. Possessed of a glut of prisoners, the Samnite ruler asked his father, Herennius, what he should do with them. "Let them all go," replied the father. The son said that this was impossible. "Then kill them all," countered the father. This was equally impossible, said his son, and he asked for some middle course. "There is none," said the wise father, for a middle course would neither make the Romans your friends nor deprive you of your enemies."

—*Erich Eyck*<sup>1</sup>

### I. INTRODUCTION

The foregoing historical scene makes an eloquent statement about the nature of leadership. However, the moral can be illustrated by more recent events. Over half a century ago, the American people were jolted out of their blissful isolation by the startling news that the United States of

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1. RICHARD M. WATT, *THE KINGS DEPART: THE TRAGEDY OF GERMANY: VERSAILLES AND THE GERMAN REVOLUTION* 391 (2000).

America had been attacked by the Japanese. Pearl Harbor was the rallying cry for America's entry and victory in the Second World War. The actions that followed the tragedy in Hawaii were decisive and successful. The American military machine, along with its allies, emerged unconditionally victorious at the conclusion of the Second World War. There was simply no middle course to unconditional surrender.

Pearl Harbor was an attack on the American military, on a Pacific island and the casualties were largely military personnel. Now the children and grandchildren of the "greatest generation" have suffered their own day of infamy. The appalling atrocities of September 11, 2001, have changed America, Americans and the world. There is an undeniable new-world-order emerging from the wreckage in lower Manhattan. What form it will take, we can only wonder.

Will America lead the world in a war against international terrorism within the existing global power structures such as the United Nations and NATO, or will she revert to her isolationist roots and operate unilaterally? Whether America chooses to heed the advice of her first President George Washington, and steer clear of permanent alliances with any portion of the foreign world in this operation, or whether she turns to the United Nations Security Council for leadership, America must take decisive action and be firm and resolute in her course.

The recent calamity in New York, Virginia and Pennsylvania will not only impact America's war on terrorism, it will also forever change the role the United States military plays in operations around the world. Even as the rubble is cleared from the streets of New York City, the flame of violence still burns in the Balkans, as the world is forced to watch as a combination of the globe's preeminent military forces falter in their bumbling efforts to maintain peace in the tiny nation of Macedonia. The result of this persistent international disunity, spanning almost a decade, is that some two-million people in the region have been displaced and an inexcusable two hundred thousand lives have been lost. It is arguable whether the billions of dollars and thousands of soldiers in the region have truly solved more problems than they have created. The primary reason for this colossal international failure is a complete lack of leadership, vision and cohesion amongst the leading nations of the world.

The Eyck description of the Romans and Samnites, teaches the lesson that indecision is not an option, if one is to succeed. Unfortunately for humanity, history has been an imperfect director and cast many leaders with a lack of focus and decisiveness in the roles of prime minister, president, chancellor, tsar, emperor, or king or queen. The paradigm of poor casting in the past century has certainly been Europe. As a result of the continent's too-frequent poor eye for talent, early twentieth-century

Europe had the dubious distinction of introducing humankind to a new form of art-killing and destruction on an industrial scale. European leadership also introduced the term *world war* into the lexicon of history.<sup>2</sup>

Although the images of the blood-soaked fields of Belgium and France, and the destruction of modern day Poland may have faded from our collective memory, they hold lessons we cannot afford to forget.

This essay will use examples of leadership during and after the Great War to focus attention on the critical issue of the relationship between the Armed Forces of the United States and the United Nations.

Beginning with the historical backdrop of the Great War, this essay will show how an indeterminate foreign policy can lead to untold human suffering and national calamity. Additionally, this essay will examine the debate over the role and authority of the United Nations as it relates to the Armed Forces of the United States of America and the American Constitution.

## II. LESSONS FROM THE GREAT WAR

In the summer of 1914, the age of empire was on life support, still clinging to the last vestiges of Victorian hegemony. This notorious summer has been the topic of countless works and yet it remains one of history's mysteries.<sup>3</sup> Rather like the Charge of the Light Brigade or the Battle of the Bulge, the hot summer of 1914 is shrouded in the fog of war. Why and how did the Great War happen? This has been a persistent query for over eighty years. Yet, no matter whom you read, be it Barbara Tuchman, John Keagan, Martin Gilbert, Paul von Hindenburg, or Douglas Haig, there is no satisfactory answer. No amount of research will ever provide an adequate explanation for the outbreak of the Great War and why or how confusion and stubbornness was able to nourish the calamity for four devastating years. There is, however, one indisputable fact about the Great War: the conflict was initiated and perpetuated by a mere handful of men. These notorious leaders, known as the Lions of July<sup>4</sup> or the Swordbearers<sup>5</sup> demanded carnage, largely because they were unable to identify and establish the ultimate goals of the conflict. This confused and

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2. The Great War of 1914-1918 was not known as World War I until well after the end of the hostilities.

3. To borrow a phrase from the popular show of the same name on the Discovery Channel.

4. See generally WILLIAM JANNEN, JR., *THE LIONS OF JULY: PRELUDE TO WAR, 1914* (1997).

5. See generally CORRELLI BARNETT, *THE SWORDBEARERS: SUPREME COMMAND IN THE FIRST WORLD WAR* (1965).

haphazard strategy is largely to blame for the length of the war.

Their ruinous legacy of weak leadership did not end with the war; rather, the shortsightedness continued through the peace process and interwar years. The French, who proportionally suffered the most devastation, failed to develop a coherent foreign policy to lead the Paris Peace Conference. Unfortunately, the French sought only to punish the Huns, regardless of how this would affect the future peace and security of Europe. This grim and myopic determination was evidenced by the Tiger Clemenceau's actions at Versailles. The draconian peace, or the *diktat* of Versailles, created more chaos and devastation than the Great War itself, because it played a significant role in the outbreak of war in 1939. It is hard to dispute the theory that 1914-1918 and 1939-1945 were, collectively, Europe's second Thirty Years' War. France's attempt to reduce Germany to a second-rate continental power fanned the flames of National Socialism, and arguably made possible Corporal Adolph Hitler's seizure of power.

The British Empire suffered from the same combination of myopia and puzzlement. The British could arrive at no better foreign policy in the postwar years than that of detachment from continental affairs and appeasement as the road to "peace in our time." These policies, like those of the French, were largely to blame for the outbreak of war in 1939. If the British Empire had threatened to intervene in Munich, rather than appease, would Hitler have been so bold? If the British had been more engaged in continental affairs, would the French have been permitted to punish Germany to the extent they did? Or, would the British have provided a check to the growing French hegemony?

Still harder to understand were the goals of Germany's foreign policy. From the blank check to Austria-Hungary, to the Third Reich re-fighting Kaiser Wilhelm's war in 1939, the Germans suffered from the same indecision as that of their enemies. While all of this may seem to some like ancient history, the impact of 1914 cannot be relegated to the ash heap of history, because its consequences have directly shaped the world in which we live.

The Great War, and its progeny, World War II, cut a swath of death and destruction all across Europe. Sixty years later, the continent is still suffering the consequences. One need only look to the Frankenstein of Versailles, the former Yugoslavia, to see that people are still bleeding and dying because of the Lions of July and their ill-conceived policies.

### III. THE BURDEN OF EMPIRE

So, what do the acts and omission of now-antiquated European leaders who extolled the virtue of "oaths to the colors" and words like:

*warlords, cran, élan, and empire* have to do with the leadership of the world's indisputable superpower in the digital era? In short, everything. Leadership is leadership. Whether we are discussing Alexander the Great, Foch, Eisenhower, or George W. Bush, a leader must lead. It is not sufficient for those placed in command of great nations to merely be of good intentions. The George W. Bush administration has inherited a nation that appears to be at the zenith of its power. America's role in the global community is undeniable. While organizations such as the European Community (E.C.) attempt to carve out their niche roles in the world, only the United Nations (U.N.) is capable of providing a second voice of leadership on the world stage. Thus, it is somewhat inevitable that the United Nations and the United States will experience times of both cooperation and disagreement, despite the longstanding accusations that the United Nations functions as an American puppet. Recent events have demonstrated an estranged relationship between the United States and the United Nations, as U.N. members have snubbed the United States and attempted to relegate the American voice to the sidelines. The current Bush administration seems to be one of the most capable and experienced administrations in the past century when it comes to foreign policy issues. Therefore, the Bush White House may seek to resolve many of the nation's foreign policy dilemmas. To be sure, one long-ignored quagmire is the military relationship between the United States and the United Nations, specifically, what role will America play in U.N. military operations.

The Clinton presidency was global in thought and interventionist in action. The activities of the Clinton administration turned the United States into the world's supercop. The Clinton years saw the commander-in-chief exercising his power to dispatch American servicemen and women around the world to try to achieve what were often murky and inconsistent goals. Although the goals were often murky and the means uncertain, the power of the president to make those decisions was not considered controversial in nature. This is a fundamental problem with the way modern Americans view their president. The commander-in-chief should not be regarded as the *generalissimo*, but as the duly elected representative of the American taxpayer.

#### IV. THE DEVELOPMENT OF PRESIDENTIAL WAR POWERS

Prior to the creation of the United States of America, the power to make, declare, and fund war was in the hands of the ruling monarch alone. To change this old-world order, the framers of the Constitution set forth a revolutionary structure of government, and established an effective

separation of powers. In particular, the separation of the purse and the sword was established as a pillar of American society.<sup>6</sup> The rationale supporting this innovative concept was summarized in the writings of James Madison when he wrote:

Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded. They are barred from the latter functions by a great principle in free-government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.<sup>7</sup>

In Madison's statement one can find support for the contention that the framers attempted to limit the Executive's war powers. One may also look to the expansive war powers granted Congress in the Constitution itself to support executive limitation.<sup>8</sup> However, for the proponents of executive limitation there is an enigma in the fact that the framers originally intended to grant Congress the power to "make war" as opposed to the codified power to "declare war."<sup>9</sup> The decision to substitute the single word *make* for *declare*, renders it difficult to clarify what the limits of the Executive's war powers were intended to be. Why was Congress' power diminished? Unfortunately, history also fails to provide us with a bright-line rule because, although the United States has only declared war five times, its troops have been engaged in hostilities abroad over two hundred times.<sup>10</sup> Furthermore, unlike other conflicts between the executive and the legislative branches, the war powers issue is one that the judicial branch is reluctant to resolve.<sup>11</sup> Therefore, this controversy, which

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6. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 8 (1995).

7. *THE WRITINGS OF JAMES MADISON* 148 (Gaillard Hunt ed. 1910); FISHER, *supra* note 6, at 9.

8. See U.S. CONST. art. I, § 8.

9. Dean N. Reinhardt, *The United States Military and United Nations Peacekeeping Operations*, 19 HOUS. J. INT'L L. 245, 247 (1996).

10. See DONALD L. WESTERFIELD, *WAR POWERS: THE PRESIDENT, THE CONGRESS AND THE QUESTION OF WAR* 168 (1996). The five declared wars were: (1) The War of 1812, (2) The Mexican War, (3) The Spanish-American War, (4) World War I and (5) World War II.

11. U.S. CONST. art. II, §§ 1-2. The authority of the judicial branch is set forth in Article III, sections 1 and 2 of the Constitution:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this

was recognized by the framers, continues to elude any concrete resolution, while service people find themselves all over the world for reasons that are unclear to the American public.

Although this issue was controversial prior to the Second World War, the postwar role of the United States as a superpower and the creation of the United Nations made the equation even more problematic. From the failure of the League of Nations, the United Nations emerged as the antidote to the disease of carnage that had plagued Europe in the previous decades. The United Nations, through its charter, dedicated itself to maintaining international peace and security, as well as other goals.<sup>12</sup> To maximize its ability to do this, the United Nations established a Security Council as one of its organs and vested in that body the authority to make these aspirations a reality, through force if necessary. While the efficacy of this system is debatable, the doctrinal foundation of the United Nations includes goals that all civilized nations should embrace. The five permanent and ten rotating members of the Security Council may ultimately represent an effective vehicle for the establishment of international peace and security; however, this is not the current situation.<sup>13</sup>

The idea of collective security is not unique to the United Nations. Previous examples include the Athenian league of 478 B.C., the Holy Alliance of Austria, Russia and Prussia in 1815, and the post-WWI League of Nations in 1919.<sup>14</sup> However, these never possessed the global reach or military might of the Security Council. Nonetheless, without the political, economic, and military support of the United States, the United Nations would face an untenable future. Thus, there are those who argue that it is incumbent upon the president to extend the Executive's power to its limits in support of the United Nations to achieve world peace. This must also be done, the argument follows, in order to fulfill the visions of the Framers, so influenced by Locke and Montesquieu. These philosophers maintained that the authority over foreign affairs was to be vested solely in the Executive. They argued that, "legislative bodies lacked the competence to manage foreign affairs because they lacked the essential qualities

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Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party. . . .

12. U.N. CHARTER art. 1.

13. Michelle Smith, *Expanding Permanent Membership in the UN Security Council: Opening a Pandora's Box or Needed Change*, 12 DICK. J. INT'L L. 173, 174 (1993).

14. John J. Kavanaugh, *U.S. War Powers and the United Nations Security Council*, 20 B.C. INT'L & COMP. L. REV. 159, 168 (1997).



of unity of design, secrecy, speed, and dispatch. . . .”<sup>15</sup>

Furthermore, those who seek to limit the Executive’s war powers are confronted with the expansive authority granted the President in Article II, Section I of the Constitution *versus* the limited powers granted Congress. In terms of war powers, Congress’ authority is extremely specific and can be enumerated and analyzed using a four-corners approach to the Constitution. Article I, Section 8 sets forth Congress’ war powers in no uncertain terms:

11. To declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water,
12. To raise and support Armies, but no appropriation of money to that use shall be for a longer term than two years,
13. To provide and maintain a Navy,
14. To make Rules for the Government and Regulation of Land and naval forces and,
18. To make all Laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or any Department or Office thereof.<sup>16</sup>

The power granted the Executive may be vague and broad because the framers intended to create executive dominance in this realm. It is possible that the president’s power was not limited to a laundry list like Congress’ because the Executive’s dominant role in the realm “was well understood by the Framers raised on Locke, Montesquieu and Blackstone.”<sup>17</sup> However, was it the intent of the framers that this extensive grant

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15. See ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* 53 (1991).

16. U.S. CONST. art. I, § 8.

17. Louis Henkin, *Foreign Affairs and the Constitution*, FOREIGN AFFAIRS (Winter 1987-88), at 43 *quoted in* TURNER, *supra* note 15, at 54.

of authority be used to protect America in times of peril? Or was it intended to give the Executive the mandate to protect the globe from itself?

#### V. THE CHARTER OF THE UNITED NATIONS AND THE UNITED NATIONS PARTICIPATION ACT

In 1945, one of the Senate's main fears in ratifying the United Nations Charter was that America would once again be drawn into a foreign war.<sup>18</sup> However, the concept that the United States might be perpetually supplying troops for peacekeeping operations was not anticipated, because peacekeeping operations are not specifically authorized under Chapter VII.<sup>19</sup> Thus, such operations were not a foreseeable byproduct of ratification. Rather, peacekeeping evolved from the charter's inability to achieve its foundational goals through the codified mechanism.

The U.N.P.A. contains a further provision to the effect that nothing in the Act itself is to be construed to authorize the President to contribute forces "in addition" to those committed under a special agreement negotiated pursuant to article 43. This adds a measure of ambiguity to the question of whether the President has authority, apart from the U.N.P.A., to contribute forces to U.N. operations.<sup>20</sup>

The structure of Chapter VII of the U.N. Charter is an ascending scale of measures that the Security Council may take in order to bring a state into compliance with the goals of the charter. At the outset, the Security Council must recognize that a breach of international peace has occurred under Article 39.<sup>21</sup> Subsequently, the Security Council may bind member nations to take action, first under Article 41, then, if necessary, under Article 42 of the charter.<sup>22</sup> The fatal flaw in the charter's method comes

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18. Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 75 (1991); see also U.N. CHARTER art. 39.

19. Reinhardt, *supra* note 9, at 252.

20. James A. R. Nafziger & Edward M. Wise, *The Status in United States Law of Security Council Resolutions Under Chapter VII of the United Nations Charter*, 46 AM. J. COMP. L. 421, 432 (1998).

21. Kavanaugh, *supra* note 14, at 171-72.

22. See U.N. CHARTER arts. 41-42. (Article 41 states that "the Security Council may decide what measures not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures." Article 42 states that "the Security Council may take action by sea, air, or

with the mechanism for assembling the forces necessary to carry out the will of the Security Council. The much maligned and unfulfilled Article 43 of the charter provides the method for the fulfillment of Article 42; however, Article 43 is ephemeral.<sup>23</sup> It may be argued that military action under the rubric of Article 42 is actually contingent on the creation of an Article 43 army. If this is the nature of the relationship, then there has never been an Article 42 sanctioned military action, which means the United Nations should not be involved in any Security Council-sanctioned military actions.

The Achilles heel of Article 43, as far as the United States is concerned, is that the special agreements to provide troops are subject to ratification by member states according to individual state's constitutional processes.<sup>24</sup> In the United States, that means that the Congress, not the president, is vested with the power to implement an Article 43 agreement.<sup>25</sup> Nonetheless, the limitation of Congress' restriction on Article 43 agreements through the United Nations Participation Act (U.N.P.A.), has not eliminated the Executive's unilateral authority to use American troops in U.N. actions. However, it has affected the charter-based legitimacy of Security Council resolutions in Korea, Iraq, and the former Yugoslavia.

Those who argue that the president can unilaterally supply troops to a U.N. mission often rely on Section 6 of the U.N.P.A. which states: "In order that there may be no doubt about the availability of our armed forces . . . Congress should . . . confirm its view that the President has the power and obligation, in compliance . . . with the Charter, to make the forces provided in this agreement available to the Security Council."<sup>26</sup> However, the commitments in these committee reports were referring to the deployment of troops under an already negotiated Article 43 agreement that does not exist.<sup>27</sup> Nonetheless, presidents from Harry

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land forces as may be necessary to maintain and restore international peace and security . . .") *Id.*

23. See U.N. CHARTER art. 43. (Article 43 provides that "all members of the United Nations in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call . . . armed forces, assistance and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.") *Id.*

24. Timothy D. O'Hara, *Without Justification: Misplaced Reliance on United Nations Security Council Resolutions for Presidential War Making*, 31 J. MARSHALL L. REV. 583, 617 (1998).

25. *Id.*

26. *Report Providing for the Appointment of Representatives of the United States in the Organs and Agencies of the United Nations, and to Make Other Provision With Respect to the Participation of the United States in Such Organization*, S. REP. NO. 717, at 9 (1945).

27. TURNER, *supra* note 15, at 90.

Truman to George W. Bush have relied on the ratification of the U.N. Charter as vesting in them the authority to support the Security Council's decisions. The interpretation of the U.N.P.A. and its limiting impact on the president is a crucial starting point for any discussion of executive war powers. Regardless of what Section 6 means, to argue that the military obligation created in Article 42 supersedes the limitations placed on that charter provision by the U.N.P.A. would be in derogation of both the Constitution and the Supreme Court.<sup>28</sup>

## VI. PEACEKEEPING OR WARMAKING?

When the United States joined the United Nations and the North Atlantic Treaty Organization (NATO) at the start of the Cold War, Congress took care to ensure that the deployment of U.S. military power would continue to occur under our constitutional process. This still left unanswered the question of how, in practice, such international arrangements would factor into the American constitutional process.<sup>29</sup> Although the public may overwhelmingly support a president's use of force, for example, President George Bush's actions in Iraq, Congress did not and cannot delegate its war powers through a treaty. Thus, even the staunchest supporter of executive dominance must admit that the Congress intended, through its passage of the U.N.P.A., to be involved in decisions supplying forces to the Security Council.<sup>30</sup> Therefore, the issue as to what the U.N.P.A. mandates often finds itself hinged to partisan political positions. Congress can denounce a treaty at its own discretion, but that does not necessarily render the president impotent as to all U.N. operations.<sup>31</sup> Rather, the president and the United Nations have avoided the quagmire of Article 43 by categorizing full-scale military operations as police actions or peacekeeping operations.

The United Nations faced its first military challenge when communist North Korea invaded South Korea. The defense of Korea by the United States and a handful of other nations was the Security Council's first use of

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28. *Reid v. Covert*, 354 U.S. 1, 18 (1957).

29. Charles Tiefer, *War Decisions in the Late 1990's by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 34 (1999).

30. Jane E. Stromseth, *Treaty Constraints: The United Nations Charter and War Powers, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 83, 85 (Gary M. Stern & Morton H. Halperin eds. 1994).

31. *See Diggs v. Schultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). "Under our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it." *Id.* *See also* O'Hara, *supra* note 24, at 645.

force. Because the Korean conflict was primarily an American-led intervention, it tested the president's authority to act pursuant to a U.N. decision. President Truman sent American troops to Korea without Congressional approval. Truman maintained that any action taken by the United Nations was not a "war" but an "international police action." His theory was that this designation nullified the need for the Congress to declare war.

It can be argued that the Congress implicitly tendered its support to the action by passing a military appropriations bill that provided for the funding of Korean military expenses. It was during these events that the Supreme Court, in the *Youngstown* case, specifically bypassed the opportunity to call Truman's actions unconstitutional. The precedent set by Truman has become the foundation of the argument used by future presidents justifying executive aggrandizement. By far the most striking recent example of unilateral executive action came during the Bush administration in response to Iraqi aggression.

On August 2, 1990, Iraq invaded Kuwait for reasons that are still debatable. Shortly after the invasion, the United Nations Security Council adopted resolution 678, which authorized member states cooperating with Kuwait to "use all necessary means to uphold and implement" earlier resolutions.<sup>32</sup> After this resolution passed, the coalition forces launched Operation Desert Storm on January 16, 1991.<sup>33</sup> Unlike the Korean conflict, the Persian Gulf conflict proceeded through the hierarchy of Articles 39 and 42. The tactics of the Bush administration were not surprising, but were effective. Like his predecessors, President George Bush claimed that the American participation in Operation Desert Storm was only as part of an international force for peace and, therefore, no declaration of war was necessary.

After Operation Desert Storm, the United States sent troops to Somalia and planned an invasion of Haiti. However, the Pandora's box was not completely opened until 1993, when a few hundred U.S. marines were sent to Macedonia as part of a peacekeeping unit, laying the groundwork for NATO's eventual war with Serbia during the Clinton years and the continuation of the Balkan operation in Macedonia.<sup>34</sup> The litany of Security Council resolutions that followed the unrest in the former Yugoslavia rendered President Clinton's constitutional authority even

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32. S.C. Res. 678, U.N. SCOR, U.N. Doc. S/Res/678 (1990), reprinted in 1 U.S. DEP'T ST. DISPATCH 298 (1990).

33. Andrew Rosenthal, *War in the Gulf: The Overview*, N.Y. TIMES, Jan. 17, 1991, at A1.

34. Elaine Sciolino, *U.S. Says it Will Send 300 Troops to the Balkan Republic to Limit Strife*, N.Y. TIMES, June 11, 1993, at A1.

more debatable than Bush's before him. Although it should be noted that none of the following resolutions authorized the use of force as a direct means of maintaining the peace, all necessary means are authorized.

On September 25, 1991, the U.N. Security Council unanimously passed Resolution 713—its first resolution concerning the former republics of Yugoslavia. In this resolution the Security Council under Chapter VII of the Charter of the United Nations, decided that all States should implement a complete embargo of weapons to Yugoslavia . . . In Resolution 795 the Security Council authorized the U.N. Secretary General to establish the U.N. Protection Force (UNPROFOR) in Macedonia . . . The United States' offer to contribute additional personnel to the UNPROFOR was welcomed by the Security Council in Resolution 842 . . . Finally in Resolution 844 again acting under Chapter VII the Security Council decided to authorize the reinforcement of the UNPROFOR.<sup>35</sup>

## VII. THE SUPREME COURT AND CONGRESS

The true predicament is that two branches of the government disagree inherently on the issue of presidential war powers, and the third branch of government has not resolved the issue and may not have the authority to do so. Unlike prayer in school, abortion, or gun-control, where the president and the Congress may disagree, war powers may not be within the purview of the Supreme Court because of the political question doctrine.

### A. *The Supreme Court*

Although the role of the Supreme Court in the war-powers controversy has been limited, the immense prestige and power of the Court makes even its sporadic decisions significant. The Court has exercised judicial restraint in this area, primarily on the basis that the issue is inherently political and therefore non-justiciable. However, the Court, in *Baker v. Carr*, announced its authority to essentially decide a Constitutional war powers issue. “[W]hether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed . . . is a responsibility of this Court as . . . interpreter of the

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35. Reinhardt, *supra* note 9, at 268.

Constitution.”<sup>36</sup> Although the Court has not frequently applied the *Baker v. Carr* rationale to the war powers debate, the Court, in *United States v. Curtiss-Wright Export Corp.*, set forth a potential template for deciding the issue.<sup>37</sup>

In *Curtiss-Wright*, the world was reintroduced to the president as the “sole organ of the federal government in the field of foreign relations.”<sup>38</sup> Yet this case is not a reliable precedent for supporting an Article 42 deployment, because the actions taken by the President in the *Curtiss-Wright* case were not inconsistent with an act of Congress. However, an Article 42 deployment would be in defiance of the U.N.P.A. The “counterforce”<sup>39</sup> to this jurisprudence came from the *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>40</sup> During the conflict in Korea, Truman ordered the seizure of a steel production plant using his independent constitutional powers as a justification. However, the Court found that the seizure was not within the president’s power. In his concurring opinion, Justice Jackson set forth a three-tiered framework that provided a fluctuating scale for the evaluation of presidential power:<sup>41</sup>

(1)When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which its distribution is uncertain. Therefore congressional inertia, indifference, or acquiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility . . . and,(3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can only rely on his own constitutional powers minus and constitutional powers of Congress on the matter. . . .<sup>42</sup>

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36. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

37. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

38. *Id.* at 320.

39. Major Geoffrey Corn, *Presidential War Power: Do the Courts Offer Any Answers?* 157 MIL. L. REV. 180, 199 (1998).

40. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

41. *Id.* at 635-38.

42. *Id.*

This fluctuating approach to analyzing war powers was affirmed in the case of *Dames & Moore v. Reagan*.<sup>43</sup> In this case, the Court upheld the executive order issued by President Reagan which terminated all legal claims against Iran then currently in U.S. courts. The Court utilized the Jackson analysis from *Youngstown*. Therefore, it can be argued that the *Youngstown, Dames & Moore* line of cases represent the most appropriate vehicle to the resolution of a war powers debate. Thus, President Reagan's unilateral war powers were at their lowest ebb when the Congress demanded that the CIA cease funding the Contras in Nicaragua.

Although the Supreme Court has not directly decided the issue of the president's decision to deploy troops for a U.N. mission, there are some lower court decisions that are instructive. In particular, the *Dellums v. Bush* case directly addressed the issue of unilateral presidential military deployment.<sup>44</sup> The case arose when fifty-four members of Congress (including members from both houses) attempted to avail themselves of the power of the judiciary to limit President George Bush's military expulsion of Iraqi forces from Kuwait. However, the decision of this Court was unfortunate because it decided to dismiss the claim using the rationale that it was not "ripe." According to the Court, the claim failed to be ripe because the entire Congress had not taken any position on the issue of the president's plan to intervene in Kuwait.

Nonetheless, some of the language in this case is instructive. In the future, it is likely that proponents of executive limitation will seize on the following rationale articulated by the Court: "[w]hile the Constitution grants to the political branches, and in particular to the Executive responsibility for conducting the nation's foreign affairs, it does not follow that the judicial power is excluded from the resolution of cases merely because they may touch upon such affairs."<sup>45</sup> Accordingly, the Executive must be wary of the *Dellums* dicta to ensure that it does not become a Congressional mission but merely remains an academic possibility.

While the zone of twilight is dicta, there is an undeniable reality about the gloss that history has imposed on the text of the Constitution itself. "The historical gloss hypothesis is premised on the conclusion that a history of unilateral presidential war making decision demonstrates that the Constitution should be interpreted to support executive authority to make such unilateral decisions in the future."<sup>46</sup> Although this gloss or custom cannot supplant actual Constitutional doctrine, it can help define

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43. *Dames & Moore v. Reagan*, 453 U.S. 660 (1983).

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

45. *Id.* at 1145.

46. See Corn, *supra* note 39, at 238.



the words of the text.<sup>47</sup> Although this argument may run afoul of the positions maintained by the traditional textualist it is clear from Justice Frankfurter's position on the issue of custom, that the concept is tenable and perhaps the President's best ally for supporting unilateral action.

Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on the executive power vested in the President by Section 1 of Article II.<sup>48</sup>

### *B. The Congress and the War Powers Resolution*

The relationship between congressional and executive war powers has been analogized by some to be in a state of cold war. Although that may be an exaggeration, the fact is that the Senate ratified the charter, and the Congress later enacted the United Nations Participation Act. Further, when Congress passed the War Powers Resolution, they made clear their intent to limit unilateral Presidential war making.<sup>49</sup> While the Resolution has proven to be ineffective and far too complicated, its purpose is undeniable. The purpose is to "insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities. . . and to the continued use of such forces. . ."<sup>50</sup>

Additionally, there have been several recent attempts to further limit Presidential authority to place American forces under foreign command, but because of Executive opposition and veto, these measures have been defeated. Some of the proposed legislative measures include: (1) the Nickles-Cochran Amendments to the Department of Defense Appropriations Act of 1994, (2) the Peace Powers Act of 1994, (3) the National

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47. See FISHER, *supra* note 6, at 190.

48. *Id.*; see also *Youngstown Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952).

49. 50 U.S.C. §§ 1541-48 (1994).

50. *Id.* § 1541.

Security Revitalization Act, and (4) the United States Armed Forces Protection Act of 1996.<sup>51</sup>

The War Powers Resolution (WPR) in Section 1543 directs the President to submit a report to Congress within forty-eight hours of the introduction of U.S. forces into combat in a hostile environment.<sup>52</sup> Once a report has been submitted, Section 1544 gives the President unilateral deployment powers for sixty days, with a possible thirty-day extension.<sup>53</sup> However, the President, under Section 1543 must terminate the deployment within the sixty days unless Congress: (1) has declared war, (2) authorized the continuation of the action, or (3) cannot meet because the U.S. is under attack.<sup>54</sup> The thrust of the WPR is to encourage the President to consult with Congress in every possible instance.<sup>55</sup>

Unfortunately for all Americans, the WPR has proven to be ineffective and rife with inherent contradictions.<sup>56</sup> Its effectiveness is not only hampered by ambiguous language, but by the fact that, unless the president reports under Section 1543(a), the clock does not begin to run. An example of this deficiency was when President Reagan reported to Congress on U.S. air strikes against Libya; the clock never started to tick because of the general nature of the report.<sup>57</sup>

One of the main deficiencies of the WPR is that it runs contrary to the intent of the framers. "One of the reasons given by John Locke and others for vesting control over relations with the external world in the executive was that the details of such matters were not susceptible to regulation by antecedent laws."<sup>58</sup> However, the WPR attempts to legislate war, which is not only naïve, but dangerous to the men and women of the armed forces. Imagine a president forced to order imprudent military tactics in order to avoid the hammer of the WPR from dismembering the operation. Clearly, the WPR has the potential to divest the President of his position as Commander-in-Chief, and vest that power in the legislature to micromanage a fluid and foreign situation.

### VIII. CONCLUSION

War powers go to the very core of our republic. As Chief Justice

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51. Corn, *supra* note 39, at 247-48.

52. 50 U.S.C. § 1543(a) (1994).

53. *Id.* § 1544.

54. *Id.* §§ 1543(a), 1544(b).

55. *Id.* § 1542.

56. FISHER, *supra* note 6, at 131.

57. *Id.* at 132.

58. TURNER, *supra* note 15, at 149.

Marshall once said, "it is a constitution we are expounding." The actions required to constitutionally authorize an exercise of war powers have roots in the text and original intent of the Constitution, yet such actions evolve during each era.<sup>59</sup> Although we must recognize new evolving paradigms in a post-Cold War world, the fact remains that we have an effective and valued separation of powers in this country.

The use of American might in support of anything other than the direct will of the American people as expressed through their elected representatives may indeed require an entirely new paradigm for the execution of war powers. However, we must clarify our goals as to this foreign and domestic policy issue. Do we want a President with the power to force American troops to don blue helmets and take orders from a modern-day Foch? Do we want a president with the authority to supply men and materiel in support of a U.N. invasion of an African nation in the midst of a holocaust? Or, do we want a president who waits upon the will of the people before making these momentous decisions? In light of the tragic death of so many Americans in New York, Virginia and Pennsylvania, America, now more than ever, must have faith in the Founding Father's vision for a democracy that can protect its borders and citizenry.

As we embark upon this path, we should remember the legacy of the Swordbearers. An undefined policy in this realm will result in indeterminate leadership while soldiers are in the field. The increasing centralization of war powers in the hands of one person is in derogation of the separation of powers. We must ask ourselves, has the world changed so much since 1914? If the answer is *no*, are we willing to have our own Lions of July?

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59. Tiefer, *supra* note 29, at 38.