

Pace International Law Review

Volume 3 | Issue 1

Article 1

September 1991

Congress, the President and the United Nations

Louis Henkin

Follow this and additional works at: <http://digitalcommons.pace.edu/pilr>

Recommended Citation

Louis Henkin, *Congress, the President and the United Nations*, 3 Pace Y.B. Int'l L. 1 (1991)

Available at: <http://digitalcommons.pace.edu/pilr/vol3/iss1/1>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact cpittson@law.pace.edu.

PACE UNIVERSITY
SCHOOL OF LAW
YEARBOOK OF
INTERNATIONAL LAW

Volume 3

1991

LECTURE

**CONGRESS, THE PRESIDENT AND THE
UNITED NATIONS†**

Louis Henkin††

Recent events—current events—have agitated a simmering constitutional controversy in the United States, the distribution of war powers between Congress and the President. They have also agitated—awakened—issues of international law, so long dormant that few of us recognize them. In the Gulf Crisis and the Gulf War, the two sets of issues, the constitutional and the international, have become fused, confused.

Despite recurrent political flurries of constitutional dimension during the past fifteen-twenty years, even students of con-

† The fourth annual Blaine Sloan Lecture was delivered on February 12, 1991. Presented in honor of Blaine Sloan, Professor Emeritus of International Law and Organization at Pace University, the lecture series is delivered each year to the University and Law School community in order to promote scholarly debate in international law.

†† University Professor Emeritus, Columbia University.

stitutional law have not been at home among the constitutional issues of foreign affairs and war powers. Students of international law, for their part, had dismissed a crucial chapter of the United Nations Charter as academic and hypothetical, during the forty (out of forty-five) years in which the Cold War had paralyzed the United Nations collective security system. The confluence of constitutional and international legal issues during the Gulf Crisis has found both constitutional and international lawyers largely at sea.

In these pages I address—briefly—the legal issues of the Gulf Crisis through the following sets of questions.

What is the distribution of authority between Congress and the President under the Constitution, as it relates to war or other uses of force against other nations?

In light of those constitutional allocations of authority, did the President require Congressional authorization to send forces of the United States into war in the Gulf?

What is the authority of the United Nations Security Council under the United Nations Charter, and what are the rights, responsibilities and obligations of the United States under the Charter and in respect of Security Council resolutions?

Did the Security Council have authority to adopt resolutions imposing sanctions against Iraq, authorizing United Nations members to enforce those sanctions, and later to use force to liberate Kuwait? Did the United States have the right, or perhaps even the obligation, pursuant to the several Security Council resolutions, to impose economic sanctions against Iraq; to monitor and enforce United Nations sanctions against violations by other states; to send military forces into the Gulf and to initiate military force against Iraqi forces in Kuwait and Iraq?

Do the rights, responsibilities and obligations of the United States under the United Nations Charter modify the normal distribution of authority between Congress and the President under the Constitution?

Did the President have authority to impose sanctions against Iraq pursuant to the Security Council resolutions, and did the subsequent Security Council resolutions relieve the President of any obligation he may have had under the Constitution to obtain

Congressional authorization to deploy forces to implement United Nations sanctions, and later to pursue war against Iraq?

Some of these legal questions about United States responses to the Iraqi aggression against Kuwait were mooted by resolutions of the Security Council¹ and Congress.² It seems fruitful nonetheless to consider those issues now, in comparative tranquility, when they are no longer the subject of case and controversy. Other legal questions, under the Constitution and under international law, remain in issue and may yet irrupt during the aftermath of the Gulf Crisis. No doubt they will have interest and significance for the future.

I. WAR POWERS—CONGRESS AND THE PRESIDENT³

The Constitution gives Congress the power to declare war.⁴ By that grant the Framers gave Congress the power to decide whether the United States shall go to war or remain at peace.⁵ The Constitution also gives Congress the power to raise and support armies and to provide and maintain a navy, and to make rules for the government and regulation of these forces.⁶

The Constitution designated the President as Commander-in-Chief of the armed forces of the United States.⁷ By that clause, the Framers sought to give effect to lessons learned during the recent Revolutionary War: They reaffirmed civilian con-

¹ See U.N. Doc. S/RES/660 (1990); U.N. Doc. S/RES/661 (1990); U.N. Doc. S/RES/662 (1990); U.N. Doc. S/RES/664 (1990); U.N. Doc. S/RES/665 (1990); U.N. Doc. S/RES/666 (1990); U.N. Doc. S/RES/667 (1990); U.N. Doc. S/RES/669 (1990); U.N. Doc. S/RES/670 (1990); U.N. Doc. S/RES/674 (1990); U.N. Doc. S/RES/677 (1990); U.N. Doc. S/RES/678 (1990). For summaries of these resolutions, see Appendix.

² H.J. Res. 77, 102d Cong., 1st Sess., 137 CONG. REC. 443 (1991).

³ I draw here on previous writings, principally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* chs. 2-4 (1972) [hereinafter *FOREIGN AFFAIRS*]; Henkin, *The Constitution and Foreign Affairs*, *FOREIGN AFF.*, Winter 1987-88, at 284; L. HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* ch. 1 (1990). See also L. Henkin, *Testimony before the United States Senate Committee on the Judiciary Regarding the President's Authority to use Force Without Congressional Authorization* (January 8, 1991) (forthcoming) [hereinafter *Testimony before the United States Senate*].

⁴ U.S. CONST. art. I, § 8, cl. 11.

⁵ See, e.g., *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.); *Brown v. United States*, 8 U.S. (1 Cranch) 110, 145, 147, 149 & 152-4 (1814) (Story, J., dissenting).

⁶ U.S. CONST. art. I, § 8, cl. 12-14.

⁷ U.S. CONST. art. II, § 2, cl. 1.

trol of the military forces; they established a single unified command of the armed forces (rather than command by "committee," as under the Continental Congress).⁸

The dispositions of the Constitution seem clear and beyond dispute. The Constitution gave the President no authority to raise and support an army; it gave him no authority to take the country to war. If Congress decided to raise, support and maintain an army and navy, the President would be their Commander. If Congress declared war, or otherwise decided for war, the President would command the armed forces in that war.

At the Constitutional Convention, the Framers recognized a single exception: the President had authority to engage in war to defend the United States if it were attacked. In those circumstances there was no decision to be made: the United States would be at war as the result of enemy action. That, in those circumstances, Congress authorized the President to fight the war went without saying.

Slowly, during the past 200 years, Presidents began to assert constitutional power to deploy forces of the United States abroad for various purposes on their own authority.⁹ In general, Presidents did not purport to derive that power from their authority as Commander-in-Chief but principally from other powers—from their duty to take care that the laws of the United States be faithfully executed;¹⁰ from power, as executive, to implement treaties of the United States; principally, from authority to conduct the foreign relations of the United States.¹¹ The President had begun to assert authority to "make U.S. foreign policy," at least as early as Washington's Neutrality Proclamation (1793)¹² and the Monroe Doctrine (1823). Slowly, perhaps ineluctably, the President acquired a general "Foreign Affairs Power," in some respects independent of Congress. Repeatedly,

⁸ See Hamilton, *The Federalist* Nos. 68, 69, in *THE FEDERALIST* 457, 462 (Cooke ed. 1961) [hereinafter *THE FEDERALIST*].

⁹ See *infra* note 14.

¹⁰ U.S. CONST. art. II, § 3. See *infra* note 16 and accompanying text.

¹¹ This authority is implied in the President's power to appoint Ambassadors (with the consent of the Senate) and to receive foreign Ambassadors. U.S. CONST. art. II, §§ 2-3. See *FOREIGN AFFAIRS*, *supra* note 3, at 45-50.

¹² Proclamation of Neutrality, No. 65, ASP, *Foreign Relations* I, 140, 93rd Cong., 1st Sess. (1793), reprinted in 32 *THE WRITINGS OF GEORGE WASHINGTON* 430-31 (J. Fitzpatrick ed. 1939).

Congress confirmed the President's "plenary" foreign affairs power by ratification or acquiescence and added to it by express delegation.¹³

In time, the President began to combine his different "hats," putting the forces which he commanded as Commander-in-Chief at the disposal of the policy he determined under his executive power or his foreign affairs power. Sometimes forces deployed under such Presidential authority engaged in or became involved in hostilities. Depending on what one considers a deployment and how one defines hostilities, there have been more than 200 such instances in which the forces of the United States were engaged in hostilities without advance authorization by Congress.¹⁴ With the exception of United States participation in the United Nations action in Korea (1950-53), however, these engagements were not properly "war" under the Constitution or under international law. With the exception of President Truman in respect of Korea, no President claimed authority to go to war without authorization by Congress.¹⁵

The Korean War was the high-water mark for claims of Presidential war power and in that case Congress acquiesced in and ratified the President's action.¹⁶ After the searing experience of the United States in Vietnam, however, Congress, in the War Powers Resolution of 1973, moved to reassert its constitutional authority.¹⁷

A. *Korea*

The Korean War (1950-1953) is of particular pertinence to the constitutional issues engendered by the Persian Gulf Crisis. In 1950, North Korean forces invaded South Korea. The United

¹³ See FOREIGN AFFAIRS, *supra* note 3, at 37-38. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), the Court spoke of "the very delicate, plenary and exclusive power of the President as sole organ of the federal government in the field of international relations."

¹⁴ For a list of these deployments see 137 CONG. REC. S130-135, (daily ed. Jan. 10, 1991).

¹⁵ Perhaps President Reagan can be seen as having claimed such power in invading Grenada and President Bush may have claimed that power in invading Panama. In both cases the actions were limited and brief, substantially short of war, but both were doubtless subject to the War Powers Resolution.

¹⁶ See FOREIGN AFFAIRS, *supra* note 3, at 345-46 & n. 27. See *infra* notes 21-23.

¹⁷ See *infra* note 21.

States led efforts in the United Nations Security Council to condemn the aggression and to mobilize resistance to it. The Security Council recommended that states come to the assistance of South Korea and that those doing so place their forces under a Unified Command led by the United States. Pursuant to those Security Council recommendations, President Truman ordered forces of the United States to help defend South Korea. Apparently, he claimed authority to do so from the President's power to carry out undertakings by the United States in the United Nations Charter, a treaty of the United States.¹⁸

President Truman did not request authority from Congress. Congress, controlled by the President's political party, did not seem significantly concerned over the Presidential initiative though it was without precedent and implied claims of new, major Presidential power at the expense of Congress. In modest debate, Congress supported the President's action, but apparently saw no need to provide a declaration of war or other formal authorization. The Republicans, the minority party in both houses of Congress, did not oppose the action in Korea. Senator Taft did question the President's constitutional authority but made little of it, and his constitutional strictures were largely overwhelmed in partisan controversy about United States foreign policy in the Far East generally.¹⁹

In the case of Korea, Congress promptly indicated full support for the Presidential action. Within days Congress appropriated funds for the conduct of the war. Soon it extended the Selective Service Act.²⁰ President Truman, I shall suggest, did not have constitutional authority to go to war when he did, but Congress immediately ratified his actions.²¹

B. *The Relevance of the Vietnam War*

In the 1960's, the United States was again at war in Asia, this time in Indochina. That war brought national malaise but

¹⁸ I consider the merits of that claim below. See *infra* note 31 and accompanying text.

¹⁹ 96 CONG. REC. 9320 (daily ed. June 28, 1950).

²⁰ Mutual Defense Assistance Act of 1950, Pub. L. No. 621, 64 Stat. 373 (1950); Far Eastern Economic Assistance Act of 1950, Pub. L. No. 447, 64 Stat. 5 (1950); Selective Service Extension Act of 1950, Pub. L. No. 599, 64 Stat. 318 (1950).

²¹ See *id.* On the effects of ratification, see Prize Cases, 67 U.S. 635, 647 (1862).

no constitutional crisis and little constitutional controversy. In 1964, in the Tonkin Gulf Resolution, Congress resolved that it “approves and supports the determination of the President as Commander-in-Chief to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”²² Later some questioned the constitutional sufficiency of that authorization to support full-fledged war, but there was little basis for claiming that Presidents had usurped Congressional authority. Congress may have been foolish, even reckless, but it had given the President a “blank check” to engage in hostilities, including war.

C. *The War Powers Resolution*

Though Congress had authorized the war, later, when the war went badly, many in Congress felt that they had been misled. When, following “non-victory” in Vietnam and the coincidence of the Watergate scandal, the Presidency was on the defensive, Congress decided to reassert its constitutional authority over war and peace. In 1973 Congress adopted the War Powers Resolution, and upheld it over President Nixon’s veto.²³

The War Powers Resolution began by setting forth Congress’ view of Presidential power under the Constitution. Congress declared that the President had power to introduce forces of the United States into hostilities (or “into situations where imminent involvement in hostilities is clearly indicated by the circumstances”) only if Congress authorized it by declaration of war or by statute, or in time of emergency occasioned by an attack on the United States (“or its armed forces”).²⁴ In subsequent sections of the Resolution, Congress required the President “in every possible instance” to consult Congress before introducing forces into hostilities; to report any such engagement of forces; and to terminate such engagement after 60 days unless Congress acted to authorize the President to continue.²⁵

²² H.J.Res. 1145, 73 Stat. 384 (1964), § 1.

²³ 87 Stat. 555, Public Law 93-148, 93rd Cong. (H.J.Res. 542, adopted over a veto by President Nixon on Nov. 7, 1973). See *Veto of the War Powers Resolution*, 311 PUB. PAPERS 893 (1973) (President’s Message to the House of Representatives Returning H.J. Res. 542 Without His Approval. Oct. 24, 1973).

²⁴ War Powers Resolution § 2(c).

²⁵ *Id.* at § 5(b). The President’s authority is extended to 90 days if the President

Congress also asserted the right to terminate any such engagement by "legislative veto," by a concurrent resolution not requiring the President's approval.²⁶ In addition, doubtless with a view in particular to the United Nations Charter and the North Atlantic Treaty, the War Powers Resolution declared that no treaty of the United States shall be interpreted as authorizing the President to introduce forces of the United States into hostilities or into situations where imminent involvement in hostilities is indicated by the circumstances, without authorization from Congress.²⁷

Presidents have repeatedly challenged the constitutionality of the War Powers Resolution, but they have not told us why it is unconstitutional.²⁸ The legislative veto provision of the Resolution (like other such provisions in Congressional legislation) may indeed have been declared unconstitutional by the Supreme Court's sweeping decision in *Chadha*.²⁹ For the rest, though the War Powers Resolution has many defects, I see no serious constitutional objection to its principal provisions as applied to hostilities that constitute war. Congress has the power to decide whether the United States shall (or shall not) go to war; the President has no independent constitutional authority to go to war. At most, by repeated practice and Congressional acquiescence, the President may have acquired authority to deploy the armed forces for foreign policy purposes *short of war*. But as regards hostilities that constitute war within the meaning of the Constitution—war as understood in international law—the Constitution is clear, and history has not eroded its mandate. Congress has the war power; the President may not take the United

certifies that military necessity respecting the safety of the armed forces requires it. *Id.*

²⁶ *Id.* at § 5(c).

²⁷ *Id.* at § 8.

²⁸ In his message to the House of Representatives explaining his veto of the War Powers Resolution, *see supra* note 23, President Nixon remarked:

House Joint Resolution 542 would attempt to take away, by mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years

[T]he only way in which the constitutional powers of a branch of the Government can be altered is by amending the Constitution—and any attempt to make such alterations by legislation alone is clearly without force.

President's Message to the House of Representatives Returning H.J. Res. 542 Without His Approval, 9 WEEKLY COMP. PRES. DOC. 1286 (Oct. 24, 1983).

²⁹ *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1982).

States into war. Surely, then, Congress can forbid the President to go to war without authorization by Congress. By its exclusive authority over war-or-peace, Congress, I believe, can also prohibit the President from deploying forces of the United States into situations where their "imminent involvement" in war "is clearly indicated by the circumstances." Congress, I believe, can also decide that hostilities short of war might lead to war and can regulate such hostilities as well.

I sum up. The Constitution in terms that can leave little room for doubt gave the President no authority to take the country into war. Without exception, the Framers, including those most strongly in favor of a powerful executive, never claimed for him any power to go to war.³⁰ History may have given the President some authority to deploy the forces of the United States for foreign policy purposes short of war; it has not given Presidents any authority to go to war. If the President has acquired authority to deploy forces for purposes short of war when Congress is silent, history has given him no such authority where Congress has prohibited it.

Except in Korea, no President has ever claimed authority to take the United States into war on his own authority. Even in Korea, the President's claim was based not on any alleged independent Presidential power to go to war but on his authority to carry out responsibilities under the United Nations Charter, a treaty of the United States.³¹ In Korea, Congress acquiesced in and ratified a Presidential war.³² Some twenty-three years later, in the War Powers Resolution, Congress, in effect, rejected the authority claimed by the President in Korea and decided that there shall be no such Presidential wars in the future, even in response to treaty responsibilities of the United States.

In the Persian Gulf in January 1991, military action by the United States to liberate Kuwait from Iraqi occupation was surely war for constitutional purposes. The President had no au-

³⁰ See, e.g., *THE FEDERALIST*, *supra* note 8, No. 69 at 417-18.

The Executive Branch of recent years, often invoking "original intent" as the proper basis for constitutional interpretation, has been remarkably silent about the intent of the Framers as to the allocation of war powers.

³¹ See 96 CONG. REC. 10781 (H. Doc. 646) (July 19, 1950) (President Truman's report to Congress on the Korean situation).

³² See *supra* notes 19 & 21-23.

thority to take the country into such war without authorization by Congress. However, on January 12, 1991, Congress gave the President authority to take the United States to war when it authorized him "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677."³³

II. THE UNITED NATIONS CHARTER AND THE GULF WAR

The Congressional Resolution of January 1991 in effect authorized the President to take the United States to war against Iraq in order to liberate Kuwait. The President had insisted that such authorization from Congress was not constitutionally necessary and he had clearly been reluctant to request it. When persuaded to request Congressional support and approval, he was apparently careful not to imply that he required them as a matter of constitutional principle.³⁴ He claimed that he had authority to go to war in the Gulf as Commander-in-Chief; some claimed he had such authority by virtue of the resolutions of the United Nations Security Council.³⁵ I have indicated that in my view he did not have the necessary authority apart from the Security Council resolutions; in my view, the resolutions of the Security Council did not serve to confer such constitutional authority.

Following the Iraqi armed attack on Kuwait, the United Nations Security Council adopted a series of resolutions. In brief, these resolutions condemned Iraqi aggression and ordered Iraq to withdraw its forces from Kuwait; decided that members of the United Nations should impose economic sanctions against Iraq; authorized member states to use necessary means to enforce those sanctions; authorized member states, if Iraq did not withdraw from Kuwait by January 15, 1991, to use all necessary means to terminate the Iraqi occupation of Kuwait.³⁶

There can be little doubt as to the authority of the Security

³³ 2 H.J. Res. 77, 102d Cong., 1st Sess., 137 CONG. REC. 443 (1991).

³⁴ *Statement by the President—the White House—Office of the Press Secretary*, Fed. News Serv., Jan. 14, 1991.

³⁵ See *Testimony before the United States Senate*, *supra* note 3.

³⁶ *Id.*

Council to adopt any of the above resolutions. But understanding the authority of the Security Council, and precisely what the Security Council resolved, will contribute to understanding the rights, responsibilities and obligations of the United States under those resolutions and their implications for the constitutional authority of the President in respect of those resolutions.

A. *Security Council Authority Under Chapter VII*

By adhering to the United Nations Charter member states assume important legal obligations. Member states are legally bound to refrain from the threat or use of force against the territorial integrity or political independence of other states, or in any other manner inconsistent with the Purposes of the United Nations.³⁷ Members of the United Nations confer on the Security Council primary responsibility for maintaining international peace and security, and agree that in doing so the Security Council acts on their behalf.³⁸ United Nations members agree to accept and carry out the decisions of the Security Council in accordance with the Charter.³⁹

I do not address here the authority of the Security Council under Chapter VI of the Charter as regards the Pacific Settlement of Disputes. In the Gulf Crisis, the Security Council exercised its authority under Chapter VII to take action with respect to threats to the peace, breaches of the peace, and acts of aggression.

It is important to understand the authority of the Security Council and what the Security Council did. Article 39 provides that the Council "shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."⁴⁰

That language is careful and purposeful. The Council may *make recommendations*, but it may also *decide* on measures in

³⁷ U.N. CHARTER art. 2, para. 4.

³⁸ *Id.* at art. 24, para. 1.

³⁹ *Id.* at art. 25.

⁴⁰ *Id.* at art. 39.

accordance with Articles 41 and 42.⁴¹ Recommendations are no doubt entitled to great weight, but they do not create legal obligations; decisions are mandatory and create legal obligations.

Under Article 41 the Security Council may decide what measures not involving the use of armed force—interruption of economic relations and communication, severance of diplomatic relations—are to be employed, and may call upon (order) members to apply such measures.⁴² Such decisions are mandatory, legally binding obligations. If these are inadequate, the Security Council, under Article 42, “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”

So much seems clear. Uncertainties arise as a result of Article 43. That article provides that:

All Members . . . undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities including rights of passage, necessary for the purpose of maintaining international peace and security.

. . . .
The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

It seems clear that the Charter contemplated that the Security Council might take action under Article 42 by using forces provided by members under Article 43. But Article 43 agreements have never been concluded. The obligation to do so “as soon as possible on the initiative of the Security Council” has been dormant; during the long sleep of the Cold War the Security Council was unable to take the necessary initiative. Perhaps now, if the Cold War is indeed ended, it may be possible for the Council to take such initiative, but pending the conclusion of

⁴¹ *Id.*

⁴² *Id.* at art. 41. For the ambiguity of “calls upon,” see *infra* note 47.

Article 43 agreements there are no Article 43 forces which the Security Council could order into action. How does that affect the powers of the Security Council under Article 42? Can the Security Council “take action” under Article 42 “by air, sea, or land forces of Members of the United Nations,” other than forces provided under Article 43 agreements, at least when such agreements have not been concluded? And if indeed the Council can take such action, can the Council only recommend that member states provide forces for such a United Nations action, or can the Council decide, order member states to do so?

Reading Chapter VII as a whole, I conclude that the Security Council can decide on mandatory measures not involving the use of armed force; that it can decide on mandatory military measures with national forces provided by member states pursuant to Article 43 agreements; that in the absence of such agreements the Security Council, under Article 42, cannot decide that member states must provide forces for Security Council action, but the Council can “take action” by authorizing, recommending, or requesting member states to use force to maintain or restore international peace and security.

My conclusion that, in the absence of Article 43 agreements, the Security Council can recommend that states take military action or can authorize them to do so, but cannot direct them to do so, is supported by history, a meager history. The Security Council has never purported to order states to send troops for Security Council action. In two cases, forty years apart—in Korea⁴³ and in the Gulf⁴⁴—the Council has only recommended or authorized such action.

B. *Security Council Action in the Persian Gulf*

The Gulf Crisis found the Security Council resorting to its powers under Chapter VII of the Charter to restore international peace and security in the absence of Article 43 agreements and Article 43 military forces. The Security Council determined that there had been a breach of international peace and security by Iraq’s invasion of Kuwait.⁴⁵ The Council decided that there

⁴³ U.N. Doc. S/RES/83 (1950).

⁴⁴ S/RES/678.

⁴⁵ S/RES/660.

shall be an embargo and other economic sanctions against Iraq and called upon all member states to apply them.⁴⁶ The Council called upon "Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstance as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order . . . to ensure strict implementation" of the embargo provisions laid down by the Security Council.⁴⁷ In that resolution the Council also requested "all States to provide in accordance with the Charter such assistance as may be required" by the states monitoring compliance with the embargo.⁴⁸ Finally, the Council authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement the relevant Security Council resolutions and to restore international peace and security in the area."⁴⁹

C. *Collective Security or Collective Self-Defense*

I have suggested that the Security Council resolution authorizing the use of force against Iraq constitutes an appropriate "action" by the Council under Article 42, "as may be necessary to maintain or restore international peace and security." It was an action in support of collective security, but it was not (and probably could not properly be) a mandatory decision: States were authorized to use force; they were not legally bound to do so.

Another perspective might give the Security Council resolutions a somewhat different cast, with somewhat different legal implications. One may see the series of resolutions as an action by the Council under Article 42 confirming and supporting action by states acting in self-defense or in collective self-defense pursuant to Article 51.

Article 51 provides that "Nothing in the present Charter

⁴⁶ S/RES/661.

⁴⁷ S/RES/665. "Calls upon" is ambiguous, sometimes purposefully so. In this case, as a request to some states to use or risk force to secure the embargo against Iraq, I am satisfied, "calls upon" is the equivalent of "requests" or "recommends."

⁴⁸ *Id.*

⁴⁹ S/RES/678.

shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations." In August 1990, beyond doubt, Iraq committed an armed attack upon Kuwait. If Kuwait declared itself a victim of an armed attack and asked the United States to join it in collective self-defense, the United States and Kuwait, and whoever else was invited and agreed to join them, had the legal right to use military force against the Iraqi forces in Kuwait.⁵⁰ They could also use military force against Iraqi territory and against Iraqi forces in that territory, as necessary to compel Iraq to abandon its aggression against Kuwait. Although the right of self-defense is, in principle, subject to limitations of necessity and proportionality, it has been accepted that the state victim of an armed attack (and invited allies) may wage full-scale war against the aggressor, if only to prevent resumption or recurrence of the attack.⁵¹

Article 51 clearly contemplated that states may use force in self-defense, or in collective self-defense, without having to await authorization or other action by the Security Council. But that article permits such use of force in self-defense "until the Security Council has taken measures necessary to maintain international peace and security." As we know, that "until clause" has been dormant during the forty years in which the Security Council was incapacitated by the Cold War and there is no experience to help define the import of that clause.

Some have asked whether the Security Council has the authority to terminate or supersede the inherent right of a state victim of an armed attack to act in self-defense. The scheme of the Charter suggests that the Security Council could do so, since all members agreed to give the Security Council "primary responsibility for maintaining international peace and security,"⁵² and "to accept and carry out its decisions."⁵³ In practice, it is highly unlikely that the Security Council would preclude action by the victim in self-defense. In some circumstances, however,

⁵⁰ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), 1986 I.C.J. 14, paras. 193-98 (Merits, Judgment).

⁵¹ See L. HENKIN, *HOW NATIONS BEHAVE* 141 (2nd ed. 1979).

⁵² U.N. CHARTER art. 24.

⁵³ *Id.* at art. 25.

the Security Council might decide to limit or regulate the use of force even by the victim. Or the Council might decide not to permit collective action in self-defense that might broaden the conflict and further threaten international peace and security. The Council might decide to preempt activities in self-defense by subsuming or incorporating them in a United Nations action.

The authority of the Security Council to limit action in self-defense became a pertinent issue for a time during the Gulf Crisis. When the Security Council decided that the members of the United Nations should impose sanctions against Iraq, and authorized military measures to enforce those sanctions, some argued that the action of the Security Council terminated (or suspended) the right of Kuwait and of other states to use force to liberate Kuwait. In my view, the Security Council had authority to do so; but did the Council in fact purport or intend to do so? Are the relevant resolutions of the Security Council to be interpreted as decisions to rely exclusively on economic sanctions, at least for a time, and to forbid military actions in collective self-defense, or even by the victim of the armed attack?

In the Gulf, that question became moot when the Security Council acted to authorize the use of force. But it remains a question that may trouble collective action to maintain peace in the future. Obviously the issue could be eliminated if the Security Council considered and resolved whether any program of sanctions it imposes should supersede or suspend the right to use military force in self-defense or in collective self-defense. Sometimes, however, it may not be politically possible or desirable to resolve that issue.

The difference I am suggesting between a collective security action and a collective self-defense action is suggested by differences between the Security Council resolutions on Korea in 1950 and those on Kuwait in 1990, and therefore between the Kuwait action and that in Korea.⁶⁴ In Korea, the Security Council recommended that states send forces to the aid of South Korea;⁶⁵ in Kuwait the Security Council authorized the use of force.⁶⁶ In

⁶⁴ See U.N. Doc. S/RES/82 (1950); U.N. Doc. S/RES/83 (1950); U.N. Doc. S/RES/84 (1950). See *supra* note 1.

⁶⁵ S/RES/83.

⁶⁶ S/RES/678.

Korea, the Council recommendation was addressed to all states; in Kuwait, though the call for economic sanctions was addressed to all states, the authorization to use force speaks to "Member States co-operating with the Government of Kuwait."⁵⁷ In Korea, the Security Council recommended that contributing states place forces under a United Nations Command; the forces were called United Nations forces; they fought under a United Nations flag.⁵⁸ In the Gulf there was no United Nations Command or United Nations flag, and the forces of the "States co-operating with the Government of Kuwait" were referred to as "the coalition."⁵⁹

In the Gulf, neither Kuwait nor those who agreed to come to its support, nor the Security Council, expressly invoked Article 51, and the Security Council resolutions speak words as consistent with collective security as with collective self-defense. But the failure to establish a United Nations force under a United Nations Command, and the failure to recommend the action authorized, suggests a collective self-defense action under Article 51 rather than a United Nations collective security action under Article 42. That distinction may have no major legal consequences, and may reflect only uncertainty of commitment to collective security in the very different world of 1990 as compared to that of 1950. But in principle, and in the future, there may be differences of some moment. Actions under Article 51 are under the control of the states acting in self-defense. The Security Council, I have suggested, has authority to limit that action, and surely to monitor its respect for principles of necessity and proportionality, but the Security Council's control may be looser both in law and in politics. Even in Kuwait the character of the military action and the Security Council's relation to it might have become important if the Security Council had been pressed to terminate or regulate the action.

⁵⁷ *Id.*

⁵⁸ S/RES/84.

⁵⁹ *See, e.g.*, S/RES/665.

III. CONGRESS, THE PRESIDENT AND THE U.N. SECURITY COUNCIL

What have been the rights, obligations and responsibilities of the United States under the Charter and under the resolutions of the Security Council in the Persian Gulf Crisis? Did such rights, obligations and responsibilities modify the distribution of authority between the President and Congress under the United States Constitution?

A. *Constitutional Authority and the U.N. Charter*

The Charter is a treaty binding on the United States under international law. Under the United States Constitution, the Charter, as a treaty of the United States, is the law of the land.⁶⁰ The President has the duty to take care that laws be faithfully executed:⁶¹ that includes also, I believe, a duty to take care that treaties be faithfully carried out. Duty to act brings with it authority (power) to do so.

Some obligations under the Charter may require implementation by Congress. Congress is internationally obligated, and has the power under the Constitution, to enact laws necessary and proper to carry out the obligations and responsibilities of the United States under the United Nations Charter. The President has the responsibility of seeking such Congressional action; he has the duty to see that such Congressional legislation is faithfully executed.

Under the Charter, the United States is obligated to negotiate Article 43 agreements. The President therefore is bound (and has power) to negotiate such agreements. The United States obligation to conclude such agreements might have served to authorize the President to conclude them on his own authority, had Article 43 not expressly provides that the obligation to conclude the agreement is "subject to ratification by the signatory states in accordance with their constitutional processes."⁶²

Even had the Charter itself, as a treaty of the United

⁶⁰ U.S. CONST. art. VI, cl. 2.

⁶¹ *Id.* at art. II, § 3.

⁶² U.N. CHARTER art. 43, para. 3. This provision was probably written into the Charter to make it acceptable to the United States Senate.

States, provided the President with power to conclude such agreements on his own authority, Congress explicitly limited that authority. The United Nations Participation Act of 1945 authorized the President to conclude Article 43 agreements but explicitly provided that they should be subject to the consent of Congress.⁶³ No President, then, has claimed, or could plausibly claim, authority to carry out the obligation of the United States to negotiate Article 43 agreements without the consent of Congress.⁶⁴

B. *Constitutional Authority in the Gulf Crisis*

In the Gulf Crisis, the United States took two related but legally discrete sets of action. It moved to defend Saudi Arabia against possible attack; it pressed Iraq to evacuate Kuwait.

To defend Saudi Arabia, the United States deployed armed forces to Saudi territory, with the consent of the Saudi Government. That deployment raised no significant issues under international law but it raised questions of Presidential authority under the Constitution. The President acted for the United States on his own authority, without Congressional authorization or approval. No doubt the President claimed authority from the precedents established over 200 years by Presidential deployment of armed forces in support of foreign policy purposes. In the Gulf, forces were deployed in the first instance not to engage in war but as a shield, for deterrent purposes. The President might even have argued that, since the United States deterrent was highly likely to be effective, such deployment was not inconsistent with the War Powers Resolution since the forces of the United States were not in fact put into a situation "where imminent involvement in hostilities is clearly indicated by the circumstances."⁶⁵

The Constitutional authority of the President came into question also as regards some of the actions taken by the United

⁶³ United Nations Participation Act of 1945, Pub. L. No. 264, § 6, 59 Stat. 619, 621 (1945). The later word of Congress supersedes any treaty provision as effective law. *Whitney v. Robertson*, 124 U.S. 190, 194 (1887).

⁶⁴ The United Nations Participation Act of 1945 requires the consent of Congress, not of the Senate alone, but if the Senate gave consent to an Article 43 agreement concluded as a treaty, that treaty would no doubt be valid.

⁶⁵ See *supra* note 24.

States for the liberation of Kuwait. The United States took the lead in developing the United Nations action, in obtaining the adoption of successive Security Council Resolutions, and in implementing and enforcing them. In accordance with Security Council Resolution 661, the United States imposed an embargo and other sanctions against Iraq. The United States was the principal of "the Member States co-operating with Kuwait"⁶⁶ and deploying maritime forces to the area, and it used forcible measures to enforce the embargo. After the Security Council's deadline for Iraqi withdrawal from Kuwait passed, the United States led the use of force to liberate Kuwait as authorized by the Security Council in Resolution 678.

As to most of these measures taken by the United States, the President acted on his own authority. In my view, the President might plausibly claim that he had the duty, therefore the authority, to carry out any mandatory, self-executing provisions of the Charter, a treaty of the United States, as well as mandatory resolutions of the Security Council, since the Charter obligated the United States to heed such resolutions. Thus, for example, the President could carry out mandatory decisions by the Security Council under Article 41 calling upon member states to apply measures not involving the use of armed force, e.g., economic sanctions, interruption of communications, rupture of diplomatic relations.⁶⁷

On the other hand, in my view, there is no basis for deriving from the Charter any authority for the President to do on behalf of the United States what the Security Council does not mandate, but only authorizes or recommends. Thus, for example, it is not clear that the Security Council has authority under the Charter to order states to use the force necessary to make sanctions effective. In any event, in the case of Iraq, the Security Council did not do so: it only "called upon"⁶⁸ states to use the necessary force to that end. It is doubtful whether the Security Council has authority to order states to use armed forces (other

⁶⁶ S/RES/678.

⁶⁷ That power, which the President might have claimed by virtue of his power to execute the treaty, was in fact expressly confirmed by Congress in the United Nations Participation Act. See United Nations Participation Act of 1945, Pub. L. No. 264, § 5(a), 59 Stat. 619, 621 (1945).

⁶⁸ S/RES/678. See *supra* note 47.

than pursuant to Article 43 agreements) to undo aggression and restore international peace and security; in any event, in Iraq the Security Council did not do so; it authorized such force; it did not even recommend it. There was then no international legal obligation on the United States to carry out the resolution of the Security Council "calling upon" it to use force to assure compliance with the sanctions resolution, or the resolution authorizing the United States to use force to liberate Kuwait.⁶⁹ There was, then, no duty on the President to take care that such Security Council resolutions be executed. The President, then, derived no authority from them or from the Charter to use force for such purposes.

The President's power to use force on his own authority would be no greater as regards military action by the United States in collective self-defense with Kuwait. The United Nations Charter *permits* action by states in collective self-defense with a victim of an armed attack; Article 51 does not even recommend such action; surely it does not mandate it. There is no legal obligation on the United States to come to the assistance of a victim of an armed attack; there is, then, no international obligation from which the President might claim to derive authority to do so.

Congress apparently so interpreted the Charter at the time it was adopted. The United Nations Participation Act authorizes the President to carry out Security Council resolutions under Article 41 that impose economic sanctions and other measures not involving the use of force.⁷⁰ The Participation Act authorized the President to negotiate Article 43 agreements but to conclude them only subject to Congressional consent.⁷¹ Congress expressly denied the President any authority to make forces available to the Security Council other than pursuant to Article 43 agreements.⁷² Clearly, Congress did not think the President

⁶⁹ S/RES/678.

⁷⁰ See *supra* note 67.

⁷¹ See *supra* note 63.

⁷² Section 7 of the United Nations Participation Act of 1945 declares "[t]hat nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance . . ." other than those provided pursuant to Article 43 Agreements. United Nations Participation Act of 1945, Pub. L. No. 264, § 7, 59 Stat. 619, 621 (1945). Con-

had any constitutional authority of his own, or derived any authority from the United Nations Charter, to make forces available for war, whether for a Security Council action under Article 42, or for collective self-defense under Article 51.

President Truman's action in Korea, then, was unconstitutional until ratified by Congress. President Bush's action would have been unconstitutional had Congress not authorized it.

C. *Failure to Respect International Obligations*

I have been discussing constitutional authority to carry out the obligations of the United States under the United Nations Charter or under mandatory Security Council resolutions. Having the power, however, Congress nonetheless might fail to enact the necessary laws (or to appropriate funds), thereby putting the United States in violation of those obligations. Or Congress might adopt measures inconsistent with the obligations of the United States; for example, it might make war in violation of the United Nations Charter, or enact law contrary to a mandatory Security Council resolution. The President will fight such wars or enforce such laws and the courts will give them effect though doing so would put the United States in violation of its international obligations.⁷³

The matter is less clear as regards failures or violations committed by the President. Although the treaty and other international obligations are law of the land; although the Constitution requires that the President take care that the laws be faithfully executed, Presidents have sometimes failed to carry out or have acted in violation of such obligations. The courts have not deemed it appropriate to enjoin such Presidential violations where the President has constitutional power or statutory authorization to take the action challenged.⁷⁴ Thus, the

gress apparently did not consider the possibility that the President might wish to send forces for collective self-defense. It is arguable that such forces too are made available to the Security Council for its purposes under Article 42, and that Congress was refusing the President that authority also.

⁷³ See, e.g., *Diggs v. Schultz*, 470 F.2d 461 (D.C. Cir. 1972). See generally, *Chinese Exclusion Case*, 130 U.S. 581 (1888); *Whitney v. Robertson*, 124 U.S. 190 (1887).

⁷⁴ Compare *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), cert. denied, 107 S. Ct. 289 (1986). See Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 883-4 (1987).

courts will not enjoin the President from taking military action that is deemed to be within his constitutional authority or has been authorized by Congress, although such action might violate Article 2(4) of the United Nations Charter. They are not likely to enjoin the President from violating sanctions mandated by the Security Council under Article 41.

IV. CONCLUSION

The United States took the lead in responding to Iraqi aggression in the Gulf. Under international law, the United States had the right to deploy troops to Saudi Arabia pursuant to an invitation by the Saudi Government, and, under Article 51 of the Charter, the United States could lawfully use force in collective self-defense if Saudi Arabia became a victim of an armed attack and invited the United States to assist it. Under the Constitution, however, the President could not engage in such war without authorization from Congress.

As regards Kuwait, initially the United States might have used force lawfully under Article 51 in collective self-defense with Kuwait, if invited to do so. But with the passage of time, and with the Security Council taking "measures necessary to maintain international peace and security,"⁷⁵ the authority of the United States to use force to liberate Kuwait became questionable unless the Security Council authorized it; the Council gave that authorization. Under the Constitution, the President could send forces into war to liberate Kuwait only upon authorization by Congress; he obtained it.⁷⁶

By seeking Congressional authorization, however reluctantly, President Bush in fact helped Congress reassert its constitutional authority. It will be easier for Congress to insist on that authority in the future; it will be more difficult for Presidents to usurp Congressional authority to decide for war or peace in the future. Congress would do well to revise the War Powers Resolution to clarify its requirements and make them

⁷⁵ U.N. CHARTER art. 51.

⁷⁶ The Congressional resolution authorized the President to engage in war to carry out the Security Council resolutions. The resolution can be deemed to authorize the President also to engage in war to defend Saudi Arabia only if such defense was also authorized by the Security Council resolutions.

more realistic, to distinguish between war and deployments short of war, and to authorize and assume responsibility for some Presidential actions in some circumstances while prohibiting others. I have little doubt of the Constitutional authority of Congress to do so.

The Bush Administration acted in the Gulf Crisis from very mixed motives. Whatever the motives, in fact President Bush took a bold step in collective security. I hope that the United States will exercise leadership in the United Nations to institutionalize that step. That will require creative initiatives, in cooperation with the Union of Soviet Socialist Republics and other powers.⁷⁷ The United States should consider anew whether it is desirable and politically feasible to return to the original plan and negotiate Article 43 agreements, or to develop other arrangements that will enable the United Nations to take collective measures to maintain or restore international peace and security. That would help deter aggression and other unilateral uses of force, reduce the need to rely on individual or collective self-defense, and move towards carrying out the determination of the peoples of the United Nations "to save succeeding generations from the scourge of war."⁷⁸

⁷⁷ It will also require that the United States itself eschew uses of force in violation of the Charter, as in Panama. See, e.g., Henkin, *The Invasion of Panama Under International Law*, 29 COLUM. J. TRANSNAT'L. L. ____ (1991).

⁷⁸ U.N. CHARTER preamble.

APPENDIX

The following passages represent the controlling provisions of the United Nations Security Council's resolutions which resulted from the Gulf Crisis.

U.N. Doc. S/RES/660 para. 2 (1990):

“Demand[ing] that Iraq withdraw immediately and unconditionally all its forces to which they were located on 1 August 1990”

U.N. Doc. S/RES/661 paras. 3, 4 (1990):

Decides that all states shall prevent:

(a) The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of the present resolution;

. . . .

(c) The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs

Decides that all States shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources . . . except payments exclusively for strictly medical or humanitarian purposes and, in humanitarian circumstances, foodstuffs

U.N. Doc. S/RES/662 para. 1 (1990):

Declaring “that [the] annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void”

U.N. Doc. S/RES/664 paras. 1, 2 (1990):

“Demand[ing] that Iraq permit and facilitate the immediate departure from Kuwait and Iraq of the nationals of third countries and grant immediate and continuing access of consular officials of such nationals”

Resolution 664 “further demands that Iraq take no action to jeop-

ardize the safety, security or health of such nationals”

U.N. Doc. S/RES/665 para. 1 (1990):

Calls upon those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council to halt all inward and outward maritime shipping in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990)

U.N. Doc. S/RES/666 para. 1 (1990):

Decides that in order to make the necessary determination whether or not for the purposes of paragraph 3 (c) and paragraph 4 of resolution 661 (1990) humanitarian circumstances have arisen, the Committee shall keep the situation regarding food-stuffs in Iraq and Kuwait under constant review

U.N. Doc. S/RES/667 paras. 2-4 (1990):

Acting under Chapter VII of the Charter of the United Nations,

Demands the immediate release of . . . foreign nationals

Further demands that Iraq immediately and fully comply with its international obligations under . . . the Vienna Conventions on diplomatic and consular relations and international law

Further demands that Iraq immediately protect the safety and well-being of diplomatic and consular personnel and premises in Kuwait and in Iraq and take no action to hinder the diplomatic and consular missions in the performance of their functions, including access to their nationals and the protection of their person and interests

U.N. Doc. S/RES/669 (1990):

“Entrusts the Committee established under resolution 661 (1990) concerning the situation between Iraq and Kuwait with the task of examining requests for assistance under the provisions of Article 50 of the Charter of the United Nations and making recommendations to the President of the Security Council for appropriate action”

U.N. Doc. S/RES/670 paras. 3, 4 (1990):

Decides that all States, notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted before the date of the present resolution, shall deny permission to any aircraft to take off from their territory if the aircraft would carry any cargo to or from Iraq or Kuwait other than food in humanitarian circumstances.

.....

Decides further that all States shall deny permission to any aircraft destined to land in Iraq or Kuwait, whatever its State of registration, to overfly its territory

U.N. Doc. S/RES/674 paras. 1, 5 (1990):

Demands that the Iraqi authorities and occupying forces immediately cease and desist from taking third-State nationals hostage, mistreating and oppressing Kuwaiti and third-State nationals and any other actions . . . that violate the decisions of this Council, the Charter of the United Nations, the Fourth Geneva Convention, the Vienna Conventions on Diplomatic and Consular Relations and international law

.....

Demands that Iraq ensure the immediate access to food, water and basic services necessary to the protection and well-being of Kuwaiti nationals and of nationals of third States in Kuwait and Iraq, including the personnel of diplomatic and consular missions in Kuwait

Doc. S/RES/677 para. 2 (1990):

“[M]andates the Security-General to take custody of a copy of the population register of Kuwait, the authenticity of which has been certified by the legitimate Government of Kuwait and which covers the registration of the population up to 1 August 1990”

U.N. Doc. S/RES/678 para. 2 (1990):

Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements . . . the foregoing resolutions, to use all necessary means to

uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area