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## Rethinking War Powers: Congress, The President, and the United Nations

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# Rethinking War Powers: Congress, the President, and the United Nations

JANE E. STROMSETH\*

I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.

—President George Bush<sup>1</sup>

The division of war powers between Congress and the President has never been free of ambiguity or tension. The Constitution grants Congress the power to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the regulation of those armed forces.<sup>2</sup> The President, on the other hand, is the Commander in Chief of U.S. armed forces.<sup>3</sup> Most scholars agree that the framers sought to strike a balance: the President alone could not commence "war," but he could use force to "repel sudden attacks" on the United States or its armed forces.<sup>4</sup> Reacting against the unilateral power of kings to go to war without the consent of the people, the framers desired a democratic check on the power of the President to initiate armed conflict.<sup>5</sup> Disagreement rages, however, over what the sparse words of the Constitution should mean today, when wars are hardly ever "declared" in advance, U.S. forces are stationed on foreign soil on a semipermanent basis, and the country's security interests are intertwined with those of other states in an increasingly interdependent international system.

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1. Remarks of President George Bush to the Texas State Republican Convention in Dallas, Texas, 28 WEEKLY COMP. PRES. DOC. 1119, 1120-21 (June 20, 1992).

2. U.S. CONST. art. I, § 8, cls. 11-14.

3. U.S. CONST. art. II, § 2, cl. 1.

4. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., rev. ed. 1937).

5. *Id.*; THE FEDERALIST NO. 69, 464-65 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Any adequate contemporary theory of the division of war powers between Congress and the President must take account of the growing role of the United Nations Security Council in responding to threats to international peace and security. In 1945, the drafters of the U.N. Charter responded to the devastation of World War II by seeking to limit the unilateral use of force as a method for resolving international disputes and by creating a mechanism to prevent war and resolve disputes peacefully. If threats to the peace or acts of aggression did occur, however, the U.N. Security Council could recommend or decide to take action, including imposing economic and diplomatic sanctions. If necessary, it could authorize collective military enforcement action to restore international peace and security.<sup>6</sup>

To make U.N. enforcement action possible, the members of the United Nations pledged in Article 43 of the Charter "to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces . . . necessary for the purpose of maintaining international peace and security."<sup>7</sup> These special agreements would be negotiated "as soon as possible" and would be subject to ratification by member states "in accordance with their respective constitutional processes."<sup>8</sup> Once these agreements were concluded, the Security Council could make use of the earmarked national contingents as the need arose, assisted by a U.N. Military Staff Committee comprised of the chiefs of staff of the five permanent Security Council members.<sup>9</sup>

The tensions of the Cold War soon eclipsed efforts to negotiate any special agreements, leaving the Security Council dependent on the willingness of member states to provide troops on an ad hoc basis. Moreover, with the notable exception of Korea, superpower disagreement essentially barred the United Nations from authorizing collective military action<sup>10</sup> in

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6. U.N. CHARTER arts. 39, 42. At the same time, Article 51 affirms that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." *Id.* art. 51.

7. *Id.* art. 43, ¶ 1.

8. *Id.* ¶ 3.

9. *Id.* art. 47. The five permanent Security Council members are the United States, Great Britain, France, China, and Russia, which replaced the former Soviet Union.

10. The Security Council did, however, impose sanctions under Chapter VII in several cases. In 1965, the Council called upon states to apply sanctions against Southern Rhodesia, S.C. Res. 217, U.N. SCOR, 20th Sess., 1265th mtg., U.N. Doc. S/RES/217 (1965), and it authorized Britain in 1966 to take limited forcible steps to enforce those sanctions, S.C. Res. 221, U.N. SCOR, 21st Sess., 1277th mtg., U.N. Doc. S/RES/221 (1966). Comprehensive mandatory economic sanctions were imposed on Southern Rhodesia in 1968, S.C. Res. 253, U.N. SCOR, 23d Sess., 1428th mtg., U.N. Doc. S/RES/253 (1968). The Security Council also imposed an arms embargo against South Africa in 1977. S.C. Res. 418, U.N. SCOR, 32d Sess., 2046th mtg., at 5, U.N. Doc. S/INF/33 (1977).

response to acts of aggression—until the Persian Gulf War following Iraq's invasion of Kuwait in August 1990. Instead, during the Cold War, the United Nations developed a more limited capacity for responding to conflict, namely, consensual deployment of "peacekeeping" forces to perform tasks such as monitoring ceasefires and observing the demobilization of opposing forces.<sup>11</sup>

Although the U.N. Charter's vision of collective security has been realized only imperfectly in the decades since 1945, the role of the Security Council seems bound to grow in the future. From the Gulf War to Bosnia and Herzegovina to internal conflicts in Somalia and elsewhere, the international community is turning increasingly to the United Nations to authorize collective responses, including the use of force if necessary. As expectations rise concerning the United Nations role in conflict resolution, U.N. Secretary-General Boutros Boutros-Ghali and many others have proposed reforms designed to ensure that the United Nations has the military resources and operational capacity to meet these expectations.<sup>12</sup> The Secretary-General has proposed, for example, that member states enter into Article 43 special agreements providing forces "on call" for military enforcement actions authorized by the Security Council. He has also asked governments to earmark troops for "peace enforcement" missions—such as actively enforcing a ceasefire with military force as needed—that go beyond traditional peacekeeping.<sup>13</sup> Numerous other individuals, including political leaders, former U.N. officials, and scholars, have proposed building a more formal U.N. military capability, such as a rapid deployment force under Security Council control that could respond to emerging conflicts around the world.<sup>14</sup>

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11. See WILLIAM DURCH & BARRY BLECHMAN, *KEEPING THE PEACE: THE UNITED NATIONS IN THE EMERGING WORLD ORDER*, at i ("Traditional peacekeeping is conflict containment, using third-party troops and observers with local consent to reduce the chances of fighting flaring anew between two countries who . . . have reached a truce."); John Mackinlay & Jarat Chopra, *Second Generation Multinational Operations*, WASH. Q., Summer 1992, at 113 (characterizing peacekeeping as a "cold war expedient that overcame some of the disabling effects of super power rivalry").

12. Boutros Boutros-Ghali, *Empowering the United Nations*, FOREIGN AFF., Winter 1992/93, at 89; Brian Urquhart, *Learning from the Gulf*, N.Y. REV. BOOKS, Mar. 7, 1991, at 34. See generally UNITED NATIONS ASSOCIATION, PARTNERS FOR PEACE, STRENGTHENING COLLECTIVE SECURITY FOR THE 21ST CENTURY (1992).

13. *An Agenda for Peace; Preventive diplomacy, peacemaking and peace-keeping; Report of the Secretary-General*, U.N. G.A., 47th Sess., ¶ 44, U.N. Doc. A/47/277 (1992) [hereinafter *An Agenda for Peace*].

14. See, e.g., Richard Gardner, *Collective Security and the "New World Order": What Role for the United Nations?*, in AFTER THE STORM: LESSONS FROM THE GULF WAR 31-40 (Joseph S. Nye, Jr. & Roger K. Smith eds., 1992) ("Some 20 to 30 UN members in different parts of the world could enter into Article 43 agreements designating units of brigade strength (2,000-3,000 men) that would be available for use by the Security Council as a Rapid Deployment Force . . ."); David Boren, *The World Needs an Army on Call*, N.Y. TIMES, Aug.

In the face of mounting expectations and proposals for a greater U.N. military role, it is time to rethink the proper constitutional balance of war powers between Congress and the President in cases in which the United Nations Security Council has authorized the use of military force. The division of war powers between Congress and the President in the U.N. context has arisen as an issue in three historical periods: in 1945 when the Senate reviewed the U.N. Charter and gave its advice and consent to the treaty's ratification, in the early 1950s during the conflict in Korea, and in the recent Persian Gulf War. This history merits careful examination both because it illuminates past understandings of the division of war powers in the U.N. context and because it is often invoked today, at times uncritically, to support conflicting positions regarding the respective war powers of Congress and the President.

This article argues that three distinct conceptions or models of the proper division of constitutional war powers have emerged from this historical experience. These three approaches offer quite different answers to the war powers questions that will arise in the years ahead with respect to military actions authorized by the U.N. Security Council. Part I discusses the *contract* or "special agreement" model, which was articulated during the U.N. Charter ratification debates in the U.S. Senate and codified in the United Nations Participation Act of 1945 (UNPA).<sup>15</sup> Under this approach, the President would negotiate and Congress would review a special agreement making a limited number of U.S. forces available to the Security Council. If Congress approved the agreement, the President could use the designated forces in military actions authorized by the Security Council; but Congress's specific authorization would be required for forces exceeding the limits of the agreement.

Part II discusses the *police power* model, which emerged clearly during the Korean War experience and was invoked by the Bush Administration in 1990 following Iraq's invasion of Kuwait. Proponents of this model claim that the President has unilateral authority to send U.S. forces to combat in international "police actions" authorized by the Security Coun-

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26, 1992, at A21 (supporting Professor Richard Gardner's proposal that U.N. member states "contribute to a rapid deployment force of 100,000 volunteers that could train under common leadership and with standardized equipment"); Alan K. Henrikson, *How Can the Vision of a "New World Order" be Realized?*, 16 FLETCHER F. WORLD AFF. 63, 74-77 (1992) (arguing for activation of U.N. Military Staff Committee and creation of Standing Reserve Peace Force, Rapid Response Peace Force, and Permanent Peacekeeping Force); Brian Urquhart, *Who Can Stop Civil Wars?*, N.Y. TIMES, Dec. 29, 1991, § 4, at 9 (arguing for creation under Article 43 of U.N. military force to allow Security Council flexibility between small-scale peacekeeping operations and large-scale collective enforcement as in Korea and Kuwait).

15. Pub. L. No. 264, §§ 1-7, 59 Stat. 619, (1945) (codified at 22 U.S.C. §§ 287-287e (1988)).

cil, regardless of their size or riskiness. Part II then discusses the third approach, the *political accommodation* model, which was suggested by the actual interplay between Congress and the President during the Persian Gulf crisis. Under this model, the President needs congressional approval before committing U.S. forces to combat in U.N. authorized military actions that raise the risk of war or great physical sacrifice. This determination is made by the President and the Congress on a case-by-case basis.

Part III then explores the implications of these three war powers models for the future, given the types of U.N. military operations likely to occur. In light of these implications, Part III concludes that the police power model is too unbounded and expansive a view of executive power. The political accommodation approach is more consistent with the Constitution's vision of shared war powers, but depends critically on Congress's ability and determination to assert itself and the President's willingness to refrain from unilateral action. Ultimately, the contract model offers the best foundation for building a workable constitutional war powers balance in the years ahead. By establishing an agreed framework for U.S. participation in U.N. authorized military actions, the contract approach would enable the President to respond promptly to small-scale threats to the peace, but would encourage direct congressional involvement in larger and more risky contingencies.

#### I. THE U.N. CHARTER IN THE SEVENTY-NINTH CONGRESS: A "CONTRACTUAL" WAR POWERS MODEL EMERGES

When the Senate gave its advice and consent to ratification of the U.N. Charter in 1945,<sup>16</sup> it understood that Chapter VII of the Charter would give far-reaching powers to the U.N. Security Council. No one disputed the Secretary of State's claim that Article 39 was the most substantive single sentence of the Charter.<sup>17</sup> It provides that "[t]he Security 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."<sup>18</sup> This broad language gives the Security Council the authority to determine what constitutes aggression or a threat to the peace, and the discretion to take the actions it deems appropriate, including diplomatic and economic sanctions<sup>19</sup> and, if necessary, forcible "action by air, sea, or land forces" to

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

17. UNITED STATES DEPT. OF STATE, REPORT TO THE PRESIDENT ON THE RESULTS OF THE SAN FRANCISCO CONFERENCE 90-91 (1945) [hereinafter REPORT TO THE PRESIDENT].

18. U.N. CHARTER art. 39.

19. U.N. CHARTER art. 41.

restore international peace and security.<sup>20</sup> At the same time, the five permanent members of the Security Council retained veto power over any U.N. military action.<sup>21</sup>

U.S. leaders in 1945 did not intend to create a standing international army under Chapter VII of the Charter. Instead, earmarked national contingents would be "called in for . . . particular cases."<sup>22</sup> Whether all or only a few states would be asked to contribute forces in a specific situation would depend on the circumstances. To ensure that the Security Council had "at its disposal forces that it [could] use immediately and quickly in emergencies,"<sup>23</sup> however, Article 43 obliged member states to conclude special agreements placing some forces "on call" for use by the Security Council.<sup>24</sup>

The Truman Administration and the Seventy-Ninth Congress recognized that the Charter's provisions for the collective use of force raised war powers concerns under the U.S. Constitution. Several Senators argued strenuously, for example, that Congress's exclusive power to declare war was being delegated to the Security Council.<sup>25</sup> Although these concerns were taken seriously by proponents of the Charter in both the Administration and Congress, the vast majority of the Seventy-Ninth Congress was ultimately satisfied that the United States could provide a limited number of forces to the Security Council through an Article 43 special agreement and still preserve Congress's power to declare war in cases involving a large-scale mobilization of U.S. forces.<sup>26</sup>

The contract approach, which emerged in 1945, was the result of an intensive, bipartisan effort on the part of Congress and the Truman Admin-

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20. U.N. CHARTER art. 42. If the Security Council "decides" to take action under Chapter VII, in contrast to simply "recommending" action, member states are obliged under Article 48 and Article 25 to carry out the Security Council's decisions. *Id.* arts. 48, 25.

21. U.N. CHARTER art. 27, ¶ 3 (providing that decisions of the Security Council on nonprocedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members").

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

23. *Id.*

24. See U.N. CHARTER art. 43, ¶ 1 (member states pledge to provide forces to the Security Council "on its call").

25. See, e.g., 91 CONG. REC. 7156 (1945) (statement of Sen. Bushfield) (objecting "to a delegation of power to one man or to the Security Council, composed of 10 foreigners and 1 American, to declare war and to take American boys into war" and arguing that this would be a "direct violation of the Constitution"); *id.* at 7988 (statement of Sen. Wheeler) (urging that a constitutional amendment be submitted to the American people so they could decide whether they want to turn the war-making power over to "one man, a delegate appointed by the President of the United States to serve on the Security Council").

26. See *infra* notes 86-107 and accompanying text.

istration to reach agreement on a framework for American participation in U.N. military actions that was consistent with the U.S. Constitution and faithful to the U.N. Charter. The sustained deliberations that led to ratification of the Charter and enactment of the U.N. Participation Act were led in large part by the members of Congress who had served on the delegation sent by the United States to negotiate the Charter.<sup>27</sup> The deliberations of the Seventy-Ninth Congress are worth studying today for several reasons. First, there has been no comparable effort since 1945 to address and resolve comprehensively the constitutional war powers dilemmas created by U.S. participation in the U.N. Charter system. Second, the U.N. Participation Act remains the law, although special agreements have not been concluded, and it is useful to understand the legislative history that produced this statute. Third, the approach adopted in 1945 is a sensible and well-considered one, which, with some modifications, still holds great promise.

The Seventy-Ninth Congress also deserves close study because, during the recent Persian Gulf crisis, contemporary legal scholars invoked portions of the 1945 record to support diametrically opposed positions concerning the war powers of Congress and the President. Thomas Franck and Faiza Patel, for example, downplayed the significance of Article 43 special agreements. They argued that any U.N. authorized use of force, by definition, is not war but "police action" to which the President can commit U.S. troops without the need for congressional authorization.<sup>28</sup> Other scholars such as Michael Glennon and David Scheffer, in contrast, argued that in the absence of a special agreement the President had no authority to commit U.S. forces to combat against Iraq without prior congressional approval.<sup>29</sup> These opposing interpretations invite further

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27. Democratic Senator Tom Connally of Texas and Republican Senator Arthur Vandenberg of Michigan, the delegation's cochairmen, were particularly active.

28. Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 64 (1991) (contending that "doves" who claim that U.N. police actions require congressional authorization ignore "the logic and text of the Charter"); *id.* at 67-69 (interpreting Senate views on U.N. Charter); see Thomas Franck, *Declare War? Congress Can't*, N.Y. TIMES, Dec. 11, 1990, at A27 ("Congress has neither a constitutional obligation nor a right to declare war before the U.S. joins in a U.N.-sponsored police action in the Persian Gulf."); see also *The Constitutional Roles of Congress and the President in Declaring and Waging War, Hearings Before the Senate Judiciary Comm.*, 102d Cong., 1st Sess. 426 (1991) [hereinafter *Constitutional War Powers Hearings*] (statement of Robert F. Turner, Professor of Law, Univ. of Virginia School of Law) ("When the President decides to risk the use of armed force in cooperation with the United Nations or other treaty partners in an effort to restore peace and end armed aggression, he is not 'initiating' a 'war' but defending the rule of law. No 'declaration of war' is necessary or appropriate in such circumstances.").

29. David Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, in RIGHT V. MIGHT 109, 150-52 (Council on Foreign Relations, 2d ed. 1991) [herein-



study of the original debates to ensure that remarks made in 1945 are not taken out of context and misused in contemporary war powers disputes.

A systematic examination of the legislative record of the Seventy-Ninth Congress leads to a rejection of the Franck and Patel interpretation. To be sure, a distinction between U.N. authorized "police action" and "war" was critical to Congress's understanding and acceptance of the U.N. Charter in 1945. But even more fundamental, as the subsequent discussion will show, was the consensus that Congress would participate in decisions to commit U.S. forces to the Security Council. Moreover, the Seventy-Ninth Congress expected U.N. "police actions" to be limited in size; if a conflict escalated and required a large-scale commitment of U.S. troops, it would be "war" under the U.S. Constitution even if it was authorized by the U.N. Security Council.

#### A. SENATE REVIEW OF THE CHARTER: THE NEED FOR A WAR POWERS BALANCE

Three main issues emerged in 1945 during the Senate's consideration of the U.N. Charter—issues on which the overwhelming majority of Senators ultimately agreed. First, any special agreement committing U.S. military forces to the Security Council would have to be approved by Congress; the President alone could not enter into such a commitment. Second, once a special agreement was approved by Congress, the President could use those designated forces in military enforcement actions authorized by the Security Council; a specific congressional authorization in each case would not be necessary. Third, by ratifying the Charter, the United States would undertake an obligation to conclude a special agreement making some forces available to the Security Council.

##### 1. Special Agreements Must be Approved by Congress

In presenting the U.N. Charter to the Senate for consideration, the Truman Administration stressed that an Article 43 special agreement, subject to congressional approval through U.S. "constitutional processes," would specify any American military forces placed "on call" for the Security Council.<sup>30</sup> By passing on any such agreement, Congress would set the basic parameters of the U.S. military commitment to the Security Council. The Secretary of State affirmed, moreover, that "no Member of the United

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after Scheffer, *Use of Force*]; David Scheffer, *War Powers and the U.N. Charter*, in *Constitutional War Powers Hearings*, *supra* note 28, at 7-10 [hereinafter Scheffer, *War Powers*]; Michael Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 80, 86-87 (1991).

30. *Charter Hearings*, *supra* note 22, at 121-22 (statement of Leo Pasvolosky, Special Assistant to the Secretary of State); *id.* at 645-46 (statement of John Foster Dulles).

Nations can be called upon to supply . . . forces which are not provided for in the agreements."<sup>31</sup>

On the Senate floor, Senators repeatedly affirmed their understanding that any U.S. troops provided to the Security Council would be delineated in a special agreement approved by Congress.<sup>32</sup> Senators differed, however, on the question of whether an Article 43 agreement would ultimately take the form of a treaty subject to Senate approval or, instead, be approved by a joint resolution of both Houses of Congress. Those who favored a joint resolution argued that both the Senate and the House of Representatives must be involved in a decision implicating Congress's power to raise and support armies.<sup>33</sup> Those who favored a treaty argued that this was the "constitutional process" envisioned in Article 43.<sup>34</sup> In the end, Senator Tom Connally spoke for many when he said, "[e]ither method would satisfy me, so long as it was an expression of the views of the Congress and of the people."<sup>35</sup>

It was, in any event, well understood that the President could not commit U.S. forces to the Security Council on his own by executive agreement or order. As Senator Arthur Vandenberg, the ranking Republican member of the Senate Foreign Relations Committee, put it: "[W]e all agree that this cannot be done by executive agreement if it eliminates the voice of Congress . . . from the equation."<sup>36</sup> Or, in Senator Claude Pepper's words, "no one has attempted to suggest that the President, without the concurrence of the Congress . . . would enter into commitments, under this charter, for us to furnish certain forces to the International Organ-

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31. REPORT TO THE PRESIDENT, *supra* note 17, at 95.

32. As one Senator put it:

I think it is clear in the mind of every Senator that the agreement by which we commit ourselves to hold available certain air forces and other armed forces, is one which must have the sanction of the Congress of the United States, either through a treaty or a joint resolution.

91 CONG. REC. 8076 (1945) (statement of Sen. Pepper).

33. *See, e.g., id.* at 8021 (statement of Sen. Lucas) (arguing that Congress as a whole must approve an Article 43 special agreement "base[d] . . . upon article 1, section 8 of the Constitution of the United States which provides the powers of Congress with respect to the control over our armed forces").

34. *See, e.g., id.* at 7990 (statement of Sen. Connally) (stating that in his view, "constitutional processes . . . meant ratification, as in the case of a treaty").

35. *Id.*

36. *Id.* at 8000 (statement of Sen. Vandenberg); *see also id.* at 8028 (same) ("My position continues unequivocally to be that the action could not be taken by Presidential executive order, that it must be done by congressional consultation."); *id.* at 8078 (statement of Sen. Millikin) ("The thing I am primarily interested in is that it be clearly understood in the debate that it may be . . . by a treaty or it may be by action of Congress, but that it shall not be by executive agreement."); *id.* at 8107 (statement of Sen. Ball) (it is "abundantly clear that the President alone cannot make this . . . agreement effective, that it must come back to Congress for approval").

ization.”<sup>37</sup> In short, it was “absolutely clear” that “the President cannot make a valid commitment about this particular subject without reference to the Congress.”<sup>38</sup>

While the Senators agreed that Congress would have the final decision regarding the troops placed “on call,” the specific limits Congress could include in a special agreement generated some debate. By the language of Article 43 itself, a special agreement would designate the “numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided” to the Security Council.<sup>39</sup> Although no one was precisely sure how many troops a special agreement would provide, most Senators thought the number would be small.<sup>40</sup> Moreover, no one questioned Congress’s right to decide where it wished “to draw the line” in terms of numbers of troops.<sup>41</sup> Senators disagreed, however, on whether Congress could set specific limits on the locations where U.S. special-agreement forces could be used. The Truman Administration’s own witness, John Foster Dulles, regarded congressionally imposed locational limits as legitimate; indeed he anticipated that other countries would include such limits in their special agreements.<sup>42</sup> In Dulles’s view, Congress would not violate any obligation under the Charter by inserting in a special agreement provisions that restricted the use of U.S. military forces to certain areas.<sup>43</sup> In contrast, Senator Tom Connally,

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37. *Id.* at 8076 (statement of Sen. Pepper).

38. *Id.* at 8079 (statement of Sen. Pepper).

39. U.N. CHARTER art. 43, ¶ 2.

40. *See, e.g., Charter Hearings, supra* note 22, at 653 (statement of Sen. Millikin) (“[I]t seems to me that the initial force to support this plan would be nominal—let us call them—police forces.”). John Foster Dulles, testifying for the Truman Administration endorsed this view: “My opinion is that the amount of military force required to make up these contingents ought to be very small for as far as anyone can predict reasonably ahead.” *Id.* at 654 (statement of John Foster Dulles). Dulles had been an advisor to the U.S. delegation at the San Francisco Conference on the U.N. Charter. *Id.* at 640.

41. 91 CONG. REC. 7957 (1945) (statement of Sen. Vandenberg).

42. When asked by Senator Walter George if Congress could restrict the places where U.S. forces could be used, Dulles responded:

I have no doubt that it can be done and I have no doubt that in a number of states it will be done. . . . Many of the smaller member states already are clear in their own minds that they will not agree to make contingents available except for use in relatively near areas. . . . [It is] quite probable that even the great powers, while they would probably want to make some forces available for use anywhere, [would have] . . . some understanding whereby they would at least supply the preponderant force in the areas of their proximity.

*Charter Hearings, supra* note 22, at 651-53 (statement of John Foster Dulles).

43. *Id.* at 651-52 (statement of John Foster Dulles). In Dulles’s opinion, Article 43 “enables the states to make any conditions which they want to attach.” *Id.* at 653 (same). Dulles’s remarks were referred to several times in the Senate floor debate. *See* 91 CONG. REC. 8024, 8026-27 (1945).

Chairman of the Senate Foreign Relations Committee, thought such limits were contrary to the “spirit” of the U.N. Charter, which assumed that “we will make agreements to furnish troops in good faith for the use of the Security Council *wherever* danger may be present.”<sup>44</sup> This issue was never resolved in the Senate hearings or debates.

## 2. International “Police Action” versus “War”

Another hotly debated issue was whether Congress should reserve the right to approve each individual use of American special-agreement forces by the Security Council. Several Senators favored a reservation to the Charter that would require congressional approval in each case. Senator Burton Wheeler argued that anything less would amount to an unconstitutional delegation of congressional war powers to “one man”—the U.S. delegate to the Security Council, a presidential appointee.<sup>45</sup> Senator Harlan Bushfield shared these concerns, objecting “to a delegation of power to one man or to the Security Council . . . to declare war and to take American boys into war.”<sup>46</sup>

Truman Administration witnesses, on the other hand, argued that requiring specific congressional approval in each case before U.S. special-agreement forces could be used would undercut the effectiveness of the Security Council, which needed to know in advance the forces it could depend on in an emergency.<sup>47</sup> Senators Connally and Vandenberg shared this view,<sup>48</sup> and the Senate Foreign Relations Committee ultimately ac-

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44. 91 CONG. REC. 7987 (1945) (statement of Sen. Connally) (emphasis added); *see also id.* at 7990 (same):

If we mean to ratify [the Charter] simply as a matter of form, and then later undertake to sabotage it by seeking excuses for not furnishing troops, or by stipulating that we will furnish them only within certain areas, we shall be violating the very fundamentals of this agreement; we shall break faith with the peoples of the world.

*Id.*

45. 91 CONG. REC. 7988 (1945) (statement of Sen. Wheeler); *see also id.* at 7989 (same) (“[I]f the American people understand that their boys would be sent at the command of any one single person to fight in foreign wars . . . they would be against it.”); *id.* at 7992 (same) (“I am opposed to giving any one man the power to put us into war.”).

46. *Id.* at 7156 (statement of Sen. Bushfield).

47. *Charter Hearings*, *supra* note 22, at 124 (statement of Leo Pasvolosky, Special Assistant to the Secretary of State).

48. *See id.* at 127 (statement of Sen. Connally):

[T]he very usefulness of the Security Council is that it is supposed to have at its disposal forces it can use immediately and quickly in emergencies. If we have to wait to get somebody’s consent, the war will be on, and we will not be able to control it, in my view.

*Id.*; *see also id.* at 125 (statement of Sen. Vandenberg) (requiring Congress’s consent each time the Security Council wanted to use U.S. forces would “violate the spirit of the Charter”).

cepted it as well.<sup>49</sup> Most Senators ultimately concluded that the limited delegation of U.S. forces to the Security Council by special agreement, protected by the U.S. veto, was constitutionally acceptable both because Congress initially would approve any special agreement *and* because these forces would be used only in U.N. authorized “police actions” of limited scope, in contrast to full-scale mobilization of U.S. forces in war.

This distinction between international “police action” and “war” was the second major issue to emerge in the Senate’s consideration of the U.N. Charter. The distinction was never viewed by its proponents as a way of eliminating Congress’s decisionmaking role by definitional fiat. On the contrary, it was part of a concerted effort to accommodate two priorities: the preservation of Congress’s exclusive authority to declare war and the need to provide the Security Council with a limited number of committed forces.

The distinction between police action and war had already been made by a prominent group of legal scholars and former officials grappling with the difficult war powers issues raised by the U.N. Charter. In a 1944 letter to the Editor of the *New York Times*, they distinguished between actions by a “small policing force,” available for immediate use by the Security Council as a “spearpoint against aggression,” and larger national forces to be used only when Congress “finds that the situation is so serious that the international forces are inadequate.”<sup>50</sup> Use of either kind of force—if authorized by the United Nations—would not be “war” under international law. But that did not by itself dispose of the constitutional issue: a substantial commitment of American forces by the President might nevertheless constitute “war” in the constitutional sense and thus require congressional approval.<sup>51</sup> For the authors of the 1944 letter, the key distinction between police action and war was size. In their view, limited forces could be made available to the Security Council without raising constitutional war powers problems because “their use, while adequate to deal with minor disturbances of international peace, would not create a situation of

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49. As the Committee’s Report on the Charter concluded, any Charter reservation requiring that U.S. special-agreement forces only be used “after the Congress had passed on each individual case would clearly violate the spirit of one of the most important provisions of the Charter,” which depended on forces being “immediately available to the Security Council to take action to prevent a breach of the peace.” SENATE COMM. ON FOREIGN RELATIONS, THE CHARTER OF THE UNITED NATIONS, S. EXEC. REP. NO. 8, 79th Cong., 1st Sess. 9 (1945) [hereinafter SENATE CHARTER REPORT].

50. John W. Davis et al., Letter to the Editor, N.Y. TIMES, Nov. 5, 1944. This letter was placed in the Congressional Record by Senator Austin during the Senate floor debate on the Charter. 91 CONG. REC. 8065 (1945). The authors included John W. Davis, W.W. Grant, Philip C. Jessup, George Rublee, James T. Shotwell, and Quincy Wright. *Id.* at 8067.

51. *Id.*

war in either the constitutional or international sense.”<sup>52</sup> Such limited police forces would be analogous to those traditionally deployed by Presidents “to protect American citizens abroad, to prevent an invasion of the territory, or to suppress insurrection.”<sup>53</sup> To be sure, the authors acknowledged, there was always a risk that use of even a small policing force might commit the United States to larger military action and thus intrude upon Congress’s power to declare war. The publicity attending any U.N. decision to authorize force, however, would give Congress more notice than had often accompanied unilateral presidential actions to protect Americans abroad that also created a risk of war.<sup>54</sup>

Truman Administration witnesses, such as John Foster Dulles, similarly adopted this distinction between limited police action and larger-scale conflict. Dulles contended that the war powers of Congress were not implicated “[i]f we are talking about a little bit of force to be used as a police demonstration.”<sup>55</sup> In contrast, “if this is going to be a large volume of force which is going to put a big drain on the resources of the United States or commit us to great and costly adventures, then the Congress ought to have a voice in this matter.”<sup>56</sup>

Senators Connally and Vandenberg also embraced the distinction between police action and war, emphatically so when pressed by Senators who contended that each individual use of U.S. forces by the Security Council would require prior congressional approval.<sup>57</sup> Vandenberg “totally sympathize[d] with those who insist that in the final analysis the control of our entry into war shall remain in the Congress;” but he also “totally sympathize[d] with the purpose of the Charter to use force to prevent situations where a declaration of war is necessary.”<sup>58</sup> Vandenberg believed, as did Senator Connally, that “there is a sharp distinction between the two.”<sup>59</sup> The Senate Foreign Relations Committee Report endorsed this view:

Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international

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52. *Id.*

53. *Id.*

54. *Id.*

55. *Charter Hearings, supra* note 22, at 655 (statement of John Foster Dulles).

56. *Id.*

57. *See id.* at 125-26 (statement of Sen. Vandenberg) (contending that military action by the Security Council is analogous to President’s use of force for national defense, which only requires congressional approval when a situation reaches the point of war); *id.* at 126-27 (statement of Sen. Connally) (usefulness of Security Council lies in its ability to take action quickly in emergencies, before a war ensues).

58. *Id.* at 126 (statement of Sen. Vandenberg).

59. *Id.*

action for the preservation of peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of Congress to declare war.<sup>60</sup>

This, admittedly, is broad language, provoked by the need to respond decisively to the war powers objections of Senator Wheeler and also, perhaps, to concerns that the Senate in approving the Charter not infringe on the constitutional power of Congress as a whole to "declare war."

Yet Senate discussions of the U.N. Charter both in committee and on the floor reveal that the distinction between "police action" and "war" rested on two important points: the purpose of the action and its size. By virtue of their commitment to the Security Council, the troops used in police actions were supposed to preserve peace and prevent war, responding to threats as delineated under Chapter VII of the U.N. Charter.<sup>61</sup> Indeed, many Senators expressed hope that the very existence of special-agreement forces would deter the outbreak of armed conflict.<sup>62</sup> Additionally, the number of U.S. forces earmarked for participation in U.N. police actions would be limited—in contrast to the large-scale mobilization of forces in a "war."<sup>63</sup>

Several proponents of the distinction between police action and war, including Senator Vandenberg, argued that the limited power of the President to participate in preventive police actions under the U.N. Charter was analogous to the President's existing constitutional authority as Commander in Chief to use U.S. forces "in a preliminary way for the national defense" without a prior declaration of war.<sup>64</sup> Senator Wheeler, on the other hand, rejected this analogy, pointing out that U.N. police

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60. SENATE CHARTER REPORT, *supra* note 49, at 9.

61. *Id.*

62. *E.g.*, 91 CONG. REC. 8015 (1945) (statement of Sen. Burton); *id.* at 8032 (statement of Sen. Chandler).

63. *See supra* note 40 and accompanying text (describing Senate expectations and Truman Administration representations in 1945). In 1947, two years after the U.N. Charter was ratified, the Military Staff Committee submitted a report to the Security Council that included provisional estimates of the overall strength and composition of Article 43 forces from the five permanent members. The permanent five did not agree on precise numbers or on what proportion each would contribute, but the overall magnitude of the contemplated force was substantial. 1947-48 U.N.Y.B. 494-95. Negotiations over Article 43 forces soon broke down, so these proposals for a sizable U.N. "police" force were never presented to the U.S. Congress for its review.

64. *Charter Hearings, supra* note 22, at 126 (statement of Sen. Vandenberg). The Senate Foreign Relations Committee essentially endorsed this view when it concluded that a reservation to the Charter requiring prior congressional approval every time the Security Council sought to use U.S. special-agreement forces would "violate the spirit of the United States Constitution under which the President has well-established powers and obligations to use our armed forces without specific approval of Congress." SENATE CHARTER REPORT, *supra* note 49, at 9.

actions would be used to protect not only Americans, but foreign citizens and interests as well.<sup>65</sup> Vandenberg and others rejoined that because the Charter linked U.S. security to that of the other member states, “a threat to international security and peace occurring anywhere on earth constituted a direct threat to the security and peace of the United States.”<sup>66</sup> Thus, according to Vandenberg, “when the President concludes to use preliminary force, in cooperation with the Security Council, to stop a dispute before it graduates into war, he is most emphatically protecting American welfare.”<sup>67</sup>

Rather than attempting to devise a grand theory of presidential police power under the U.N. Charter, Senator Eugene Millikin reminded his colleagues that the line indicating where the President’s power to conduct “policing operations” ends and “the power of Congress to make war and to supply and maintain our military forces begin[s]” is “a no-man’s land which has never been eliminated by an acceptable definition.”<sup>68</sup> Under the U.N. Charter, however, Congress would have the opportunity “to establish a practical definition” of the division of war powers when it considered and approved a special agreement under Article 43.<sup>69</sup> Millikin contended that “the initial quota of forces which we allocate can be considered the measure of our view of the forces required, at least initially for policing operations”<sup>70</sup>—a number that could later be adjusted upwards or downwards in light of experience. If the President desired additional forces for U.N. action, he would be required to return to Congress. There were both domestic and international benefits to this approach, Millikin argued:

[H]aving in this practical way defined the limits on the forces to be used for policing purposes, we automatically establish the line where the

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65. 91 CONG. REC. 7989 (1945) (statement of Sen. Wheeler) (arguing that the President’s authority to deploy troops abroad to protect American citizens and property did not mean he could “send American troops anywhere in the world to protect foreign interests” without the consent of Congress); *id.* at 7994 (same).

66. *Id.* at 8059 (statement of Sen. Austin).

67. *Id.* at 7957 (statement of Sen. Vandenberg).

68. *Id.* at 8033 (statement of Sen. Millikin).

69. Millikin first suggested this approach in his colloquy with Dulles during Dulles’s testimony before the Senate Foreign Relations Committee. *Charter Hearings*, *supra* note 22, at 654 (statement of Sen. Millikin). Dulles himself had suggested that

[w]hen the Congress knows what will be proposed concerning the size, the character, and the area of possible use of an American military contingent then we will know what we are talking about, and then it may be desirable by statute to fix the relative responsibility of the President and the Congress.

*Id.* at 641 (statement of John Foster Dulles).

70. *Id.* at 654 (statement of Sen. Millikin).



constitutional war powers of Congress shall commence. Such a formula, assuming that it is sought and carried out in good faith, would meet our full obligation to the Organization and at the same time preserve the traditional prerogatives of the President and the constitutional powers of the Congress in the subject matter.<sup>71</sup>

Such an approach was ultimately adopted in the U.N. Participation Act, which tried to clarify by statute the line between the war powers of the President and those of the Congress with respect to U.N. military actions.

In short, the distinction between police action and war was embraced by proponents as a way of clarifying and protecting the war powers of Congress, and not abdicating them, in the new security system established by the U.N. Charter. The majority of the Seventy-Ninth Congress accepted the need to give the Security Council flexibility by ceding a very limited authority to the President to use designated U.S. forces in U.N. sanctioned "police" actions. The concept of U.N. "police action," however, clearly was premised on the conclusion of special agreements approved by Congress.<sup>72</sup> Thus, contemporary claims that American troops can be used in any U.N. authorized military action, regardless of its size, without any prior congressional approval, would have surprised the Seventy-Ninth Congress.

### 3. Treaty Obligations under the U.N. Charter

The third major issue emerging in the Senate debate over the U.N. Charter concerned the treaty obligations the United States would undertake by ratifying the Charter. Many Senators stressed that under Article 43 the United States was obliged to enter into an agreement with the Security Council in order to designate at least some troops for U.N. sanctioned enforcement action.<sup>73</sup> As Senator John McClellan argued, once the Charter was ratified, "we shall have incurred the basic obligation under it to furnish troops," although Congress subsequently would "deter-

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71. *Id.*

72. *E.g.*, 91 CONG. REC. 8030 (1945) (statement of Sen. Lucas) ("Enforcement action under the Charter will involve only the forces pledged under these special agreements.").

73. *See, e.g., id.* at 7987 (statement of Sen. Connally) ("In the Charter we agreed to make these agreements. We are under obligation to make some kind of an agreement with the Security Council."); *id.* at 8030 (statement of Sen. Lucas) ("The exact terms of [our military] obligation are to be determined by an agreement to be negotiated later, but nevertheless the basic fundamental obligation to contribute forces is created by this charter."); *id.* at 8025 (statement of Sen. Taft) ("We are obligated to the other nations just as much to furnish a particular force covered in a supplementary agreement as we are obligated to conform to other provisions in the general treaty."); *id.* at 8079 (statement of Sen. Pepper) ("[A]s every Senator who has spoken on the subject has pointed out, we have committed ourselves to supply these forces that may be agreed upon later, that may be determined in detail later.").

mine the number of troops we shall supply.”<sup>74</sup> Virtually everyone assumed that such an agreement would be promptly concluded and submitted to Congress for approval.

At the same time, a few Senators argued that the President would gain certain power directly under the Charter itself, which would vest as soon as it was ratified. According to this argument, the U.N. Charter would be the supreme law of the land, and the President would have both the duty and the power to “take care” that it was faithfully executed.<sup>75</sup> Senator Scott Lucas argued that this power would extend beyond the President’s existing constitutional “power to call out the troops for the purpose of faithfully enforcing the laws of the land, including treaties” in situations involving the personal or property rights of American citizens abroad.<sup>76</sup> Under the Charter, he contended, “almost any dispute between nations becomes our business,” and the President thus would have the power to respond to threats to the peace all over the world by calling forth “the contingents which we agree to contribute.”<sup>77</sup> Similarly, Senator Warren Austin argued that the President had constitutional authority “to employ all the force that is necessary to enforce the law,” including treaties.<sup>78</sup> Under the Charter, the President would have broad authority “to enforce peace,” Austin continued, because “a breach of the peace anywhere on earth which threatens the security and peace of the world is an attack on us.”<sup>79</sup>

These remarks about broad presidential authority to “execute” the U.N. Charter seem in tension with the emphasis throughout the Senate debate that Congress must approve any commitment of U.S. troops to the Security Council. Senators Austin and Lucas thus qualified their comments when questioned by colleagues: Austin readily acknowledged that the power to declare war rested in Congress and “the President will be bound faithfully to execute this charter and to preserve the peace by the methods and in the manner set out in the charter.”<sup>80</sup> Lucas viewed the expanded power of the President as vesting upon ratification of the Charter, but subject to

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74. *Id.* at 8023 (statement of Sen. McClellan).

75. *Id.* at 8031 (statement of Sen. Lucas); *id.* at 8065 (statement of Sen. Austin).

76. *Id.* at 8031 (statement of Sen. Lucas).

77. *Id.*

78. *Id.* at 8065 (statement of Sen. Austin); *see also id.* at 7991 (statement of Sen. Connally) (“[I]t is the duty of the President of the United States to enforce the laws and a treaty legally ratified by the Senate is a law of the United States.”); *id.* at 8031-32 (statement of Sen. Fulbright) (reading from Willoughby’s treatise on the Constitution that a President sending troops outside the United States in times of peace “in pursuance of express provisions of a treaty, or for the execution of treaty provisions . . . could not reasonably be subject to constitutional objection”).

79. *Id.* at 8065 (statement of Sen. Austin).

80. *Id.* The U.N. Charter itself recognized in Article 43 that any agreement to provide troops was subject to the “constitutional processes” of member states. *See* U.N. CHARTER art. 43, ¶ 3.

Congress's subsequent agreement to commit a specified number of troops to the Security Council.<sup>81</sup> Any obligation to contribute forces "will be clearly defined and delimited in advance," he stressed, and Congress's exclusive power to declare war would not be affected.<sup>82</sup>

Several other Senators directly challenged the notion that the President should be free to "execute" the U.N. Charter in any manner he saw fit. As Senator Elbert Thomas pointed out, "[t]he acceptance of a treaty does not in any sense set aside the ordinary practices under the Constitution of the United States."<sup>83</sup> In short, virtually everyone in Congress—including Senators Lucas and Austin—assumed that Congress, by virtue of its final say over any agreement making U.S. forces available for U.N. military actions, would be actively involved in implementing U.S. obligations under the Charter. Even President Truman shared this view: he sent a message to Congress on June 27, 1945 confirming that once special agreements were negotiated he would "ask the Congress for appropriate legislation to approve them."<sup>84</sup> The Senate gave its advice and consent to ratification of the U.N. Charter the next day.<sup>85</sup>

#### B. THE U.N. PARTICIPATION ACT OF 1945: IMPLEMENTING THE WAR POWERS BALANCE

A few months after the U.N. Charter was ratified, the Seventy-Ninth Congress sought to implement the war powers balance between Congress and the President through the United Nations Participation Act of 1945 (UNPA).<sup>86</sup> That Act demonstrated Congress's desire to provide the U.N. Security Council with a limited number of troops that could be used promptly to preserve the peace, while at the same time protecting Congress's war powers in larger conflicts. Under the UNPA, U.S. representatives at the United Nations vote in accordance with the instructions of the President,<sup>87</sup> who must in turn report to Congress any Security Council decisions to take enforcement action.<sup>88</sup> The Act also gives the President

81. 91 CONG. REC. 8031 (1945) (statement of Sen. Lucas).

82. *Id.* at 8030 (statement of Sen. Lucas).

83. *Id.* at 8025 (statement of Sen. Thomas); *see also id.* at 8065 (statement of Sen. George) (the President has a duty "to execute this treaty and to preserve the peace by the means and methods and in the way provided in this treaty").

84. *Id.* at 8185 (statement of President Truman). According to Senate Majority Leader Alben Barkley, "[t]here was some fear that the President might undertake to by-pass Congress altogether by an executive agreement," and "the object of this letter is simply to disabuse anyone's mind of any fear or suspicion that he would pursue that course." *Id.* at 8186 (statement of Sen. Barkley).

85. *Id.* at 8190.

86. *Supra* note 15. The Senate passed the UNPA by a vote of 65 to 7, 91 CONG. REC. 11,409 (1945); the House passed the Act by 344 to 15, *id.* at 12,288.

87. 59 Stat. 620, § 3, 22 U.S.C. § 287a.

88. 59 Stat. 620, § 4, 22 U.S.C. § 287b.

authority to implement fully any economic sanctions approved by the Security Council.<sup>89</sup>

The key provisions regarding the balance of war powers are contained in section six of the UNPA, which concerns the use of armed force. The section authorizes the President to negotiate an Article 43 agreement with the U.N. Security Council, which would be "subject to the approval of the Congress by appropriate Act or joint resolution."<sup>90</sup> The Act then specifies the critical war powers balance:

The President shall not be deemed to require the authorization of the Congress to make available to the Security Council on its call in order to take action under article 42 of said Charter and *pursuant to such special agreement or agreements* the armed forces, facilities, or assistance provided therein.<sup>91</sup>

This delegation, however, is immediately qualified: "[N]othing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance *in addition to* the forces, facilities, and assistance provided for in such special agreement or agreements."<sup>92</sup>

In short, once Congress approved a special agreement, the President could commit a limited number of U.S. forces to Security Council enforcement actions, subject to the numerical and other limits established in the agreement. The line between small-scale "police actions," which could be conducted without the need for specific congressional authorization in each case, and war or large-scale conflict would thus be established by the special agreement, just as Senator Eugene Millikin had urged during the Charter ratification process.<sup>93</sup> Moreover, as the Senate Report on the UNPA stressed, "all were agreed on the basic proposition that the military agreements could not be entered into solely by executive action."<sup>94</sup>

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89. 59 Stat. 620-621, § 5, 22 U.S.C. § 287c(a).

90. 59 Stat. 621, § 6, 22 U.S.C. § 287d. The agreement would indicate the number and type of armed forces the United States would make available to the Security Council "on its call" to maintain international peace and security, as well as the degree of readiness of the forces, their general location, and the nature of any additional assistance and facilities to be provided. *Id.*

91. *Id.* (emphasis added).

92. *Id.* (emphasis added).

93. See *supra* notes 69-71 and accompanying text.

94. S. COMM. REP. NO. 717, 79th Cong., 1st Sess. 8 (1945). The previous debate over whether congressional authorization should be expressed through treaty ratification or through a joint resolution was resolved in favor of the latter method on the view that Congress as a whole should approve forces under its constitutional powers to raise and support armies, U.S. CONST. art I, § 8, cl. 12, to provide and maintain a navy, *id.* cl. 13, and to make rules for the regulation of the armed forces, *id.* cl. 14. S. COMM. REP. NO. 717, *supra*; see also H.R. COMM. REP. NO. 1383, 79th Cong., 1st Sess. 7 (1945) (discussing this view).

The congressional debate that preceded passage of the UNPA reflected the continuing tension between the majority in Congress, who believed that the Act struck the right war powers balance, and a minority, who insisted that the Article 43 approach did not adequately protect the constitutional power of Congress to declare war. As in the Charter ratification debate, the most forceful advocates of the former, or "contractual" approach, were Senator Tom Connally, Chairman of the Senate Foreign Relations Committee, and Senator Arthur Vandenberg, the Committee's ranking Republican member. Both Senators emphasized that Congress must approve any Article 43 special agreement in the first place and the President would have to request from Congress any additional troops beyond those specified in the agreement.<sup>95</sup> Once the United States entered into a "primary contract" with the United Nations, the President could direct the use of the designated forces when called upon by the Security Council, but this power would be "strictly limited by the ultimate contract for these purposes which the Congress shall approve."<sup>96</sup> This contractual approach, in their view, ensured the effectiveness of the Security Council without infringing upon the war powers of Congress.<sup>97</sup>

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Both the House and Senate Reports on the UNPA quoted at length from the Senate Foreign Relations Committee Report on the U.N. Charter, which rejected as inconsistent with the Charter any amendment requiring prior congressional approval for every Security Council use of U.S. special-agreement forces. The UNPA reports thus confirmed Congress's view that "the President has the power and obligation, in compliance with our undertaking under the Charter, to make the forces provided in the agreements available to the Security Council." S. COMM. REP. No. 717, *supra*, at 9; H.R. COMM. REP. No. 1383, *supra*, at 8. Both reports stressed, however, that nothing in the Act should be construed as authorizing the President to provide any additional forces to the Security Council beyond those designated in a special agreement.

95. 91 CONG. REC. 10,965, 10,967, 11,405 (1945) (statement of Sen. Connally); *id.* at 10,967, 10,975 (statement of Sen. Vandenberg). "[A]greements shall be brought back to the Senate and the House for discussion and action," Connally stressed, and "Congress can limit the troops and throw all sorts of safeguards around them." *Id.* at 11,405 (statement of Sen. Connally).

96. *Id.* at 10,975 (statement of Sen. Vandenberg).

97. As Senator Connally explained, "[i]t is not provided, as some Senators probably will desire, that the President must first come to the Congress and secure specific authorization for the furnishing of troops in each and every instance." *Id.* at 10,965 (statement of Sen. Connally). Such an arrangement would hamper the Security Council's ability to "act promptly in time of crisis." *Id.* Instead, "the President shall have the authority in certain emergencies to employ the troops up to the number specified in any special agreement entered into." *Id.* But the President's power was limited: "[H]e could not employ more troops than we have agreed to furnish in the nature of a police force." *Id.*; *see also id.* at 10,975 (statement of Sen. Vandenberg) (the power of the President, through his representative, shall be "limited always and specifically to such military force as the Congress, by subsequent action, contractually puts at the disposal of the President and the [United Nations]"). Senator Connally also stressed that the Congress had additional ways to control the use of these forces: Congress held the power of the purse, and the U.S. representative to

The Article 43 skeptics remained unpersuaded. Several Senators insisted that even the special agreement approach amounted to an unconstitutional delegation of Congress's power to declare war. Senator Burton Wheeler contended, for example, that "[w]e are only fooling ourselves and fooling the people of the country when we say that we will give to the President power to put down aggression with a small force, and not at the same time delegate to him the full power to declare war at any time."<sup>98</sup> The problem, as Wheeler saw it, was that once Congress gave the President the authority to use a small force, the situation could escalate if the force were deployed against a strong power.<sup>99</sup> "[W]e are then at war, . . . whatever we may want to call it, and the Congress is going to have to accept that fact, and vote then for the use of more troops."<sup>100</sup> Senator Raymond Willis likewise contended that Congress, not the President nor the U.S. representative to the United Nations, should make the decision to commit U.S. troops to conflict, and that if it was kept adequately informed, Congress could act both expeditiously and responsibly.<sup>101</sup>

Senator Wheeler proposed an amendment to the UNPA that would directly protect Congress's war powers. Under the Wheeler Amendment, notwithstanding any special agreement, the President would have no authority to make armed forces available to the Security Council to take action under Article 42 of the U.N. Charter "unless the Congress has by appropriate act or joint resolution authorized the President to make such forces available . . . in the specific case in which the Council proposes to take action."<sup>102</sup> This amendment was defeated by a vote of sixty-five to nine.<sup>103</sup> The Senate also defeated an amendment proposed by Senator Robert Taft. Like Wheeler, Taft believed the UNPA went too far in delegating war powers to the President,<sup>104</sup> but he responded by advocating certain

the United Nations was subject to Senate confirmation. *Id.* at 10,969, 10,970 (statement of Sen. Connally).

98. *Id.* at 11,393 (statement of Sen. Wheeler).

99. *Id.* at 11,027 (statement of Sen. Wheeler) ("[W]ithout the approval of Congress, I am opposed to giving power to any President of the United States to send a police force into some other part of the world. If we should send a police force against a strong power it might mean war.").

100. *Id.* at 10,967 (statement of Sen. Wheeler). Moreover, Wheeler argued, in contrast to situations in which the President had used troops without Congress's consent to save American lives or property, here the President was being given power to protect the citizens of other states "wherever and whenever the [Security] Council determines that there is an aggression." *Id.* at 10,966 (statement of Sen. Wheeler).

101. *Id.* at 11,398, 11,400 (statement of Sen. Willis).

102. *Id.* at 11,392 (text of Wheeler Amendment).

103. *Id.* at 11,405 (official voting record on amendment).

104. In Taft's view, section three of the UNPA, which provided that the U.S. representative would vote in accordance with the President's instructions, surrendered to the President "the power to declare war." *Id.* at 11,240 (statement of Sen. Taft). Although "[c]ertain of

limits on the power of the U.S. representative to the United Nations to vote for the use of force.<sup>105</sup>

The defeat of these amendments did not indicate that the Seventy-Ninth Congress intended the President to have unilateral power to commit U.S. forces to any U.N. authorized use of military force regardless of its size. On the contrary, it reflected the majority's satisfaction with the war powers balance in the special agreement contractual approach. Thus, broad claims that congressional leaders, such as Senators Vandenberg and Connally, believed the President needed no authorization from Congress to participate in U.N. approved "police actions"<sup>106</sup> are misleading. Such statements fail to take account of the central premise of their vision of "contracted peace forces"—that it was up to *Congress* to determine the size and contours of the military forces that would be provided to the Security Council. As Professor Edward Corwin wrote in 1949, "the United Nations Participation Act of 1945 definitely bases American implementation of the United Nations Charter not on Presidential prerogative but on the national legislative power."<sup>107</sup>

#### C. THE BALANCE REAFFIRMED: THE 1949 AMENDMENTS TO THE U.N. PARTICIPATION ACT

Congress's desire to set boundaries on the participation of U.S. armed forces in United Nations activities was reaffirmed in the 1949 amendments to the UNPA.<sup>108</sup> Those amendments authorize the President to detail U.S. armed forces personnel to the United Nations, but attach clear restrictions: U.S. personnel can only be used in support of U.N. activities "specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the

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his actions may involve the use of police power," other actions "he is authorized to take under the provisions of section 3 may well result in war." *Id.*; see also *id.* at 11,083 (same) ("What the President does may not be war, but it . . . may be likely to involve us in war, at a cost of billions of dollars and hundreds of thousands of lives.").

105. Taft's Amendment provided, *inter alia*, that

[t]he representative of the United States on the Security Council shall . . . refuse to vote under article 39, 41, or 42 (except by direction of the Congress) for measures against a nation unless he is satisfied that such measures, if taken, will bring about a result in accord with international justice as well as international peace and security.

*Id.* at 11,036. The amendment was defeated by a vote of 41 to 18. *Id.* at 11,167. For a discussion of the Taft Amendment, see Scheffer, *War Powers*, *supra* note 29, at 12-14.

106. See Franck & Patel, *supra* note 28, at 67-68 (discussing the Senate debate on the U.N. Charter).

107. Edward S. Corwin, *Who Has the Power to Make War?*, N.Y. TIMES, July 31, 1949, § 6 (Magazine), at 14.

108. Act of Oct. 10, 1949, Pub. L. No. 341, 63 Stat. 734-36 (1949) (codified at 22 U.S.C. § 287d-1 (1988)) [hereinafter UNPA amendments].

United Nations Charter.”<sup>109</sup> Moreover, the President can only commit U.S. personnel to “serve as observers, guards or in any noncombatant capacity.”<sup>110</sup> To further limit this delegation, the amendments set a numerical ceiling, providing that “in no event shall more than a total of one thousand of such personnel be so detailed at any one time.”<sup>111</sup>

Senators such as Arthur Vandenberg were determined to place precise limits on the use and number of these personnel to avoid loopholes or subsequent misunderstandings. This concern was evident in the Senate Foreign Relations Committee’s executive session hearings on the amendments.<sup>112</sup> Truman Administration witnesses explicitly assured the Senators that the amendments were “not a method of bringing into operation Article[] 43” and did not contemplate military action of any kind.<sup>113</sup> The Administration’s main witness stressed that any U.S. personnel detailed to the United Nations under the amendments would engage in the peaceful settlement of disputes “without the use of force or sanctions” and that they would not be “subjected to any combat or semi-combat type of condition.”<sup>114</sup> Senator Vandenberg stated that he agreed with that objective and viewed it as “very essential.”<sup>115</sup> Modifications were made in the text of the proposed amendment to insure no confusion on this point.<sup>116</sup>

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109. *Id.* 63 Stat. 735-736, 22 U.S.C. § 287d-1(a); *see also* S. COMM. REP. NO. 510, 81st Cong., 1st Sess. 5 (1949) (“[T]he assistance provided by section 7 is limited to UN activities directed to the peaceful settlement of disputes under either chapter VI or VII of the Charter, but does not apply to activities involving the employment of armed forces by the UN.”); *see also* H.R. COMM. REP. NO. 591, 81st Cong., 1st Sess. 5-6 (1949) (emphasizing that troops could only be used for peacekeeping missions).

110. UNPA amendments, *supra* note 108, 63 Stat. 736, 22 U.S.C. § 287d-1(a).

111. *Id.* The Senate and House Reports on these provisions indicate that they were designed to affirm and clarify the President’s authority to detail a limited number of armed services personnel to the U.N. for noncombatant purposes only. At the time the amendments were adopted, Congress expected these personnel to assist with logistical aspects of several U.N. political commissions then working on the peaceful resolution of conflicts in the Balkans, India and Pakistan, Indonesia, Palestine, and Korea. S. COMM. REP. NO. 510, *supra* note 109, at 3; H.R. COMM. REP. NO. 591, *supra* note 109, at 3. The one thousand person ceiling was included “as a clear indication that the Congress intends only that auxiliary personnel shall be made available and that there shall not be any wholesale drawing upon American manpower resources.” *Id.* at 5; *see also* S. COMM. REP. NO. 510, *supra* note 109, at 5.

112. STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 81ST CONG., 1ST SESS., EXECUTIVE SESSION ON S. 1073 TO AMEND THE UNITED NATIONS PARTICIPATION ACT OF 1945 (Comm. Print 1949), at 40-52.

113. *Id.* at 40, 44 (statement of Mr. Gross); *see also id.* at 50 (statement of Mr. Goodrich).

114. *Id.* at 41 (statement of Mr. Gross).

115. *Id.* at 41 (statement of Sen. Vandenberg).

116. *Id.* at 44-46. President Truman subsequently issued an executive order providing for the detail of U.S. personnel to the United Nations for peaceful dispute settlement subject to the limits set forth in section seven of the UNPA. Exec. Order No. 10,206, Support of Peaceful Settlement of Disputes, 16 C.F.R. 529 (1951), *reprinted in* 22 U.S.C. § 287d-1 (1988).



#### D. A VISION UNIMPLEMENTED

The balance the Seventy-Ninth Congress sought to strike between assuring effective and flexible U.S. participation in the United Nations, while preserving the exclusive authority of Congress to declare war, remained unimplemented and essentially untested at the end of the 1940s. The Article 43 special agreements anticipated in 1945 were early casualties of Cold War tensions that made agreement among the five permanent members of the Security Council impossible. The vision of a limited number of forces placed "on call" for the Security Council's use in preventing war or checking aggression never materialized.

The members of the Seventy-Ninth Congress had been so certain that U.S. forces would be committed to the Security Council by special agreement that they never directly addressed the respective war powers of Congress and the President in the absence of such an agreement.<sup>117</sup> The Seventy-Ninth Congress assumed that the line between "police action" and "war" would be drawn—at least initially—when Congress gave its consent to a special agreement negotiated by the President. Without an agreement in place to draw this practical war powers line, there was a real risk that the distinction between police action and war would lose any concrete moorings. Moreover, suggestions of expanded presidential power under the U.N. treaty would soon resurface as the conflict in Korea tested the boundaries of the "police action" concept.

## II. SUBSEQUENT EXPERIENCE: CONSTITUTIONAL WAR POWERS AND THE UNITED NATIONS

The issue of the respective war powers of Congress and the President when the U.N. Security Council has authorized the use of military force has arisen directly in only two cases: the Korean War in the early 1950s and the Persian Gulf War forty years later. In each case, the President in office invoked Security Council resolutions to argue that he had the power

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117. Virtually everyone seemed to assume that a special agreement would be negotiated promptly. Only one person, Senator James Tunnell, directly raised the question of the obligation of the United States to provide troops under the U.N. Charter if "there never is an agreement of any type." 91 CONG. REC. 8024 (1945) (statement of Sen. Tunnell). Senator Scott Lucas replied that "when we ratify this Charter . . . we are legally and morally bound to furnish forces of some kind or character to help keep the peace of the world." *Id.* (statement of Sen. Lucas). Representative Sol Bloom, who introduced the UNPA in the House, in contrast, stated that "the obligation of the United States to make forces available to the Security Council does not become effective until the special agreement has been passed upon by Congress." *Id.* at 12,267 (statement of Rep. Bloom). Senator Forrest Donnell likewise took the position that under the U.N. Charter the Security Council had no power to order the use of U.S. forces in the absence of a special agreement. *Id.* at 11,175 (statement of Sen. Donnell).

to commit U.S. forces to combat without the prior consent of Congress. Both President Truman and President Bush articulated a “police power” model of war powers that surpassed the limits of size and congressional participation central to the contract model of the Seventy-Ninth Congress.

Why did the contract model so quickly give way to an open-ended police power model? In particular, why did the same Senators who articulated the contract model in 1945 so readily accept Truman’s “police power” claims in 1950? This Part explores these issues and also considers the dangers of the police power model revealed by the Korean and Persian Gulf experiences. This Part also examines the emergence during the Persian Gulf conflict of a “political accommodation” model of the respective war powers of Congress and the President.

A. WAR IN KOREA: THE DEMISE OF A CONTRACTUAL BALANCE AND  
THE RISE OF A POLICE POWER MODEL

The Korean War presents a troubling precedent for advocates of strong congressional war powers. President Truman committed substantial American ground, air, and naval forces to combat without prior congressional approval. Professor Thomas Franck and Faiza Patel view the Korean War as a defensive “police action” authorized by the U.N. Security Council and thus well within the President’s constitutional authority.<sup>118</sup> Many Senators in 1950 agreed with this view. What is striking is that many of the same Senators who sought to protect Congress’s war powers through the UNPA were supportive of Truman’s actions—at least initially—despite the fact that Congress was informed only after Truman made the decision to commit troops to combat. Indeed, Truman decided to commit U.S. forces *before* the Security Council had even authorized the use of military force to defend Korea.

Despite many Senators’ initial support, there was a subsequent congressional backlash against Truman, expressed most sharply during the so-called “Great Debate” in 1951 over deployment of U.S. troops to Europe

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118. See Franck & Patel, *supra* note 28, at 70-71 (discussing Truman’s actions and the Senate’s response). In contrast, many scholars, including myself, view Truman’s initial actions as infringing on Congress’s constitutional power to declare war. See *Constitutional War Powers Hearings*, *supra* note 28, at 89 (statement of Louis Henkin, Professor Emeritus, Columbia University School of Law) (stating that Truman had no authority from the Constitution, the U.N. Charter, or the UNPA to send U.S. forces to war in Korea, but subsequent congressional actions ratified the President’s decision and “probably cured the original lack of constitutional authority”); *id.* at 125 (statement of Harold Koh, Professor, Yale Law School) (expressing opinion that Truman’s decision was unwise and violated the Constitution); Peter Raven-Hansen, Remarks at the American Society of International Law, 85th Annual Meeting (Apr. 17, 1991), in *THE AMERICAN SOCIETY OF INTERNATIONAL LAW, PROCEEDINGS OF THE 85TH ANNUAL MEETING* 8, 12 (1991) (arguing that the United States unconstitutionally entered the Korean War).

under the North Atlantic Treaty. The record of the Great Debate indicates that the balance of war powers during the Korean War was perceived by many in Congress as the byproduct of a unique event, rather than a war powers paradigm for the future.<sup>119</sup>

#### 1. Truman's Decisions: June 24 to June 30, 1950

The fledgling United Nations system faced its first major test in June of 1950 when North Korean forces crossed the 38th parallel and invaded the Republic of Korea.<sup>120</sup> The attack caught most of the world by surprise; it was perceived in Washington as a direct challenge to the United Nations and to the postwar security structure the United States sought to create. The affront to the authority of the United Nations was clear: the Republic of Korea had only just attained independent statehood in 1948 after free elections under U.N. auspices.<sup>121</sup> Above all, the North Korean attack was perceived by President Truman and many others as a critical test of American willingness to stop Communist aggression in the increasingly tense postwar period.<sup>122</sup>

*The Security Council's Role.* On the evening of June 24, 1950, shortly after news of the attack reached Washington, State Department officials recommended that the U.N. Security Council be called into emergency session.<sup>123</sup> Truman concurred, and the Security Council met on June 25 to consider the Korean situation. The Council adopted a resolution proposed by the United States, which denounced the Korean attack as a "breach of the peace" and called for an immediate cease-fire and withdrawal of North Korean forces to the 38th parallel.<sup>124</sup> The Security Council also called

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119. Justin Castillo, *The Great Debate and the President's Power to Deploy Troops Abroad 9* (unpublished student manuscript, on file with *The Georgetown Law Journal*).

120. The attack occurred at 4:00 a.m. on Sunday, June 25, Korean time, or 3:00 p.m. on Saturday, June 24, eastern daylight time. GLENN PAIGE, *THE KOREAN DECISION* 91 (1968).

121. For a useful summary of the U.S. and U.N. involvement in Korea, see Senator Alexander Smith's account in 96 CONG. REC. 9331-32 (1950) (statement of Sen. Smith). See also *Papers of Harry S. Truman*, 1950 PUB. PAPERS 528 (Truman's July 19, 1950 address to Congress) [hereinafter *1950 Truman Papers*].

122. As Senator Paul Douglas put it:

The basic reason for our intervention was the recognition by the President, and, I believe, by the Nation, of the fact that, if the Communists were successful in taking over southern Korea without our imposing any effective opposition, they could be depended upon to make similar invasions of other areas.

97 CONG. REC. 9649 (1950) (statement of Sen. Douglas).

123. DEAN ACHESON, *PRESENT AT THE CREATION* 402, 404 (1969); PAIGE, *supra* note 120, at 92-93.

124. S.C. Res. 82, U.N. SCOR, 5th Sess., 473d mtg., at 4, U.N. Doc. S/INF/4/Rev.1 (1950). The vote on the resolution was nine to zero, with one abstention. *Id.* at 5. The

upon all U.N. members "to render every assistance to the United Nations in the execution of this resolution."<sup>125</sup>

Truman met that evening with his top military and political advisers, including the Secretaries of State and Defense, the Joint Chiefs of Staff, the Secretaries of the armed services, and several other State Department officials.<sup>126</sup> On their advice, Truman authorized General Douglas MacArthur to supply South Korean forces with arms and other equipment and to provide U.S. air cover to assist the evacuation of Americans from Seoul.<sup>127</sup> Truman stressed at this meeting that "we are working entirely for the United Nations" and will "wait for further action until the UN order is flouted."<sup>128</sup> Truman also asked the State Department to prepare a statement that he would deliver "in person to Congress on Tuesday [June 27] indicating exactly what steps had been taken."<sup>129</sup>

Truman had little time to wait. The military situation deteriorated rapidly as North Korean forces continued their advance. On the evening of June 26, Truman met with his top advisers again and decided to commit U.S. air and naval forces to assist South Korean forces in repelling the North Korean attack.<sup>130</sup> At the time of this decision, the Security Council had neither considered nor adopted a resolution authorizing the use of military force to defend the Republic of Korea. Secretary of State Acheson advised Truman, however, that the Security Council would meet the next day, and that diplomatic reports indicated the United States "would get full support" for its proposed Security Council resolution recommending "such assistance as was needed . . . to repel the attack."<sup>131</sup> If the Soviet Union decided to attend the Security Council meeting and veto the resolution, "we would still take the position that we could act in support of the Charter," contended Assistant Secretary of State Dean Rusk.<sup>132</sup> Truman agreed, and said he "rather wished they would veto."<sup>133</sup> As a precaution,

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Soviet representative was absent in protest over the presence of a Nationalist Chinese representing China. Once the Soviet Union returned to its seat at the Security Council, the Council was stalemated, and the General Assembly was seized with the Korean conflict under the *Uniting for Peace* Resolution. G.A. Res. 377A, U.N. GAOR, 5th Sess., 302d mtg., Supp. No. 20, at 10, U.N. Doc. A/1775 (1950).

125. S.C. Res. 82, *supra* note 124, at 4-5.

126. 7 UNITED STATES DEPT. STATE, FOREIGN RELATIONS OF THE UNITED STATES 1950 157 (1976) [hereinafter 7 FOREIGN RELATIONS OF THE UNITED STATES 1950].

127. *Id.* at 157-58, 160-61.

128. *Id.* at 160.

129. *Id.* at 160 & n.9. Truman also asked that no statements be made to either the press or Congress until Tuesday. *Id.* at 161.

130. *Id.* at 178-79; ACHESON, *supra* note 123, at 408.

131. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 181.

132. *Id.*

133. *Id.*

the Secretaries of Defense and State urged Truman to announce publicly his decision to deploy U.S. forces before the Security Council met.<sup>134</sup>

Despite subsequent claims by the Truman Administration that it sent American forces to Korea at the request of the Security Council, Acheson in his memoirs acknowledges that “some American action, said to be in support of the resolution of June 27, was in fact ordered, and possibly taken, prior to the resolution.”<sup>135</sup> The Security Council did not authorize the use of force until late on the evening of June 27, *after* Truman had issued his public statement announcing U.S. air and naval support for South Korea and *after* the U.S. representative to the Security Council read that statement to his colleagues at the Security Council meeting. The new resolution, adopted just as North Korean forces were overrunning Seoul,<sup>136</sup> “recommended” that U.N. member states “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”<sup>137</sup>

No one at the United Nations seemed terribly bothered by the fact that Truman’s decisions preceded formal Security Council authorization, perhaps for the reasons given by U.N. Secretary-General Trygve Lie: Truman’s orders were “fully within the spirit” of the earlier June 25 resolution calling on members to render every assistance to the U.N., and there clearly were sufficient votes on the Security Council in favor of authorizing military assistance to South Korea.<sup>138</sup> It was also clear that the United States was in the driver’s seat—drafting the Security Council resolutions and deciding on their implementation—even before they were approved

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134. *Id.* at 183.

135. ACHESON, *supra* note 123, at 408.

136. PAIGE, *supra* note 120, at 206-07.

137. S.C. Res. 83, U.N. SCOR, 5th Sess., 474th mtg., at 5, U.N. Doc. S/INF/4/Rev.1 (1950). The vote was seven in favor, with Yugoslavia opposed and India and Egypt abstaining. The Soviet Union did not attend the meeting. *Id.* at 5 & n.13.

Some scholars have argued that the Korean action was an act of collective self-defense under Article 51 of the Charter rather than a U.N. enforcement action under Chapter VII because the resolution of June 27 did not involve a “decision” by the Security Council under Articles 39 and 42 but merely a “recommendation.” *E.g.*, Eugene Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law, Continued: Until What? Enforcement Action or Collective Self-Defense*, 85 AM. J. INT’L L. 506, 508 (1991). Professor Bowett argues persuasively, however, that “[t]he better view is to regard the Korean action as enforcement action authorized by recommendations under Article 39.” D.W. BOWETT ET AL., UNITED NATIONS FORCES 34 (1964). Even if all the technical requirements of Article 42 were not met, the participating countries “regarded their action as essentially United Nations action under the authority of the Security Council.” *Id.* at 34; *see also id.* at 45-47 (discussing widely held view that the participating forces served as United Nations forces in a United Nations action).

138. PAIGE, *supra* note 120, at 206 (quoting TRYGVE LIE, IN THE CAUSE OF PEACE 331-32 (1954)).

by the Security Council itself. It was the Security Council that acted at the request of the United States and not the other way around.<sup>139</sup>

This pattern was repeated on July 7, 1950, when the Security Council adopted a third resolution recommending that all forces defending Korea be placed under a “unified command under the United States of America” and requesting that the United States “designate the commander of such forces.”<sup>140</sup> Although Truman indicated publicly that he was “responding” to the recommendation of the Security Council in naming General MacArthur commander,<sup>141</sup> the United States had been the moving force behind the July 7 resolution.<sup>142</sup>

*Congress’s Nonrole.* Just as Truman deployed U.S. forces without prior Security Council authorization, he also acted without the prior approval of Congress. Truman met with a group of congressional leaders for the first time on the morning of June 27—two days after he first authorized U.S. assistance to the South Korean forces and the morning after he ordered U.S. air and naval forces to enter combat.<sup>143</sup> After Acheson summarized the developments in Korea, President Truman praised the prompt action

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139. American officials acknowledged as much: when asked by a British diplomat about a rumor that the U.S. Government felt American forces were being sent to Korea “against the wishes of the Government under compulsion of the Security Council,” the U.S. Deputy Assistant Secretary of State responded that such a rumor was “fantastic” and that “the obvious answer was that we had taken the initiative in presenting the two Security Council resolutions.” 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 268 (colloquy on June 30, 1950 between British Embassy Counselor and the U.S. Deputy Assistant Secretary of State for Far Eastern Affairs).

140. S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., at 6, U.N. Doc. S/INF/4/Rev.1 (1950). The Security Council also authorized “the unified command at its discretion to use the United Nations flag in the course of operations against North Korean forces concurrently with the flags of the various nations participating.” *Id.*

141. See 1950 Truman Papers, *supra* note 121, at 520 (Truman’s statement of July 8, 1950). According to Paige, Truman informed congressional leaders on June 30 that MacArthur would be both the U.N. and the U.S. commander in Korea. PAIGE, *supra* note 120, at 262.

142. The United States decided it would appear inappropriate to introduce the resolution in the Security Council itself and therefore sought the assistance of another state. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 292-93, 299-301, 306-09, 318, 320-21. Britain and France ultimately introduced the resolution. U.N. SCOR, 5th Sess., 476th mtg., at 3, U.N. Doc. S/PV.476 (1950). They shared the U.S. view that the Security Council’s role in overseeing the course of combat should be minimal. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 306-07.

143. The group included Senate Majority Leader Scott Lucas, Speaker of the House Sam Rayburn, House Majority Leader John McCormack, Chairman of the Senate Foreign Relations Committee Tom Connally, and ranking Republican members Senator Alexander Wiley and Senator Alexander Smith, as well as the Chairmen and ranking minority members of the House Foreign Affairs Committee and the House and Senate Armed Services Committees. ACHESON, *supra* note 123, at 408; PAIGE, *supra* note 120, at 187. Acheson had called three congressional leaders on the morning of June 26. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 170.

of the U.N. Security Council and read a statement describing his decisions, which he planned to release to the press at the end of the meeting. Truman stressed that North Korean forces persisted in their attack despite the Security Council's demand that they cease hostilities and withdraw to the 38th parallel. The Security Council, Truman noted, "called upon all members of the United Nations to render every assistance to the United Nations" in executing the June 25 resolution. "In these circumstances I have ordered United States air and sea forces to give the Korean Government troops cover and support."<sup>144</sup>

Congressional leaders responded favorably to Truman's decisions both during and after the meeting.<sup>145</sup> Senate Majority Leader Scott Lucas of Illinois stated, for example, that all those attending the meeting "agreed with the [President's] statement, and agreed that it was the only thing which could be done under the distressing circumstances which presently exist."<sup>146</sup> Republican Senator Alexander Smith also defended Truman's actions as "a clean-cut and direct stand by the United States to carry out our obligation to the United Nations to make the United Nations exist as an organization which can function in an emergency."<sup>147</sup> The House of Representatives voted that afternoon to extend the draft, and the Senate followed suit the next day.<sup>148</sup>

On the day of the Senate vote, however, Senator Robert Taft mounted a forceful challenge to the President's unilateral action. Taft, probably the most influential Republican in Congress at that time, did not quarrel with the substance of the President's decision, but with his method.<sup>149</sup> The

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144. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 202. Truman also indicated that he had ordered the U.S. Seventh Fleet to prevent any attack on Formosa and had ordered fortification of U.S. forces in the Philippines. *Id.*

145. *Id.* at 200-01; PAIGE, *supra* note 120, at 193.

146. 96 CONG. REC. 9230 (1950) (statement of Sen. Lucas).

147. *Id.* (statement of Sen. Smith). Some members of Congress did express concern, however, that the President's actions raised the risk of war without any prior congressional authorization. *See id.* at 9229-30 (statements of Sens. Kern & Watkins), 9232-33 (statement of Sen. Watkins). Senator Watkins, in particular, argued that before the President sent U.S. forces to Korea, which "is in effect war or a step leading to war," he should have informed Congress of the situation and asked "for the authority to go ahead and do whatever was necessary to protect the situation." *Id.* at 9233 (statement of Sen. Watkins). That is what Watkins would have done if he were President, he said, to which Senator Lucas responded: "By so doing you would have repudiated the United Nations Organization [and] destroyed it for all peaceful intents and purposes." *Id.* (statement of Sen. Lucas).

148. PAIGE, *supra* note 120, at 219. The Senate vote was unanimous and the House vote was nearly so.

149. 96 CONG. REC. 9322 (statement of Sen. Taft). Indeed, Taft stated that "if a joint resolution were introduced asking for approval of the use of our Armed Forces already sent to Korea and full support of them in their present venture, I would vote in favor of it." *Id.* at 9320 (same).

President, Taft argued, had placed American forces “in a de facto war” in Korea “without consulting Congress and without Congressional approval.”<sup>150</sup>

Taft acknowledged that “the Korean situation is changed by the obligations into which we have entered under the Charter of the United Nations,” but he did not think this justified the President’s acting without Congress’s approval.<sup>151</sup> The UNPA “enacted the circumstances under which the President may use armed forces in support of a resolution of the Security Council,” Taft stated, including the “first requisite” of negotiating a special agreement.<sup>152</sup> No agreement had yet been negotiated or presented to Congress. The President, Taft concluded, had “no authority to use armed forces in support of the United Nations in the absence of some previous action by Congress dealing with the subject and outlining the general circumstances and the amount of the forces that can be used.”<sup>153</sup> Taft urged his colleagues not to stand by silently in the face of “a complete usurpation by the President of authority to use the Armed Forces of this country” lest Congress effectively “terminate” its right under the Constitution to declare war.<sup>154</sup>

Taft’s plea to his colleagues fell on unresponsive ears. Most of his fellow Republicans were so pleased with the substance of the President’s decision—which amounted to a reversal of a policy they had long challenged<sup>155</sup>—that they were uninterested in Taft’s challenge to the President’s constitutional authority.<sup>156</sup> Senator Alexander Smith stressed that “it was the responsibility of every member of the United Nations to back

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150. *Id.* at 9322 (statement of Sen. Taft).

151. *Id.* at 9323 (statement of Sen. Taft).

152. *Id.*

153. *Id.*

154. *Id.*

155. As Senator Alexander Smith put it, “I say thank God the administration has changed its policy and has reached an aggressive policy regarding the Far East.” *Id.* at 9330 (statement of Sen. Smith).

156. On the Republican side, the strongest and most sustained defense of the President’s actions came from Senator Alexander Smith of New Jersey, a ranking member of the Senate Foreign Relations Committee who had attended the June 27 meeting with the President. Smith acknowledged that Truman made his decision to send U.S. air and naval forces to Korea’s defense before the meeting, and that the congressional delegation was only asked to comment after the fact. *Id.* at 9332 (statement of Sen. Smith). He stressed, however, that “if I had been asked yesterday, ‘Have you any criticism to make? Do you vote “yes” or “no”?’ I would have voted ‘yes’ enthusiastically, because . . . at last we were taking a strong position in the Far East.” *Id.* Moreover, Smith continued, “I do not think there was anyone present at the meeting who did not feel that he was enthusiastically behind everything that was presented, although our advice had not been asked on what was presented to us.” *Id.*



up the decisions and recommendations of the Security Council,"<sup>157</sup> but that "the ultimate ability to make the order of the Security Council really effective" rested largely with the United States.<sup>158</sup> Had Truman not taken such prompt and decisive action, "the United Nations would have been through,"<sup>159</sup> its authority and effectiveness eroded. Although there was always a danger that a world war would break out, Smith regarded the firm action taken as "the only step" that could "possibly have averted World War III."<sup>160</sup>

On the Democratic side, Senator Scott Lucas launched a two-fold defense of the President. First, he argued that "the President had a right to intervene under the resolutions adopted by the Security Council of the United Nations," which could not "be enforced unless some military action [was] taken."<sup>161</sup> Second, Lucas argued that the President had well-established (and well-used) constitutional authority as Commander in Chief to take military action if he believed "that the safety, the security, and the honor of this country are involved."<sup>162</sup> Moreover, almost everyone argued that Congress should stand by the President to express solidarity as American soldiers entered combat in Korea.<sup>163</sup>

In this supportive context, President Truman continued to make decisions about the use of force without significant congressional involvement. For example, on June 29, Truman authorized U.S. air operations against military targets in North Korea and, for the first time, approved the use of a limited number of U.S. ground troops south of the combat zone.<sup>164</sup> On

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157. *Id.* at 9333 (statement of Sen. Smith). Smith recognized that the June 25 resolution did "not say anything about repelling any armed attack," but he was satisfied by the fact that the June 27 resolution, adopted "not quite simultaneously with the President's statement, but almost simultaneously," did so, and that Truman had every reason to believe that such authorization would be forthcoming from the Security Council when he made his decision to commit U.S. forces. *Id.* at 9334 (same).

158. *Id.* at 9334 (statement of Sen. Smith).

159. *Id.* at 9333 (statement of Sen. Smith).

160. *Id.* at 9334 (statement of Sen. Smith). Senator William Knowland of California, a longstanding critic of Truman's previous hands-off policy in Asia, also supported the "police action against a violator of the law of nations and the Charter of the United Nations." *Id.* at 9347 (statement of Sen. Knowland).

161. *Id.* at 9328, 9329 (statement of Sen. Lucas).

162. *Id.* at 9328 (statement of Sen. Lucas).

163. *E.g., id.* at 9329 (statement of Sen. Lucas); *id.* at 9330 (statement of Sen. Connally); *id.* (statement of Sen. Smith); *see also* comments made on June 27, *id.* at 9230 (statement of Sen. Smith); *id.* at 9232 (statement of Sen. Morse); *id.* at 9232 (statement of Sen. Lucas); *id.* at 9233 (statement of Sen. Kefauver); *id.* at 9233 (statement of Sen. Humphrey); *see also* comments on June 30, *id.* at 9539 (statement of Sen. Knowland); *id.* at 9540 (statement of Sen. Stennis); *id.* at 9543 (statement of Sen. Lucas); *id.* at 9544 (statement of Sen. Connally).

164. ACHESON, *supra* note 123, at 411-12; PAIGE, *supra* note 120, at 244.

the morning of June 30, he decided to commit additional American ground forces to Korea.<sup>165</sup> As before, Truman met with congressional leaders to inform them of his decisions only after he had made them.

At least one voice was raised in dissent from these unilateral actions. Senator Kenneth Wherry, the Republican floor leader, questioned the President's authority to commit U.S. *ground* forces to Korea without first consulting Congress.<sup>166</sup> Truman responded that the military situation was deteriorating so quickly that he had to make his decisions without delay.<sup>167</sup> When Senator Smith urged the President to seek a resolution from Congress approving the steps he had taken, Truman agreed to consider Smith's suggestion and asked Secretary of State Acheson to prepare a recommendation on that issue.<sup>168</sup> Smith seemed satisfied by Truman's response; Wherry was not.

Senator Wherry took his concerns to the floor of the Senate, where he argued that the President should not have sent U.S. forces to Korea without congressional authorization.<sup>169</sup> When the Senate was considering the U.N. Charter, Wherry stressed, he had been assured that "the constitutional power of Congress to declare war was in no way modified by the Charter."<sup>170</sup> Moreover, Wherry disputed the precedential relevance of prior, unilateral military actions by U.S. Presidents—he pointed out that they concerned the protection of American lives and property, which was "a very different situation than was brought about by the President's ordering air power and warships to southern Korea."<sup>171</sup> Although the President's decision to deploy U.S. forces had already been made, Wherry urged the President to report to and consult the Congress, so that it could exercise its constitutional responsibilities.<sup>172</sup>

Like Taft before him, Wherry found little sympathy for his position. Republican Senator William Knowland argued that the President had the authority to commit U.S. forces to Korea both "under the terms of our obligations to the United Nations Charter" and under his constitutional power as Commander in Chief. A declaration of war was unnecessary, in

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165. ACHESON, *supra* note 123, at 412; 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 255; PAIGE, *supra* note 120, at 257. Those decisions were announced publicly on the morning of June 30 in a White House press release. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 257.

166. ACHESON, *supra* note 123, at 412; PAIGE, *supra* note 120, at 257.

167. PAIGE, *supra* note 120, at 262-63.

168. ACHESON, *supra* note 123, at 413.

169. 96 CONG. REC. 9538 (1950) (statement of Sen. Wherry).

170. *Id.*

171. *Id.*

172. *Id.*

his view, because the Korean conflict was not a war but a “police action.”<sup>173</sup> Senator Eugene Millikin, the eloquent defender of a practical war powers balance in 1945, and Senator Ralph Flanders were also persuaded that this was a “police operation,” not a war.<sup>174</sup> In Flanders’s view, the President’s action in Korea “gets its justification from the preservation of the usefulness and very existence of the United Nations.”<sup>175</sup> Senator Tom Connally concurred: the United States had both the authority and the obligation to send forces to Korea under the U.N. Charter and the Security Council’s resolutions.<sup>176</sup> By early afternoon on June 30, the Senate passed an appropriations measure providing over one billion dollars in aid to U.S. allies, with sixteen million dollars specifically designated for Korea and the Philippines.<sup>177</sup>

Congress’s failure to contest its nonrole in the decision to deploy troops can be explained by a number of interrelated reasons. First and foremost, almost everyone in Congress agreed with the *substance* of Truman’s decisions to send American troops to repel the North Korean attack.<sup>178</sup> Even Taft and Wherry made clear their support for the substance of Truman’s actions. Second, most members of Congress believed that the President needed to act promptly in an emergency—that the rapidly deteriorating military situation in Korea required quick and decisive action. Third, almost all members believed it was important to stand behind the President and convey a sense of solidarity and unity as American soldiers entered combat.<sup>179</sup> As Senator Knowland expressed it: “At this critical hour in our Nation’s history we need, more than at almost any other time, a united American public opinion and a united Congress upholding the hands of the President of the United States.”<sup>180</sup>

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173. *Id.* at 9540 (statement of Sen. Knowland). Senator John Stennis argued that the actions taken through the United Nations “are providing a new method of meeting world emergencies and a new method of preventing war.” *Id.* (statement of Sen. Stennis).

174. *Id.* at 954 (statement of Sen. Millikin). Millikin stressed, however, that “[i]f it is a war prior congressional consent must be obtained.” *Id.*

175. *Id.* at 9541 (statement of Sen. Flanders).

176. *Id.* at 9544 (statement of Sen. Connally). Majority Leader Lucas likewise came to Truman’s defense, stressing that the United States was “acting directly under the resolution adopted by the Security Council.” *Id.* at 9542 (statement of Sen. Lucas).

177. *Id.* at 9546 (the vote was 66 to 30 in favor); see also PAIGE, *supra* note 120, at 267 (discussing debate and vote).

178. Leading Republican Senators were probably the most enthusiastic of all about this turnaround in the Truman Administration’s policy toward Asia. See, e.g., 96 CONG. REC. 9330 (1950) (statement of Sen. Smith) (stating that he “welcome[d] from the bottom of [his] heart” the Administration’s change in policy); see also Bert Andrews, *United States Far East Policy Reversed by Truman’s Order for Action—Stand of Herbert Hoover, MacArthur, Taft, and other Republican Senators Seen as Upheld*, N.Y. HERALD TRIB., June 28, 1950, reprinted in 96 CONG. REC. 9337 (1950) (providing a chronology of events leading to the change in policy).

179. See *supra* note 163.

180. 96 CONG. REC. 9539 (statement of Sen. Knowland).

The U.N. Security Council resolutions calling for assistance from U.N. member states in Korea were also an important factor in congressional support. Most Senators who spoke on the Senate floor emphasized either the importance of supporting the United Nations as an institution, or the responsibility of the United States to respond to the Security Council's specific call for help, or both.<sup>181</sup> There was a strong sense in Congress that the very survival of the United Nations depended on the United States. Moreover, many in Congress seemed to assume, or at least hope, that the conflict in Korea would be a contained and limited one, and that a prompt U.N. "police action" was the best way to avoid a possible third world war.<sup>182</sup> Few anticipated the protracted and bloody war the Korean "police action" would soon become.

## 2. A Turning Point: Advice from Acheson and Lucas

As the first week of the Korean conflict came to a close, the President had not ruled out the possibility of requesting from Congress a joint resolution approving the steps he had taken. To be sure, the resolution would come after the fact; but at least it would explicitly state congressional support for the use of American military forces in Korea. On July 3, Truman met with his top military and political advisers to consider Secretary of State Acheson's recommendation on this issue.<sup>183</sup> Only one member of Congress was included in this critical meeting: Senate Majority Leader Scott Lucas.

Acheson urged the President to report on the Korean situation before a joint session of Congress in the near future, but he did not recommend that Truman request a joint resolution of approval.<sup>184</sup> Instead, Acheson urged the President to "rest on his constitutional authority as Commander in Chief of the armed forces."<sup>185</sup> Nevertheless, Acheson's staff prepared a draft resolution of approval in case members of Congress wished to take the "initiative" in introducing one after the President's report.<sup>186</sup>

Senator Lucas thought the draft resolution was "satisfactory" and pass-

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181. See, e.g., *id.* at 9543 (statement of Sen. Lucas); *id.* at 9544 (statement of Sen. Connally). See *supra* notes 157-161, 173-176 and accompanying text.

182. See, e.g., 96 CONG. REC. 9334 (statement of Sen. Smith).

183. The Secretaries of State and Defense, the secretaries of the armed services, the Chairman of the Joint Chiefs of Staff General Omar Bradley, and several other officials, were present. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 286.

184. *Id.* at 287. As Acheson writes in his memoirs: "This would, of course, be largely formal but would bring the whole story together in one official narrative and meet the objection of some members that information had come to them only through the leaders and the press." ACHESON, *supra* note 123, at 414.

185. ACHESON, *supra* note 123, at 414.

186. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 287; ACHESON, *supra* note 123, at 414.

able, but he questioned its desirability.<sup>187</sup> According to Lucas, “the President had very properly done what he had to without consulting the Congress.”<sup>188</sup> Lucas said that “most of the members of Congress were sick of the attitude taken by Senators Taft and Wherry.”<sup>189</sup> Indeed, “[m]any members of Congress had suggested to [Lucas] that the President should keep away from Congress and avoid debate.”<sup>190</sup> If the President were to report to Congress, Lucas advised, it “might sound as if the President were asking for a declaration of war.”<sup>191</sup> Instead, Lucas urged the President to deliver his message “as a fireside chat with the people of the country.”<sup>192</sup> Lucas predicted that Congress would not “stir things up” for the President, to which Truman responded with prescience: “this depends on events in Korea.”<sup>193</sup>

After canvassing the views of the various cabinet members in attendance, as well as those of the Chairman of the Joint Chiefs of Staff and the service secretaries,<sup>194</sup> Truman decided that he would make a report to Congress, but would not call Congress back from its current recess to do it.<sup>195</sup> He deferred a decision on the draft joint resolution of approval.<sup>196</sup>

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187. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 287-88.

188. *Id.* at 287.

189. *Id.* at 288.

190. *Id.* at 290.

191. *Id.* at 288. Debate on a joint resolution “might last at least a week,” Lucas estimated. *Id.* at 290.

192. *Id.*

193. *Id.* at 291.

194. *Id.* at 288-90. Secretary of Defense Louis Johnson largely agreed with Lucas. Interestingly, the three service secretaries were the most supportive of a presidential message to Congress. Secretary of the Army Frank Pace said “the legislative branch has a strong desire for participation at some time”; Secretary of the Air Force Thomas Finletter commented that “[i]f such a message were sent by the President people would feel a sense of participation”; and Secretary of the Navy Francis Mathews “thought it was essential to say something to the people and not to by-pass the Congress.” 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 289-90. General Bradley, Chairman of the Joint Chiefs of Staff, said that “some report at some time was a very good idea but he wished to avoid a long debate in Congress on matters which now seemed to be taken for granted.” *Id.* at 290. Special Assistant to the President Averell Harriman stressed the need for cooperation between Congress and the President because although “things are going well now there may be trouble ahead.” *Id.* Assistant Secretary of State Dean Rusk said that “clear Congressional support would help abroad,” where the remarks of Taft and Wherry were widely reported. *Id.*

195. 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 290. Earlier in the discussion, Truman “said that it was necessary to be very careful that he would not appear to be trying to get around Congress and use extra-Constitutional powers.” *Id.* at 288.

196. Truman indicated at the end of the meeting that he would “hold up his decision” until he could meet with the Senate Majority Leader, the House Majority Leader, the Speaker of the House, and the Vice President the following week. *Id.* at 290, 291 and n.6. No record of such a meeting appears in FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, or in Acheson’s memoirs, ACHESON, *supra* note 123.

Truman ultimately presented a message to a joint session of Congress several weeks later, on July 19.<sup>197</sup> Following the advice of his Secretary of State and Senate Majority Leader Lucas, Truman never sought a congressional resolution in support of his decision to commit U.S. forces to combat in Korea.

### 3. The "Police Power" Model Articulated

The State Department's full-scale defense of Truman's actions in Korea began in earnest in early July. A widely circulated State Department memorandum, entitled *Authority of the President to Repel the Attack in Korea*,<sup>198</sup> presented an expansive conception of the President's constitutional powers as Commander in Chief of the armed forces of the United States. The memorandum essentially argued: The President, as Commander in Chief, has "full control" over the use of U.S. forces. Presidents traditionally have used those forces without consulting Congress not only to protect U.S. citizens and property abroad, but also to protect "the broad interests of American foreign policy."<sup>199</sup> Preserving the United Nations "as an effective international organization" is a paramount concern of U.S. foreign policy. The North Koreans defied the United Nations when they invaded South Korea, threatening its continued existence "as a serious instrumentality for the maintenance of international peace."<sup>200</sup> The President, therefore, had the authority to send U.S. forces to Korea without prior congressional approval.

Although the memorandum did state that the President's actions to repel the North Korean attack were authorized by the Security Council resolutions,<sup>201</sup> the State Department rested its case primarily on the "traditional power" of the President to take unilateral military action to protect U.S. foreign policy in general and the U.N. Charter in particular. Unilateral use of U.S. military forces by the President "in the broad interests of American foreign policy" could be characterized, it was contended, as "international police action,"<sup>202</sup> or "executive use of the Armed Forces to establish our own and the world's scheme of international order."<sup>203</sup>

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197. *1950 Truman Papers*, *supra* note 121, at 527-37. On the evening of July 19, Truman presented a radio and television address to the American people on the Korean situation. *Id.* at 537-42.

198. DEP'T ST. BULL., July 31, 1950, at 173.

199. *Id.* at 174.

200. *Id.* at 176-77.

201. *Id.* at 173, 176. The memorandum did not invoke Article 51 of the U.N. Charter or the concept of collective self-defense.

202. *Id.* at 174.

203. *Id.* at 175 (quoting Former Assistant Secretary of State James Grafton Rogers). Much of the memorandum included selected quotations from the U.N. Charter debates in the Senate, which were used to argue that leading Senators—Connally, Millikin, Wiley and

A systematic defense of Truman's decision was presented a few days later by liberal Democratic Senator Paul Douglas of Illinois.<sup>204</sup> Douglas, echoing Senator Lucas, argued that the pace of modern warfare is so rapid and congressional delay so likely that "it would be unwise to insist that the President cannot use armed force in advance of formal congressional approval."<sup>205</sup> There was wisdom, Douglas contended, in permitting the President to resort to an "intermediate method" between peace and war, because "international situations frequently call for the retail use of force in localized situations which are not sufficiently serious to justify the wholesale and widespread use of force which a formal declaration of war would require."<sup>206</sup> Moreover, Douglas stressed, U.S. actions were fully consistent with international law because "once the United Nations called upon its members to lend military aid . . . any use of armed force by us was not an act of war, but, instead, merely the exercise of police power under international sanction."<sup>207</sup>

Truman himself defended his decision to send U.S. forces to Korea largely as an action in support of the United Nations. At a June 29 press conference, he insisted that the nation was not at war, but instead was participating in a United Nations police action.<sup>208</sup> Later, in his July 19 message to Congress, Truman stressed that the North Korean attack "was a clear challenge to the basic principles of the United Nations Charter and to the specific actions taken by the United Nations in Korea."<sup>209</sup> "If this challenge had not been met squarely," he continued, "the effectiveness of the United Nations would have been all but ended, and the hope of mankind that the United Nations would develop into an institution of world

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Austin—recognized the existence of broad presidential power to use force unilaterally in support of U.S. foreign policy and the U.N. Charter in particular. *Id.* at 174-75, 176. No mention was made, however, of the many remarks by these and other Senators during those same debates that stressed the importance of congressional participation in decisions to make forces available to the United Nations.

204. *See* 96 CONG. REC. 9647 (1950) (statement of Sen. Douglas) ("The Constitutional and Legal Basis for the President's Action in Using Armed Forces to Repel the Invasion in South Korea").

205. *Id.* at 9648 (statement of Sen. Douglas).

206. *Id.* Douglas argued further that although most prior cases of unilateral presidential action involved direct and immediate threats to American lives and property, the security of the United States ultimately would have been at risk if the North Korean aggression went unchecked because communist forces would then be likely "to make similar invasions of other areas." *Id.* at 9649 (statement of Sen. Douglas). Douglas recognized that "[t]he damage to American mission schools and churches and American business houses, while real, was not in any sense the primary reason for our intervention." *Id.*

207. *Id.* at 9649 (statement of Sen. Douglas).

208. *1950 Truman Papers*, *supra* note 121, at 504.

209. *Id.* at 527, 528 (special message to the Congress reporting on the situation in Korea, July 19, 1950). Truman gave a radio and television address to the American people that evening. *Id.* at 537.

order would have been shattered.”<sup>210</sup> Thus, Truman explained, when North Korean forces continued their attack in defiance of the Security Council’s resolution of June 25, he ordered U.S. air and naval forces to assist Korean Government troops “in order to support the resolution.”<sup>211</sup>

#### 4. The “Great Debate”: Congress Finally Responds

Although the Korean “police action,” and the “police power” model of presidential war powers underlying it, was challenged by only a few members of Congress in the summer of 1950, congressional acquiescence in ever-expanding claims of presidential prerogative would not last. When President Truman announced in December of 1950 that he intended to increase substantially the number of U.S. forces stationed in Western Europe under the North Atlantic Treaty, Senator Robert Taft was joined by others in challenging the President’s legal authority to deploy these forces without Congress’s consent. Representative Frederic Coudert of New York mounted the first challenge on January 3, 1951, introducing a resolution requiring that “no additional military forces be sent or maintained outside of the United States . . . without the prior authorization of the Congress in each instance.”<sup>212</sup> Coudert explained that the Korean experience motivated his proposal: “A large number of members are beginning to realize how devastating a precedent they have set in remaining silent while the President took over the powers specifically reserved for Congress in the Constitution.”<sup>213</sup> If Congress allowed the President’s actions “to go unchallenged,” Coudert stated, it would be “acknowledging that he can bypass the Congress any time he wants to.”<sup>214</sup>

In the Senate, Taft argued that Truman had acted unconstitutionally in Korea and “[w]ithout authority he apparently is now attempting to adopt a similar policy in Europe.”<sup>215</sup> No military emergency in Europe required immediate action, Taft contended, and Congress should have a full opportunity to debate and authorize any further deployment of U.S. forces.<sup>216</sup> As the Korean conflict continued to escalate,<sup>217</sup> Taft’s remarks resonated

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210. *Id.* at 528.

211. *Id.* at 529.

212. Bert Andrews, *Issue Is Joined in Congress on “Hoover Plan,”* N.Y. HERALD TRIB., Jan. 4, 1951, at 1, 10 (interview with Rep. Frederic R. Coudert, Jr., of New York).

213. *Id.*

214. *Id.*

215. 97 CONG. REC. 59 (1951) (statement of Sen. Taft); *see also* William S. White, *Big Debate Opened*, N.Y. TIMES, Jan. 6, 1951, at A1 (discussing Taft’s criticism of the Truman Administration).

216. 97 CONG. REC. 55-56, 60-61 (1951) (statement of Sen. Taft).

217. Full-scale Chinese participation in the war began in late November 1950. ACHESON, *supra* note 123, at 469; 7 FOREIGN RELATIONS OF THE UNITED STATES 1950, *supra* note 126, at 1237-38 (telegram from Gen. MacArthur to the Joint Chiefs of Staff, dated Nov. 28, 1950).



in Congress, and a "Great Debate" over the scope of the President's power to deploy U.S. troops abroad was soon in full swing.<sup>218</sup>

Under challenge by Congress, Truman's claims of executive power became more extreme and his attitude toward Congress more dismissive. Truman asserted during a January 1951 press conference, for example, that as Commander in Chief he had the constitutional authority "to send troops anywhere in the world," without consulting Congress "unless I want to."<sup>219</sup> "I am polite, and I usually always consult them," he added,<sup>220</sup> but his view of consultation seemed quite perfunctory: "I don't ask their permission, I just consult them."<sup>221</sup> Truman asserted, moreover, that he would "continue to send troops wherever it is necessary to uphold" U.S. obligations under the U.N. Charter or any other treaty.<sup>222</sup>

An executive branch defense of the President's power to send troops abroad without the consent of Congress, which was circulated in February 1951, went well beyond the State Department's memorandum of the previous July.<sup>223</sup> Congress's war powers under the Constitution should not be construed, the new memorandum contended, so "as to curb or cripple the powers of the President as Commander in Chief,"<sup>224</sup> which in turn were defined expansively.<sup>225</sup> Indeed, according to the memorandum, the President as Commander in Chief had broad authority to deploy troops to "execute" and carry out the purposes of treaties such as the United

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218. Much of the debate centered around a resolution introduced in the Senate by Kenneth Wherry of Nebraska, the Republican floor leader, on January 8: "*Resolved*, That it is the sense of the Senate that no ground forces of the United States should be assigned to duty in the European area for the purposes of the North Atlantic Treaty pending the formulation of a policy with respect thereto by the Congress." 97 CONG. REC. 319 (1951) (statement of Sen. Wherry). For the best published accounts of the Great Debate, see TIMOTHY IRELAND, *CREATING THE ENTANGLING ALLIANCE* 207-14 (1981); ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* 135-40 (1973). A more complete account is provided in Castillo, *supra* note 119. As Timothy Ireland notes, the Great Debate revolved around two sets of issues: constitutional issues regarding the relative authority of the President and the Congress in NATO matters, and policy issues concerning the military feasibility and wisdom of the proposed U.S. troop deployments to Western Europe. IRELAND, *supra*, at 208.

219. *Papers of Harry S. Truman*, 1951 PUB. PAPERS 19-20 (Jan. 11, 1951 press conference) [hereinafter *1951 Truman Papers*].

220. *Id.*

221. *Id.* at 20.

222. *Id.* at 19.

223. STAFF OF JOINT COMM. MADE UP OF COMM. ON FOREIGN RELATIONS AND COMM. ON ARMED SERVICES OF THE SENATE, 82D CONG., 1ST SESS., *REPORT ON THE POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES* (1951) [hereinafter *REPORT ON THE POWERS OF THE PRESIDENT*].

224. *Id.* at 1-2.

225. The memorandum argued that "[u]se of the congressional power to declare war . . . has fallen into abeyance because wars are no longer declared in advance," while "[t]he constitutional power of the Commander in Chief has been exercised more often because the need for armed international action has grown more acute." *Id.* at 27.

Nations Charter and the North Atlantic Treaty as he deemed appropriate, without congressional authorization.<sup>226</sup> “Repelling aggression in Korea or Europe cannot wait upon congressional debate,” the memorandum asserted.<sup>227</sup> Critical debate over the scope of the President’s power, moreover, was “essentially sterile, if not dangerous to the success of our foreign policy.”<sup>228</sup>

Congressional dissenters persisted, however. Although there were differing views on the nature and extent of Congress’s role in the decision to send U.S. forces to Europe as part of a peacetime army,<sup>229</sup> a majority of the Senate ultimately rejected the President’s increasingly expansive claims of unilateral authority. The “Great Debate” came to a close in April 1951, when the Democratically controlled Senate adopted a resolution that approved Truman’s proposal to send four divisions to Europe, but added, over the Administration’s opposition, that no additional forces should be sent “without further Congressional approval.”<sup>230</sup> President Truman got what he wanted—troops for Europe and the funding to sustain them—but the process of obtaining them required him to work with Congress.<sup>231</sup>

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226. *Id.* at 2, 11-12, 20-21, 25, 27. In stark contrast to the understanding of congressional participation that infused the U.N. Charter debates, the memorandum asserted:

The power to send troops abroad is certainly one of the powers which the President may exercise in carrying out such a treaty as the North Atlantic Treaty or the United Nations Charter. Since it is a power which only he can exercise, provisions of these treaties which have to do with such measures of defense may certainly be deemed to be “addressed” to the President.

*Id.* at 20. The memorandum also argued that the UNPA did not prohibit the President from acting as he did in Korea because it did not limit in any way “action which the President may take by virtue of his own power and responsibility in foreign affairs.” *Id.* at 3. Moreover, the memorandum asserted, the 1945 debates over the war powers implications of the U.N. Charter “centered on action under article 42 of the Charter,” and “[n]othing was said that could be construed as a limitation on the President’s constitutional authority to use troops to carry out other provisions of the Charter, or to respond to Security Council action under article 39.” *Id.* at 24.

227. *Id.* at 27.

228. *Id.* at 3. President Truman indicated his agreement with this analysis in a subsequent press conference. See *1951 Truman Papers, supra* note 219, at 176 (Mar. 1, 1951 press conference).

229. See Castillo, *supra* note 119, at 24-60 (describing the range of views within both the Republican and Democratic parties on the respective roles of Congress and the President regarding deployment of troops abroad in the absence of ongoing hostilities).

230. 97 CONG. REC. 3282 (1951). The vote on S. Res. 99 was 69 to 21, with 6 not voting. The provision requiring congressional approval for any additional increases passed by a narrower margin: 49 to 43, with 4 not voting. 3 UNITED STATES DEPT. OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1951 at 24 (1981); SCHLESINGER, *supra* note 218, at 140. The House did not take action on its version of this resolution. IRELAND, *supra* note 218, at 220 n. 131.

231. Castillo, *supra* note 119, at 65. Senator Taft, for example, viewed “the resolution as ‘a clear statement by the Senate that it has the right to pass on any question of sending troops to Europe to implement the Atlantic Pact, that it is unconstitutional for the President

The Great Debate, though rarely studied by war powers scholars, was a sign from Congress that Korea was a unique event, *not* a new paradigm for war powers relations between Congress and the President.<sup>232</sup> General Eisenhower certainly understood this message: once he became President, Eisenhower sought and received congressional approval before sending U.S. troops to Formosa in 1955, and to the Middle East in 1957.<sup>233</sup> Although Korea may stand as a startling example of temporary congressional acquiescence, Congress itself, by virtue of the Great Debate, did not let that precedent stand unchallenged.

##### 5. Some Lessons of the Korean "Police Action"

The Korean experience exposed many of the dangers of an unchecked "police power" model of executive war powers. Most importantly, it demonstrated why Security Council authorization of the use of force should not automatically replace the need for authorization by Congress before U.S. forces are sent to combat as part of a U.N. "police action." In the Korean conflict, the Security Council was essentially the ratifier and legitimizer of presidential decisions already made—not a deliberative body to which the President responded. Truman conceded as much in a July 1950 note to Secretary of State Acheson, praising him for alerting the Council just after the North Korean attack but acknowledging, "[h]ad you not acted promptly in that direction we would have had to go into Korea alone."<sup>234</sup> In short, the Administration's claim that the U.N. Security Council justified its decision to use force was circular: Truman decided to take military action in response to the North Korean attack and announced his decisions *before* the Council even voted to authorize force, both to avoid a Soviet veto and to assure the Council that its resolution would be implemented. Yet Truman argued domestically that he was sending U.S. forces to Korea in *response* to a U.N. call for military action. In reality, it was the Security Council that responded to Truman's call.

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to send troops abroad to implement . . . that pact without congressional approval, at least until war comes.' " SCHLESINGER, *supra* note 218, at 140 n.29.

232. Castillo, *supra* note 119, at 9; *see also* *G.I.'s for N.A.T.O., But With A Restriction*, N.Y. TIMES, Apr. 8, 1951, § 4, at 1 (noting that Senate endorsement was "hedged with a restriction on the President's future freedom of action").

233. Act of Jan. 29, 1955, Pub. L. No. 84-4, 69 Stat. 7 (repealed 1974) (Formosa); Act of Mar. 9, 1957, Pub. L. No. 85-7, 71 Stat. 5 (amended 1961) (1957) (Middle East); *see also* SCHLESINGER, *supra* note 218, at 159. *But see* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1792 & n.117 (1968) (discussing Eisenhower's commitment of troops to Lebanon) [hereinafter Note, *Congress, the President, and the Power to Commit Forces to Combat*].

234. ACHESON, *supra* note 123, at 415 (quoting in full Truman memo to Dean Acheson, dated July 19, 1950).

Although the Security Council's resolution of June 27 did authorize the collective military action in Korea as a matter of international law, it did not dispose of the constitutional issue. When American forces are committed to combat in substantial numbers, as in Korea, the risk of great physical sacrifice is real, and Security Council authorization cannot substitute for Congress's constitutionally granted power to "declare war." Senator Robert Taft put it well in January of 1951 when he argued:

The effect of the President's claim that he can agree with foreign nations to commit American soldiers to an international force in any number and any place in the world without Congressional authority is to eliminate Congress and the people themselves for all practical purposes from any part in the decision of foreign policies and the making of war and peace.<sup>235</sup>

In short, a substantial commitment of U.S. forces to a U.N. enforcement action should not be made without congressional approval.

The Korean conflict revealed the risks involved in defining away Congress's war powers role simply by calling something a U.N. "police action," regardless of the operation's size or risk. Truman, as well as numerous members of Congress, played this label game in 1950. It is certainly true that a U.N. authorized military action to restore international peace and security is not "war" under international law; but it may still constitute "war" in the domestic constitutional sense if it involves sending substantial numbers of U.S. forces into a combat situation.<sup>236</sup>

As the Korean War unfolded, the U.N. "police action" far exceeded the limits initially anticipated by Congress. By November 1950, after China joined the hostilities, even President Truman acknowledged his own uncer-

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235. *Excerpts from Taft Address Here on World Crisis*, N.Y. TIMES, Jan. 16, 1951, at A10.

236. Even if a U.N. authorized military action is viewed as an exercise of collective self-defense, *see* Rostow, *supra* note 137, the authorization of Congress may still be constitutionally required. This would depend on the specific circumstances and on the scope of the President's authority to "repel sudden attacks," particularly attacks not launched directly against the United States or its forces. Almost all of the collective security treaties to which the United States is a party provide that collective self-defense commitments will be carried out in accordance with "constitutional processes;" and executive branch officials have regularly assured the Senate that treaty commitments would not preempt Congress's power to declare war. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 209-20 (1990). For a helpful discussion of the President's constitutional authority to take defensive action, *see* Peter Raven-Hansen, *Breeding Contempt: An Essay on the Too Familiar History of the War Clause* 9-11, 30-53 (unpublished manuscript, on file with *The Georgetown Law Journal*); *id.* at 50 ("There is utterly no support in the history of the framing and ratification of the War Clause for any claim that the framers intended the implied power of the President to repel sudden attacks to include attacks on other nations."). Raven-Hansen's manuscript will be published in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* (Morton H. Halperin & Gary M. Stern eds., forthcoming 1993).

tainty over whether the Korean conflict would remain a "police action" or become "another terrible war."<sup>237</sup> As the conflict dragged on and became an unpopular, divisive war, members of Congress came to lament their earlier acceptance of Truman's unilateral decisions. Senator William Knowland, one of the staunchest early defenders of Truman's "police action," accused the executive branch a year later of leading the United States into a war, "but without a declaration of the Congress."<sup>238</sup> Shortly before his death, Senator Arthur Vandenberg expressed a regret no doubt shared by many others: "The President's great mistake was in not bringing his Korea decision to the immediate attention of Congress . . ."<sup>239</sup> Had he done so, as Arthur Schlesinger argues, he might have "spared troop morale and national unity, not to mention the administration itself, at least one damaging form of attack after the war became unpopular."<sup>240</sup>

#### B. THE PERSIAN GULF WAR: FROM POLICE POWER TO POLITICAL ACCOMMODATION

For forty years after the United Nations authorized the use of force in Korea, Cold War tensions rendered the collective security machinery of the U.N. Charter largely unusable. On August 2, 1990, however, shortly after Iraqi President Saddam Hussein invaded neighboring Kuwait in an aggressive surprise attack, the Security Council took united action. The Council condemned the invasion and demanded that Iraqi forces withdraw immediately to the positions they had occupied on the first of August.<sup>241</sup> A few days later, the Security Council imposed comprehensive economic sanctions on Iraq under Chapter VII of the Charter.<sup>242</sup> Like President Truman before him, President George Bush worked hard to forge an international consensus through the U.N. Security Council in response to

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237. *1950 Truman Papers*, *supra* note 121, at 728 (Nov. 30, 1950 press conference).

238. *Military Situation in the Far East, Hearings before the Senate Committee on Armed Services and the Senate Committee on Foreign Relations to Conduct an Inquiry into the Military Situation in the Far East and the Facts Surrounding the Relief of General of the Army Douglas MacArthur from his Assignments in that Area, Part I*, 82d Cong., 1st Sess. 765, 933 (1951).

239. Letter from Senator Arthur Hendrick Vandenberg to Senator Henry Cabot Lodge (Feb. 26, 1951), in *THE PRIVATE PAPERS OF SENATOR VANDENBERG*, 571, 572-73 (Arthur H. Vandenberg, Jr. & Joe A. Morris eds., 1952).

240. SCHLESINGER, *supra* note 218, at 134-35.

241. S.C. Res. 660, 4th Sess., 2932d mtg., U.N. Doc. S/RES/660 (1990). Security Council Resolution 660 passed by a vote of 14 to 0, with one member, Yemen, not participating in the vote. INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL, 45th Sess., at 111, U.N. Doc. ST/LIB/SER.B/S.27 (1990).

242. S.C. Res. 661, 45th Sess., 2933d mtg., U.N. Doc. S/RES/661 (1990). Security Council Resolution 661 was adopted on August 6, by vote of 13 to 0, with two abstentions. INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL, 45th Sess., at 112, U.N. Doc. ST/LIB/SER.B/S.27 (1990). That resolution also affirmed the inherent right of individual or collective self-defense under Art. 51 of the Charter. S.C. Res. 661, *supra*, at 1.

the aggression. Also like Truman, Bush largely shaped the nature and timing of the response through deployments of U.S. forces to the region.

President Bush announced on August 8 that he was sending substantial U.S. forces to Saudi Arabia and the Persian Gulf as part of "Operation Desert Shield," in order to counter any further Iraqi aggression.<sup>243</sup> In this first phase of the Gulf crisis, the President received strong support from Congress, even though he had not consulted Congress before making his initial deployment. The House and Senate both passed resolutions in early October supporting the defensive steps taken by the President and commending his leadership at the United Nations, but not authorizing war.<sup>244</sup> Congressional supporters of the resolutions were careful to stress that they approved of the President's actions thus far, but were not providing him with a blank check or another Gulf of Tonkin Resolution.<sup>245</sup>

In late October, as the congressional recess approached, a number of Senators and Representatives began to express concern that the President might usurp the war powers of Congress by taking military action against

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243. President George Bush, Address to the Nation Announcing the Deployment of United States Armed Forces to Saudi Arabia, 26 WEEKLY COMP. PRES. DOC. 1216 (Aug. 8, 1990). Bush formally reported this deployment to Congress on August 9, "consistent with" the War Powers Resolution, stating that he did not believe involvement in hostilities was imminent. 136 CONG. REC. H8446 (daily ed. Oct. 1, 1990). Within three months, 230,000 American troops were deployed as part of Operation Desert Shield. The President's News Conference on the Persian Gulf Crisis, 26 WEEKLY COMP. PRES. DOC. 1789, 1790 (Nov. 8, 1990).

244. See H.R.J. Res. 658, 101st Cong., 2d Sess., 136 CONG. REC. H8441 (daily ed. Oct. 1, 1990). This was adopted by a vote of 380 to 29. *Id.* at H8549. It supported the deployment of U.S. forces to the Persian Gulf, supported the resolutions of the Security Council, and urged continued use of "diplomatic and other nonmilitary means" to attain Iraq's withdrawal from Kuwait "while maintaining credible United States and multinational deterrent military force." *Id.* at H8441-42. The Senate resolution "strongly approve[d] the leadership of the President in successfully pursuing the passage of United Nations Security Council Resolutions" and supported "continued action by the President in accordance with the decisions of the United Nations Security Council and in accordance with United States constitutional and statutory processes." S. Con. Res. 147, 101st Cong., 2d Sess., 136 CONG. REC. S14,333 (daily ed. Oct. 2, 1990) (adopted on October 2 by a vote of 96 to 3, *id.*). Congress also passed the Iraq Sanctions Act of 1990, Pub. L. No. 101-513, §§ 586-586J, 104 Stat. 2047-2055 (1990), providing for continued economic sanctions against Saddam Hussein's regime.

245. See, e.g., 136 CONG. REC. S14,189 (daily ed. Sept. 28, 1990) (statement of Sen. Pell) ("[T]his resolution does not . . . constitute authority for the President to initiate unprovoked military action against Iraq."); *id.* at S14,190 (statement of Sen. Moynihan) ("The resolution does not give the President a blank check."); *id.* at S14,191 (statement of Sen. Adams) (the resolution "does not authorize acts of war. . . . It authorizes protection of our troops" and "protection of Saudi Arabia."); *id.* at S14,316 (daily ed. Oct. 2, 1990) (statement of Sen. Sarbanes) ("I do not think [the resolution] gives the President a blank check for future action. I do think it expresses support for past action."); *id.* at S14,337 (statement of Sen. Hollings) ("[T]here will be no Gulf of Tonkin Resolution this time around. Senate Concurrent Resolution 147 is limited in its scope, and neither explicitly nor implicitly gives license to the President to wage an unprovoked offensive against Iraq.").

Iraq while Congress was out of session. Secretary of State James Baker did little to assuage these concerns in his October 17 testimony before the Senate Foreign Relations Committee.<sup>246</sup> Baker stressed that the President would consult with Congress,<sup>247</sup> but he also indicated that extended public debate on the President's authority to commit U.S. forces to combat would only compromise the position of the Commander in Chief and undercut the "operational security" of U.S. forces.<sup>248</sup> Democratic as well as Republican Senators rejoined that the President must come to Congress for approval before taking any offensive military action against Iraq.<sup>249</sup> "There is a difference between consultation and authorization," Senator Paul Sarbanes stressed, and "the commitment of American forces by the President in a major assault to drive Saddam Hussein out of Kuwait would require an authorization from the Congress."<sup>250</sup> Baker, in turn, was deliberately noncommittal on whether the President would seek such authorization.<sup>251</sup> When Congress adjourned at the end of October, members gave the leadership explicit authority to call it back into session if necessary.<sup>252</sup>

### 1. President Bush's Trumanesque Stance

Just as the President sought to maintain maximum flexibility vis-a-vis Congress, Bush also—like Truman before him—sought to preserve maximum U.S. military flexibility vis-a-vis the United Nations, even as he worked quite masterfully to secure a series of Security Council resolutions condemning Iraq's aggressive actions. Thus, for example, President Bush asserted that he did not need U.N. authorization to use U.S. naval forces to enforce the sanctions imposed on Iraq by the Security Council, but instead could act in collective self-defense at the request of the Govern-

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246. *U.S. Policy in the Persian Gulf: Hearings Before the Senate Comm. on Foreign Relations*, 101st Cong., 2d Sess. (1990) [hereinafter *Persian Gulf Policy Hearings*].

247. *Id.* at 92-93 (statement of James A. Baker, III, Secretary of State).

248. *Id.* at 107, 118 (statement of James A. Baker, III, Secretary of State).

249. *Id.* at 100-02 (statement of Sen. Lugar); *id.* at 103 (statement of Sen. Sarbanes); *id.* at 107 (statement of Sen. Kassebaum); *id.* at 108 (statement of Sen. Kerry). *But see id.* at 115 (statement of Sen. Boschwitz) (emphasizing need for executive flexibility). *See also* Thomas L. Freidman, *Senators Demand Role in Approving any Move on Iraq*, N.Y. TIMES, Oct. 18, 1990, at A1 (summarizing Senators' demands for opportunity to approve military action).

250. *Persian Gulf Policy Hearings*, *supra* note 246, at 103 (statement of Sen. Sarbanes); *see also id.* at 113 (statement of Sen. Simon) (emphasizing differences between consultation and authorization).

251. *Id.* at 109 (statement of James A. Baker, III, Secretary of State).

252. *See* H. Con. Res. 399, 101st Cong., 2d Sess., § 2 (1990) 136 CONG. REC. H12,370 (daily ed. Oct. 27, 1990). On October 26, 81 members of Congress "had issued a statement demanding 'that the Administration not undertake any offensive military action without the full deliberation and declaration required by the Constitution.'" Harold H. Koh, *Presidential War and Congressional Consent*, 27 STAN. J. INT'L L. 247, 248 n.2 (1991) (quoting Statement of Concern of Eighty-One Members of Congress (Oct. 26, 1990), Exhibit No. 26, *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990)).

ment of Kuwait.<sup>253</sup> The Secretary-General and other members of the Security Council disputed this claim, and the Bush Administration ultimately decided not to force the issue. Instead, the United States sought and obtained Security Council adoption of Resolution 665,<sup>254</sup> which called upon cooperating member states with maritime forces in the region “to use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council” to inspect ships and to ensure strict compliance with the U.N. sanctions.<sup>255</sup> Similarly, although Secretary of State Baker indicated in October that the United States was exploring the possibility of U.N. authorization for the use of force against Iraq, he also stated that the United States would resist any efforts to place American forces under the command of the United Nations.<sup>256</sup>

Just after midterm congressional elections, Operation Desert Shield changed character and entered a second phase. President Bush announced on November 8, 1990, that he was sending another 150,000 American troops to the Gulf, in addition to the 230,000 troops already deployed, in order to provide “an adequate offensive military option.”<sup>257</sup> This decision, made without prior consultation with Congress, generated a prompt response from congressional leaders.<sup>258</sup>

Leading Democrats, including Senate Majority Leader George Mitchell, Senators Sam Nunn and Claiborne Pell, and Representatives Lee Hamilton and Les Aspin, warned Bush not to commit the United States to war against Iraq without first obtaining authorization from Congress.<sup>259</sup> Lead-

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253. Scheffer, *Use of Force*, *supra* note 29, at 126.

254. S.C. Res. 665, 45th Sess., 2938th mtg., U.N. Doc. S/RES/665 (1990).

255. *Id.* at 1. Security Council Resolution 665 was adopted on August 25 by a vote of 13 to 0, with two abstentions. U.N. S.C., 45th Sess., 2938th mtg., at 26, U.N. Doc. S/PV.2938 (1990). INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL, 45th Sess., at 112, U.N. Doc. ST/LIB/SER.B/S.27 (1990).

256. *Persian Gulf Policy Hearings*, *supra* note 246, at 106 (statement of James A. Baker, III, Secretary of State). In early November, the President stated that the United States had the authority to take offensive action without a U.N. authorizing resolution, “[b]ut we’ve been great believers in going to the United Nations.” President’s News Conference, 26 WEEKLY COMP. PRES. DOC. 1789, 1792 (Nov. 8, 1990).

257. President’s News Conference, *supra* note 256, at 1789, 1790; *see also* Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of Additional United States Armed Forces to Saudi Arabia, 26 WEEKLY COMP. PRES. DOC. 1834 (Nov. 16, 1990) (outlining rationale for and details of continued buildup); R.W. Apple, Jr., *Bush Sends New Units to Gulf to Provide “Offensive Option”*; *U.S. Force Could Reach 380,000*, N.Y. TIMES, Nov. 9, 1990, at A1 (providing details of latest military buildup).

258. As Senator Nunn put it: “When the announcement was made that there was going to be another buildup of forces that was going to have an offensive mission and there was no consultation prior to that, that was when a lot of people—including myself—started asking questions.” Gerald F. Seib & David Rogers, *Congress Presses Bush for Voice in Gulf Policy*, WALL ST. J., Nov. 14, 1990, at A11.

259. Michael Weisskopf, *Democrats Criticize Gulf Policy*, WASH. POST, Nov. 12, 1990, at A1; *Meet the Press* (NBC television broadcast, Nov. 11, 1990) (with guests Sen. Pell and Rep.



ing Republicans, including Senate Minority Leader Robert Dole and Senator Richard Lugar urged the President to call an emergency session of Congress, in Dole's words, to force Congress to "put up or shut up;"<sup>260</sup> but the President declined to do so.<sup>261</sup> Congressional leaders did not call Congress back from its recess, although they did indicate their intention to hold hearings on the Gulf crisis before the House and Senate Armed Services Committees and the Senate Foreign Relations Committee.<sup>262</sup> The President continued to "consult" with congressional leaders, but he neither sought congressional approval of his buildup nor indicated that he would seek authorization from Congress before going to war with Iraq.<sup>263</sup>

## 2. The Makings of a Constitutional Crisis

By the end of November of 1990, the stakes had risen and a constitutional crisis was in the making. Over forty members of Congress filed suit against the President on November 20 to enjoin him from initiating an attack against Iraq without prior congressional approval.<sup>264</sup> The Security Council adopted Resolution 678<sup>265</sup> on November 29, authorizing member states "to use all necessary means" to implement prior Security Council resolutions and "restore international peace and security in the area" unless Iraq withdrew its forces from Kuwait by January 15, 1991.<sup>266</sup>

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Hamilton) (transcript on file with *The Georgetown Law Journal*); *This Week With David Brinkley* (ABC television broadcast, Nov. 11, 1990) (with guests Sen. Mitchell and Rep. Aspin) (transcript on file with *The Georgetown Law Journal*).

260. *Dole Urges Crisis Session*, L.A. TIMES, Nov. 13, 1990, at 1.

261. According to White House spokesperson Marlin Fitzwater, no debate over military action was necessary because "we're seeking a peaceful resolution" of the conflict with Iraq. Seib & Rogers, *supra* note 258, at A11.

262. *Id.*

263. See Maureen Dowd, *President Seems to Blunt Calls for Gulf Session*, N.Y. TIMES, Nov. 15, 1990, at A1 (although the President assured members of Congress that he would consult with them before using force, he stopped short of promising to seek congressional authorization). Reflecting on the pain of war, Bush asserted during his November 30 press conference: "It's only the President that should be asked to make [that] decision . . ." The President's News Conference, 26 WEEKLY COMP. PRES. DOC. 1948, 1955 (Nov. 30, 1990).

264. *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990). The number of congressional plaintiffs later rose to 53. Koh, *supra* note 252, at 249. Judge Greene denied relief on ripeness grounds, but he made clear his view that "the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat." *Dellums*, 752 F. Supp. at 1145.

265. S.C. Res. 678, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990).

266. *Id.* at 1. Security Council Resolution 678 was adopted by a vote of 12 to 2, with one abstention. INDEX TO PROCEEDINGS OF THE SECURITY COUNCIL, 45th Sess., at 111, U.N. Doc. ST/LIB/SER.B/S.27 (1990). Resolution 678 was adopted under Chapter VII but made no mention of Article 42. Professor Oscar Schachter argues that the collective military action in the Gulf is best viewed as an exercise of collective self-defense under Article 51, but he also recognizes that Resolution 678 "may be read as consistent with both Article 51 and Article 42." Oscar Schachter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 459, 462 (1991); see generally *id.* at 457-63. Although Article 42 was not invoked

The Bush Administration's view of Resolution 678 was made clear by Secretary of Defense Richard Cheney's statement before Congress in early December: "I do not believe the President requires any additional authorization from the Congress before committing U.S. forces to achieve our objectives in the Gulf."<sup>267</sup> Echoing arguments once made by supporters of President Truman, Cheney asserted that a prior declaration of war by Congress would "fl[y] in the face of what we are trying to accomplish" in this U.N. operation.<sup>268</sup> Above all, Cheney invoked history to argue that the President had broad authority as Commander in Chief to commit U.S. troops abroad without the prior consent of Congress: Presidents had done so on over 200 occasions, he argued, only obtaining a declaration of war five times.<sup>269</sup> Cheney pointed to Korea in particular as an illustration of "well-established principles" concerning the President's authority to send U.S. forces to combat. He never noted any distinction between the emergency situation in Korea, in which U.S. forces were deployed to stop an attack as it was taking place, and the situation in the Gulf, in which coalition forces had been building for months.<sup>270</sup>

Appearing before the Senate Foreign Relations Committee in early December, Secretary of State Baker acknowledged that U.N. Resolution 678 did not *require* the use of force.<sup>271</sup> Any decision to use force would be made "at the top political levels of the countries making up the multina-

directly, it is significant that the military action in the Persian Gulf both began and ended in accordance with Security Council resolutions. See S.C. Res. 678, *supra* note 265, at 1 (authorizing the use of "all necessary means" to force Iraq to withdraw from Kuwait); S.C. Res. 687, 46th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991) (providing, *inter alia*, for a ceasefire, deployment of a U.N. observer unit along the Iraq-Kuwait border, and for the elimination of Iraq's weapons of mass destruction). In short, it is quite plausible to regard the Gulf operation as a U.N. enforcement action authorized by the Security Council.

267. *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the Senate Comm. on Armed Services*, 101st Cong., 2d Sess. 701 (1990) (statement of Richard Cheney, Secretary of Defense) [hereinafter *Hearings on Persian Gulf Options*].

268. *Id.* at 703. The United States was "working under the auspices of the United Nations Security Council . . . to implement the policy of the United Nations," Cheney stated, and he was "not sure why you would want to have the United States go out and unilaterally on its own turn this into an Iraq-U.S. war." *Id.* Moreover, Cheney argued, the President had the constitutional authority as Commander in Chief to commit U.S. forces to defend Kuwait, given the request for help from Kuwait's legitimate government and "the vote—not authorization but certainly the vote by the United Nations in support of that effort." *Id.* at 702.

269. *Id.* at 702, 730-31; *Crisis in the Persian Gulf: Sanctions, Diplomacy and War: Hearings Before the House Comm. on Armed Services*, 101st Cong., 2d Sess. 589 (1990) (statement of Richard Cheney, Secretary of Defense) ("[I]n the more than 200 times that U.S. military force has been committed over the history of the Nation, there are only five occasions in which the Congress of the United States voted a prior declaration of war.") [hereinafter *Hearings on Crisis in the Persian Gulf*].

270. *Hearings on Crisis in the Persian Gulf*, *supra* note 269, at 590.

271. *Persian Gulf Policy Hearings*, *supra* note 246, at 152 (statement of James A. Baker, III, Secretary of State).

tional force,"<sup>272</sup> Baker stated, but the Administration had made no decision to ask Congress for a declaration of war or a resolution of support.<sup>273</sup> Instead, Baker simply noted that, "as a co-equal branch of Government the Congress could, if it chose to do so, express itself on this issue."<sup>274</sup>

Throughout December, President Bush refused to answer the question of whether he would initiate offensive military action against Iraq without authorization from Congress.<sup>275</sup> Bush instead stated that he would "love to see Congress say this minute that we fully endorse the United Nations resolutions and the President should fully implement them" because, as he put it, "I'm determined to do that."<sup>276</sup>

When the new Congress reconvened in January 1991, war powers were at the top of the agenda. Representatives Charles Bennett and Richard Durbin pressed the House to adopt their resolution providing that the Constitution "vests all power to declare war in the Congress" and that "[a]ny offensive action taken against Iraq must be explicitly approved by the Congress of the United States before such action may be initiated."<sup>277</sup> Senator Tom Harkin introduced a similar resolution in the Senate.<sup>278</sup> Senate Judiciary Committee hearings on January 8 examined the constitutional war powers of Congress and the President.<sup>279</sup> Congress was finally, if belatedly, beginning to assert its constitutional war powers in a more direct and determined way. Deploying troops, even considerably reinforcing them, was one thing; initiating combat against Iraq, albeit under a U.N. umbrella, was quite another.<sup>280</sup>

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272. *Id.*

273. *Id.* at 158. Baker said such support would, however, be "welcome." *Id.*

274. *Id.*

275. *See, e.g.,* The President's News Conference with Regional Reporters, 26 WEEKLY COMP. PRES. DOC. 2049, 2053 (Dec. 18, 1990) (when asked by reporter whether he would initiate military action against Iraq without a congressional declaration of war, Bush responded: "[I]t's very difficult to answer that question in one definitive way.").

276. Remarks and a Question-and-Answer Session with Reporters at Camp David, Maryland, Following Discussions With Prime Minister John Major of the United Kingdom, 26 WEEKLY COMP. PRES. DOC. 2066 (Dec. 22, 1990).

277. H.R. Con. Res. 32, 102d Cong., 1st Sess. (1991), 137 CONG. REC. H390 (daily ed. Jan. 12, 1991). Bennett had introduced an earlier and longer version of this resolution on September 26, 1990. H.R. Con. Res. 372, 101st Cong., 2d Sess. (1990), 136 CONG. REC. H8054 (daily ed. Sept. 26, 1990).

278. S. Res. 9, 102d Cong., 1st Sess. (1991), 137 CONG. REC. S77 (daily ed. Jan 4, 1991).

279. *See generally Constitutional War Powers Hearings, supra* note 28.

280. As Senator George Mitchell expressed it:

Acting in his capacity as Commander in Chief, President Bush has deployed a vast American military force to the Persian Gulf. He was not required to seek the approval of Congress to order that deployment, and he did not do so. But if he now decides to use those forces in what would plainly be war he is legally obligated to seek the prior approval of the Congress.

137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell).

Up to this point, the President had operated on a “police power” model of presidential authority to commit U.S. forces to combat. Although the legal memoranda underlying this vision are not yet available to the public, one can reasonably surmise that they bear some resemblance to the July 1950 and February 1951 memoranda prepared by the State Department for President Truman—contending that the President as Commander in Chief can commit U.S. forces to combat without the consent of Congress if he decides that it is in the foreign policy interests of the United States to do so.<sup>281</sup> In public, the Bush Administration stressed the historical practice of unilateral presidential action. The Administration also suggested that a declaration of war is neither necessary nor appropriate when the United States participates in an “international force” operating under U.N. authorization.<sup>282</sup>

President Bush seemed to place less emphasis than Truman on Security Council resolutions as a basis of presidential authority. This was most likely the result of Bush’s desire to preserve U.S. freedom of military action in the Gulf from the very beginning, including freedom from any U.N. command structure that might be established, even as he sought U.N. resolutions supporting the use of force.<sup>283</sup> It was somewhat easier back in 1950—with the United States so clearly in the drivers seat at the U.N.—for Truman to have it both ways. Moreover, the Bush Administration did not rely heavily, at least not in public, on Truman’s well-used claim that the U.N. Charter is the “law of the land” that the President can faithfully execute as he deems appropriate.<sup>284</sup> Despite differences in emphasis,

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281. See *supra* notes 198-203, 223-228 and accompanying text.

282. *Hearings on Persian Gulf Options*, *supra* note 267, at 703 (statement of Richard Cheney, Secretary of Defense).

283. See *Persian Gulf Policy Hearings*, *supra* note 246, at 106 (statement of James A. Baker, III, Secretary of State) (“We would have difficulties with a United Nations command, representing as we do . . . such a disproportionately large element of the multinational force.”). In contrast to the Truman Administration, which characterized the collective military action in Korea as a U.N. authorized enforcement action, the Bush Administration focused more (at least initially) on collective self-defense under Article 51 of the Charter as the primary basis for military action in the Gulf. Once the Security Council adopted Resolution 678, however, the Administration invoked that resolution as the basis for collective military action. Scheffer, *Use of Force*, *supra* note 29, at 126-29. Whether that resolution is best viewed as authorizing U.N. enforcement action or approving collective self-defense is a separate question. See *supra* note 266 (discussing this issue). In any event, characterizing the Gulf action as collective self-defense will not by itself resolve the war powers issue. See *supra* note 236.

284. At least one scholar testifying before the Senate Judiciary Committee in January 1991, however, advanced an argument based on the President’s authority to “take care” that the U.N. Charter was “faithfully executed.” See *Constitutional War Powers Hearings*, *supra* note 28, at 230, 237-41 (statement of Eugene Rostow, Distinguished Fellow, United States Institute of Peace). Perhaps the War Powers Resolution, though not of central significance in the Gulf conflict, restrained the Bush Administration from publicly advancing such claims,

however, the Bush Administration shared Truman's basic view that the President has the constitutional authority to commit U.S. forces to combat in a U.N. approved military action without the authorization of Congress.

### 3. A Constitutional Accommodation

As congressional concern about war powers intensified in early January, prudential calculations, rather than any change of view regarding his constitutional powers,<sup>285</sup> prompted President Bush to request the House and Senate to "adopt a Resolution stating that Congress supports the use of all necessary means to implement UN Security Council Resolution 678."<sup>286</sup> Bush indicated in his letter to congressional leaders that he was "determined to do whatever is necessary to protect America's security,"<sup>287</sup> implying that he would act on his own if necessary. He asked Congress "to join . . . in this task," however, by "express[ing] its support for the President at this critical time."<sup>288</sup> In sum, congressional support, not authorization, was all the President requested and thought he needed.<sup>289</sup>

Congressional authorization to use force—not simply support for the President—was what Bush received four days later, following a passionate and often eloquent congressional debate. The debate centered on which of two basic approaches Congress should adopt. The Democratic leadership in both houses sponsored resolutions urging the continued application

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given its stipulation that "[a]uthority to introduce United States Armed Forces into hostilities . . . shall not be inferred . . . from any treaty heretofore or hereafter ratified" unless the treaty is implemented by legislation that explicitly authorizes such action. 50 U.S.C. § 1547(a)(2) (1988). More likely, the Administration was reluctant for political reasons to emphasize the binding nature of treaties in this context when it sought to minimize their significance in others.

285. As President Bush subsequently explained: "I have a great respect for Congress, and I prefer to work cooperatively with it wherever possible. Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf war." Remarks at Dedication Ceremony of the Social Sciences Complex at Princeton University, 27 WEEKLY COMP. PRES. DOC. 589, 590 (May 10, 1991) [hereinafter Princeton Speech].

286. Letter to Congressional Leaders on the Persian Gulf Crisis, 27 WEEKLY COMP. PRES. DOC. 17, 18 (Jan. 8, 1991). Bush stated in his letter to congressional leaders that it would "greatly enhance the chances for peace if Congress were now to go on record supporting the position adopted by the UN Security Council" and "it also would help dispel any belief that may exist in the minds of Iraq's leaders that the United States lacks the necessary unity to act decisively in response to Iraq's continued aggression against Kuwait." *Id.* at 17-18.

287. *Id.* at 18.

288. *Id.*

289. Various Senators indicated in a subsequent debate that the President had stated explicitly that he needed no authorization from Congress to use force against Iraq. *See, e.g.*, 137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell); *id.* at S120 (statement of Sen. Biden); *id.* at S165 (statement of Sen. Cohen). Bush reaffirmed this position in his Princeton Speech, *supra* note 285.

of economic sanctions to pressure Saddam Hussein to leave Kuwait, leaving open the possibility of a future authorization of force.<sup>290</sup> Proponents argued that sanctions should be given more time to work, and that Congress should not delegate to the President in advance the authority to initiate war.<sup>291</sup> These resolutions were ultimately defeated in both Houses.<sup>292</sup>

Congress instead adopted a joint resolution favored by the Bush Administration, which authorized the President to use force “pursuant to United Nations Security Council Resolution 678” after he determined and notified the Speaker of the House and the President Pro Tempore of the Senate that “the United States ha[d] used all appropriate diplomatic and other peaceful means to obtain” Iraq’s compliance with the Security Council’s resolutions and “those efforts have not been and would not be successful in obtaining such compliance.”<sup>293</sup> Proponents of this resolution argued that demonstrating firm U.S. resolve offered the last best chance for peace, although the possibility of war was real.<sup>294</sup> In the end, Congress

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290. See H.R. Con. Res. 33, 102d Cong., 1st Sess. (1991), 137 CONG. REC. H406 (daily ed. Jan. 12, 1991) (the Hamilton-Gephardt resolution); S.J. Res. 1, 102d Cong., 1st Sess. (1991), 137 CONG. REC. S361 (daily ed. Jan. 12, 1991) (the Mitchell-Nunn resolution). The Senate version authorized the use of force to enforce the economic sanctions, to defend Saudi Arabia from a direct attack by Iraq, and to protect U.S. forces in the region, and it did “not rule out declaring war or authorizing the use of force at a later time should that be necessary to achieve the goal of forcing Iraqi troops from Kuwait.” *Id.* It set forth an expedited set of procedures under which Congress would “consider any future Presidential request for a declaration of war or for authority to use military force against Iraq.” *Id.* The House version was almost identical.

291. As Senator Mitchell contended:

In its simplest form, the question is whether Congress will give the President an unlimited blank check to initiate war against Iraq, at some unspecified time in the future, under circumstances which are not now known and cannot be foreseen, or whether, while not ruling out the use of force if all other means fail, we will now urge continuation of the policy of concerted international economic and diplomatic pressure.

137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell).

292. The vote was 183 to 250 against in the House, 137 CONG. REC. H442-43 (daily ed. Jan. 12, 1991), and 46 to 53 against in the Senate, 137 CONG. REC. S369 (daily ed. Jan. 12, 1991).

293. Authorization for Use of Military Force Against Iraq Resolution, H.R.J. Res. 77, 102d Cong., 1st Sess. (1991), enacted as Pub. L. No. 102-1, 105 Stat. 3, 4 (1991). The House adopted H.R.J. Res. 77 by a vote of 250 to 183. 137 CONG. REC. H485 (daily ed. Jan. 12, 1991). The Senate adopted S.J. Res. 2 by a vote of 52 to 47. 137 CONG. REC. S403 (daily ed. Jan. 12, 1991).

294. See, e.g., 137 CONG. REC. H452 (daily ed. Jan. 12, 1991) (statement of Rep. Aspin) (“[L]ike many of my colleagues . . . I, too, believe that the passage of the Solarz-Michel resolution is the last, best hope to a peaceful solution to this crisis. But I recognize that if we pass this resolution and Saddam Hussein continues to stonewall us . . . then it means war.”); see also *id.* at S279 (daily ed. Jan. 11, 1991) (statement of Sen. Pressler) (resolution would strengthen the President’s bargaining position in attempts to negotiate peaceful settlement); *id.* at S285 (statement of Sen. McConnell) (same). Some viewed the resolution

adopted and the President signed the Authorization for Use of Military Force Against Iraq Resolution, giving the President what one analyst called "a conditional declaration of war."<sup>295</sup>

In sharp contrast to the debates during the Korean conflict, hardly anyone in Congress during the Gulf crisis believed the President had constitutional authority to commit U.S. troops to combat against Iraq merely because the U.N. Security Council had authorized the use of force. The House of Representatives adopted the Bennett-Durbin resolution, affirming that any offensive military action against Iraq required prior and explicit congressional approval.<sup>296</sup> Strong statements were made on both sides of the aisle in both Houses of Congress affirming Congress's constitutional power to declare war. As Senator Sam Nunn put it, the commitment of over 400,000 American forces to combat against Iraq is "not a grey area" as far as war powers are concerned.<sup>297</sup> Few disputed that such an action "would plainly be war"<sup>298</sup> and that the U.S. Constitution required the prior consent of Congress.<sup>299</sup> To be sure, several members of Congress

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as a way of "preserving, not necessarily using, the military option." *Id.* at S305 (daily ed. Jan. 11, 1991) (statement of Sen. Smith); *see also id.* at S310 (statement of Sen. Durenberger) ("[B]y making war in the gulf legally more likely, this resolution will make it less necessary.").

295. Memorandum from David Ackerman, Legislative Attorney, Congressional Research Service to Rep. Fascal, 137 CONG. REC. H446 (daily ed. Jan. 12, 1991) (addendum to statement of Rep. Fascal) ("At most the resolution would seem to be a conditional declaration of war, as certain conditions have to be met before its authorization of the use of force takes effect."). For an argument that "a formal declaration of war" was required, and not simply a congressional authorization, see J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 33 (1991). For a compelling critique of this claim, see Harold H. Koh, Comment, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122 (1991); Raven-Hansen, *supra* note 236, at 53-59.

296. H. Con. Res. 32, 102d Cong., 1st Sess. (1991), 137 CONG. REC. H390 (daily ed. Jan. 12, 1991). The vote was 302 to 131. 137 CONG. REC. H405 (daily ed. Jan. 12, 1991).

297. 137 CONG. REC. S190 (daily ed. Jan. 11, 1991) (statement of Sen. Nunn).

298. 137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell). As Senator Joseph Biden put it: "[W]hereas the actions taken to date by the United States may be classified as participation in a police action, an American-led attack on Iraq would cross the threshold into war. Whether to cross that threshold is a question the Framers of the Constitution vested surely and unequivocally in the U.S. Congress." 137 CONG. REC. S337 (daily ed. Jan. 12, 1991).

299. Only a very few members of Congress argued that the President could take military action against Iraq without prior approval from Congress. *See, e.g.*, 137 CONG. REC. S187-188 (daily ed. Jan. 11, 1991) (statement of Sen. Reid) (stating that the President has authority to initiate hostilities, subject to congressional control via the appropriations process); *id.* at S387-89 (daily ed. Jan. 12, 1991) (statement of Sen. Helms) (arguing that the Constitution "is silent on whether the President is prohibited from making war if Congress has not declared war"); *see also* 137 CONG. REC. H180 (daily ed. Jan. 10, 1991) (statement of Rep. Fields) (stating that the framers intended Congress to control the size of the military, but that once established, the President would control its use); *id.* at H268 (daily ed. Jan. 11, 1991) (statement of Rep. Gunderson) (claiming that the President has "clear authority" under the Constitution to initiate military action, given Congress's previous appropriation

argued that Congress ought to support the United Nations and the President in taking action that was designed to protect international peace and security.<sup>300</sup> But almost every member of Congress who addressed the Security Council's use-of-force resolution made the same basic point: U.N. authorization cannot substitute for the authorization of Congress required by the U.S. Constitution.<sup>301</sup> The Security Council's resolution

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of funds to send troops to the Persian Gulf region); *id.* at H235 (daily ed. Jan. 11, 1991), H465 (daily ed. Jan. 12, 1991) (statements of Rep. Ray) (stating that the President has "authority to engage American troops in an offensive action without a declaration of war from Congress"); *id.* at H465 (daily ed. Jan. 12, 1991) (same); *id.* at H483 (daily ed. Jan. 12, 1991) (statement of Rep. Ireland) (urging Congress to send a "strong message of support," but contending that the President has inherent authority as Commander in Chief to launch an offensive). In contrast, 302 Representatives voted in favor of the Bennett-Durbin resolution, and numerous members of Congress argued forcefully in debate that the power to declare or authorize war belongs to Congress.

300. Representative Ron Packard went the furthest in defending a police power model. Citing the arguments of Professor Thomas Franck, he contended that because "the U.N. Charter provides an alternative to a declared war our only option is to support the President according to the U.N. resolution." 137 CONG. REC. H233 (daily ed. Jan. 11, 1991) (statement of Rep. Packard); *see also* 137 CONG. REC. S262 (daily ed. Jan. 11, 1991) (statement of Sen. Stevens) ("I do not want to declare war. . . . What we want to do is support the objectives of the U.N. resolution to achieve peace, to try and keep the peace."). In October 1990, Senator Daniel Patrick Moynihan had argued that U.N. authorized actions were not the same as "war," and he was "not prepared to say that the President cannot act in concert with the Security Council before consulting with Congress." 136 CONG. REC. S14,316 (daily ed. Oct. 2, 1990) (statement of Sen. Moynihan). But after the President increased the number of U.S. forces in the Gulf in November, Moynihan joined ranks with those who argued that the President should not commit American forces to combat against Iraq without consulting Congress. Kenneth J. Cooper, *Bush to Consult "Every Step of the Way,"* WASH. POST, Nov. 13, 1990, at A20. Representative Jim Leach called the operation in the Gulf a "police action"; by voting to authorize force, Congress would be "granting the Executive discretion to use American Armed Forces as constables enforcing international [sic] law in an international police action." 137 CONG. REC. H456 (daily ed. Jan. 12, 1991). Although he believed a "declaration of war" in this context would be "inappropriate," Leach nevertheless insisted that congressional *authorization* was constitutionally required. *Id.*

301. *See, e.g.*, 137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell) ("The Constitution of the United States is not and cannot be subordinated to a U.N. resolution."); *id.* at S105 (statement of Sen. Leahy) ("Our Constitution stands supreme to the U.N. resolution or to anything else."); *id.* at S121 (statement of Sen. Biden) ("The choice to go to war remains with the Congress and the Congress alone."); *id.* at S127 (statement of Sen. Kennedy) ("It is . . . wrong to suggest that President Bush has the authority under any of the United Nations resolutions to commence war in the Persian Gulf without Congressional approval."); *id.* at S223-24 (daily ed. Jan. 11, 1991) (statement of Sen. Bentsen) ("Congress can certainly set different standards" than the U.N. Security Council regarding the use of force); 137 CONG. REC. H345 (daily ed. Jan. 11, 1991) (statement of Rep. Mineta) ("What actions the United Nations may authorize do not matter" because "the Constitution says only the Congress can declare war."); *id.* at H361 (statement of Rep. Slaughter) ("Under the Constitution, it is the Congress—not the United Nations or the President of the United States—that has the awesome responsibility to declare war."); *id.* at H373 (statement of Rep. Roemer) ("I will not vote to abdicate the decision to declare war to a U.N. resolution. Congress should shoulder the res-



was important to consider as a foreign policy matter, but as a constitutional matter Congress ultimately had to make its own decision on whether to authorize force.<sup>302</sup>

The most sustained critique of the police power model of presidential power came from Senator Joseph Biden, who had chaired war powers hearings in early January and was troubled by the claim that the President's power to take care that the laws be faithfully executed meant he could use force to implement U.N. resolutions without Congress's approval.<sup>303</sup> A treaty cannot modify the Constitution's allocation of war powers, Biden argued, and the U.N. Charter, in any event, did not give the President the power to take this country into war.<sup>304</sup> Furthermore, as other members of Congress also noted, Resolution 678 authorized but did not *require* the use of force, leaving it to member states to decide according to their own constitutional processes what actions they would take.<sup>305</sup> The President's actions thus far could be "classified as participation in a police action," Biden contended, but "an American-led attack on Iraq would cross the threshold into war," which was a decision "the Framers . . . vested surely and unequivocally in the U.S. Congress."<sup>306</sup>

possibility . . ."); cf. 137 CONG. REC. S388 (daily ed. Jan. 12, 1991) (statement of Sen. Helms) ("[T]he U.S. Constitution is superior to any obligations which we may or may not have undertaken by assenting to the U.N. Charter. . . . The power to declare and make war therefore remains with the United States, and has not been delegated to the United Nations."). Senator Arlen Specter chastised Congress for failing to act earlier and urged it to support the President and the United Nations in the Gulf, but he ultimately concluded that authorization from Congress was needed "to permit the President to enforce . . . U.N. Resolution 678." 137 CONG. REC. S196, S186 (daily ed. Jan. 11, 1991) (statement of Sen. Specter).

302. As Senator Lloyd Bentsen stated, the members of the Security Council "have not sworn to uphold the Constitution" and "were not elected to represent the will of the American people." 137 CONG. REC. S223-24 (daily ed. Jan. 11, 1991) (statement of Sen. Bentsen); see also *id.* at S105 (daily ed. Jan. 10, 1991) (statement of Sen. Leahy) ("If we hide behind the U.N. resolution, however valuable in uniting the world community, that would be an abrogation of our constitutional obligation."); *id.* at S121 (statement of Sen. Biden) ("[W]hile the U.N. resolutions do count as a foreign policy matter, they do not change in any way the constitutional calculus.").

303. 137 CONG. REC. S121 (daily ed. Jan. 10, 1991) (statement of Sen. Biden). For an articulation of this position, see *Constitutional War Powers Hearings*, *supra* note 28, at 230, 237-41 (statement of Eugene Rostow, Distinguished Fellow, United States Institute for Peace).

304. 137 CONG. REC. S121 (daily ed. Jan. 10, 1991) (statement of Sen. Biden).

305. *Id.* Thus, there was no "treaty obligation on the President to launch a war in the gulf." *Id.*; see also *id.* at S127 (statement of Sen. Kennedy) ("U.N. Resolution 678 only authorizes each member government to use force against Iraq in accordance with the procedures of each country; it does not require any nation to go to war. And under our Constitution, the President can go to war only if Congress has declared it."); *id.* at S330 (daily ed. Jan. 12, 1991) (statement of Sen. Leahy) (same).

306. 137 CONG. REC. S337 (daily ed. Jan. 12, 1991) (statement of Sen. Biden). In the House of Representatives, Representative Hamilton Fish also rejected the "take care"

In the end, Congress authorized the use of force against Iraq “pursuant to” Security Council Resolution 678, but without endorsing an open-ended claim of presidential power to engage in U.N. “police actions.” Indeed, Congress rejected the “police power” arguments so popular in 1950—that the President has constitutional authority to commit U.S. forces to combat to implement Security Council resolutions, or more broadly, to protect U.S. foreign policy interests embodied in the U.N. Charter. Congress, in 1991, refused to define away its war powers by labeling the major military operation in the Persian Gulf a “police action.” On the contrary, Congress insisted that it was the body with the constitutional power to decide whether U.S. forces should be sent into combat against Iraq, even if the timing of any military action was left to the President. On the doctrinal level, Congress asserted its authority, establishing an important counter-precedent to Korea.

#### 4. A Qualified Victory

For many in Congress, any feelings of victory over this assertion of congressional prerogative were muted by its limited practical significance. The President had not consulted Congress before deciding to build up U.S. forces in the Gulf in early November, or before agreeing to include a January 15 deadline in the Security Council resolution. Those choices set in motion developments that came close to forcing Congress’s hand when it deliberated in January over whether to authorize force. Indeed, only four days after Congress voted, President Bush initiated the military offensive against Iraq. Senator Bob Graham spoke for many when he argued that “any effective participation of Congress as the representatives of the people in shaping policy has been rendered [a] formality by the occurrences of the last several months, at least since November 8 when the level of U.S. military in the region moved from defensive to an offensive posture.”<sup>307</sup>

Yet Congress itself bore some responsibility for waiting until the week before the January 15 deadline to address the use of force issue directly and collectively. Congressional leaders could have called Congress back into session in November, following the President’s decision to create an “offensive military option” or following the Security Council’s decision to

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argument, contending that nothing in the UNPA authorized the President to commit U.S. troops to combat and, instead, the Act could be read as prohibiting it. 137 CONG. REC. H246 (daily ed. Jan. 11, 1991) (statement of Rep. Fish).

307. 137 CONG. REC. S286 (daily ed. Jan. 11, 1991) (statement of Sen. Graham); *see also id.* at S218-19 (statement of Sen. Harkin) (criticizing the President’s unilateral decision to shift from defensive to offensive posture and his apparently arbitrary choice of the Jan. 15 deadline); *id.* at S251 (statement of Sen. Kerry) (unilateral actions of President put Congress “in a box”); *id.* at H466 (daily ed. Jan. 12, 1991) (statement of Rep. Kaptur) (presidential actions put Congress in a difficult position).

authorize force, but they chose not to do so. As the late Senator John Heinz lamented in January, "There is more than enough blame to go around: we in the Congress wanted to play a waiting game, and the President supported that game, since it provided him with the latitude he needed and wanted in dealing with the United Nations and with Iraq."<sup>308</sup>

Even though Congress's involvement came at the eleventh hour and executive decisions largely determined the course of events, it is still significant that President Bush sought the support of Congress before sending American troops into combat against Iraq and that Congress voted to authorize the use of military force. These events suggest a third war powers model, one of *political accommodation*. Under this approach, the President needs congressional approval before committing substantial American forces to combat as part of a military action authorized by the U.N. Security Council. Such a commitment implicates Congress's constitutional power to declare war because of the degree of physical sacrifice and risk of loss that is involved.<sup>309</sup> Consistent with this view, an overwhelming majority of Congress concluded in 1991 that the Constitution required congressional authorization before nearly half a million American troops were sent to combat, albeit on behalf of the United Nations, in what would "plainly be war."<sup>310</sup>

It is doubtful, however, that President Bush ultimately accepted congressional approval as constitutionally *mandated* rather than simply politically prudent in cases like the Gulf War involving military conflict of substantial proportions.<sup>311</sup> Bush told an audience in May of 1991 that although he

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308. 137 CONG. REC. S313 (daily ed. Jan. 11, 1991) (statement of Sen. Heinz); *see also* 137 CONG. REC. H401 (daily ed. Jan. 12, 1991) (statement of Rep. Roth) ("In the 5 months since this crisis began, Congress has not fulfilled its duty" and "when Congress leaves a vacuum, Presidents can step in and maneuver Congress into a position where a vote against military action is a vote to undercut our troops at their moment of maximum vulnerability."); *id.* at H410 (statement of Rep. Green) ("[B]y waiting until this late hour we have rendered ourselves extraneous to any positive policy role.").

309. *Cf. Note, Congress, the President, and the Power to Commit Forces to Combat, supra* note 233, at 1774-75 (arguing that one of the rationales underlying the "war-declaring clause" is to give the people a say in decisions involving "a risk of great economic and physical sacrifice," which suggests the need for congressional approval "prior to engaging in 'major' hostilities above a certain level of intensity"); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 33 (1990) ("The President may deploy forces for foreign policy purposes, but he may not, without congressional authorization, engage them in hostilities that amount to war, or put them where they court war."); *see also id.* at 40 ("A line between foreign affairs and war is not easily drawn. . . . But it is a line drawn by the framers and redrawn by our history . . .").

310. 137 CONG. REC. S101 (daily ed. Jan. 10, 1991) (statement of Sen. Mitchell); *see also supra* notes 296-299 and accompanying text.

311. In signing the joint resolution authorizing force, Bush provided the following disclaimer:

As I made clear to congressional leaders at the outset, my request for congressional

sought the support of Congress, he believed he had "the inherent power to commit our forces to battle after the U.N. resolution."<sup>312</sup> In June 1992, months after the Gulf War was over, the President was more direct: "I didn't have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."<sup>313</sup> This view of presidential prerogative, coupled with the fact that executive decisions during the unfolding Gulf crisis virtually presented Congress with a *fait accompli*, suggests that the workability of a political accommodation model will depend on Congress's determination to assert its constitutional power and on the willingness of future Presidents to accept a greater congressional war powers role.

### III. THE FUTURE: CONSTITUTIONAL WAR POWERS AND THE UNITED NATIONS

Reconciling the demands of U.N. participation with the constitutionally imposed balance of war powers remains an unfinished challenge. A resolution of this matter is important because the U.N. Security Council seems destined to play an increasingly significant role in responding to threats to peace and security in the years ahead. The ability of the United States to help the Security Council meet these increased demands will be impeded if the domestic legal terms and conditions for the use of American forces in U.N. authorized military actions are not settled.

At the heart of the matter is the scope of the President's constitutional authority to commit U.S. military forces to hostilities, either in the U.N. context or more generally. Few scholars or politicians question the President's authority to take emergency military action to defend against an attack or imminent attack on the United States, or to protect U.S. military forces and citizens abroad. Beyond these generally agreed upon examples of "repelling sudden attack," however, there are tremendous differences over the scope of the President's authority to send U.S. forces into combat.<sup>314</sup> Naturally, these differences lead to different conclusions regarding

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

Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WEEKLY COMP. PRES. DOC. 48 (Jan. 14, 1991).

312. Princeton Speech, *supra* note 285, at 590.

313. Remarks of President George Bush, *supra* note 1, at 1120-21.

314. See Joseph R. Biden, Jr. & John B. Ritch, III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367, 370-72 (1988) (comparing "monarchist" views with a "joint decision" approach).

the effect of Security Council authorization of the use of force on the President's authority.

This article has developed three models as a way to interpret past debates over war powers in the U.N. context. The "police power" model, articulated during the Korean War and the Gulf War, is premised on an expansive conception of the President's constitutional war powers and views congressional authorization as essentially irrelevant in U.N. approved "police actions." The "political accommodation" and "contract" models, in contrast, are premised on the view that Congress's war powers remain relevant in the U.N. context, particularly in any large-scale action that places substantial numbers of American forces at risk. The remaining question is which model provides the soundest foundation for the future.

In evaluating the implications and potential of each model, it is important to distinguish between different types of U.N. authorized military operations and the forces likely to conduct them in the future; different types of actions may have different implications for the constitutional division of war powers. At one end of the spectrum are large-scale enforcement actions authorized by the Security Council under Chapter VII of the U.N. Charter to restore international peace and security. Such large-scale actions can be undertaken in a variety of ways. The actions in Korea and the Persian Gulf were carried out by a coalition of national forces acting at the behest of the Security Council and under the command of an American general.<sup>315</sup> Ad hoc coalitions of national forces may continue to act on behalf of the Security Council in the future under "delegated mandates,"<sup>316</sup> as in the Gulf, which leave considerable discretion over military objectives and tactics in the hands of the state commanding the troops. It also may be possible (and desirable) to create delegated mandates that are more specific about political goals and provide for greater collective political control by the Security Council.<sup>317</sup> Now that Cold War tensions have dissipated, U.N. Secretary-General Boutros Boutros-Ghali has urged member states to give the Security Council a

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315. Scholars continue to debate whether the military actions in Korea and in the Persian Gulf are best viewed as U.N. enforcement actions or as U.N. authorized collective self-defense. See *supra* notes 137, 266. The forces in Korea operated under a U.N. flag, while the forces in the Persian Gulf operated under a U.N. "umbrella." In both cases, however, an American general was in command and the United States contributed the preponderance of the armed forces.

316. I am grateful to William Durch for introducing me to this term.

317. Mackinlay & Chopra, *supra* note 11, at 127-28. The Security Council attempted to do this in the case of Somalia; see S.C. Res. 794, 47th Sess., 3145th mtg., ¶ 18, U.N. Doc. S/RES/794 (1992) (requesting regular reporting on "the implementation of this resolution and the attainment of the objective of establishing a secure environment" in order to "enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations").

more permanent capacity for collective military action by negotiating Article 43 agreements, thereby placing designated national forces, assistance and facilities "on call" for use by the Security Council.<sup>318</sup>

At the other end of the spectrum are classic U.N. "peacekeeping" operations, in which unarmed observers or lightly armed forces are deployed with the consent of the parties to undertake tasks such as monitoring a ceasefire, safeguarding local stability to allow elections, and monitoring human rights practices. Peacekeeping forces have traditionally been under the political control of the Security Council and under the overall command of the Secretary-General, with forces supplied by member states on a voluntary basis. While some states already hold peacekeeping forces ready for U.N. action, the Secretary-General has urged member states to confirm "[s]tand-by arrangements . . . concerning the kind and number of skilled personnel they will be prepared to offer the United Nations as the needs of new operations arise."<sup>319</sup>

American participation in peacekeeping operations has in the past been minimal, but it may increase now that Cold War tensions no longer serve as an effective bar to greater U.S. involvement.<sup>320</sup> In light of factors such as size, type of mission, force capacity, and risk, it is likely that the war powers issue will be easier to resolve with respect to peacekeeping opera-

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318. *An Agenda for Peace*, *supra* note 13, at 13. So far, the response from the United States and Britain has been cautious, in large part because of concerns about the role that the Military Staff Committee created by the U.N. Charter might play in commanding such forces. See, e.g., John M. Goshko & Barton Gellman, *Idea of a Potent U.N. Army Receives a Mixed Response*, WASH. POST, Oct. 29, 1992, at A22 (explaining U.S. concerns that provisions for joint military command are "too unwieldy" and doubts that "U.S. interests would coincide with those of a multinational military command"); Paul Lewis, *France's U.N. Plan at Odds with U.S.*, N.Y. TIMES, Feb. 2, 1992, at 7 (noting U.S. concerns that French plan to strengthen Military Staff Committee would compromise U.S. control of American forces in U.N. operations). Prior to the Secretary-General's proposal, Secretary of State James Baker expressed reluctance to place U.S. forces under the operational command of the Military Staff Committee in testimony before Congress during the Gulf War. *Persian Gulf Policy Hearings*, *supra* note 246, at 157 (statement of James A. Baker, III, Secretary of State).

The language of Chapter VII is flexible, however, regarding the precise role of the Military Staff Committee. Article 42 makes no mention of the Committee. Article 47 provides that the Military Staff Committee "shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council," but it also says that "[q]uestions relating to the command of such forces shall be worked out subsequently." U.N. CHARTER art. 47, ¶ 3. The Military Staff Committee could, for instance, be given a coordinating role in the training of Article 43 forces and could help translate the Security Council's broad political goals into "strategic objectives," with operational command issues left flexible and resolved in concrete cases, as in Korea and the Persian Gulf. Other members of the Security Council may insist on a greater role for the Military Staff Committee, however, and numerous other obstacles remain before a network of special agreements will be concluded.

319. *An Agenda for Peace*, *supra* note 13, at 15.

320. United States involvement still may not be desirable in cases where it would be perceived as a partisan rather than a neutral party.

tions than with respect to Chapter VII enforcement. Indeed, under section seven of the UNPA the President currently is authorized to detail up to one thousand U.S. armed forces personnel to U.N. operations aimed at the peaceful settlement of disputes.<sup>321</sup>

In a world ridden with ethnic and secessionist conflicts and civil war, however, the United Nations will increasingly be called upon to engage in actions that fall somewhere between consensual peacekeeping and large-scale military enforcement. In situations in which there is no peace to be kept, and only some of the parties desire a U.N. presence, the U.N. may authorize Chapter VII "peace enforcement" actions such as assisting in the delivery of humanitarian relief in hostile territory.<sup>322</sup> Forces engaged in such action would need to be armed more heavily than traditional peacekeepers and would be deployed in situations in which armed conflict is likely to occur. The Security Council's resolution of August 1992 authorizing member states to take "all measures necessary" to facilitate delivery of "humanitarian assistance" wherever it is needed in Bosnia and Herzegovina, although not fully implemented, is an example of one such difficult "peace enforcement" mission.<sup>323</sup> Another example is the U.N. approved military operation in Somalia, in which forces predominantly from the United States were authorized to use "all necessary means to establish . . . a secure environment for humanitarian relief operations."<sup>324</sup> Adopted under Chapter VII, these resolutions stop well short of authorizing major military enforcement action, but clearly go beyond traditional peacekeeping.

The need for forces trained and equipped to engage in such "peace enforcement" missions seems increasingly clear, even as questions concerning the precise nature and command of such forces remain open. The

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321. The legislation encompasses troops dispatched to serve as "observers, guards, or in any noncombatant capacity" so long as the operation does not involve "the employment of armed forces contemplated by chapter VII" of the U.N. Charter. 63 Stat. 735-36, 22 U.S.C. § 287d-1(a) (1988).

322. Other "peace enforcement" missions might include actively restoring and maintaining a ceasefire (not just monitoring one), helping to maintain law and order, and guaranteeing rights of passage. Mackinlay & Chopra, *supra* note 11, at 116-17.

323. S.C. Res. 770, 47th Sess., 3106th mtg. U.N. Doc. S/RES/770 (1992); see Paul Lewis, *U.N. Council Votes for Use of Force for Bosnia Relief*, N.Y. TIMES, Aug. 14, 1992, at A1 (noting reluctance of most nations to commit troops despite Security Council authorization); Trevor Rowe, *U.N. Approves Use of Military Force for Bosnia Aid, Seeks War Crime Data*, WASH. POST, Aug. 14, 1992, at A1 (commenting that resolution was a "narrow but concerted effort" to provide humanitarian assistance rather than a "blank check" to use force).

324. S.C. Res. 794, *supra* note 317, at 3. The resolution also called upon member states "nationally or through regional agencies or arrangements, to use such measures as may be necessary to ensure strict implementation" of a prior resolution calling for an embargo on all delivery of weapons and military equipment to Somalia. *Id.* ¶ 4 (referring to S.C. Res. 733, 47th Sess., 3039th mtg., ¶ 5, U.N. Doc. S/RES/733 (1992)).

Security Council resolution concerning humanitarian relief in Bosnia, as well as a subsequent resolution authorizing enforcement of an economic embargo against Serbia, both called on states to take action "nationally or through regional agencies or arrangements," effectively operating under a "delegated mandate" approach.<sup>325</sup> The Somalia resolution authorized the Secretary-General and the concerned member states "to make the necessary arrangements for the unified command and control of the forces involved,"<sup>326</sup> reflecting a U.S. offer of troops that was conditioned on American command.

Such ad hoc arrangements provide valuable flexibility in responding to unfolding crises, but they also pose difficulties. They delegate considerable political and military control at a time when a growing number of states are expressing opposition to repeated reliance on single-nation command arrangements of the sort used in the Persian Gulf.<sup>327</sup> Drafters of the Somalia resolution attempted to meet such concerns in a number of ways. The resolution called for the establishment of "appropriate mechanisms for coordination" between the U.N. and allied forces, inviting the Secretary-General to establish a U.N. peacekeeping liaison staff at the headquarters of the unified command, and requesting regular reports to the Security Council on the progress of the mission in order "to enable the Council to make the necessary decision for a prompt transition to continued peace-keeping operations."<sup>328</sup>

Another difficulty in continuing to rely on ad hoc arrangements is that troops may not always be available on a prompt enough basis. After all, starvation and anarchy in Somalia continued for months before the United States offered forces to ensure the delivery of relief supplies. Thus, some commentators favor creating a more formal U.N. capacity for future "peace enforcement" actions, such as a rapid-deployment force of earmarked national forces that would train together on a regular basis.<sup>329</sup> Whether such forces would be created through Article 43 agreements or through some other mechanism has yet to be resolved.<sup>330</sup>

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325. S.C. Res. 770, *supra* note 323, at 2; S.C. Res. 787, 47th Sess., 3137th mtg., at 4, U.N. Doc. S/RES/787 (1992).

326. S.C. Res. 794, *supra* note 317, at 4; *see also Letter Dated 29 November 1992 from the Secretary-General Addressed to the President of the Security Council*, U.N. S.C., 47th Sess., U.N. Doc. S/24,868 (1992) (discussing proposed options).

327. Mackinlay & Chopra, *supra* note 11, at 124-26.

328. S.C. Res. 794, *supra* note 317, at 4.

329. *See, e.g.,* sources cited *supra* note 14 (discussing various proposals).

330. Senator David Boren has proposed creating such forces through Article 43 agreements. *See* Boren, *supra* note 14. Secretary-General Boutros Boutros-Ghali has proposed a somewhat different arrangement. He favors "peace enforcement units" consisting of volunteer troops that would train within their national forces but are made available to the Security Council by member states. Boutros-Ghali urges that these forces be placed under the



In short, the U.N. Security Council is likely to authorize a wide variety of military operations in the future, ranging from consensual peacekeeping, to small-scale peace enforcement, to large-scale military actions. The constitutional balance of war powers between Congress and the President may differ depending on the nature, size, and risk of the U.N. military action. The value of the three war powers models discussed above thus will depend, at least in part, on their responsiveness to these factors.

#### A. THE POLICE POWER MODEL

The police power model of war powers does not adequately take into account the varying characteristics of U.N. authorized military responses to international crises. The model is based upon an expansive conception of presidential power reinforced by the commitments embodied in the U.N. Charter. With no special agreements in place to set limits on the forces at the President's disposal, the police power model posits broad authority for the President to deploy U.S. forces in *any* U.N. authorized use of force, regardless of its size or character.

Three distinct claims underlie the police power conception, each of which was advanced directly by the Truman Administration and implicitly, if not explicitly, by the Bush Administration and its supporters.<sup>331</sup> First, under this model, the President's customary or "traditional" power as Commander in Chief to take military action abroad is not limited to defensive actions to protect the United States and its citizens, but includes the authority to use force without congressional consent to protect "the broad interests of American foreign policy."<sup>332</sup> Those broad interests include preserving the effectiveness of the United Nations as an institution and responding to threats to the U.N. Charter as they arise.

Grounding an expansive notion of presidential power in the global commitments and responsibilities undertaken in the U.N. Charter may have been acceptable to most members of Congress during the early days of the Korean crisis—the first major military emergency of the Cold War. In a non-emergency situation, though, such as Truman's decision to send substantial troops to Europe as part of the North Atlantic Treaty Organization, Congress was not willing to let the President alone determine what

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command of the Secretary-General as are peacekeeping forces. Recognizing that "peace enforcement" is neither traditional peacekeeping nor large-scale military enforcement action, he cautioned that "[s]uch peace-enforcement units should not be confused with the forces that may eventually be constituted under Article 43 to deal with acts of aggression or with the military personnel which Governments may agree to keep on stand-by for possible contribution to peace-keeping operations." *An Agenda for Peace*, *supra* note 13, at 13.

331. For a perceptive discussion and critique of "custom," "treaty," and "police action" arguments advanced during the Gulf War, see Raven-Hansen, *supra* note 118, at 8-13.

332. *Authority of the President to Repel the Attack in Korea*, *supra* note 198, at 174.

was in “the broad interests of American foreign policy.”<sup>333</sup> Similarly, as the Persian Gulf crisis unfolded, many members of Congress differed with the President over how best to respond to the threat that Iraq’s invasion of Kuwait posed to the U.N. Charter and to U.S. political and economic interests.

To claim that the President as Commander in Chief has unilateral authority to send U.S. forces to combat whenever he thinks it is in the interest of the United States or the United Nations to do so, regardless of the size or riskiness of the operation, is essentially to read Congress’s power to declare war out of the Constitution. Such an expansive conception of executive war power has virtually no limits. It relegates Congress to the role of bystander in questions of war and peace, rather than a partner in determining the nature and scope of U.S. participation in international institutions such as the United Nations that have the authority to use military force. In a world no longer dominated by Cold War tensions, it is hard to see any political, let alone constitutional, basis for such a vision.

A second, related claim advanced by proponents of the police power model is that the U.N. Charter—a treaty ratified by the United States—is the “law of the land,” which the President has the constitutional duty to “faithfully execute.”<sup>334</sup> As the Truman Administration put it: “The power to send troops abroad is certainly one of the powers which the President may exercise in carrying out such a treaty as . . . the United Nations Charter.”<sup>335</sup>

Faithfully executing the U.N. Charter, however, does not necessarily require the use of force. In neither Korea nor the Persian Gulf did the Security Council *require* member states to use force—it simply authorized them to do so. Thus, in neither case was there a treaty obligation to commit American soldiers to combat.<sup>336</sup> More fundamentally, the Consti-

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333. *Id.* See *supra* notes 212-233 and accompanying text (discussing the “Great Debate”).  
334. U.S. CONST. art. II, § 3 (Take Care Clause); art. VI, cl. 2 (Supremacy Clause).

335. REPORT ON THE POWERS OF THE PRESIDENT, *supra* note 223, at 20.

336. Moreover, as Professor Henkin stated in his testimony before the Senate Judiciary Committee in January 1991:

[I]t is far from obvious that the charter gives the Security Council authority to order states to take military action, as distinguished from authorizing them to do so, or recommending that they do so. In any event, whatever the power of the Security Council in theory, in fact, it has not purported to order states to use force.

*Constitutional War Powers Hearings*, *supra* note 28, at 88 (statement of Louis Henkin, Professor Emeritus, Columbia University School of Law); see also Schachter, *supra* note 266, at 464 (arguing that Article 43 of the Charter “makes clear that member states cannot be legally bound to provide armed forces unless they have agreed to do so”). More recently, Professor Henkin has argued that “the President has Constitutional authority to send U.S. forces into war pursuant to a *decision* of the Security Council, but not pursuant to its *recommendation* or *authorization*, unless Congress authorizes it.” *Notes from the President*,

tution stands supreme to any treaty. The war powers granted to Congress as a whole by the U.S. Constitution cannot be preempted by a treaty approved by the Senate alone,<sup>337</sup> nor did the U.N. Charter attempt to do this. Instead, the Charter explicitly provided that any forces committed to the Security Council through the anticipated special agreements would be subject to the "constitutional processes" of member states.<sup>338</sup> Moreover, the Senate gave its advice and consent to the Charter on the explicit understanding that Congress would approve any special agreement to commit U.S. forces, and that the President would return to Congress for any additional forces required in a U.N. authorized enforcement action.<sup>339</sup>

The absence of special agreements does not mean the President can "execute" the U.N. Charter in any way he sees fit. On the contrary, under the UNPA, the President can claim no authorization from the Congress to use forces in the absence of a special agreement.<sup>340</sup> Thus, the President must either come to Congress for specific authorization in an individual

NEWSLETTER (Am. Soc. Int'l L., Wash., D.C.), Nov.-Dec. 1992, at 1-2 (emphasis in original). However, Henkin argues, even in the case of a Security Council decision "the President may not act if Congress has forbidden it." *Id.* at 2.

During the Gulf conflict, the Security Council "decided" to impose economic sanctions. S.C. Res. 661, *supra* note 242, at 2-3. The member states of the United Nations are obliged to carry out Security Council decisions under Articles 25 and 48 of the U.N. Charter. When it came to enforcing the sanctions against Iraq, the Security Council did not "decide" to take military action but instead "call[ed] upon" member states with maritime forces in the region to help enforce the sanctions. S.C. Res. 665, *supra* note 254, at 1. Similarly, Security Council Resolution 678 "authorized" but did not require the use of "all necessary means" to expel Iraq from Kuwait. S.C. Res. 678, *supra* note 265, at 1. Likewise, in the Korean conflict, the Security Council "recommended" that member states help "repel the armed attack." S.C. Res. 83, *supra* note 137, at 5.

337. See S. EXEC. REP. NO. 12, 95th Cong., 2d Sess. 66 (1978) ("A treaty may not declare war because the unique legislative history of the declaration-of-war clause . . . clearly indicates that the power was intended to reside jointly in the House of Representatives and the Senate."); GLENNON, *supra* note 236, at 192-205 (arguing that a treaty could not constitutionally grant the President war-making powers beyond those already possessed and, in any event, no treaties currently in force purport to do so); *Congress, the President, and the Power to Commit Forces to Combat*, *supra* note 233, at 1798-1800 (framers specifically considered and rejected allowing Senate alone to declare war); Raven-Hansen, *supra* note 118, at 10 (same).

338. U.N. CHARTER art. 43.

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

340. Professor Henkin argued during the Gulf crisis that the UNPA "can be read as prohibiting the President from using armed forces" in the absence of congressionally-approved special agreements. *Constitutional War Powers Hearings*, *supra* note 28, at 89. Senator Robert Taft made a similar argument in June 1950 during the Korean crisis: "There is no authority to use armed forces in support of the United Nations in the absence of some previous action by Congress dealing with the subject and outlining the general circumstances and the amount of the forces that can be used." 96 CONG. REC. 9323 (1950) (statement of Sen. Taft).

case or act within his own inherent constitutional authority to repel sudden attacks. Furthermore, the scope of that authority should be interpreted narrowly in the U.N. context given Congress's clear intent in the UNPA to participate in any decision to commit forces to the United Nations Security Council. In sum, the President cannot "execute" the U.N. Charter without reference to the war powers of Congress.

The third claim of police power proponents begins with a sound insight and then takes it too far. The sound insight is that there is an important difference between the unilateral decision of a state to go to "war," on the one hand, and the collective authorization of force by the Security Council to protect international peace and security, on the other. The difference between these two situations as a matter of international law is clear. Proponents go too far, however, in claiming that any U.N. authorized "police action," regardless of its size, by definition does not constitute "war" under the U.S. Constitution, and thus is not subject to Congress's constitutional power to "declare war."<sup>341</sup>

Some of these proponents argue that the Security Council is a deliberative body that can provide the same sort of check on resort to force that the framers of the Constitution sought in Congress.<sup>342</sup> There are several problems with this analysis, however. First, the President alone controls the U.S. vote on the Security Council and, as the Korea and Gulf War experiences make clear, the United States wields sufficient power that the President has largely been able to shape the Security Council's response to accord with his own views on whether to use force. In both Korea and the Gulf, the Security Council hardly constituted a significant check—much less a democratic one—on the President's decision regarding whether and how to use force.

Second, the framers of the Constitution did not vest the power to declare war in one body; they vested it in two, the Senate and the House, both to restrain any rush to war and to enhance democratic participation.<sup>343</sup>

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341. See Franck & Patel, *supra* note 28, at 63-70 (arguing that intent of drafters and ratifiers of the Charter was to obviate the need for a congressional declaration of war in U.N. authorized police actions); Franck, *supra* note 28 (Congress had neither obligation nor right to declare war during Gulf crisis). Although the Senate Foreign Relations Committee wrote in its 1945 report on the U.N. Charter that U.N. authorized "enforcement" action was not war and the declaration clause thus was inapplicable, the Senate debate over the U.N. Charter as well as the UNPA reflect a clear consensus that Congress had to approve any special agreement in the first place *and* that any large-scale commitment of forces would be more akin to "war" and would require specific congressional approval. See *supra* Parts I.A.1.-A2., I.B.

342. Franck & Patel, *supra* note 28, at 74.

343. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 4, at 318-19; 2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1866) (remarks of James Wilson to the Pennsylvania constitutional ratifying convention) ("This system will not hurry us into war; it is calculated

This democratic concern underlying the constitutional division of war powers remains important in the U.N. context because American troops—by virtue of U.S. military preeminence—are likely to do much of the fighting and dying on behalf of the United Nations. Moreover, if there is time for the Security Council to deliberate about whether to authorize force, there will usually be time for Congress to do so as well.

To be sure, Congress may decide, as the UNPA envisions, to cede limited military forces to the control of the President and the Security Council. As in the Gulf War, however, Congress is unlikely to relinquish its power to decide in cases involving the substantial commitment of American troops in a U.N. “police action” that nevertheless plainly is war. The “this isn’t war” argument would simply eliminate by definitional fiat the constitutional role of Congress as the voice of the American people, even in cases like Korea and the Persian Gulf involving combat by American soldiers on a major scale.

#### B. THE POLITICAL ACCOMMODATION MODEL

An alternative model of the division of war powers with respect to U.N. authorized military action is the political accommodation model, which emerged during the Gulf crisis. This model focuses on the size and risk of particular U.N. actions in determining where the line between the President’s “police” powers and Congress’s war powers should be drawn. In the absence of an attack on the United States or its people, this approach requires congressional approval before U.S. troops are committed to combat in substantial numbers because the risk of great physical sacrifice—of war—is real.<sup>344</sup> In contrast, the President on his own authority could order U.S. participation in small-scale actions authorized by the Security Council that involve minimal risk of escalation,<sup>345</sup> including “peacekeeping”

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to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large . . .”).

344. Cf. sources cited *supra* in note 309. Even if a President disputes that congressional authorization is constitutionally required, he may still seek such authorization for prudential reasons. See Morton H. Halperin, *The Way to Pick A Fight*, WASH. POST, Jan. 10, 1993, at C4 (arguing that the President “should cut through the entire constitutional debate about war powers by simply asserting that, as a matter of prudence and policy, force will not be used except in a true emergency to repel an attack, without the passage of a congressional resolution”).

345. See Raven-Hansen, *supra* note 118, at 13. Raven-Hansen invokes “customary constitutional law” to argue that “[s]ome historical uses of force by the President were defensive responses to immediate attack on the United States or its people, falling within the President’s implied constitutional power to repel sudden attacks.” *Id.* at 11. Other historical uses of force “did not require prior congressional approval because they posed no significant risk of loss or war for the United States given their scale.” *Id.* Raven-Hansen goes on to distinguish between small or “retail” “police actions,” on the one hand, and

operations undertaken with the consent of the parties. The support in Congress for President Bush's decision to send U.S. troops to Somalia for humanitarian purposes, and the minimal concern initially expressed over his failure to seek the approval of Congress in advance, reflects the political accommodation approach.<sup>346</sup> Determinations of risk under this model are made on a case-by-case basis, with Congress and the President engaging in their usual struggle over their respective war powers.<sup>347</sup>

The political accommodation approach has advantages over the police power model. It is more consistent with the vision of shared war powers embodied in the Constitution. Under the accommodation model, U.N. authorization is no substitute for congressional deliberation when a substantial number of American soldiers are sent into combat and asked to put their lives at risk. At the same time, the political accommodation approach aims to give the President and the Security Council the ability to respond promptly to small-scale threats to the peace while preserving for Congress the power to approve major commitments of U.S. forces. This model has the virtue of flexibility; it leaves to Congress and the President the task of reaching an accommodation in each case based on the size and risk of the mission.

The political accommodation war powers model has two drawbacks, however, one political and one conceptual. As the Gulf War experience illustrates, the political accommodation approach depends on the willingness of Congress to share in the burden and responsibility of making hard decisions about whether to use military force in the face of conflicting

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larger or "wholesale" actions on the other. Invoking custom, he argues that "the retail-wholesale distinction suggests that there will be many cases in which the President does have inherent or customary constitutional authority to deploy forces in police actions without prior congressional authorization." *Id.* at 11-13. In cases involving a substantial risk of loss, however, prior congressional authorization would be required. *Id.* at 11.

346. In December 1992, few members of Congress thought that President Bush's decision to send U.S. troops to Somalia to help deliver relief supplies raised a risk of imminent hostilities or war. Congressional leaders did express concern, however, about defining the objectives of the operation clearly and about the length of time U.S. forces would stay in Somalia. They also expressed a desire for ongoing consultation while the mission was underway. Walter Pincus, *Lawmaker: 'Define the Mission,'* WASH. POST, Dec. 4, 1992, at A20. A few members of Congress argued that Congress should take a stand on the mission. *A Few in Congress Advising Caution, or Vote, on Somalia,* N.Y. TIMES, Dec. 7, 1992, at A13. In light of the uncertain risks and duration of the Somalia operation, there was wisdom in that view. Indeed, the Senate subsequently voted to authorize the deployment of U.S. forces to Somalia pursuant to the War Powers Resolution. 139 CONG. REC. S1368 (daily ed. Feb. 4, 1993); Walter Pincus, *Senate Authorizes Troops to Somalia,* WASH. POST, Feb. 5, 1993, at A10.

347. Gary Born argues that a constant struggle over shared war powers is exactly what the framers wanted. See *Constitutional War Powers Hearings*, *supra* note 28, at 456 (statement of Gary Born) ("The Framers deliberately chose not to attempt to allocate those powers with any rigid legal formula. Rather, when threats to the Nation arise, the Framers intended that Congress and the President would work through the democratic process to decide whether military forces should be used.").

pressures and uncertain outcomes.<sup>348</sup> It also depends on the *ability* of Congress to assert its constitutional role in specific cases, which may be difficult when the President makes unilateral decisions that come close to preordaining the outcome. It is never easy to make responsible choices about whether to authorize military force; it is even harder when troops have already been deployed, the stakes have been raised, and the credibility of the United States as a participating member of the United Nations has been placed on the line. Unless Congress is vigilant at an early stage in a conflict, events may overtake its ability to exercise a meaningful decision on the ultimate question of committing U.S. troops to combat. In the end, if Congress is reluctant to express itself, it will be left to the predilection of the President to decide whether to seek congressional approval and, even then, Congress may find itself presented with a virtual *fait accompli*.

As a conceptual matter, assessments of risk and distinctions between large and small-scale commitments of U.S. forces are generally in the eye of the beholder. The Persian Gulf conflict was an easy case—it plainly was “war” by almost anyone’s definition. However, U.N. authorized actions in the future may be more ambiguous in scope and risk, especially in volatile civil war situations where conflict can escalate beyond original expectations. While consensual peacekeeping activities will surely continue, even more demanding “peace enforcement” operations are likely in the future. The hazard of this model is that when the risk of armed conflict is present but uncertain, and the consent of all the parties is not obtainable, the political accommodation approach may not provide clear enough guidance on the respective authority of the President and the Congress to decide on the commitment of U.S. forces.

### C. THE CONTRACT MODEL REVISED

The contract model mitigates the drawbacks of the political accommodation model by establishing statutory numerical and purpose-based limits on U.S. participation in U.N. authorized military actions, rather than relying simply on the ongoing struggle between Congress and the President to determine the war powers balance in each case as it arises. The contract approach takes as its starting point the central role of Congress in making U.S. troops available to the United Nations, based on Congress’s constitutional power to raise and support military forces and its power to declare war. Just as the Seventy-Ninth Congress expected that Congress

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348. For a perceptive discussion of the political pressures in favor of congressional inaction, see Todd Peterson, *The Law and Politics of Shared National Security Power*, 59 GEO. WASH. L. REV. 747, 769-72 (1991) (reviewing HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990)).

would determine how many troops would be placed “on call” for use by the Security Council, a modern contract model aims to ensure that Congress plays a constructive and significant role in determining the scope and nature of U.S. commitments to the United Nations *in advance* of conflict, rather than simply responding to presidential decisions in individual crises. In short, Congress is not just the “on/off switch” in particular cases; it would also help define in a more general and prospective way the contours of American participation in U.N. military operations.

Under the contract model, authorization of the use of force by the U.N. Security Council does not replace the need for democratic deliberation by the United States Congress. The President retains the authority to defend the United States and its citizens from “sudden attack.” But when the risk of war and great physical sacrifice is real, Congress should be involved in the decision to send American troops into combat,<sup>349</sup> even on behalf of the United Nations. On this view, congressional authorization would be required not only to establish the basic parameters of any “permanent” U.S. troop commitments to the United Nations, but also to send any substantial number of American soldiers into combat or other hostile situations that pose the risk of war. Recognizing that terms such as “substantial” and “risk of war” are subjective, the contract model attempts, as Senator Millikin urged in 1945, to draw some practical lines indicating where the President’s power to conduct “policing operations” ends and the war powers of Congress begin.<sup>350</sup>

A modern contract approach would build on the U.N. Participation Act, including its provision authorizing the President to negotiate a “special agreement” with the Security Council pursuant to Article 43 of the U.N. Charter, delineating the troops “on call” for its use in actions to safeguard international peace and security. The United States could probably contribute most to the United Nations in the near future by earmarking and training forces to participate in Chapter VII “peace enforcement” missions, such as securing the delivery of relief supplies in hostile territory or actively enforcing a ceasefire—missions that fall short of large-scale enforcement action but go well beyond consensual peacekeeping.<sup>351</sup> If the President ultimately negotiates a “special agreement” for such purposes, it would be submitted to Congress for approval by joint resolution or act, as required by the UNPA. Once Congress approves an agreement, the

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349. Cf. sources cited *supra* in note 309.

350. 91 CONG. REC. 8032-33 (1945) (statement of Sen. Millikin).

351. These forces could also be used for “preventive deployments” in cases in which a state requests and the Security Council authorizes deployment of a U.N. force to deter an attack before it takes place. When U.N. authorized forces are sent into hostile or contested territory to impose peace, not just “keep” it, the risk of war will generally be present, and Congress thus should have a voice in determining U.S. participation.



President could make the designated forces available for enforcement action authorized by the Security Council.<sup>352</sup>

In reviewing any proposed agreement, Congress could, and should, insist on certain safeguards. First, the number of troops provided to the Security Council should be limited. Although Congress could ultimately raise the number in light of subsequent experience, it could initially approve as few as three or four brigades (about 2000 troops each).<sup>353</sup> Forces in this range would enable the United States to participate immediately in small "peace enforcement" actions, but a more substantial commitment of American forces would require specific authorization by Congress in individual cases. Without an agreed statutory limit, Presidents may be more likely to operate on a police power model and commit U.S. forces to U.N. actions without seeking prior authorization from Congress, at least in cases where the forces are under U.S. command as part of a delegated U.N. mandate.<sup>354</sup>

In order to promote well-informed discussion of the merits of participating in specific U.N. actions, the UNPA should be amended to establish regular and more effective channels for consultation between the President and Congress. One approach would be to form a special bipartisan select committee on U.N. authorized military operations in each House of Congress, perhaps on the model of the House and Senate intelligence committees.<sup>355</sup> The UNPA currently requires the President to report to Congress at least once a year on U.N. activities, and to make "special current reports on decisions of the Security Council to take enforcement measures."<sup>356</sup> The statute could be amended to require ongoing reports on a regular basis—every two months, for instance—on all U.N. authorized military activities (both peace enforcement and peacekeeping) in which the United States is participating. These reports could be reviewed by the select committees in each House and provide a basis for follow-up hearings. The UNPA could also be amended to require the President to consult with the committees before U.S. special-agreement forces are actually sent into combat.<sup>357</sup>

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352. 59 Stat. 621, § 6, 22 U.S.C. 287d (1988).

353. A brigade generally consists of three battalions plus other support units. States usually contribute battalion-size units for peacekeeping operations. Some "peace enforcement" actions may require larger forces, however.

354. If U.S. forces are placed under a non-American U.N. commander, for instance in peacekeeping or possibly under Article 43, the President may be more reluctant to commit substantial numbers of U.S. forces and the operation may thus be self-limiting.

355. Alternatively, a special joint committee drawn from the Foreign Affairs and Armed Services Committees of both Houses could be formed.

356. 22 U.S.C. § 287b (1988).

357. Alternatively, the UNPA could be amended to require consultation between the President and a designated group of congressional leaders before U.S. special-agreement

The contract approach aims to establish clear numerical and purpose-based parameters on the commitment of U.S. troops to U.N. authorized actions. With respect to consensual peacekeeping operations, the 1949 amendments to the UNPA provide a useful starting point but need to be refined.<sup>358</sup> Section seven of the Act authorizes the President to detail up to one thousand U.S. armed forces personnel to U.N. activities directed at peaceful settlement of disputes and “not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter” to serve as guards, observers, or “in any noncombatant capacity.”<sup>359</sup> Under this provision, U.S. troops should be able to participate in consensual peacekeeping operations under the traditional rules of non-use of force except in self-defense. In light of the evolution of peacekeeping operations since 1949, however, an explicit reference to “consensual peacekeeping operations” should be added to the statute as an example of an authorized activity; this will clarify the President’s statutory authority. In terms of numbers, the UNPA’s current one thousand person limit is too low to permit the United States to become a significant participant in U.N. peacekeeping operations. Earmarking and training three to six battalions (about 700 troops each) for peacekeeping functions would allow the United States to make a more substantial contribution.<sup>360</sup>

The War Powers Resolution<sup>361</sup> must be taken into account in implementing the contract approach. To avoid any uncertainty, the joint resolution

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forces are sent into combat. This group might include the majority and minority leaders of both Houses and the Chairperson and ranking minority member of the Armed Services, Foreign Relations and Intelligence Committees of both Houses. Cf. S.J. Res. 323, 100th Cong., 2d Sess. (1988) (Byrd-Nunn-Warner-Mitchell proposal to amend the War Powers Resolution, *discussed in* HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* 189-93 (1990)). Consultation with an informal bipartisan leadership group was carried on during the Gulf War and was favored by some members of Congress with respect to the Somalia operation. Pincus, *supra* note 346.

358. Because American participation in consensual “peacekeeping” operations is unlikely to involve the United States in war or significant hostilities, the authorization provided by Congress in the 1949 Amendments to the UNPA may not be constitutionally required. At the same time, any standing commitment to provide armed forces to the U.N. would implicate Congress’s power to raise and support armies and is certainly contingent on appropriations by Congress. Even if not constitutionally compelled, a contract approach in the peacekeeping context may help build a political consensus in favor of greater U.S. involvement in peacekeeping as well as provide some assurance to the United Nations of a serious U.S. commitment in this area.

359. 22 U.S.C. § 287d-1 (1988).

360. In a speech to the U.N. General Assembly in September 1992, President Bush indicated that U.S. troops would train for peacekeeping missions in the future, but he made no formal commitments with respect to U.S. participation in U.N. peacekeeping operations. Thomas L. Friedman, *Bush, in Address to U.N., Urges More Vigor in Keeping the Peace*, N.Y. TIMES, Sept. 22, 1992, at A1, A14.

361. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1982)).

or act of Congress approving an Article 43 special agreement should state expressly that it, together with the UNPA, provides authorization to the President from Congress to use the earmarked forces—authorization that the War Powers Resolution requires within 60 days when U.S. forces are introduced into hostilities or situations where hostilities are imminent.<sup>362</sup> Peace enforcement operations under Chapter VII of the U.N. Charter, which lack the consent of all the parties and involve the deployment of forces in hostile terrain, are likely to raise a risk of imminent hostilities in most cases, and thus generally will require the authorization of Congress. The section of the UNPA providing for U.S. participation in peacekeeping would also provide statutory authorization from Congress, although it is not clear the War Powers Resolution would require such authorization in cases of consensual peacekeeping, which generally will not involve U.S. troops in hostilities or situations in which hostilities are imminent.<sup>363</sup>

The contract approach aims to create a framework around which expectations could coalesce. By pre-authorizing a limited number of forces for both peace enforcement and peacekeeping, Congress would assure the President and the Security Council of an intermediate military option that could be used promptly without the need for specific congressional approval in each case. Such an approach has both domestic and international benefits. Domestically, by establishing a practical war powers balance, the contract approach reduces the risk that U.S. participation in U.N. actions will generate divisive war powers disputes between Congress and the President. By establishing in advance an agreed framework, it should help forge a stronger domestic consensus in favor of participation in U.N. actions, even in hard cases. Internationally, the ready availability of special-agreement forces will strengthen the U.N.'s capacity to respond promptly to future humanitarian emergencies, civil disorders and small-scale cross-border conflicts. The existence of such forces may also help deter the outbreak or escalation of some conflicts.

As with the police power and political accommodation models, the contract approach is not problem-free. Advocates of presidential power may argue that it would limit the President's ability to respond flexibly to crises as they arise, constraining his freedom to fashion ad hoc approaches

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362. *Id.* at 50 U.S.C. §§ 1543(a)(1), 1544(b). If the UNPA is amended to include the reporting and consultation requirements proposed above, the War Powers Resolution should also be amended to reflect the fact that the UNPA's procedures apply when U.S. special-agreement forces are used in U.N. authorized military actions.

363. *Id.* § 1543. In explosive civil war situations, however, even operations that begin with the consent of the parties may sometimes break down and involve U.N. forces in hostilities. This happened, for example, during the U.N. operation in the Congo in the 1960s. See generally GEORGES ABI-SAAB, *THE UNITED NATIONS OPERATION IN THE CONGO, 1960-1964* (1978).

outside of the Article 43 framework. Certainly, the existence of a contract framework would undercut the validity of unilateral police power claims by the President with respect to U.N. authorized actions. But it would not preclude the President from arguing the need to use troops other than Article 43 forces in specific cases.<sup>364</sup>

Advocates of congressional power, in contrast, may view the contract approach as delegating too much authority to the President, preferring instead specific approval by Congress of any commitment of U.S. forces to a nonconsensual U.N. military operation.<sup>365</sup> There admittedly is always a risk that deploying a small number of pre-authorized troops would make it difficult for Congress to turn down a later request to approve more forces, even if it had doubts about the wisdom of the operation.<sup>366</sup> Nevertheless, the contract model—more than the police power or political accommodation approaches—would give Congress the opportunity to shape the nature of U.S. participation in future U.N. military actions in advance of

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364. The Article 43 approach, for example, does not impair the ability of the United States to exercise its right of self-defense under Article 51 of the U.N. Charter.

365. Despite the limits built into a special agreement, concerns might be raised about the constitutionality of an arrangement under which Congress pre-authorizes the use of force without specifying the particular conflict or the specific party against whom the troops would be used. Such concerns could be addressed in several ways. Congressional approval for individual operations could be provided on a fast-track basis once the Security Council has authorized a military action. Alternatively, Congress could condition use of U.S. special-agreement forces on its approval of specific U.N. operations in annual appropriations legislation.

Senator Joseph Biden, who has taken a leadership role on this issue, has advocated fairly broad predelegation to the President in U.N. authorized actions. See Biden & Ritch, *supra* note 314, at 397-99 (urging amendment of War Powers Resolution to provide, *inter alia*, that “the President, through powers vested by the Constitution and by this law, is authorized to use force abroad . . . to participate in multilateral actions undertaken under urgent circumstances and pursuant to the approval of the United Nations Security Council”). In October 1990, before the President’s November troop build-up in the Persian Gulf, Biden introduced a resolution to provide statutory authorization for the President “to participate in collective security actions in the event that the United Nations directs the use of military force to counter threats to regional security posed by the Iraqi regime.” 136 CONG. REC. S14,334 (daily ed. Oct. 2, 1990) (statement of Sen. Biden). In July 1992, Biden introduced S.J. Res. 325 urging the President to negotiate an Article 43 special agreement with the Security Council and affirming the pre-authorization provisions of the UNPA. S.J. Res. 325, 102d Cong., 2d Sess (1992), 138 CONG. REC. S9853 (daily ed. July 2, 1992).

366. As one Senator argued in 1945, Congress was mistaken if it thought that by limiting the troops available to the President for U.N. actions and reserving its authority over the remainder Congress could “retain its constitutional responsibility to declare or to not declare war.” This was “fantastic nonsense,” Senator Edwin Johnson contended:

One does not go 1 foot down Niagara Falls and then make up his mind about the wisdom of going the rest of the way. If he even goes prowling around close to the Falls he will be sucked in. War is exactly like that. There is no halfway measure.

91 CONG. REC. S11,085 (1945) (statement of Sen. Johnson).

conflict, instead of being forced simply to respond to executive-initiated decisions in the middle of a crisis.

#### CONCLUSION

This article has examined three different models of the division of war powers between Congress and the President and has explored their implications for the kinds of military actions likely to be authorized by the United Nations Security Council in the future. As the foregoing analysis suggests, the police power model is too expansive and unbounded a view of executive power. The political accommodation model accords better with the shared war powers set forth in the Constitution, but it depends critically on the willingness of the President and the Congress to resolve war powers differences cooperatively on a case-by-case basis, which may not be possible if the President is determined to act unilaterally or if Congress is unwilling to act. The contract model is a principled effort to strike a practical war powers balance before a crisis even occurs, and to give the United Nations the capacity to take prompt action on a limited scale.

In addressing the constitutional war powers issues raised by U.N. authorized military actions, the President and the Congress should keep in mind the differences between the three war powers models as they work to strengthen the U.N.'s ability to respond to the many diverse threats to international peace and security. In the immediate future, the political accommodation approach may prevail, as it ultimately did during the Gulf War. In the longer term, however, the contract approach deserves greater attention than it has received thus far, if only because the types of conflicts for which it is applicable will be so numerous.

Despite its advantages, however, the contract model will not resolve all the war powers questions that will arise in the U.N. context. Member states entering into Article 43 agreements are likely to attach too many conditions and limitations for Article 43 forces to be of much value in large-scale conflicts requiring a substantial force deployment. In future cases of major cross-border aggression, the Security Council may rely again on a delegated mandate approach, in which U.S. troops participate not under Article 43 agreements, but as part of an ad hoc coalition of national forces assembled for a specific large-scale response.<sup>367</sup>

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367. There will be strong domestic pressure in such situations for the United States to assume command of the entire operation if its combined land, air, and naval forces are disproportionately represented in the forces to be employed in combat. At the same time, one cannot rule out the development of modified command structures in which a U.S. force commander would have a multinational (and possibly U.N. appointed) general staff and receive guidance from the Security Council via the Military Staff Committee and the Secretary-General. This would be especially true if U.S. forces were a smaller component of the total.

In such cases, it will largely be up to the Congress and the President—in their usual war powers tug of war—to determine whether a political accommodation will be reached or whether the police power model will reign by default. Even in these cases, however, the existence of a contract framework (and the numerical limits it establishes) would undercut the legitimacy of police power claims that the President has unilateral authority once the Security Council has authorized an action. The contract approach may thus contribute to a greater and more effective congressional role in assessing the merits of U.S. participation in specific U.N. military operations, especially when substantial numbers of American troops are involved.

