UIC Law Review

Volume 31 | Issue 2 Article 10

Winter 1998

Without Justification: Misplaced Reliance on United Nations Security Council Resolutions for Presidential War Making, 31 J. Marshall L. Rev. 583 (1998)

Timothy D. A. O'Hara

WITHOUT JUSTIFICATION: MISPLACED RELIANCE ON UNITED NATIONS SECURITY COUNCIL RESOLUTIONS FOR PRESIDENTIAL WAR MAKING

TIMOTHY D. A. O'HARA*

INTRODUCTION

"[T]o support and defend the Constitution," such is the oath taken by members of the armed forces.[1] This oath implies that a soldier's duty to follow orders does not extend to those that are unconstitutional.[2] However, an order's constitutionality is not always easily determined and soldiers have been punished for obeying orders that they thought to be proper but were in fact unlawful.[3] So what is a soldier to do upon receiving an order that is genuinely believed to be unconstitutional yet is issued directly by the President of the United States?

Army Specialist Michael New (New) faced such a dilemma in

---

* J.D. Candidate, June 1998.

1. Enlistment Oath, 10 U.S.C. § 502 (1994) (requiring that a member of the armed services obey lawful presidential orders).

2. *See* 10 U.S.C. § 890 (1994) (indicating that a soldier will be subject to punishment if he willfully disobeys a lawful order). However, military courts have not found that a soldier has a duty to follow an illegal order. *See, e.g.*, United States v. Padgett, 45 M.J. 520, 524-25 (C.G.C.M.R. 1996) (refusing to punish a soldier for disobeying an invalid order); United States v. Baird, 1987 WL 16552 at *3 (D.D.C. 1987) (noting that a soldier is conditioned to "follow all but the most obviously illegal orders"). *See also* COMMANDER EDWARD M. BYRNE, MILITARY LAW 146 (2d ed. 1970) (stating that an order is lawful only if it is not inconsistent with the Constitution or laws of the U.S.).

3. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (finding a ship captain, acting under presidential instructions, liable for damages for seizing a ship because the President lacked the authority to issue the instructions). The *Barreme* case shows that not every presidential order is necessarily constitutional. *Id.* at 179. In 1975, a circuit court reviewed the military court martial of an army officer charged and ultimately convicted of murdering civilians during the Vietnam War. Calley v. Callaway, 519 F.2d 184, 189 (5th Cir. 1975). The army officer defended by claiming that he acted under proper orders. *Id.* at 193. However, the court held that if the officer knew or should have known of the order's unlawfulness, following that order would not be a valid defense. *Id. C.f.* United States v. Austin, 27 M.J. 227, 232 (C.M.A. 1988) (finding that the defendant risked punishment when he refused a legitimate direct order even though believing it to be illegal).

1995 when President Clinton ordered New's unit to the Former Yugoslavia Republic of Macedonia to participate in a United Nations (U.N.) authorized military action.[4] New questioned the legitimacy of the presidential order after learning that it required him to wear U.N. patches and insignia on his uniform.[5] New argued that the wearing of such U.N. markings would be an indication of allegiance to the U.N. and would therefore violate his oath to defend the U.S. Constitution.[6] Despite reading the U.N. Charter as ordered, New believed that the Charter proved inconsistent with the U.S. Constitution and that the deployment violated U.S. law.[7] Ultimately, New refused to obey the deployment order and the Army dishonorably discharged him for bad conduct.[8]

Like the Army, many think New's behavior was improper and deserving of punishment.[9] Yet, in the three years since New's discharge, members of Congress,[10] presidential candidates[11] and the

4. United States v. Perry, 919 F. Supp. 491, 492 (D.D.C. 1996). *See also* Steven Greenhouse, *With Congress or Without It, Clinton to Aid U.N. in Bosnia*, N.Y. TIMES, June 23, 1995, at A4 (discussing Clinton's military deployment to the former Yugoslavia). *See also* S.C. Res. 743, U.N. SCOR (1992) (authorizing the establishment of a U.N. peace keeping force in the former Yugoslavia).

5. *Perry*, 919 F. Supp. at 493.

6. *Id.*

7. *Id. See also* Letter from Michael G. New, Member of HH1/15 INF Medical Platoon, to Chain of Command (Sept. 19, 1995) *available in The Court Martial of Specialist Michael G. New* § v (Mar. 18, 1996) <http://www.iglou.com/first-principles/mar96/cover.html> [hereinafter *Court Martial*] (stating that "I have reviewed the U.N. Charter, its history and objectives which I was somewhat familiar with, and I still find that the U.S. Constitution and Declaration of Independence are incompatible with the U.N. Charter").

8. United States *ex rel.* New v. Perry, No. 1:96CV00033, 1996 WL 420167, at *1 (D.D.C. Jan. 16, 1996).

9. *See, e.g.*, Bruce T. Smith, *Hats Off to the Army*, FED. LAW., Mar./Apr. 1996, at 17 (crediting the Army's prosecution of Michael New and stating that calling New to "task" was the right thing to do legally because if soldiers fail to follow orders the military's control structure will eventually fail).

10. *See, e.g.*, H.R. 3308, 104th Cong. (1996) (amending the U.S. Code to limit the placement of U.S. forces under U.N. operational or tactical control, and for other related purposes); H.R. Con. Res. 134, 104th Cong. (1996) (enacted) ("[C]ondemning the court martial of Specialist Michael New of the United States Army"). *See also* Letter from Roscoe G. Bartlett, Member of Congress, to John Shalikashvilil, Chairman, Joint Chiefs of Staff, Pentagon (Feb. 6, 1996) *available in Court Martial, supra* note 7, § v ("The case of U.S. Army Specialist Michael New has revealed certain facts suggesting that the U.S. military and foreign assistance to U.N. peace operations are *not* being conducted in ways consistent with the U.S. Constitution and U.S. Statutes.") (emphasis added).

11. *See, e.g.*, Patrick J. Buchanan, Speech Before the Manchester Institute of Arts and Sciences (Mar. 20, 1995) *available in* WL 5/15/95 VITALSPCH 461. In response to Vice President Gore's statement that the parents of Army helicopter pilots killed in Somalia could be proud that their sons and daugh-

general public[12] have spoken out in support of New's actions and against U.S. military involvement in U.N. operations. While political gamesmanship may partially explain this outcry,[13] the divided reaction to New's discharge is not surprising for it ultimately calls into question the President's ability to order U.N. related military deployments without receiving prior congressional authority.

The controversy over the President's constitutional power to unilaterally deploy the military in hostile environments has existed since the writing of the Constitution.[14] Nevertheless, more recent presidential reliance on U.N. Security Council resolutions to justify unilateral military deployments[15] seems to transcend the Founding Fathers' intention that no single branch of government

---

ters "died in the service of the United Nations," Mr. Buchanan stated that "those young men and woman didn't take an oath to the United Nations. They took an oath to defend the Constitution and the country we love." *Id.* at *4. Buchanan further stated that if elected, "no young men and women will ever be sent into battle except under American officers and to fight under the American flag." *Id.*

12. *See, e.g.*, Volney F. Morin, *Letters to the Editor*, WALL ST. J., Feb. 14, 1996, at A15 (claiming that New "ha[d] it right" for not violating his oath to defend the Constitution); John Luebbers, *Court Martialled Soldier is a True Patriot*, U.S.A. TODAY, Jan. 30, 1996, at 8A (describing New as a "true patriot" for refusing to obey an order contrary to the Constitution).

13. *Cf.* Charley Reese, *Republicans Blow Chance to Nail Clinton in Michael New Case*, ORLANDO SENTINEL, June 9, 1996, at G2 (criticizing the Republican's failure to further exploit New's court martial for "clearly" wasting a chance to attack Clinton politically for his alleged illegal military deployment to Macedonia). The U.N. is also often the target of absurd political attacks. *See, e.g.*, Dan Glaister, *Short Cuts*, THE GUARDIAN (London), Dec. 17, 1994, *available in* 1994 WL 9728180 (reporting that some U.N. opponents claim that space aliens abducted the former U.N. Secretary General Javier Perez de Cuellar in 1994).

14. The following books collectively analyze the balance of war powers between the President and Congress over the last 200 years. *See generally* ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE: BEYOND THE U.N. CHARTER PARADIGM 47-111 (1993) (detailing how the U.N. operates); JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSON OF VIETNAM AND ITS AFTERMATH 13-15 (1993) (discussing the development of modern presidential war power); LOUIS FISHER, PRESIDENTIAL WAR POWER 70-91 (1995) (describing the action taken by the President and Congress in the Korean War); ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER, THE ORIGINS 116-27, 139-64, 196-224, 267-376 (1976) (discussing the relations between the President and Congress in the eighteenth and nineteenth centuries); ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 1-157 (1991) (discussing the conflict between Congress and the President concerning application of the War Powers Resolution); DONALD L. WESTERFIELD, WAR POWERS 63-68, 136-61(1996) (discussing the present day debate on presidential war power).

15. *See, e.g.*, Christopher S. Wren, *U.N. Resolutions Allow Attack on the Likes of Iraq*, N.Y. TIMES, Feb. 5, 1998, at A6 (stating that the U.N. Security Council resolutions provide authority for President Clinton to attack Iraq).

should possess the power to unilaterally make war.[16] Yet, ratifying the U.N. Charter arguably allows for the U.N. Security Council to create binding military obligations upon the U.S.[17] As a result, the President may not only claim these obligations as providing authority for non-congressionally authorized military deployments but that he is constitutionally required to fulfill such obligations in spite of congressional objections as Commander-in-Chief and Chief Executive.[18]

While not overlooking the U.N. Charter's legitimacy as U.S. law,[19] or the potential good that may be derived from U.N. missions, this Comment ultimately argues two points: first, a U.N. Security Council resolution calling for members to provide military force does not create a legal obligation upon the U.S. justifying, in and of itself, a unilateral presidential military deployment; and second, ratification of the U.N. Charter and the subsequent enactment of the United Nations Participation Act (UNPA)[20] actually works to constrain how some individuals perceive the President's constitutional authority to use military force. This is not to say that the President can not unilaterally deploy troops on U.N. missions or otherwise, but if he does, it is argued that he is either acting contrary to the Constitution or at least in violation of U.S. statutory law.

In order to restore the Founding Fathers' checks and balances, with respect to war making, between the executive and legislative branches, this Comment suggests that Congress must actively reassert itself into the decision making process. To accomplish this, this Comment proposes that Congress take two actions: first, utilize the courts to interpret the U.N. Charter in light of U.S. statutes and determine whether U.N. Security Council resolutions calling for military force authorize the President to deploy troops without congressional authorization; second, create a list of requirements or criterion that must be met or established before Congress will politically and financially support a

16. *Compare* U.S. CONST. art. I, § 7, cls. 11-14 (providing Congress the power to declare war and to raise and support military forces), *with id.* art. II, § 2 (providing that the President shall be Commander-in-Chief).

17. *See* U.N. CHARTER art. 25 (requiring member states to fulfill Security Council resolutions).

18. *See* U.S. CONST. art II, § 2, cl. 1 (providing that the President shall be Commander-in-Chief of the military); *id.* § 1, cl. 1 (providing that the President shall be the Chief Executive). Under the Executive Power, the President may claim a duty to enforce treaty obligations and under the Commander-in-Chief Clause he may then claim the power to enforce those obligations by deploying troops without congressional support. *Id.* §§ 1,2.

19. U.S. CONST. art. VI, cl. 2. (setting forth that the Constitution, U.S. laws, and treaties "shall be the supreme law of the land").

20. United Nations Participation Act of 1945, 22 U.S.C. § 287 (1994 & Supp. 1996).

Presidential military deployment.

To understand the basis of these conclusions and proposals, this Comment discusses and analyzes how presidential war powers have evolved over the last two hundred years and what influence the U.N. Charter may have on them. Accordingly, Part I provides the history of the United Nations and examples of when Presidents have fulfilled Security Council resolutions without prior congressional authorization. Part II discusses presidential and congressional war powers as originally expressed in the Constitution and as defined today. Part III examines the effect that treaties may have on the President's constitutional ability to make war without express congressional authorization. Part IV first discusses the potential for expanded presidential war powers under U.N. Security Council resolutions followed by a discussion on how the U.N. Charter may in contrast actually work to limit the perceived presidential war powers. Part V then briefly examines the effect of the judiciary and legislative branches' chosen role in modern presidential military deployments. Finally, Part VI proposes that Congress work to restore the Founding Fathers' intended balance of war powers to ensure that only when all branches of government agree will this Nation send its troops into battle.

I. PRESIDENTIAL WAR MAKING AND THE U.N.

While it should not be thought that ratifying the U.N. Charter initially created the confusion between presidential and congressional war powers, it did certainly add to it. To better appreciate Mr. New's legal dilemma, it is helpful to reflect on the history of presidential war making in relation to the U.N. Accordingly, Section A provides an overview of the U.N. Charter and the accompanying UNPA. Next, Section B documents various military operations which Presidents ordered under the auspices of U.N. Security Council resolutions, and which Congress never formally authorized.

A. The U.N. Charter and the United Nations Participation Act

In the early 1940's, just decades after the League of Nations failed,[21] world leaders once again promoted the idea that an international group of states should be assembled to promote international peace and security.[22] In 1945 this group became the United

21. BARRY CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1296-97 (2d ed. 1995). The world's nation-states established the League of Nations, a predecessor to the U.N., after World War I. *Id.* at 1296. Despite being premised on the principle of peace and international security, the League failed to prevent World War II which led to the League's downfall. *Id.* at 1297.

22. *See* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 2-23 (Bruno Simma ed., 1994) [hereinafter U.N. COMMENTARY] (listing the various meetings between the leaders of the western allied states during the last

Nations.[23] The agreed upon Charter of the U.N. calls for promoting human rights,[24] solving international problems,[25] and maintaining international peace and security through "effective collective measures."[26] To accomplish these goals, the U.N. is operationally divided into two primary internal organs:[27] the General Assembly[28] and the Security Council.[29] The General Assembly is composed of member state delegates[30] and is authorized to regulate the running of its own body and make "recommendations" for the benefit of individual member states and their citizens.[31] While attempts have been made to increase the General Assembly's role in U.N. actions,[32] the U.N.'s real power lies within the Security Council.[33]

---

years of World War II that led to the U.N.'s creation).

23. *Id.* at 10

24. U.N. CHARTER art. 1, para. 3

25. *Id.*

26. *Id.* at art. 2, paras. 1-7 (listing the U.N.'s ultimate purpose as the maintenance of international peace and security through the suppression of aggression and promotion of international cooperation between the world's nation states).

27. *See id.* at art. 7, para. 1. While the General Assembly and the Security Council are the UN's primary controlling organs, U.N. councils also consist of the Economic and Social Council, the Trusteeship Council, the International Court of Justice, and the Secretariat. *Id.*

28. *Id.* at arts. 9-22 (setting forth the provisions that establish and empower the U.N. General Assembly).

29. *Id.* at arts. 23-32 (setting forth the provisions that establish and empower the U.N. Security Council). *See also* RICHARD HISCOCKS, THE SECURITY COUNCIL: A STUDY IN ADOLESCENCE 51-81 (1973) (discussing the operation of the Security Council). The Security Council is technically in session 24 hours a day, 365 days a year so that it may react to any international crisis immediately. *Id.* at 57, 60. However, a major problem facing the Security Council's operation is the permanent members' vetoes. AREND & BECK, *supra* note 14, at 57. While the U.N. Charter's framers established the permanent members' exclusive veto right so that the Security Council could not order an action on a permanent member's nation without that member's consent, as a result of political alliances, these veto's are now used to protect permanent members' allies. *Id.*

30. U.N. CHARTER art. 9, paras. 1-2.

31. *Id.* at art. 10. For a discussion on the General Assembly's power to make recommendations and there legal significance, see U.N. COMMENTARY, *supra* note 22, at 231-42.

32. *See, e.g.,* Uniting for Peace Resolution, G.A. Res. 377(v), UN GAOR (1950). Although the General Assembly has no power to obligate member states, U.N. CHARTER art. 23, the U.S. proposed the Uniting for Peace Resolution to allow the General Assembly to make recommendations for military action in order to bypass the Security Council's gridlock caused by the Cold War. AREND & BECK, *supra* note 14, at 59 While, unlike Security Council resolutions, the General Assembly resolutions are not binding, the U.S. nevertheless intended to use the General Assembly resolutions to justify its use of military force in various operations. *Id.* 59-60. Despite such attempts to further the power of the General Assembly, the International Court of Justice (ICJ) still does not recognize General Assembly resolutions as formal sources of international law. ICJ stat. art. 38(1).

33. *See* U.N. CHARTER arts. 23-32 (describing the Security Council's vari-

The Security Council's five permanent members, of which the U.S. is one,[34] and ten other rotating members have the responsibility to maintain international peace and security.[35] The Security Council meets this responsibility by issuing resolutions in accordance with the U.N. Charter.[36]

After the United States ratified the U.N. Charter,[37] Congress passed the UNPA to implement the Charter.[38] The UNPA provides the procedures for the U.S. to satisfy U.N. obligations such as appointing representatives[39] and paying dues.[40] But more importantly, the UNPA details how U.S. armed forces will be made available for U.N. operations.[41] While it is not clear that simply ratifying the Charter should have automatically affected the balance of war powers,[42] subsequent presidential action and congressional inaction raise concerns that U.N. Security Council resolutions create another legal justification for unilateral presidential war making.

B. Presidential War Making Under the U.N. Charter

In 1950, five years after he signed the U.N. Charter, President Truman sent troops to Korea pursuant to a U.N. Security Council resolution[43] without prior congressional authorization.[44]

---

ous powers). For a discussion on the importance and development of the Security Council since the ratification of the U.N. Charter, see HISCOCKS, *supra* note 29, at 51-66.

34. U.N. CHARTER art. 23, para. 1. The other permanent members to the Security Council are China, France, Great Britain, and Russia. *Id.* Recently, the U.S. and other U.N. members discussed expanding the Security Council to twenty members including ten veto empowered permanent members. Barbara Crossette, *U.S. Experts Suggest India Ease Its Presence in Kashmir*, N.Y. TIMES, Oct. 12, 1997, at 4.

35. U.N. CHARTER art. 23, para. 1, art. 24 para, 1-3. For a discussion on the role of non-permanent Security Council members and how they are chosen, see U.N. COMMENTARY, *supra* note 22, at 395-96.

36. U.N. CHARTER art. 24. Articles 25 and 48 require that member states fulfill Security Council resolutions. *Id.* at arts. 25, 48.

37. *Senate Ratifies Charter of United Nations 89 to 2; Truman Hails Aid to Peace*, N.Y. TIMES, July 29, 1945, at A1 (discussing the Senate's passage of the U.N. Charter).

38. United Nations Participation Act of 1945, 22 U.S.C. § 287 (1994 & Supp. 1996).

39. *Id.* § 287(a).

40. *Id.* § 287j.

41. *Id.* §§ 287d & 287d-1.

42. *See* FISHER, *supra* note 14, at 79 (arguing that nothing in the passage of the U.N. Charter indicates that simply ratifying the Charter "altered the Constitution" or caused Congress to lose its "war making power").

43. *See* Statement by the President on the Situation in Korea, 173 PUB. PAPERS 492 (June 27, 1950) (stating that the U.N. resolution led to the U.S. military deployment to Korea). *See also* S.C. Res. 82, U.N. SCOR (1950) (calling upon member states to render assistance in resisting the North Korean forces).

While some congressmen complained of the President's deployment,[45] as a whole, Congress initially made little protest.[46] Despite the various justifications claimed for the deployment,[47] and despite Truman defining the mission as a police action,[48] then Secretary of State Dean Acheson made no secret of the fact that the United States was at war in Korea without a congressional declaration.[49]

---

44. *See* Arthur Krock, *President Takes Chief Role in Determining U.S. Course*, N.Y. TIMES, June 28, 1950, at A1 (discussing Truman's unilateral troop deployment to Korea). Then Secretary of State Acheson even suggested that such deployments are "not subject to congressional control." *Assignment of Ground Forces of the U.S. to Duty in the European Area: Hearing Before the Senate Comm. on Foreign Relations and Comm. on Armed Services*, 82d Cong. 89 (1951) (testimony of Secretary of State Acheson). At least one scholar questions why Truman did not attempt to receive congressional support in the first place when it appeared that he could have easily received it. John C. Yoo, *The Continuation of Politics by other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 178 (1996).

45. *See, e.g.*, 96 CONG. REC. H9268 (daily ed. June 27, 1950) (statement of Rep. Marcantonio). Congressman Vito Marcantonio realized the significance of President Truman's actions when he stated that "[w]hen [Congress] agreed to the United Nations Charter [Congress] never agreed to supplant our Constitution with the United Nations Charter. The power to declare war . . . . [has] been usurped from us." *Id.* Some Congressmen even attempted to retroactively authorize the mission but the resolution failed. H.J. RES. 9, 81st Cong. (1950).

46. FISHER, *supra* note 14, at 87 (claiming that Congress' reaction to the Korea invasion as a whole proved to be "largely passive"). One reason for Congress' initial inaction may have been based on public opinion polls that showed that 81% supported Truman's decision to deploy troops. *See* TURNER, *supra* note 14, at 9. However, only a year later, over half those polled indicated that the U.S. should bring the troops home. *Id.*

47. For example, Secretary of State Dean Acheson recommended to Truman that he could rely on the Commander-in-Chief clause as authority for the deployment. Yoo, *supra* note 44, at 178. When asked for advise by Truman, Senator Tom Connaly analogized the President's right to risk the lives of U.S. soldiers without congressional authority to that of a home owner who may shoot a burglar without "going down to the police station and getting permission," concluding that the President had the right to deploy the troops as Commander-in-Chief and under the U.N. Charter. Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J.L. & PUB. POL'Y 533, 567 (1996).

48. The President's News Conference of June 29, 1950, 179 PUB. PAPERS 504 (June 29, 1950). *But see* ELY, *supra* note 14, at 11 (stating Truman's calling Korea a "police action" and not really a war is part of the "national treasury of grave yard humor").

49. Acheson stated that, "in the usual sense of the word there is a war" in Korea. *Military Situation in the Far East: Hearing Before the Senate Comm. on Armed Services and Comm. on Foreign Relations*, 82d Cong. 2014 (1951). However, while conceding that only Congress can declare war, Acheson stated that Congress is not the only branch that "can start fighting." *Id.* Even Truman later labeled the Korean conflict as a war. Address in San Francisco at the Opening of the Conference on the Japanese Peace Treaty, 216 PUB. PAPERS 504 (Sept. 4, 1951). *See also* Weissman v. Metropolitan 112 F. Supp. 420, 425 (S.D. Cal. 1953) (stating that "[w]e doubt very much if there is any question in the minds of the majority of the people of this country that the

Notwithstanding the debate about whether the Security Council resolution provided any authority for Truman's deployment order, more recent Presidents have cited Truman's reliance on the resolution to justify their own unilateral war making under the U.N.[50]

In 1990, the U.N. Security Council passed numerous resolutions sanctioning Iraq for its invasion of Kuwait, including one that specifically called on members to "use all necessary means" to assist the Kuwaiti Government.[51] In response, President Bush deployed over 500,000 troops to the Persian Gulf[52] without initially seeking congressional authorization.[53] Despite congressional reservations over the deployment's legality,[54] Bush claimed that he had the constitutional right to unilaterally implement the U.N. resolutions.[55] Nevertheless, Bush did eventually request a congressional resolution to support the mission,[56] which Congress enacted.[57] Yet, the purpose of the request seemed to relate more to Bush's concerns over political support than constitutional legitimacy because the troops were already committed to combat regardless of whether or not the congressional resolution passed.[58]

---

conflict now raging in Korea can be anything but war").

50. *See, e.g.*, The President's News Conference of August 3, 1994, 30 WEEKLY COMP. PRES. DOC. 1616 (Aug. 3, 1994) (referring to previous unilateral U.N. presidential deployments).

51. S.C. Res. 678, U.N. SCOR (1990) (authorizing member states' cooperation with the Kuwaiti government to "*use all necessary means*" to restore regional peace and security) (emphasis added).

52. Terry Atlas, *Allies Increasing Sorties*, CHI. TRIB., Feb. 6, 1991, at 6.

53. *See* FISHER, *supra* note 14, at 148 (claiming that President Bush "made no effort to seek authority from Congress" and focused instead on "encouraging the U.N. Security Council to authorize the use of force . . .")

54. *See* Dellums v. Bush, 752 F. Supp. 1141, 1143 (D.D.C. 1990) (discussing attempt by members of Congress to enjoin the President from making war against Iraq without congressional approval). The *Dellums* court dismissed the action because a majority of Congress did not bring the action, and therefore the congressmen lacked standing. *Id.* at 1149. The *Dellums* court noted, however, that it would not hear the case notwithstanding the lack of standing because it would not want to confront President Bush on his ability to unilaterally deploy troops while Congress refused to use their constitutional powers to confront him. *Id.* at 1150. Nevertheless, the *Dellums* court also recognized that "the forces involved [were] of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat . . . ." *Id.* at 1145. *See also* ELY, *supra* note 14, at 50 (claiming that the dismissal was "erroneous" because the *Dellums* court added an unrelated and unconstitutional element to the existing standing requirements).

55. Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, PUB. PAPERS 40 (Jan. 14, 1991).

56. Letter to Congressional Leaders on the Persian Gulf Crisis, PUB. PAPERS 13 (Jan. 8, 1991) (requesting that Congress adopt a resolution that supports the use of "all necessary means" to defeat Iraq).

57. Authorization for Use of Military Force Against Iraq Resolution, H.J. RES. 77, 102d Cong. (1991).

58. *See* Letter to Congressional Leaders on the Persian Gulf Crisis, PUB. PAPERS 14 (Jan. 8, 1991) (stating that Bush was "determined to do whatever

Later, Bush seemed to confirm the true nature of his request when during a 1992 campaign speech in Texas he stated that the Constitution did not require him "to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait."[59]

In 1992 Bush again deployed troops, this time to Somalia to assist in a U.N. humanitarian operation.[60] The mission's stated purpose was to provide food to the starving.[61] However, the reason for the starvation had much more to do with warring Somali political factions than an act of nature.[62] As a result, by the time President Clinton took office in 1993, the Somali mission was changing from merely distributing food, as initially intended, to rebuilding the Somalia nation.[63] When the U.S. finally pulled out in 1995, the mission had not only failed to meet its initial goal of providing lasting relief for the starving,[64] but dozens of U.S. and allied soldiers were killed by warring gangs;[65] and American TV viewers witnessed the gut wrenching image of a dead U.S. pilot being dragged and kicked through the streets of Mogadishu.[66] Yet, perhaps the most significant aspect of this mission was that Bush felt constitutionally authorized to deploy troops not only without congressional authority but also without the existence of any defined national security risk to the U.S.[67]

---

is necessary to protect America's security" and asking for Congress to join him). During a question and answer session shortly before the Gulf War began, Bush stated, "I don't think I need [a congressional resolution]. . . . There are different opinions on either side of this question, but . . . I feel that I have the authority to fully implement the United Nations resolutions." The President's News Conference on the Persian Gulf Crisis, PUB. PAPERS 20 (Jan. 9, 1991). He also stated, "I still feel that I have the constitutional authority—many attorneys having so advised me." *Id.*

59. Remarks at the Texas State Republican Convention in Dallas, Texas, PUB. PAPERS 995 (June 20, 1992).

60. Michael R. Gordon, *U.N. Backs a Somalia Force as Bush Vows a Swift Exit; Pentagon Sees Longer Stay*, N.Y. TIMES, Dec. 4, 1992, at A6 (describing Bush's proposed military deployment to Somalia). *See* S.C. Res. 751, U.N. SCOR (1992) (deciding to establish a U.N. operation in Somalia).

61. Address to the Nation on the Situation in Somalia, PUB. PAPERS 2175 (Dec. 4, 1992).

62. Michael Stopford, *Locating the Balance, The United Nations and the New World Disorder*, 34 VA. J. INT'L L. 685, 690-91 (1994). Michael Stopford served as the Director for the United Nations Information Center during the Somalia deployment and has a unique perspective on this U.N. mission. *Id.*

63. *Id.* at 691-92.

64. *Id.* at 692 (claiming that the result of the mission was "a far cry, sadly, from earlier hopes").

65. Paul Watson, *Apologetic Somalis Deliver 2 Bodies*, N.Y. TIMES, Oct. 9, 1993, at A1 (recounting the return of the dead soldiers).

66. *See* 141 CONG. REC. H4870 (daily ed. May 11, 1995) (statement of Rep. Metcalf) (stating that the soldier dragged through the streets is an "event forever etched in American minds").

67. *See* Address to the Nation on the Situation in Somalia, PUB. PAPERS

In early 1995, as American troops were still pulling out of Somalia, President Clinton prepared to fulfill a U.N. Security Council resolution[68] calling for the Haitian military leadership to be forcibly removed from power.[69] Similar to the Somalia mission, the risk to U.S. national security posed by Haiti's political instability was not entirely clear.[70] Clinton claimed the purpose of the deployment would be "to carry out the will of the U.N.,"[71] apparently believing a U.N. Security Council Resolution justified the deployment of U.S. soldiers. Yet, unlike previously proposed U.N. missions, this time the full Senate reacted immediately, resolving by a unanimous vote that the Security Council resolution did "not constitute [presidential] authorization for the deployment of United States Armed forces in Haiti under the Constitution of the United States . . . ."[72] However, Clinton disregarded the Senate's opinion and ordered the invasion claiming, "like [his] predecessors of both parties," the Constitution did not require him to receive congressional approval to fulfill a U.N. Security Council resolution.[73] Only as a result of last minute negotiations did Clinton cancel what would have been the largest airborne assault by U.S. forces since World War II.[74]

Despite presidential claims that the Constitution does not require prior congressional approval for U.N. related military operations, the idea that a President would unilaterally risk soldiers lives to feed the starving overseas would have, most likely, surprised the Founding Fathers. This assumption, however, does not indicate that such presidential action is necessarily unconstitutional. This is, in part, the result of the evolving definition of the President's war powers.

2176 (Dec. 4, 1992) (citing delivery of food to the starving as the "only" reason for deploying troops to Somalia). *See also* Stopford, *supra* note 62, at 694 (stating that "it is remarkable that the Somalia[ ] . . . crisis reached the Security Council at all").

68. S.C. Res. 940, U.N. SCOR (1994).

69. Thomas L. Friedman, *Leaders in Haiti Wrong to Think They Can Stall U.S., Clinton says*, N.Y. TIMES, Oct. 29, 1993, at A5.

70. *Cf.* The President's News Conference of August 3, 1994, PUB. PAPERS 1616 (Aug. 3, 1994) (suggesting the U.S. interest to be several thousand Americans and friends and family of Haitians living in the U.S.).

71. Address to the Nation on Haiti, 30 WEEKLY COMP. PRES. DOC. 1780 (Sept. 15, 1994); FISHER, *supra* note 14, at 156.

72. 140 CONG. REC. S10397-489 (daily ed. Aug. 3, 1994); FISHER, *supra* note 14, at 155.

73. 30 WEEKLY COMP. PRES. DOC. 1616 (Aug. 3, 1994); FISHER, *supra* note 14, at 156

74. David A. Fulghum, *Massed Airborne Forces Aimed at Heart of Haiti*, AVIATION WK. & SPACE TECH., Oct. 10, 1994, at 71. The intended invasion of Haiti became unnecessary when former President Carter negotiated an agreement that provided for the peaceful return of President Aristide to power in Haiti. David E. Rosenbaum, *Resolutions Abruptly Turn from Opposition to Praise*, N.Y. TIMES, Sept. 20, 1994, at A3.

II. CONSTITUTIONAL AUTHORITY

In light of the increase of recent presidential fulfillment of U.N. Security Council resolutions without express congressional authorization, it is increasingly important that the alleged presidential authority for such actions be examined for legitimacy. This Part analyzes congressional and presidential constitutional powers related to war making from four perspectives. In Section A, the original meaning of the constitutional powers related to war making are examined. Section B analyzes court decisions defining these constitutional powers. Part C discusses the notion of customary presidential war making. Lastly, Section D examines the aggregation of the President's constitutional powers to justify unilateral military deployments.

A. The Constitution and the Framers' Intent

Most criticism concerning presidential decisions to unilaterally fulfill Security Council resolutions is based on the assumption that congressional authorization is constitutionally required prior to a presidential use of military force.[75] However, this is by no means clear, and despite numerous books and articles on presidential war making, there is little agreement as to the President's constitutional limitations.[76] However, while the constitutional powers are open to various traditional and modern interpretations, it is generally accepted that the founding fathers were determined to not allow any branch of government the unbridled ability to make war as traditionally enjoyed by early English Kings.[77] Well aware of the potential for tyranny when power is concentrated in a single body,[78] the Founding Fathers separated the constitutional powers so that neither Congress nor the President could unilat-

75. *See, e.g.*, FISHER, *supra* note 14, at 185 (claiming that Presidents regularly send troops into combat without congressional authorization contrary to the intentions of the Founding Fathers); ELY, *supra* note 14, at 52 (suggesting "[t]hat Congress has lost its intended constitutional position in deciding on war and peace").

76. *C.f.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (stating that "[j]ust what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh").

77. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 662 (1981) (Rehnquist, J.) (stating that "the description of [the King's] evils in the Declaration of Independence leads [him] to doubt that [the Founding Fathers] were creating their new Executive in his image").

78. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that "[t]he history of the . . . King of Great Britain is a history of repeated injuries and usurpation, all having in direct object the establishment of an absolute Tyranny over [the states]"). James Madison wrote that "[t]he accumulation of all powers . . . in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (James Madison).

erally deploy troops without each other's consent.[79] This in turn allowed these branches an effective check on one another to control against the potential for unilateral use of the military.[80] However, in the hands of modern day politicians, it is questionable whether this separation still serves as an effective check against unilateral war making.[81]

1. The President's Powers

Two broad provisions in the Constitution arguably provide for modern presidential war making. The first provides that the "President shall be Commander in Chief of the Army and Navy . . . ."[82] Two reasons are generally offered to explain this: the first is to provide for an efficient running of the military under a single leader in times of crisis;[83] the second is to ensure civilian control over the military.[84] However, the Founding Fathers' explanations that describe this power to be "so evident in itself . . . that little need be said to explain or enforce it,"[85] do little to illuminate the full extent of this provision.[86] Nevertheless, there is no indication that the Founding Fathers intended that the Commander-in-Chief clause would allow the President to have unilateral use of the military.[87] Rather, it appears that the most that can be derived from this provision is that the President would have complete command

79. *Compare* U.S. CONST. art. I, § 8, cls. 11-14 (providing Congress the power to declare war and to maintain military forces), *with id.* art. II, § 2 (providing that the President shall be Commander-in-Chief). Alexander Hamilton stated that the reason for separating the purse from the sword is to not "furnish one body with all the means of tyranny." SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 229 (Morton J. Frisch ed. 1985).

80. THE FEDERALIST NO. 78 (Alexander Hamilton).

81. *C.f.* EDWARD S. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION 141 (Richard Loss ed. 1977). Corwin repeats the following story:

> [o]nce upon a time a doctor, an engineer, and a politician were debating which of these callings was the most ancient. The doctor rested his case on the contention that the removal of the rib from Adam's side was obviously a surgical operation; to which the engineer rejoined that before Adam had even appeared on the scene the world itself had to be created out of chaos, and that this was clearly an engineering operation. 'Very true,' chimed in the politician, 'but who do you think created chaos?'

Id.

82. U.S. CONST. art II., § 2, cl. 1.

83. THE FEDERALIST NO. 74 (Alexander Hamilton).

84. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 341 (Max Farrand ed. 1974) [hereinafter RECORDS].

85. THE FEDERALIST NO. 74 (Alexander Hamilton).

86. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (stating that the Commander-in-Chief clause implies "something more than an empty title").

87. *C.f.* Holtzman v. Schlesinger, 414 U.S. 1304, 1311-12 (1973) (Marshall, J., denying application to dissolve stay order) (indicating that the President is required to receive congressional approval for war making, except "perhaps" in the case of emergencies).

of military forces once they were raised by Congress.[88]

The second constitutional provision that indirectly provides for presidential war making is the Executive Power.[89] The Constitution provides that the "executive Power shall be vested in [the] President"[90] and that under that power, "he shall take Care that the Laws be faithfully executed . . . ."[91] While the constitutional delegates were generally in favor of a strong President, they also worried that if that strength extended to matters of war and peace, it would "render the Executive a Monarchy. . . ."[92] Presumably for this reason, the Constitution gives the power to declare war, raise armies, and control the appropriations of money to Congress.[93] However, the Executive power is very broad and often defined as including every power not otherwise expressly granted to the other branches.[94] Such an understanding led some anti-federalists at the time of the Constitution's ratification to voice concern that the President would be "vested with powers exceeding those of the most *despotic monarch*."[95]

2. Congress' Powers

In comparison to the President's two broad delegations of power related to war making, Congress has numerous, more explicit, war making powers. The most important, which are often presumed to limit the President's authority to unilaterally use military force, are the congressional powers to declare war and

88. *See* United States v. Sweeny, 157 U.S. 281, 284 (1895) (claiming that the Commander-in-Chief clause "rest[s] in the President the supreme command over all the military forces,— such supreme and undivided command as would be necessary to the prosecution of a successful war"); THE FEDERALIST NO. 69 (Alexander Hamilton) (stating that the President's power would extend no further than command of the military and not to declaring war or the raising of armies).

89. *See, e.g.*, *Youngstown*, 343 U.S. at 582-83 (discussing Truman's claim that the power of Commander-in-Chief coupled with the Executive power allowed him to seize U.S. steel mills). *See also* WESTERFIELD, *supra* note 14, at 32 (citing the President's Executive Power as one of the powers that may be aggregated with his Commander-in-Chief powers).

90. U.S. CONST art. II, § 1, cl. 1.

91. *Id.* at art II, § 3.

92. 3 RECORDS, *supra* note 84, at 65.

93. U.S. CONST. art I, § 8, cls. 11-13 and § 9, cl. 7.

94. *See, e.g.,* CORWIN, *supra* note 81, at 23 (stating that the President has all "the prerogatives of a monarchy in connection with war-making except only the power to declare war and the power to create armed forces").

95. THE ANTIFEDERALISTS 77 (Kenyon ed. 1985) (emphasis in original). *See also Youngstown*, 343 U.S. at 634 (Jackson, J., concurring) (stating that the "comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country . . ."); CORWIN, *supra* note 81, at 23 (finding that "[t]he concentration of power and responsibility demanded by war is apt to give a system grounded on the rigid maxims of republicanism a somewhat violent wrench").

grant letters of marque and reprisal.[96] Although this delegation may be interpreted to mean that congressional authorization is required prior to any military deployment, such a narrow understanding is not clearly derived from this language's history. This is first made apparent by the Founding Fathers decision to provide Congress' the power to "declare" war rather than an earlier proposal that would have provided Congress the power to "make" war.[97] The Founding Fathers apparently made this change so that the President could use military force without receiving any form of congressional authority to "repel sudden attacks."[98] Additionally, some argue that at the time of the Constitutional Convention, declarations of war, letters of marque and reprisals provided nothing more than a legal standard by which a nation or its citizens could carry on warring activities that would otherwise be considered robbery or piracy. [99] Under this interpretation and despite counter claims from various other scholars, it seems that the Founding Fathers did not intend a declaration of war, or the receipt of any other congressional grant, to be an absolute prerequisite for the President to unilaterally deploy troops into battle, if such troops existed.[100]

However, the more likely constitutional checks on presidential war making are Congress' powers to "raise and support Armies,"[101] "provide and maintain a Navy"[102] and "make Rules for the Government and Regulation of the land and naval Forces"[103] coupled with the provision that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[104] Ultimately, these delegations work together to ensure that

96. U.S. CONST. art. I, § 8, cl. 11.

97. 2 RECORDS, *supra* note 84, at 318-19.

98. *Id.*

99. *See, e.g.*, Yoo, *supra* note 44, at 204-08 (summarizing the discussions on how several early European legal scholars defined declaration of war, letter of marque and reprisals).

100. *Id.* at 242 (claiming that the congressional power to declare war "did little to alter the relative domestic authorities of the executive and legislative branches" and that "[i]ts primary function was to trigger the international laws of war, which would clothe in legitimacy certain actions taken against one's own and enemy citizens"). Furthermore, Yoo claims that recent scholars have betrayed the original intent of these congressional powers. *Id.* at 188-95. Even Alexander Hamilton indicated that "when a foreign nation declares, or openly and avowedly makes war upon the United States [the U.S. is already at war] and any declaration on the part of Congress is nugatory; it is at least unnecessary." TURNER, *supra* note 14, at 64. For even at the time of the Constitutional Convention, Hamilton noted that a "formal denunciation of war has of late fallen into disuse . . . ." THE FEDERALIST NO. 25 (Alexander Hamilton).

101. U.S. CONST. art. I, § 8, cl. 12.

102. *Id.* at cl. 13.

103. *Id.* at cl. 14.

104. *Id.* § 9, cl. 7.

the power of the purse is separated from the presidential power of the sword.[105] James Madison justified this separation on the basis that "[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded.*"[106] While Congress could perhaps utilize any one of these powers to limit or completely bar unilateral presidential military deployments, because the U.S. now maintains a standing army, Congress's practical ability to control the military is greatly reduced.[107] However, Congress' reduced ability to control presidential war making can also be attributed to judicial opinions that have helped to expand the President's war powers.

B. Judicial Definition of the Constitutional War Powers

Since Presidents first deployed troops without clear congressional authority, the courts have worked to define the constitutional war powers. The judiciary's interpretation of the war powers has generally developed in relationship to three time periods. First, in cases prior to and resulting from the 1778-1800 Quasi-war with France, the Supreme Court adopted the idea of "perfect" and "imperfect" wars.[108] In contrast to a perfect war which entirely "destroys the national peace and tranquillity," an imperfect war "interrupts it only in some particulars . . . ." [109] Additionally, the Court seemed to expand the President's power to unilaterally use force beyond simply repelling sudden attack by finding that non-

105. THE FEDERALIST NO. 78 (Alexander Hamilton).

106. FISHER, *supra* note 14, at 9 (emphasis in original). Madison also said of the power of the purse that it is "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." THE FEDERALIST NO. 58 (James Madison).

107. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 264 (1996) [hereinafter FISHER, CONFLICTS] (stating that "[c]ongressional control was at its strongest point when there was no standing army, for in such cases the President would have to come to the legislative branch and ask for authority. But when troops and ships are available to move at the President's command, the balance of power can tip to the executive branch"). *See* TURNER, *supra* note 14, at 95-96 (claiming that "once a military force was created, it belonged to the [P]resident to deploy and employ it to best protect the interests of the nation, and that included the power to fight . . .").

108. Bas v. Tingy, 4 U.S. (1 Dall.) 37, 40 (1800) (Washington, J., delivered seriatim); Miller v. The Ship Resolution, 2 U.S. (1 Dall.) 19, 21 (1781).

109. *Miller*, 2 U.S. (1 Dall.) at 21. In *Bas*, Justice Washington further explained that a declared war is a "perfect" war and allows all the citizens of each nation at war to "commit hostilities against all the members of the other, in every place, and under every circumstance." 4 U.S. (1 Dall.) at 40. Yet, when hostilities are limited in "nature and extent" and to "places, persons and things," only those citizens given special permission are allowed to engage in hostilities. *Id.*

defensive war may be waged even without a formal declaration of war.[110] Nevertheless, the Court still found that Congress alone had the constitutional power to authorize these undeclared or imperfect wars.[111]

Later, during the Civil War, the Court again seemed to expand the President's war powers in a case relating to President Lincoln's naval blockade of Southern ports.[112] Despite the President lacking congressional authorization, the Supreme Court upheld the blockade's constitutionality.[113] The Court found that while the President has no power to initiate or declare war, he is duty bound to "meet [a war] in the shape it present[s] itself, without waiting for Congress to baptize it with a name . . . ."[114] Furthermore, the Court emphasized that the President alone can determine when a crisis exists and the amount of force necessary to resist that crisis.[115]

The final period of judicial development extends from the end of the Korean War to the present day. During this time, courts have begun to openly question the President's authority to unilaterally deploy troops.[116] For example, during the Vietnam War, Supreme Court Justice Thurgood Marshall stated that if he decided the issue, he "might well [have] conclude[d] on the merits that continued American military operations in Cambodia [were] unconstitutional."[117] Nevertheless, while not expressly expanding the President's war power, the courts during this time period have chosen not to influence the balance of war power by relying on two rationales. First, the courts have declined jurisdiction under the political question doctrine which suggests that war power issues should be resolved solely between Congress and the President.[118]

110. *Bas*, 4 U.S. (1 Dall.) at 40-41.

111. Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 28 (1801).

112. The Prize Cases, 67 U.S. (2 Black) 635 (1862).

113. *Id.* at 668. "[T]he President is not only authorized . . . but is bound to accept the challenge without waiting for any special legislative authority." *Id.*

114. *Id.* at 669.

115. *Id.* at 670.

116. *See, e.g.*, Mora v. McNamara, 389 U.S. 934, 937 (1967) (Douglas, J., dissenting) (explaining that the then on going Vietnam War raised numerous problems ranging from whether the President's aggregate powers justified the presidential troop deployments to what is the "relevancy of the Gulf of Tonkin Resolution" and continued congressional funding).

117. Holtzman v. Schlesinger, 414 U.S. 1304, 1313 (1973) (Marshall, J., denying application to dissolve stay order).

118. *See, e.g.* Holtzman v. Schlesinger, 484 F.2d 1307, 1311 (2d Cir. 1973) (indicating that "[w]hile [the justices] as men may well agonize and bewail the horror of . . . war, the sharing of Presidential and Congressional responsibility . . . is a bluntly political and not a judicial question"); Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (labeling the issue to a political question, stating that "it is clear that the constitutional propriety of the means by which Congress has chosen to ratify and approve the protracted military operations in Southeast Asia is not for the court to question"); Berk v. Laird, 317 F. Supp.

Second, when courts have heard cases raising war power issues, many have found that continued congressional military funding substituted for formal or express congressional authorization and constituted a "vote for the war."[119]

To this day, the courts continued reliance on these rationales present a formidable obstacle for those wishing to utilize the courts to end a military deployment.[120] Nevertheless, except in times of emergency, courts still find that presidential war making requires some form of congressional authorization to be constitutional.[121] However, the courts may be ready to take a more active role in war making, as exhibited by a district court decisions prior to the Gulf War which indicated that under certain conditions the political question doctrine may be overcome, allowing a court to hear a war powers case.[122] While it is unclear how the Supreme Court may

---

715, 729 (E.D.N.Y. 1970) (stating that "[i]t would be difficult to think of an area less suited for judicial action").

119. *Berk*, 317 F. Supp. at 724; *see also Orlando*, 443 F.2d at 1043 (arguing that the "framers' intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war . . . "); *but see* Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973) (answering that "[t]his court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war").

120. *See, e.g.,* Crockett v. Reagan, 720 F.2d 1355, 1356-57 (D.C. Cir. 1983) (denying motion to hear congressional claim brought against the President for military action in El Salvador); Ange v. Bush, 752 F. Supp. 509, 518 (D.D.C. 1990) (finding that the "court must respect both the President's powers as well as the powers of the nation's elected representatives in Congress. Interjecting the court into this political process will only exacerbate the problems facing this nation."); Lowry v. Reagan, 676 F. Supp. 333, 339 (D.D.C 1987) (labeling issue a political question in dismissing a claim brought by Members of the House of Representatives because "[i]f the Court were to intervene in this political process, it would be action 'beyond the limits inherent in the [c]onstitutional scheme'"); Rappenecker v. United States, 509 F. Supp. 1024, 1028 (N.D. Cal. 1980) ("It has long been settled that the underlying factual or legal determinations on the basis of which the President conducts the foreign relations of the United States are not subject to judicial scrutiny.").

121. *See, e.g., Holtzman*, 414 U.S. at 1311 (Marshall, J., denying application to dissolve stay order) (noting that as a "matter of substantive constitutional law, it seems likely that the President may not wage war without some form of congressional approval—except, perhaps, in the case of a pressing emergency . . ."); *Mitchell*, 448 F.2d at 613 (explaining that the President may wage war without congressional approval in response to a "belligerent attack" or in a "grave emergency").

122. Dellums v. Bush, 752 F. Supp. 1141, 1145 (D.D.C. 1990) (finding the presidential claim that all war power issues are political and non-justiciable is "far too sweeping to be accepted by the courts"). The *Dellums* court further stated that "[i]f the Executive had the sole power to determine that any particular offensive military operation, no matter how vast, does not constitute war-making but only an offensive military attack, the congressional power to declare war will be at the mercy of a semantic decision by the Executive." *Id.*

decide a modern day war powers issue, scholars have argued that Congress' failure to utilize its powers to restrict presidential military action should be interpreted by the courts as supporting the expansion of the President's constitutional war making powers.

C. Customary Presidential War Making

Regardless of the intended balance of war powers, since the establishment of a standing army in the late 1700's, Presidents have ordered military deployments with and without congressional authority over 200 times,[123] while the United States has fought only five congressionally declared wars.[124] As articulated by Supreme Court Justice Frankfurter, such a "systematic, unbroken and long pursued" use of military force by the President can establish a custom that can further the President's constitutional powers.[125] However, for such a presidential custom to be established, Justice Frankfurter would also have required that Congress be aware of the presidential practice and yet never have questioned it.[126] While Presidents have established a history of troop deployments,[127] scholars are split on the second element as to whether Congress has failed to sufficiently question the practice of presidential war making.[128] Louis Fisher has stated that prior to Korea, nearly every use of presidential force followed the prescribed constitutional process of Congress and the Executive working together,[129] while Donald Westerfield demonstrates that those deployments that were not questioned consisted mainly of small, low risk, naval landing parties and actions taken to protect

123. See WESTERFIELD, *supra* note 14, at appendix C for a detailed list of the presidential uses of force without declarations of war.

124. See *id.*, *supra* note 14, at appendix D for a list of the five declared wars: the War of 1812 declared in 1812; the Mexican War declared in 1846; the Spanish-American War declared in 1898; the first World War declared in 1917; and the second World War declared in 1941.

125. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). *See also* Stuart v. Laird 5 U.S. (1 Cranch) 299, 308 (1803) (stating that "practice and acquiescence under it for a period of several years" allows for a contemporary interpretation of constitutional issues). President Taft said that "[s]o strong is the influence of custom that it seems almost to amend the Constitution." FISHER, CONFLICTS, *supra* note 107, at 24.

126. *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring).

127. See WESTERFIELD, *supra* note 14, at appendix C for a detailed list of presidential war making.

128. Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 865 (1996) (categorizing scholars into two groups: first are those who consider that history of presidential war making should establish its constitutionality, while the second group sees this history as nothing more than a continued violation of the constitution).

129. FISHER, CONFLICTS, *supra* note 107, at 264 (claiming that "[o]nly after World War II did the idea of defensive war take a quantum jump, both conceptually and in practice").

U.S. interests.[130] Furthermore, since Presidents began large scale unilateral military deployments, initially with the Korean War, Congress has not only questioned the President's actions, they have brought law suits,[131] enacted limiting legislation,[132] and exercised the power of the purse.[133]

However, even if both elements of Justice Frankfurter's custom test are now met, it would seem absurd to allow a branch of government that is constitutionally limited in a certain area to lose those limits simply because it continually exceeded them. In fact, Justice Frankfurter supported a similar doctrine in several cases finding that an unconstitutional act does not become constitutional simply because it is consistently repeated.[134] As a result, it would appear that custom only acts to further define the President's existing power to unilaterally make war and does not, and should not, justify extra- constitutional powers.[135] To argue otherwise would seemly allow the President, with congressional acquiescence, to amend the Constitution contrary to the method for which it expressly provides.[136] However, while the custom of presidential war making appears a questionable justification for expanded presidential authority to unilaterally deploy troops, both Presidents and scholars argue an additional method to legitimize presidential war making.

D. The Executive's Aggregate Powers

Another argument for increased presidential war making is through the aggregation of the President's individual expressed and implied powers.[137] While it is doubtful that the Founding Fa-

130. *See* WESTERFIELD, *supra* 14, at appendix C (listing the unilateral military deployments between 1798 and the Korean War). *See also* Stromseth, *supra* note 128, at 876-77 (stating that presidential deployments prior to Korea were a "far cry from committing U.S. forces to a major and sustained combat operation").

131. *See generally, e.g.* Drinan v. Nixon, 364 F. Supp. 854 (D. Mass 1973) (attempting to limit President Nixon's war making in South-east Asia).

132. *See, e.g.,* War Powers Resolution, 50 U.S.C. § 1544(b) (requiring the President to provide a writing showing authority for military deployments).

133. *See, e.g.,* The Boland Amendment, 98 Stat. 1935, § 8066(a) (1984) (limiting the funding for the Nicaraguan Freedom Fighters).

134. *See, e.g.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (stating that "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation . . ."); Inland Waterways Corp. v. Young, 309 U.S. 517, 524 (1940) (Frankfurter, J., concurring) (claiming that "[i]llegality cannot attain legitimacy through practice").

135. *C.f. Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring) (stating that custom may give "meaning to the words of a text or supply them").

136. Stromseth, *supra* note 128, at 876.

137. *See, e.g., Youngstown*, 343 U.S. at 587 (responding to the argument that the aggregation of the presidential powers justify extended war powers);

thers anticipated aggregation as a means by which to justify the modern expansion of the President's unilateral war making,[138] two Supreme Court decisions provide a basis that may justify such aggregation as a legitimate means for increased presidential war powers.

1. *Unlimited Power in Foreign Affairs:* Curtiss-Wright[139]

In *United States v. Curtiss-Wright*, the Supreme Court decided whether Congress had delegated too much of its authority when it allowed the President to impose and lift arms embargoes at his discretion.[140] Despite earlier cases indicating that such delegations were unconstitutional when concerning domestic matters, the Court in *Curtiss-Wright* made a distinction between domestic and foreign affairs.[141] Justice Sutherland, writing for the majority, found that such a distinction must be realized, stating that "[t]he broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers . . . to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs."[142]

WESTERFIELD, *supra* note 14, at 32 (claiming that shortly after the Constitutional Convention of 1787, the President began aggrandizing the Executive Branch by an "aggregation" of the many powers that allegedly derive from the Constitution). Westerfield lists ten presidential roles that are generally believed to be derived from the Constitution and that ultimately provide for the overall power of the President. *Id.* These roles are Chief Executive, Commander-in-Chief, Chief Diplomat, Chief of State, Chief Legislator, Voice of the People, Chief of his Political Party, Manager of Economic Welfare and Growth, Guardian of Peace, and World Leader. *Id.*

138. *C.f.* WESTERFIELD, *supra* note 14, at 31 (claiming that the Founding Fathers could not have foreseen the present expansion of the President's aggregate powers). Despite the ongoing debate over the President's unilateral use of force, Fisher argues that there can be little doubt about the "limited scope of the President's war power," as no President has ever received any explicit constitutional power to make war. FISHER, *supra* note 14, at 7.

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

140. *Id.* at 311-12. The President had previously declared an arms embargo against Bolivia under the authority of a congressional act. *Id.* at 311. The act delegated power to the President to initiate an embargo against countries when, at his discretion, he believed that the embargo would reestablish peace between the warring countries. *Id.* at 311-12.

141. *Id.* at 315. In the year before the *Curtiss-Wright* case, the Supreme Court had already decided cases that found unconstitutional equally broad delegations of domestic power from Congress to the President. *See* FISHER, *supra* note 14, at 57-58. In *Curtiss-Wright*, the Court distinguished those cases on the grounds that they interpreted internal affairs while the issue presented in *Curtiss-Wright* concerned external or what is known as foreign affairs. *Id.* Fisher suggests that the distinction between internal and external affairs is the result of Justice Sutherland's past service as chair of the Senate Foreign Relations Committee. *Id.* at 58.

142. *Curtiss-Wright*, 299 U.S. at 315-16. Justice Sutherland claimed that the distinction between internal and external affairs results from the nature of the colonies' separation from Great Britain. *Id.* at 316. The Justice offered

Under Justice Sutherland's argument, the President's power in foreign affairs does not therefore need "affirmative grants" of power from the Constitution.[143] While scholars criticize the *Curtiss-Wright* opinion for providing the President with "extra-constitutional" powers in foreign affairs,[144] this opinion provided a legal foundation to support the existence of "independent, implied, and inherent powers for the President" to unilaterally make war.[145] Sixteen years later, the Supreme Court again attempted to define the limits of the President's aggregate powers.

2. Youngstown Sheet & Tube Co. v. Sawyer[146]

In *Youngstown*, the Supreme Court faced the issue of whether President Truman acted within his aggregate powers when he seized U.S. steel mills to prevent a potential worker strike.[147] Truman argued national security justified the seizures claiming that the Korean War effort required the uninterrupted supply of steel.[148] In a six to three decision, Justice Black, writing for the majority, declared that the President's authority for such an act must "stem either from an act of Congress or from the Constitution

---

a theory whereby the sovereignty of the U.S. did not vest from the people but rather vested directly from Great Britain. *Id.* In support of this theory, the Justice claimed that the powers of external sovereignty did not pass to the colonies severally "but to the colonies in their collective and corporate capacity as the United States of America." *Id.*

143. *Id.* at 318.

144. *See, e.g.* FISHER, *supra* note 14, at 57-61. Fisher also attacks the *Curtiss-Wright* opinion on multiple grounds. *Id.* at 58. First, he argues that the opinion incorrectly characterizes external sovereignty as passing directly from Great Britain to the President. *Id.* Fisher claims that it would have transferred directly to the Continental Congress. *Id.* Even assuming that external sovereignty did pass directly from Great Britain to the United States due to the balance of power resulting from the separation of the branches, Fisher still claims that there is no reason to think that the President, without Congress, would have necessarily received a free reign in foreign affairs. *Id.* at 59. *C.f.* ELY, *supra* note 14, at 24 (claiming that the *Curtiss-Wright* opinion does not "readily command . . . intellectual respect . . .").

145. FISHER, *supra* note 14, at 61.

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

147. *Id.* at 582. Truman's executive order allowed for the mills to continue operating after the government-induced bargaining between the owners and the employees failed. *Id.* at 582-83.

148. *Id.* at 583. In supporting Truman's seizures, the Justice Department argued that "a strike disrupting steel production for even a brief period would so endanger the well being and safety of the Nation that the President had the 'inherent power' to do what he had done—power supported by the Constitution, by historical precedent, and by court decisions." *Id.* at 584. One of the attorneys for the President in *Youngstown* averred to a district court that while the Constitution limited the acts of Congress and the judiciary, the only limits placed on the President are the ballot box or impeachment. WESTERFIELD, *supra* note 14, at 37 (quoting Holmes Baldridge, assistant U.S. attorney general).

itself."[149] In *Youngstown*, however, Truman had attempted to authorize himself by issuing his own Executive Order.[150] The Court held that neither the President's power as Commander-in-Chief nor as Chief Executive could sustain the order to seize the mills.[151] In so holding, the Court reiterated that the Constitution does not give the law making power to the President but rather entrusts it to the "Congress alone in both good times and bad times."[152]

3. *"What is a King?"*[153]

While the Founding Fathers deliberately chose not to make the President a King of the worst kind, "an elective one,"[154] the Supreme Court decisions in *Curtiss-Wright* and *Youngstown* have allowed modern Presidents to expand their war making powers to that similar of a Monarch[155] by providing support for such aggrandizement.[156] First, the opinion in *Curtiss-Wright* would lead to almost unlimited presidential power in foreign affairs due to its ambiguous language. While the opinion limited the President by indicating that he may not act contrary to the Constitution,[157] it also provided that he was not limited to the powers enumerated therein.[158] Because presidential war making is not explicitly provided for or forbidden in the Constitution, the *Curtiss-Wright* opinion would seem to support unilateral presidential war making under the premise that such acts fall within the President's power to conduct foreign affairs. Not surprisingly, Presidents rely on their role in foreign affairs for just that.[159]

---

149. *Youngstown*, 343 U.S. at 585.

150. *Id.* at 588.

151. *Id.* at 587.

152. *Id.* at 588-89.

153. DAVID SHRAGER & ELIZABETH FROST, THE QUOTABLE LAWYER 167 (1986). The full quote by John Gofer is, "[d]o law away, what is a King? Where is the right of any thing?" *Id.*

154. 1 JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 85 (1840) (Albert, Scott & Co. 1893).

155. *See* SOFAER, *supra* note 14, at 6-15 (discussing the powers of British Monarchs in the seventeenth century). British Kings would often only consult with their private ministers concerning matters of foreign affairs. *Id.* at 11. Matters concerning foreign affairs were kept secret from the Parliament so that "not even after-the-fact authority was sought." *Id.* Furthermore, a British King could initiate war at his "prerogative." *Id.* at 7.

156. FISHER, *supra* note 14, at 61 (noting that *Curtiss-Wright* has "become a popular citation" when courts hold for expanded presidential power). Westerfield claims that *Youngstown* is useful for understanding how Presidents have justified expanded powers during emergencies. WESTERFIELD, *supra* note 14, at 38.

157. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

158. *Id.* at 318.

159. *See, e.g.*, Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of the United States Forces in Gre-

The second problem is that *Youngstown* did little to affect the holding in *Curtiss-Wright*[160] because the Supreme Court failed to apply the presidential limitation expressed in *Youngstown* to the President's conduct in foreign affairs.[161] Even though Justice Jackson's concurring opinion in *Youngstown* indicated that *Curtiss-Wright* does not allow the President to conduct foreign affairs contrary to express congressional limitations,[162] *Curtiss-Wright* is, nevertheless, still claimed as support for expansive presidential powers in foreign affairs.[163]

The third problem is that even though the Court in *Youngstown* tried to limit the Executive Power so that the President may only execute the laws of the land, it provided a strong argument for unilateral presidential war making. As provided in the Constitution, the President has a duty to uphold the laws of the Nation,[164] and as Commander-in-Chief he may lead a standing Army.[165] Therefore, if a law bound the U.S. to provide military assistance, the President, as Chief Executive, would have a duty to fulfill this legal obligation, and as Commander-in-Chief he would have the authority to deploy the troops.[166] Such a law is embodied in almost every mutual security treaty that the U.S. enters,[167] including the U.N. Charter.[168]

III. TREATY OBLIGATIONS AND THE CONSTITUTION

Beyond the President's expressed and implied constitutional war powers, treaty obligations may provide another justification

---

nada, PUB. PAPERS 1512 (Oct. 25, 1983) (relying on the President's role in foreign affairs and the Commander-in-Chief Clause for the Grenada invasion). *But see* Dellums v. Bush, 752 F. Supp. 1141, 1145 (D.D.C. 1990) (calling claims that foreign affairs and Commander-in-Chief powers justify unilateral military deployments as "far too sweeping"); Ange v. Bush, 752 F. Supp. 509, 513 (D.D.C. 1990) (claiming that the President's power in foreign affairs is not clearly spelled out).

160. FISHER, *supra* note 14, at 102.

161. *Compare* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952) (dealing specifically with the President's seizure of steel mills within the U.S.), *with Curtiss-Wright*, 299 U.S. at 315-16 (stressing that the President's acts at issue there concerned only external matters).

162. *Youngstown*, 343 U.S. at 636 n.2.

163. FISHER, *supra* note 14, at 102.

164. U.S. CONST. art. II, § 3.

165. *Id.* § 2 & art. III.

166. *See* WESTERFIELD, *supra* note 14, at 46 (discussing the possibility that treaties may affect the President's war making powers).

167. *See, e.g.* North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246 (stating that an armed attack against one NATO member shall be considered an attack against them all, and that each will assist the party attacked to "restore and maintain security of the North Atlantic area").

168. *See* U.N. CHARTER arts. 42 & 25 (providing collectively for the Security Council to obligate members to deploy troops).

for unilateral presidential military deployments. Yet, beyond simply justifying military deployments, treaties may also work to enlarge the President's war powers beyond those either expressed or implied by the Constitution.[169] The Founding Fathers provided that the Constitution, U.S. laws, and treaties "shall be the supreme Law of the Land."[170] However, while the Constitution requires U.S. laws be made "pursuant to the Constitution," treaties are the supreme law of the land if they are made "under the authority of the U.S."[171] Some fear that the phrase "under the authority of the U.S." implies that so long as a treaty is made by the President with the advice and consent of two thirds of the Senate[172] it will be constitutionally valid, even if its purpose is not necessarily "pursuant to the Constitution."[173] As a result, once mutual security treaties are made, it is open to question whether they may supersede the intended constitutional balance of war powers by legally obligating the President to make war with or without subsequent congressional authorization.[174]

A. Dismembering an Empire?: The Founding Fathers

The debates during the ratification of the Constitution establish that while treaties should be considered the law of the land,

---

169. *C.f.* JOSEPH PAIGE, THE LAW NOBODY KNOWS 161 (1977) (claiming that the "potential for harm [under the Treaty Power] is horrendous" especially in "the hands of an unscrupulous or incompetent President . . ."). *See* WESTERFIELD, *supra* note 14, at 45 (stating that the legal constraints for treaties are yet to be determined).

170. U.S. CONST. art. VI, cl. 2. Article VI provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land . . . ." *Id.* Alexander Hamilton explained that treaties must be made the law of the land or they would be merely "dead letter" without a court to enforce. THE FEDERALIST NO. 22 (Alexander Hamilton).

171. U.S. CONST. art. VI, cl. 2.

172. *Id.* at art. II, § 2, cl. 2 (providing that the President "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur . . . ").

173. *See, e.g.*, PAIGE, *supra* note 169, at intro. (claiming that the Treaty Power allows the President to be a dictator and "subvert the Constitution"). *But see* Reid v. Covert, 354 U.S. 1, 16-17 (1957) (stating that treaties are made "under the authority of the U.S." rather than "pursuant to the Constitution" only so that the peace treaties ending the Revolutionary War, made before the Constitution's creation, would not be invalid).

174. *Compare* WESTERFIELD, *supra* note 14, at 46 (reporting that Congress is highly aware that treaty obligations are one of the major presidential arguments for sending U.S. troops into foreign conflicts), *with* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 355 (1970) (acknowledging that the Treaty Power is "general and unrestricted" but arguing that it "cannot be construed to authorize a destruction of other powers given in the [Constitution]).

they were not intended to be superior to the Constitution or inconsistent with the delegated powers enumerated therein.[175] However, George Mason addressed the concern that a treaty may be used to modify the Constitution at a state ratifying convention in 1788.[176] He suggested that the Constitution be amended to express that "no treaty shall be valid which was contradictory to the Constitution,"[177] otherwise a number of "corruptible men might join the President to dismember the empire."[178] Many delegates quickly rejected this assertion.[179] Most notably, George Nicholas stated that "no treaty which shall be repugnant to the spirit of the Constitution, or inconsistent with the delegated powers shall be valid."[180] In the end, Mason's amendment failed.[181] However, it evinced that the Founding Fathers were well aware that the limitations on the Treaty Power were not clearly defined.[182] Despite the Founding Fathers' intention that treaties should not affect the constitutional balance of power, the Supreme Court would later put this principle in doubt.

---

175. *See, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN 1787 499-516 (Jonathon Elliot ed. 1881) [hereinafter DEBATES] (describing the Virginia debates on ratifying the Constitution concerning the Treaty Power). James Madison emphasized the importance of binding treaties, stating that "[t]he confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with [the Colonies]; they are apprised that our government cannot perform any of its engagements, but that they may be violated at pleasure by any of the states." 2 JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 593 (Albert, Scott & Co. 1893).

176. 3 DEBATES, *supra* note 175, at 508.

177. *Id.*; PAIGE, *supra* note 169, at 12.

178. 3 DEBATES, *supra* note 175, at 508; PAIGE, *supra* note 169, at 12.

179. *Id.* For example, James Madison rejected the concept that corrupt men could align with the President and use the Treaty Power to make law contrary to the Constitution, stating that "I do not conceive that [the treaty] power is given to the President and the Senate to dismember the empire, or to alienate any great essential right. I do not think the whole legislative power has this authority." *Id.*

180. *Id.* George Nicholas went on to say that treaties made under the "authority of the United States," will be "sufficiently secured, because it declares that, in pursuance of the powers given, they shall be the supreme law of the land, notwithstanding anything in the Constitution or laws of the particular States." *Id.* Alexander Hamilton also expressed this view, stating that "a treaty cannot be made which alters the Constitution of the country, or which infringes any express exceptions to the power of the Constitution of the United States." PAIGE, *supra* note 169, at 14.

181. 3 DEBATES, *supra* note 175, at 509.

182. For example, Alexander Hamilton stated that "it is difficult to assign any . . . bounds" to the Treaty Making Power. PAIGE, *supra* note 169, at 14. Similar to Hamilton, Thomas Jefferson wrote that "[t]o what subject [the Treaty Power] extends, has not been defined in detail by the Constitution, nor are we entirely agreed among ourselves." *Id.* at 120.

B. *The Wildfowl Act of 1918*[183] *and* Missouri v. Holland[184]

In 1916, the United States government entered into a treaty with Great Britain providing for the protection of migratory birds.[185] As required by the treaty, Congress created the Wildfowl Act of 1918.[186] However, this new legislation exactly paralleled the Wildfowl Act of 1913[187] which two district courts had already ruled unconstitutional.[188] As a result, the members of Congress debated at length on the newly proposed legislation's constitutionality.[189] Soon after Congress enacted the legislation, the State of Missouri brought an action attempting to prevent the federal government from enforcing it.[190]

Missouri v. Holland forced the Court to consider whether a treaty could authorize Congress to legislate in an area that, without the treaty, it otherwise could not.[191] The opinion, offered by

183. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703 (1994).

184. Missouri v. Holland, 252 U.S. 416 (1920).

185. Act of Aug. 16, 1916, ch. 120, 39 Stat. 1702 (establishing that the United States and Great Britain would provide for the protection of migratory birds in the United States and Canada by establishing open and closed hunting seasons).

186. Migratory Bird Treaty Act, ch. 128, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. § 703 (1994)); PAIGE, *supra* note 169, at 33.

187. PAIGE, *supra* note 169, at 31. *See* Migratory Bird Act, ch. 145, 37 Stat. 847 (1913) (protecting certain migratory birds that annually passed through the U.S. by authorizing federal game wardens to charge hunters who killed such designated birds).

188. United States v. McCullagh, 221 F. 288 (E.D. Kan. 1915); United States v. Shauver, 214 F. 154 (E.D. Ark. 1914). Both cases were dismissed on the ground that Congress had violated the Tenth Amendment by attempting to regulate birds within the individual states. *McCullagh*, 221 F. at 289-90; *Shauver*, 214 F. at 160.

189. *See* 61 CONG. REC. 7360-7368 (daily ed. June 4, 1918) (debating legislation to implement 1918 Migratory Bird Treaty Act); PAIGE, *supra* note 169, at 33. The members of Congress knew full well that the Act they were trying to pass under the 1916 Treaty would most likely be unconstitutional. Congressman George Huddleston objected to the proposed act, stating that "[w]ithout the Treaty, the Bill is unconstitutional . . . . The real purpose of the treaty was to make constitutional a law which otherwise would not be constitutional." 61 CONG. REC. 7368 (daily ed. June 4, 1918). He continued, stating that he could not "believe that what is otherwise unconstitutional as an unjustifiable invasion of powers reserved to the States may become constitutional merely because the Senate and the President of the United States . . . negotiate and approve a treaty with a foreign country." *Id.*

190. Missouri v. Holland, 252 U.S. 416 (1920).

191. *Id.* The State argued that the 1918 Act unconstitutionally interfered with the rights reserved to the states by the Tenth Amendment. *Id.* at 431. The Court responded that the Tenth Amendment analysis did not properly answer the question. *Id.* He explained that while the power is not expressly given to the Federal Government, if a valid treaty is made, "there can be no dispute about the validity of the [enacting] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."

Justice Oliver Wendell Holmes, disregarded the earlier district courts' holdings on the unconstitutionality of the 1913 Act.[192] Noting that treaties, as compared to laws, must only be made under the authority of the government rather than pursuant to the Constitution,[193] Justice Holmes stated that "[i]t is obvious that there may be matters of the sharpest exigencies for national well being that an act of Congress could not deal with but that a treaty followed by such an act could . . . ."[194] Consequently, the Supreme Court found that valid treaties granted Congress legislative powers beyond those expressed in the Constitution.[195] As a result of the *Holland* opinion, some have suggested that the Treaty Power is superior to the Constitution.[196] If this reading of *Holland*'s holding with regards to Congress is true, then arguably treaties could have a similar effect on presidential powers.

C. Can the President be Empowered by Treaty?

Even though dealing expressly with congressional powers, the *Holland* opinion and its subsequent supporting cases[197] leave unclear whether treaty obligations may affect the President's powers

---

Id. at 432.

192. *Id.* at 433. Justice Holmes rejected the earlier district courts' decisions stating that "[w]hether *Shauver* or *McCullagh*] were decided rightly or not they cannot be accepted as a test of the treaty power." *Id.* at 433.

193. *Id.* at 432. Justice Holmes wrote that "[i]t is said that a treaty cannot be valid if it infringes the Constitution, that there are limits . . . and that one such limit is that what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Id.* at 432. Yet because treaties need only be made under the authority of the U.S. rather than pursuant to the Constitution, Justice Holmes stated that "[i]t is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention." *Id.* at 433.

194. *Id.* Justice Holmes went on the write that "it is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." *Id.* at 433 (internal quotes omitted).

195. *Id.* at 432. The only limitation on creating additional powers for Congress is that the treaty must be valid. *Id.* Several courts have followed this rationale. *See, e.g.*, United States v. De Yian, 905 F. Supp. 160, 163 (S.D.N.Y. 1995) ("That Congress has authority to implement treaties . . . pursuant to its power under the Necessary and Proper Clause of the Constitution is undisputed."). *But see* Reid v. Covert, 354 U.S. 1, 16 (1957). In an apparent attempt to clarify the *Holland* opinion, the Court in *Reid* stated that "[t]here is nothing in this [opinion] which intimates that treaties and law enacted pursuant to them do not have to comply with the provisions of the Constitution." *Id.* at 16. However, the Court in *Reid* interestingly noted that nothing in the *Reid* opinion contradicted the *Holland* holding. *Id.* at 18.

196. *See, e.g.*, PAIGE, *supra* note 169, at 43 (claiming that "the treaty power is above and beyond the Constitution and all other law").

197. *See, e.g.*, Palila v. Hawaiian Dept. of Land and Natural Res., 471 F. Supp. 985, 999 (D. Haw. 1979) (holding a congressional act constitutional under the Treaty Power).

as they do Congress'. Under the *Holland* rationale, if the preservation of waterfowl is considered to be of the sharpest exigency for the national well being, it would seem reasonable that the protection of a U.S. ally from attack would also qualify as such an exigency. Therefore, similar to the Supreme Court's rationale in *Holland*, even if the Founding Fathers never intended the President to unilaterally make war, because they did not expressly prohibit it, a mutual security treaty may provide a legal obligation that authorizes the President to act in a manner that without the treaty he could not. There is no question that Presidents already claim treaty obligations to justify troop deployments without subsequent congressional support,[198] but there is a difference between 'can' and 'may' make war.[199]

Without any cases on this point, commentators have spent much time considering this issue. Louis Fisher has suggested that mutual security agreements cannot, and have not, affected how this country is constitutionally required to go to war.[200] Similarly, John Hart Ely provides the analogy that if congressional authorization could be substituted by a treaty, "the President and the Senate might make a treaty with Liberia, . . . and then embark upon a war with any country in the world. [Thereby substituting] Liberia for our House of Representatives."[201] Yet even Ely notes that the potential for such empowerment "is not entirely free from doubt."[202]

---

198. *See, e.g.*, The President's News Conference of January 11, 1951, 6 PUB. PAPERS 19 (Jan. 11, 1951). President Truman said that "[u]nder the President's constitutional powers as Commander-in-Chief of the Armed Forces he has the authority to send troops any where in the world [and will] continue to live up to [U.S.] obligations under the United Nations, and [the U.S.'s] other treaty obligations," by sending troops when so obligated. *Id.* Later, Truman claimed that one reason to maintain a strong military after World War II was to "fulfill the U.S.'s military obligations under the U.N. Charter." Address on Foreign Policy at the Navy Day Celebration in New York City, 178 PUB. PAPERS 431 (Oct. 27, 1945). During the Vietnam War, President Johnson claimed that the South East Asia Treaty Organization (SEATO) authorized military deployments to Vietnam. The President's News Conference of February 26, 1966, 88[17] PUB. PAPERS 221 (February 26, 1966). *See also* Southeast Asia Collective Defense Treaty, Sept. 8, 1954, 6 U.S.T. 81. Johnson later claimed that he would meet treaty obligations to protect South-East Asia. The President's Toast at a State Dinner in His Honor in Chakri Throne Hall, Bangkok, Thailand, 555 PUB. PAPERS 1275 (Oct. 28, 1966).

199. Holtzman v. Schlesinger, 484 F.2d 1307, 1318 (2d Cir. 1973).

200. FISHER, *supra* note 14, at 95 (claiming that if the President and two-thirds of the Senate use the Treaty Power to purposely bypass the House of Representatives' role in declaring war, it would deny the House's constitutional power under Article I).

201. ELY, *supra* note 14, at 14.

202. *Id.* at 15 (stating that it is not absolutely impossible to imagine that a treaty could be constitutional that "would at the same time (a) be self-executing in the sense that it required no further action on the part of Con-

Former Secretary of State John Foster Dulles evidenced a basis for such doubt in 1952 when he stated that "treaty law can override the Constitution" and "take powers away from Congress and give them to the President."[203] While the Secretary's comment may be considered radical, it should not be completely disregarded. Even members of the Senate have stated that the enactment of prior laws may delegate congressional authority to the President, thereby allowing him to make war without a declaration or any form of subsequent congressional authorization.[204] However, this potential expansion of presidential war making power may not be strictly limited to treaties.

D. Presidential Executive Agreements

Even though, with respect to international compacts, the Constitution only expressly mentions treaties,[205] Presidents often rely on their aggregate and implied constitutional powers to unilaterally create executive agreements with foreign nations.[206] Generally these agreements deal with the "daily grist of the diplomatic mill" or the establishing of U.S. foreign policy.[207] However, sometimes their scope can reach that of a treaty, as in the case of mu-

---

gress and (b) satisfy what . . . the Declaration of War Clause [does], namely that it would indicate who the enemy is to be").

203. Vernon Hatch, *The Treaty Making Power: "An Extraordinary Power Liable to Abuse*, 39 A.B.A. J. 808, 808 n.1 (1953) (quoting Secretary of State John Foster Dulles, Address to the American Bar Association in Louisville Kentucky on Apr. 12, 1952). The Secretary of State went so far as to say that "treaties can take powers from the State and give them to . . . some international body and they can cut across the rights given the people by the constitutional Bill of Rights." *Id.*

204. WESTERFIELD, *supra* note 14, at 22 (citing U.S. Senate, Documents Relating to the War Power, at 182-85). *See also* CORWIN, *supra* note 81, at 161 (claiming that the "proposition that legislature cannot delegate its powers" was "cast overboard for the purposes of war as early as World War I"). *See also* The National Commitment Resolution, S. Res. 85, 91st Cong. (1973) (indicating that from the Senate's prespective, a treaty obligation justifies presidential miltary deployments). However, this resolution is particularly ambiguous concerning the requirement that treaties may provide legislative authorization, even though the resolutions later specially requires that both Houses of Congress shall be involved, which is not the case with treaty ratification. *Id.*

205. U.S. CONST. art II, § 2, cl 2. *See also* 1 THE JAMES MADISON LETTERS 615 (1884) (stating that it would be absurd to allow the President alone the power to make treaties)

206. *See* DAVID GRAY ADLER, THE CONSTITUTION AND THE TERMINATION OF TREATIES 91 (1986). Adler argues that *Curtiss-Wright* allowed the expansion of executive agreements because the case stands for the proposition that in foreign affairs, the President is not restricted by the Constitution. *Id. But see* Reid v. Covert, 354 U.S. 1, 18 (1957) (holding that an executive agreement dealing with foreign affairs may be nullified by an act of Congress).

207. WESTERFIELD, *supra* note 14, at 50.

tual security agreements[208] or as when President Roosevelt agreed to provide U.S. naval destroyers to Great Britain prior to the U.S. entering World War II.[209] Although the Constitution does not expressly provide for the creation of executive agreements, the Supreme Court has held that executive agreements shall nevertheless have the same force and effect as treaties.[210] While the Court has found little or no distinction between these agreements and treaties, commentators either strongly oppose such an understanding[211] or suggest that the effect of presidential agreement obligations may actually exceed that of treaties.[212]

Yet, based on the Court's findings, and notwithstanding the holding in *Youngstown*, which arguably only focuses on domestic affairs,[213] if a President unilaterally made a mutual security agreement, which by its nature dealt with foreign affairs, it is possible that the President may, under the *Curtiss-Wright* Court's foreign affairs reasoning,[214] unilaterally deploy troops when the agreement so requires.[215] While the potential for expanded presidential war power through treaties or executive agreements may alarm some, the potential is not without limit.[216]

---

208. *See* PAIGE, *supra* note 169, at 82. Paige reports that in 1940, prior to Congress declaring war against Germany, President Roosevelt entered separate, military alliance agreements with Canada and Iceland. *Id.* The agreement with Iceland in particular obligated the U.S. to defend against any invasion of that island nation. *Id.*

209. *See id.* at 77-82, 163.

210. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324, 331 (1937) Despite the Court's findings, such an understanding would appear to directly contradict the Founding Fathers ideals. *See, e.g.*, THE FEDERALIST NO. 22 (Alexander Hamilton). Hamilton claimed that it would be unsafe to entrust the entire Treaty Power to a single elected official. *Id.* Yet in substance, the Court has allowed this in the form of executive agreements.

211. *See, e.g.*, PAIGE, *supra* note 169, at 75 (warning that if the holding in *Pink* is "carried to its logical conclusion . . . [it indicates that] [t]he President can, in making an executive agreement, give away any or all the property or rights of the States or its citizens and the Supreme Court would be obliged to enforce this even if it violated the Constitution . . . ").

212. *See, e.g.* WESTERFIELD, *supra* note 14, at 56 (stating that it is possible that obligations under executive agreements may even surpass those of treaties).

213. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (finding that President Truman had abused his powers when he seized U.S. steel mills in the U.S.).

214. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936) (allowing the President to act in foreign affairs without the need for an express constitutional grant of power).

215. The potential for troop deployments under executive agreements should draw more concern than those under treaties, because unlike a treaty, an executive agreement does not require the Senate's advice or consent.

216. *See, e.g.*, FISHER, CONFLICTS, *supra* note 107, at 255 (discussing how control over the funding of a military deployment will allow Congress the

E. Termination of International Agreements

Even though treaty termination is not discussed in the Constitution, there is no reason to believe that treaties and executive agreements, can not be terminated.[217] In fact, presidents, Congress, and even the Senate have all claimed to have individually done just that.[218] While symmetry between the method of creating and terminating international agreements appears the most logical means for termination,[219] the Supreme Court refused to endorse this rationale in *Goldwater v. Carter*.[220] In *Goldwater*, Congressmen brought an action questioning the legitimacy of President Carter's unilateral termination of a mutual security treaty with Taiwan.[221] The Court, in a plurality opinion, however, dismissed the case rather than endorsing Carter's action or establishing a formal treaty termination process.[222]

---

power to "successively, and successfully, narrow the reach of executive agreements").

217. *See* Reid v. Covert, 354 U.S. 1, 18 (1957) (stating that "when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null"); Goldwater v. Carter, 444 U.S. 996, 1004 n.1 (1979) (Rehnquist, J., concurring) (explaining that "[a]s our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of out government"). John Jay wrote that "they who make treaties may alter or cancel them." THE FEDERALIST NO. 64 (John Jay). Nevertheless, by 1986, only eighteen treaties had been terminated. ADLER, *supra* note 206, at 190.

218. PAIGE, *supra* note 169, at 21. While not claiming to have terminated a treaty with France, President George Washington "issued a proclamation of neutrality concerning the war between Great Britain and France," even though, at that time, the Treaty of Alliance with France and the U.S. was in force. *Id.* While Hamilton argued in favor of the President's right to issue the proclamation, Madison responded that the President did not have the right to interfere in foreign affairs without congressional authorization. *Id.* at 22. In 1962, President Kennedy notified Cuba of the termination of the 1902 United States-Cuba Convention on Commercial Relations. ADLER, *supra* note 206, at 189. Kennedy's action stands as one of the few truly unilateral presidential terminations. *Id.* The first time a congressional joint resolution effectively terminated a treaty under international law was in 1865. *Id.* at 177. In that instance, one of many to follow, Congress required President Lincoln to notify Great Britain that the Reciprocity Treaty of 1854 was terminated. *Id.* at 178. More recent congressional action occurred in 1951 when Congress ordered the President to terminate most-favored-nation status for Hungry and Poland in 1951. *Id.* at 179-80. In 1856, the Senate effected the first treaty termination by resolution when it requested that President Pierce notify Denmark of the termination of the Treaty of Commerce and Navigation with that country. *Id.* at 172.

219. *See* ADLER, *supra* note 206, at 106 (discussing the advantages of terminating a treaty in the same manner in which it is created). *See also In re* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 75 (1821) (indicating that treaty obligations may only be "changed or varied by the "same formalities" with which they were created).

220. 444 U.S. at 997-98.

221. *Id.* at 996.

222. *Id.*

Nevertheless, the Court did rule on whether a subsequent congressional act could work to nullify an executive agreement. In *Reid v. Covert*, the Court dealt with the potential for an executive agreement to overcome certain constitutionally granted rights.[223] The Court found that when Congress creates legislation that is inconsistent with a prior international agreement, the legislation will nullify the treaty or executive agreement.[224] In so holding, the Court in *Reid* reflected the long standing principle that because statutes and treaties are "placed on the same footing," when any two are found inconsistent, the one enacted or ratified later in time will control.[225] This principle gains significant importance when analyzing the present U.S. obligations under the U.N. Charter.

IV. PRESIDENTIAL WAR MAKING AND THE UNITED NATIONS CHARTER

With the understanding of Part II's discussion on the President's constitutional war powers and Part III's discussion on international agreements, it is now possible to clarify how ratifying the U.N. Charter has legally affected the President's war powers whether acting with or without the U.N. Ultimately, this Part argues that the U.N. Charter does not presently provide the Security Council the ability to create a legal obligation that would potentially authorize the President to unilaterally deploy troops. Rather, this Part suggests that ratifying the U.N. Charter actually works to limit how some individuals perceive the President's constitutional war powers. Accordingly, Section A discusses the U.N. Charter as intended. Section B examines the Charter in practice. Section C analyzes congressional limitations expressed in the UNPA concerning U.S. military participation in U.N. missions. Finally, Section D discusses the actual affects of the U.N. Charter and UNPA on unilateral presidential war making.

A. U.N. Charter Obligations as Intended

As originally intended, the President would be legally obligated to send troops upon a U.N. Security Council request.[226] The U.N. Charter is based on the premise of "collective security"[227]

223. Reid v. Covert, 354 U.S. 1, 25 (1957).
224. *Id.* at 18.
225. *Id.* at 32 n.34.
226. *Participation by the United States in the United Nations Organization: Hearing on S. 1580 Before the House Comm. on Foreign Affairs*, 79th Cong. (1945) (statement by Secretary of State Acheson).
227. U.N. CHARTER art. 1, para. 1. *See generally* U.N. COMMENTARY, *supra* note 22, at 51-52 (claiming that the nature of collective security under the U.N. Charter is a "one-for-all-and-all-for-one" alliance). For a full discussion on the advantages and disadvantages of such a global system of security, see AREND & BECK, *supra* note 14, at 47-68.

whereby member states pledge to work collectively to defeat any aggressor state, irrespective of that state's location.[228] In the wake of the League of Nations' failure to provide for effective collective security,[229] the U.N. Charter contains Chapter VII.[230] This Chapter, contrary to the principles of the American Founding Fathers,[231] effectively puts the sword and purse in the hands of one group by providing a mechanism by which the Security Council could legally obligate member states to provide military resources for collective security.[232]

1. *Use of Force: Chapter VII*

Under the U.N. Charter's Chapter VII, once the Security Council determines the existence of a threat to peace,[233] the Council becomes empowered to recommend or obligate member states to take action under either Articles 41[234] or 42[235] of the Char-

228. U.N. CHARTER art. 42.

229. CARTER & TRIMBLE, *supra* note 21, at 1296-98. The League of Nations marked a "different attitude to the problems of force in the international order" of world states. *Id.* at 1296. For instance, members of the League agreed to a three month cooling off period after initial hostilities before beginning an all out war. *Id.* at 1296-98. While the League did not make war making completely illegal, it did hope that the cooling off period would stop countries from going to war without prior thought as to the potential consequences. *Id.* at 1297. Despite its good intentions, the League failed to stop Nazi atrocities or World War II, and soon thereafter the League fell apart. *Id.* Notably, the U.S. never joined the League of Nations. FISHER, *supra* note 14, at 71. The Senate would not ratify the treaty creating the league because of concern that it might legally obligate the U.S. to deploy troops. *Id.* at 71-72. Similar to today's concerns, the Senate then believed that this legal obligation may have provided the President an excuse to unilaterally deploy troops abroad without congressional approval. *Id.*

230. *See generally* U.N. CHARTER arts. 39-51 (defining the U.N. Charter's Chapter VII which provides for the U.N.'s application of collective force to stem international breaches of the peace). See generally U.N. COMMENTARY, *supra* note 22, at 605-78 for a discussion detailing how the Chapter VII articles are used together to enforce collective security.

231. *See, e.g.*, 1 RECORDS, *supra* note 84, at 139-40 (recording that George Mason stated that the "purse & the sword ought never to get into the same hands . . . .").

232. *See* U.N. CHARTER. arts. 39-43 (providing the process by which the U.N. may authorize and obligate member states to deploy troops).

233. *Id.* at art. 39. Article 39 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." *Id.*

234. *Id.* at art. 41. Article 41 provides that "[t]he Security Council may decide what measures *not involving the use of armed force* are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures." *Id.* (emphasis added).

235. *Id.* at art. 42. Article 42 provides that the Security Council "may take such action by air, sea, or land forces as may be necessary to maintain or re-

ter. Article 41 provides that the Security Council may obligate member states to impose and enforce sanctions upon an offending state.[236] However, as limited by its first sentence, Article 41 only provides for "measures not involving the use of armed force."[237] Only when Article 41 sanctions fail or when the Council believes that such sanctions would be ineffective could the Security Council then impose military obligations upon member states pursuant to Article 42.[238] Article 42 is the Charter's only article that provides the Security Council with the authority to obligate members to provide air, sea and land forces to U.N. missions and is often indicated by the phrase "all necessary means."[239]

2. *The Binding Nature of the U.N. Charter*

In most areas, the U.N. Charter's ability to legally bind member states, whether under its articles or through Security Council resolutions, cannot be doubted.[240] The Charter provides for such legal obligations through Article 25,[241] and more specifically Article

---

store international peace and security. Such actions may include demonstrations, blockade, and other operations by air, sea or land forces of Members of the United Nations." *Id.*

236. *Id.* at art. 41. Article 41 provides that the Security Council may order the "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." *Id.*

237. U.N. CHARTER art. 41. *See* U.N. COMMENTARY, *supra* note 22, at 625 (discussing the other measures the Security Council may take in place of military action under an Article 41 resolution).

238. U.N. CHARTER art. 42. Article 42 provides that "[s]hould the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate" it may then take military action. *Id.*

239. AREND & BECK, *supra* note 14, at 54. Although Article 42 is seldom specifically mentioned, when the phrase "all necessary means" is included in a Chapter VII Security Council resolution, it indicates that the Security Council is acting pursuant to the provisions of Article 42. *Id.* However, Senator McConnell complained that failure to mention Article 42 means that "U.S. soldiers are deployed in a [U.N.] combat zone with an absence of reference to the actual legal mandate . . . ." 142 CONG. REC. S11174 (daily ed. Sept. 24, 1996) (statement of Sen. McConnell).

240. *Compare* U.S. CONST. art. VI, cl. 2 (providing that treaties shall be the supreme law of the land), *with* U.N. CHARTER art. 25 (requiring that all members fulfill Security Council resolutions). *But see* Diggs v. Richardson, 555 F.2d 848, 850 n.9 (D.D.C. 1976) (refusing to answer whether under the Constitution and U.N. Article 25 a Security Council resolution should be considered binding on the United States). Even if Security Council resolutions do bind the U.S., a U.S. court still must determine whether congressional legislation would be required to implement them, or whether they would go into effect immediately upon issuance by the Security Council. For a discussion on the interpretation of the Security Council's ability to create binding resolutions or decisions, see U.N. COMMENTARY, *supra* note 22, at 409-15.

241. U.N. CHARTER art. 25. Article 25 provides that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." *Id.*

48 in Chapter VII.[242] While both theses Articles legally obligate member states to carry out Security Council resolutions, Article 25, unlike Article 48, limits the obligatory nature of Security Council resolutions by requiring that such resolutions be made "in accordance with the *present* Charter," (emphasis added), rather than be made in accordance with the *intentions* of the Charter.[243] This distinction is critical to the UN's ability to militarily obligate member states because *presently* the Charter does not appear to provide the Security Council with the legal ability to obligate a member state to provide troops under an Article 42 resolution.

B. The Charter in Reality: Article 43

The reason for most of the confusion concerning the legal obligations of the Security Council resolutions would seem to stem from the meaning of Article 43.[244] This article provides the legal process by which members will contribute troops and equipment to fulfill Article 42 resolutions calling for military support and requires that each member state will negotiate "special agreements" in order to determine the number and amount of soldiers and equipment to provide.[245] Most important is the requirement that the "special agreements" will be subject to ratification by the individual member states in "accordance with their respective constitutional processes."[246] To better define the phrase "constitutional

242. *Id.* at art. 48. Article 48 provides that "[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine." *Id.*

243. *Compare id.* at art. 25 *with id.* at art. 48.

244. *See, e.g.*, WESTERFIELD, *supra* note 14, at 67-68 (stating that without Article 43 special agreements, it is not clear whether a member is under a legal obligation to provide forces involuntarily and that this is "[p]erhaps . . . the crux of the dispute between Congress and the President . . . "). Despite the argument that an Article 43 agreement is essential for the Security Council to have any legal authority to require member states to deploy soldiers, it is also claimed that this requirement is not an absolute necessity for the "effective functioning" of the U.N. Security Council's ability to request military assistance from member states. Turner, *supra* note 47, at 560.

245. *See* U.N. CHARTER art. 43, para. 1 (providing that "[a]ll Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call . . . armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security").

246. *See id.* at art. 43. Article 43 provides that the contribution of military assistance will be made "*in accordance with a special agreement or agreements*" and that "[s]uch agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided." *Id.* (emphasis added). Further the agreement or agreements "shall be concluded between the Security Council and Members or between the Security Council and groups of

processes" so that President Truman would not simply negotiate a "special agreement" by executive agreement,[247] Congress stipulated in the UNPA that "constitutional processes" means that the President must receive congressional approval to create Article 43 "special agreements."[248]

Despite the belief that Article 43 "special agreements" would be made shortly after ratification of the Charter, to date, neither the U.S. nor any other member state has ever signed a "special agreement" with the Security Council.[249] This would seem to indicate that Article 42 resolutions requiring members to deploy military forces are not presently binding because no forces have yet to be provided through Article 43 "special agreements."[250] This understanding as it concerns the U.S. is furthered by the language within the UNPA.

C. *Limits on the President: United Nations Participation Act*

Since Congress passed the UNPA in 1945, and President Truman arguably refused to abide by it,[251] commentators have de-

---

Members and shall be subject to ratification by the signatory states *in accordance with their respective constitutional processes*." *Id.* (emphasis added).

247. FISHER, *supra* note 14, at 80-81.

248. United Nations Participation Act, 22 U.S.C. § 287 (1994 & Supp. 1996). The UNPA "[w]ithout the slightest ambiguity" defines what is to be the constitutional process for deploying troops upon a U.N. Security Council request. FISHER, *supra* note 14, at 80. Even Turner, a staunch presidential supporter, recognizes this definition. Turner, *supra* note 47, at 557.

249. AREND & BECK, *supra* note 14, at 57. Despite efforts to negotiate Article 43 agreements, the member nations could never agree on the proper amount and types of military forces each member would make ready to contribute. *Id.* The special agreements failed as a direct result of disagreements between the Soviet Union and the United States over fears by the Soviet Union that the troops provided to the United Nations may eventually be used against it. *Id.* As a result of these problems, the Article 43 "special agreement" negotiation meetings ceased in 1947. *Id.*

250. *See, e.g.*, *Participation by the United States in the United Nations Organization: Hearing on S. 1580 Before House Comm. on Foreign Affairs*, 79th Cong. (1945) (statement by Secretary of State Acheson) (stating that only after "special agreements" are created will the U.S. be "bound to furnish" troops to the U.N.); U.N. COMMENTARY, *supra* note 22, at 639, 731 (stating that without Article 43 special agreements, "no member state is obligated to make troops available upon a Security Request"). This conclusion is also supported by New York Law School Professor Rosalyn Higgins. Rosalyn Higgins, *The United Nations Role in Maintain International Peace: The Lessons of the First Fifty Years*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 135, 139 (1996) (stating that without Article 43 "special agreements" it is "impossible [to] obligat[e] . . . members to participate in [U.N.] military [missions]").

251. FISHER, *supra* note 14, at 84-85 (arguing that when President Truman unilaterally fulfilled the United Nations' resolution calling on member states to "render every assistance to the United Nations" to force the North Koreans north of the 38th parallel, he acted contrary to the UNPA). But *see* Turner, *supra* note 47, at 580-81. In contrast to Dr. Fisher's conclusions, Professor Turner claims that nothing that President Truman did while defending Korea

bated on the actual limiting affect of this legislation in relationship to U.N.-related presidential military deployments.[252] As mentioned previously, this Act provides for the process by which the day-to-day obligations of the U.N. Charter will be fulfilled.[253] More importantly, it also provides the process by which the U.S. will fulfill U.N. Security Council requests for military forces.[254]

Despite the ongoing debate over whether the UNPA is intended to limit the President,[255] it is difficult to understand how the Act could have any other effect. The first sentence of section 287d authorizes the President to negotiate an Article 43 "special agreement" to determine the number of troops and equipment to be allocated to the U.N. when the Security Council so requires.[256] However, it provides that any such agreement be "subject to the approval of Congress by appropriate act or joint resolution."[257]

---

in any way contradicted the Constitution or the UNPA. *Id.*

252. *Compare generally* FISHER, *supra* note 14, *with* Turner, *supra* note 47. These two authorities take completely opposite sides on every issue that defines the debate on the President's war power under U.N. Security Council resolutions in relationship to UNPA limitations.

253. United Nations Participation Act, 22 U.S.C. § 287 (1994 & Supp. 1996).

254. *See id.* § 287d which provides:

> [t]he President is authorized to negotiate a special agreement with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution, [providing for the types, readiness, and nature of military assistance], to be made available to the Security Council on its call for the purpose of maintaining international peace and security in accordance with Article 43 of [the U.N. Charter].

Id. Further, § 287d requires that "[t]he 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 [the U.N.] Charter and *pursuant to such special agreement* . . . the armed forces, facilities, or assistance provided for therein." *Id.* (emphasis added). *See also id.* § 287d-1. For a more detailed discussion of the provisions in § 287d-1 which are relevant to this topic, see *infra* note 262.

255. *Compare* FISHER, *supra* note 14, at 79-81, *with* Turner, *supra* note 47, at 556. Professor Turner believes that Dr. Fisher has "erred seriously" when he interpreted the UNPA and its purpose. Turner, *supra* note 47, at 556. Unlike Dr. Fisher, Professor Turner believes that Congress passed the UNPA for "housekeeping" reasons and that it contains no limitations on the President. *Id.* at 557-58. This argument is based, in part, on the lack of congressional outcry when President Truman initially sent troops to Korea without prior congressional approval. *Id.* at 558. Turner states that "when the Senate gave its consent to the ratification of the U.N. Charter in 1945, it expressly *rejected* the argument that the use of American military personnel in hostilities authorized by the Security Council would require independent authorization by the American Congress." *Id.* at 89 (emphasis in original). He reinforces this statement with excerpts from a Senate Committee on Foreign Relations report. *Id.* However, as Turner mentions, the report pertained to forces that would be made available after Article 43 special agreements were created. *Id.* at 90. As a result, such statements have little present relevance because no such special agreements are now in effect.

256. 22 U.S.C. § 287d.

257. *Id.*

Only after an Article 43 "special agreement" receives congressional approval, as defined by the UNPA, is the President free from the requirement for subsequent congressional authorization to provide military assistance in response to an Article 42 troop deployment.[258] Clarifying this point further, section 287d sets forth that "nothing herein contained shall be construed as authorization to the President by Congress to make available to the Security Council [any forces] in addition to [those forces] provided for in such special agreement or agreements."[259] The Executive Branch at the time understood this to mean that independent presidential negotiation of an Article 43 special agreement would have "no force [or] effect" until such "special agreements" received congressional approval.[260] Additionally, as stated by then Secretary of State Acheson at a hearing on the UNPA, only when such "special agreements" are approved by Congress is the U.S. bound to provide troops to the U.N. and the President thereby authorized to furnish troops up to the agreed upon limit.[261]

Further indicative of the UNPA's intended limitation on unilateral presidential war making is section 287d-1. This Section authorizes the President, upon the request of the U.N., to send armed personnel to serve as observers, guards, or in any other *non-combatant* capacity without receiving subsequent congressional approval.[262] But this otherwise broad grant of presidential

---

258. *See, e.g., Participation by the United States in the United Nations Organization: Hearing on S. 1580 Before the Senate Comm. on Foreign Affairs*, 79th Cong. (1945) (statement of Secretary of State Acheson) (stating that only after "special agreements" are created would the President be authorized to deploy troops).

259. 22 U.S.C. § 287d. Section 287d provides that "except as authorized in § 287d-1 of this title, *nothing* herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council [any] assistance *in addition* to the forces, facilities, and assistance *provided for* in such special agreement . . . ." *Id.* (emphasis added).

260. *Participation by the United States in the United Nations Organization: Hearing on S.1580 Before the Senate Comm. on Foreign Affairs,* 79th Cong. at 146 (1945) (statement of Secretary of State Acheson). Secretary of State Dean Acheson was questioned whether the President could be permitted "to provide military assistance to the Security Council without consulting or submitting the matter to Congress" under section 287d. *Id.* The Secretary rejected this possibility, stating that "[t]he answer to that question is 'No' . . . the President may not do that . . . until the special agreements [are] approved by the Congress, [any independent presidential negotiation] has *no force and effect.*" *Id.* (emphasis added).

261. *Id.*

262. 22 U.S.C. § 287d-1. Section 287d-1 provides that:

> the President, upon request by the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such request, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and *not involving* the employment of armed forces contemplate by charter VII of the United Nations Charter.

authority is strictly limited by two clauses. First, the U.N. activities must not involve the "employment of armed forces contemplated by chapter VII of the [U.N.] Charter,"[263] which includes Article 42 troop deployments.[264] Secondly, "in no event shall more than a total of one thousand of such [U.S. military] personnel be . . . detailed at any one time."[265] This is not one thousand per U.N. request, but a total of one thousand to cover the multitude of all ongoing U.N. missions.[266]

The wording of section 287d-1, while allowing limited non-combatant presidential military deployments, further indicates that under the UNPA, Article 42 Security Council Resolutions do not presently authorize the President to deploy any branch of the armed forces into hostile environments. If otherwise, as some argue,[267] the limitations expressed in section 287d-1 would not make any sense. Why would the section specifically exclude these one thousand troops from participating in Chapter VII missions if the President is already authorized to unilaterally deploy any number of troops to such a mission? It seems clear that section 287d-1 as well as section 287d can only be sensibly read to reflect the fact that presently the UNPA restricts the President from fulfilling a Chapter VII, Article 42 military mission in the absence of an Article 43 "special agreement" or subsequent congressional authorization.

D. The Real Effects of Ratifying the U.N. Charter

While the U.N. Charter is often claimed as providing justification for presidential military action,[268] such reliance is misplaced.

Id. (emphasis added). Further, Subsection 1 also provides that presidential deployments shall be "under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States to serve as *observers, guards,* or in any *non-combatant capacity,* but in no event shall *more than a total of one thousand* of such personnel be so detailed at any one time." *Id.* (emphasis added).

263. *Id.*

264. *Cf.* U.N. CHARTER, art. 42 (contained within Chapter VII).

265. 22 U.S.C. § 287d-1

266. *See* FISHER, *supra* note, at 14, at 83-84. Fisher argues that it is unlikely that the 1000 non-combatant limit was established so that the President could easily overcome it by simply requesting that the U.N. Security Council mandate additional missions. *Id.* Such a construction of section 287d-1 would effectively make this sections limitations meaningless.

267. *See, e.g.,* Turner, *supra* note 47, at 557 (believing that section 287d-1 is not a further restriction on presidential war making, rather it did not even "address the issue of using U.S. combat forces in response to international aggression").

268. *See, e.g.,* Statement on Allied Military Action in the Persian Gulf, PUB. PAPERS 42 (Jan. 16, 1991) (stating that Operation Desert Storm was to "enforce the mandate of the U.N. Security Council"). President Truman ordered troops to Korea because of a Security Council resolution. Statement by the President on the Situation in Korea, 173 PUB. PAPERS 492 (June 27, 1950).

First, even if mutual security treaties could create legal obligations that would potentially authorize presidential troop deployments without congressional authorization, presently the U.N. Security Council cannot obligate the U.S. through an Article 42 troop deployment resolution. Secondly, the U.N. Charter not only fails to provide a means of authorizing the President to deploy troops, it actually works individually and collectively with the UNPA to limit how some individuals perceive the President's constitutional war powers.

1. Obligations under the U.N. Charter

At the present time, there appears to be no way for the Security Council to legally bind the U.S. and thereby potentially authorize the President to unilaterally deploy the armed forces.[269] This is because Chapter VII's Article 42, which potentially allows for military operations, should not be considered self-executing[270] but rather requires that Congress legislate an Article 43 "special agreement" before the Security Council can legally bind the U.S. to send troops. As a result, without a legal obligation, the President cannot claim authorization from Article 42 resolutions in order to deploy U.S. troops on U.N. missions. However, one may argue that Article 48 legally obligates fulfillment of Article 42 troop deployments regardless of whether or not an Article 43 "special agreement" exists because Article 48 fails to require that Security Council resolutions necessarily be made "in accordance with the *present* Charter."[271] However, such an understanding of Article 48

President Clinton claimed the proposed Haiti invasion would be to carry out the "will of the United Nations." Address to the Nation on Haiti, 30 WEEKLY COMP. PRES. DOC. 1780 (Sept. 15, 1994).

269. *See Participation by the United States in the United Nations Organization: Hearing on S. 1580 Before House Comm. on Foreign Affairs*, 79th Cong. (1945); U.N. COMMENTARY, *supra* note 22, at 639. *But see* Turner, *supra* note 47, at 547 (claiming that even in the absence of an Article 43 "special agreement" an obligation under the U.N. Charter may exist.).

270. *See* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987). An international agreement of the United States is "non self executing" (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementation legislation, or (c) if implementing legislation is constitutionally required. *Id. See also* 74 AM. JUR. 2D *Treaties* § 3 (stating that "a self-executing treaty is one that operates of itself without the aid of legislation"). Former Secretary of State Acheson also supported this understanding. *Participation by the United States in the United Nations Organization: Hearing on S. 1580 Before House Comm. on Foreign Affairs*, 79th CONG. (1945).

271. *See* U.N. CHARTER art. 48 (providing that members shall take action "to carry out the decisions of the Security Council" but not explicitly requiring that Article 43 agreements be signed for this obligation to become effective). Professor Turner supports such a conclusion claiming that the President may

cannot be sustained because it directly contradicts the language of Articles 25[272] and 106.[273]

First, Article 48 operates within Article 25, and as such, for Article 48 to bind member states to fulfill Article 42 Security Council resolutions, such resolutions must still meet Article 25's standard of being made "in accordance with the present Charter."[274] However, it may be argued that perhaps the Charter's founders envisioned the failure of Article 43 "special agreements" and inserted Article 48 so that Article 42 troop deployments would be binding even without Article 43 "special agreements." Article 106 may initially appear to justify such an Article 48 interpretation because it provides that pending the creation of Article 43 "special agreements," the Security Council's five permanent members "shall . . . consult . . . with a view to such joint action . . . necessary for the purpose of maintaining international peace and security" on behalf of the U.N.[275] However, dependence on Article 106 to support Article 48's creation of binding obligations has two flaws.

First, Article 106 requires discussion only by the Security Council's permanent members rather than the entire Security Council.[276] Therefore, even if some permanent members did individually or collectively agree on a particular military action, such an agreement would not be a valid Security Council resolution as defined in the U.N. Charter.[277] As a result, because Article 48 only requires member states to fulfill resolutions created by the entire Security Council as opposed to just the permanent members,[278] an Article 106 agreement could never be made binding by Article 48.[279] Secondly, Article 106 specifically states that it is the creation

---

still have the authority to unilaterally provide troops to the U.N. without Article 43 "special agreements." Turner, *supra* note 47, at 562.

272. U.N. CHARTER art. 25.

273. *Id.* at art. 106 (providing that "[p]ending the coming into force of such special agreements referred to in Article 43 as in the opinion of the Security Council *enable it to begin the exercise* of its responsibilities under Article 42 . . . ") (emphasis added).

274. U.N. COMMENTARY, *supra* note 22, at 652 (claiming that "Article 48 constitutes an affirmation of members' obligations under Article 25."). Furthermore, "[i]n spite of [Article 48's] strong wording, it cannot modify the limits which the preceding Articles put on this obligation." *Id.*

275. U.N. CHARTER art. 106.

276. *Id.* Article 106 only provides that the permanent members may take joint action on "behalf of the [U.N.]" rather than under direction of the entire Security Council. *Id.*

277. *See id.* at art. 27, para. 2 (requiring that a Security Council resolution must receive nine of the fifteen Security Council member votes and survive the permanent members' vetoes to be valid).

278. *Id.* at art 48.

279. *See id.* at art. 106. An Article 106 agreement is non-obligatory because it is not a proper Security Council resolution as defined under Article 27(2). *Id.* at art. 27, para. 2. Rather, it is left for the permanent members, inde-

of an Article 43 "special agreement" that "in the opinion of the Security Council enable[s] it to begin the exercise of its responsibilities under Article 42 [concerning troop deployments] . . . ."[280] As a result, because no special agreements exist, the Security Council seems unable, even in its "opinion," to create a resolution calling for troop deployments under Article 42.[281] Because the U.N. Charter is to be "read as a whole [and its] meaning is not to be determined merely upon a particular phrase with which, if detached from the context, may be interpreted in more that one sense,"[282] any argument that Article 48 presently allows the creation and enforcement of a binding Article 42 troop deployment resolution is inconsistent with the language of Articles 25 and 106, and should therefore be considered without merit.

However, even if these arguments are ignored and Article 42 troop deployments did initially create a binding legal obligation under the present Charter, the subsequent passage of the UNPA has nullified this obligation. As previously discussed, the UNPA creates strict limits on the President's legal ability to deploy troops pursuant to U.N. authorized missions without congressional authority.[283] According to the Supreme Court's rationale in *Reid v. Covert*, any obligation or duty created in an international agreement is nullified by a subsequent inconsistent act of Congress.[284] Because the UNPA stipulates that the President has no authority to unilaterally send troops upon an Article 42 troop deployment until the creation of an Article 43 "special agreement," the UNPA is inconsistent with and would therefore nullify any potential authority that may have been initially derived from a Security Council Article 42 resolution calling for the use of military force.[285] This conclusion is supported by various court holdings specifically finding that a subsequent inconsistent act of Congress may nullify an otherwise binding Security Council resolution.[286]

---

pendent of the ten other Security Council members, to take military action. *Id.* at art. 106. Therefore Article 48, which requires fulfillment of such resolutions, does not make an Article 106 agreement binding. *Id.* at art. 48 In fact, no member state has ever used this provision to justify military force. AREND & BECK, *supra* note 14, at 18

280. U.N. CHARTER art 106.

281. *Id.*

282. U.N. COMMENTARY, *supra* note 22, at 43.

283. See Part IV, Section C, *supra*, for a discussion on the UNPA's limitations on presidential deployments without prior congressional authorization.

284. Reid v. Covert, 354 U.S. 1, 18 (1957); Committee of US Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 936 (D.C. Cir. 1988).

285. *See* United Nations Participation Act of 1945, 22 U.S.C. § 287d (1994 & Supp. 1996) (requiring that congressional approval be obtained before the President can deploy troops to a U.N. mission).

286. *See, e.g.*, Diggs v. Schultz, 470 F.2d 461, 465-66 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1975) (finding that in relationship to a Security Council resolution, a subsequent congressional act which is in "blatant disregard" of a Security Council resolution shall not be considered a violation of a treaty obli-

Nevertheless, even if it were universally accepted that the U.N. Charter does not and never did create legal military obligations that could potentially authorize presidential military deployments, the President could arguably still justify troop deployments, whether or not related to the U.N., on the traditional grounds of custom, aggregate powers, national interests, or any combination thereof.[287] However, such reliance would be a mistake because while the U.N. Charter cannot presently create a legal obligation on the U.S. to provide troops, it does create legal obligations on the U.S. to refrain from the use of military force.[288] These obligations in turn forbid certain aspects of presidential war making that may have been constitutional prior to the U.N. Charter's ratification.[289]

2. Limitations on Presidential War Making

While the U.N. Charter places limitations upon virtually all aspects of war making, the limitations differ depending on whose behalf the action is taken and whether the U.N. Security Council authorizes it.

a. Non-U.N. Authorized Military Actions and International Law

The Charter's Article 2 limits the President's constitutional war powers by requiring that member states uphold certain purposes and principles whether operating under or independent of U.N. Security Council resolutions.[290] The most important principles are those that require that "[a]ll Members . . . settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered,"[291] and that "[a]ll Members . . . refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner incon-

---

gation because it invalidates the resolution as it concerns the U.S.). Further more, the *Diggs* court found that "[u]nder our constitutional scheme, Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it." *Id.* at 466.

287. See Part II, *supra*, for a discussion on the various means to support unilateral presidential war making.

288. *See* U.N. CHARTER art. 2 (mandating that members "settle their . . . disputes by peaceful means . . .").

289. This of course begs the question of whether the U.N. Charter is in fact unconstitutional. If the President has the constitutional authority to use military force in defense of national interests, for example, then the U.N. Charter would be unconstitutional if it limits that power. If the U.N. Charter is unconstitutional, then the President would be under no duty to enforce it.

290. *See id.* (listing seven principles which in addition to the purposes enumerated in Article 1 each member must uphold).

291. *Id.* at art. 2, para 3. For a discussion on "peaceful settlement" as being the cornerstone of contemporary world order, see U.N. COMMENTARY, *supra* note 22, at 99.

sistent with the Purposes of the United Nations."[292] Therefore, non-U.N.-sanctioned presidential military actions such as the Lebanon deployment, invasion of Grenada, air strikes against Libya, Panama invasion, and the initial threat to use force in Haiti, which may have otherwise been constitutional prior to ratifying the U.N. Charter,[293] should now be seen as violations of the U.N. Charter which the President is constitutionally required to enforce.[294]

However, several reasons may be provided to argue that most unilateral presidential war making is not an Article 2 violation. First, it may be claimed that Article 2 is not self-executing, and therefore, without subsequent congressional legislation to enforce it, the President is not bound to follow its principles.[295] This is not terribly convincing because the Supreme Court generally interprets treaties to be self-executing unless they expressly require enforcing legislation,[296] as is the case with Article 43 "special agreements."[297] Article 2, however, expresses no such requirements.[298]

---

292. U.N. CHARTER art. 2, para 4.

293. Based solely on the Supreme Court's broad reasoning in *The Prize Cases*, 67 U.S.. (2 Black) 635 (1862), and ignoring the subsequent limitations expressed within the U.N. Charter's Article 2, a strong argument may be made that these unilateral presidential military deployments would be justified under the President's constitutional war powers. As the Court stated in *The Prize Cases*, the President alone is to determine when a crisis exists and is duty bound to defend against it whether or not Congress chooses to "baptize it with a name . . . ." *Id.* at 699.

294. Because the Constitution provides that treaties, such as the U.N. Charter, are to be considered the supreme law of the land, U.S. CONST. art. VI, the President is constitutionally required to execute the U.N. Charter's obligations. *Id.* at art. II § 3 (stating that the President "shall take Care that the Laws be faithfully executed . . ."). Again, this begs the question of whether the U.N. Charter itself is unconstitutional. *See supra* note 289.

295. Jonathan A. Bush, *The Binding of Gulliver: Congress and Courts in an Era of Presidential War Making*, 80 VA. L. REV. 1723, 1759 (justifying that "[b]y all accounts, Article 2(4) is not self executing and there has never been implementing legislation for the principles set out there and in related articles").

296. *See, e.g.*, Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984) (explaining that the Warsaw Convention is a self-executing treaty because it does not require legislation to give the treaty legal force); Asakura v. City of Seattle, 25 U.S. 332 (1924) (noting that the Treaty of Commerce and Navigation Between the U.S. and Japan is self-executing because it "operates of itself without the aid of any legislation). *See also* RESTATEMENT (THIRD) THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987) (noting a treaty is "non self executing" if an international agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation).

297. *See* U.N. CHARTER art. 43 (indicating that members must conclude agreements with the Security Council to determine the military assistance that will be provided by the member nations when so obligated under an Article 42 resolution calling for military assistance).

298. *Compare id.* at art. 43(3) (forcing "ratification by the signatory states in

Secondly, one scholar has argued that Article 2 itself somehow actually authorizes the President to act independently of the U.N. Security Council to stop countries in violation of Article 2.[299] However, there is simply no basis in the Charter for such an understanding[300] nor does the scholar provide an example of a President ever making such a claim.[301] Thirdly, it may be argued that the U.N. Charter provides exceptions to the Article 2 principles through Articles 51 and 52.[302] Article 52 states that "nothing in the . . . Charter precludes . . . regional arrangements . . . for dealing with [regional] matters to maintain . . . peace and security . . . ."[303] Yet this Article does not prove an exception, but to the contrary, expressly requires that actions taken under such regional arrangements be consistent with the purposes and principles set forth in Article 2.[304]

More commonly cited as an exception to Article 2's limitations is Article 51, which provides, in part, that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defen[s]e if an armed attack occurs against a Member of the United Nations . . . ."[305] Presidents have relied on Article 51 to argue that nothing in the Charter has acted to limit their traditional authority to unilaterally use military force defensively.[306] How-

---

accordance with their respective constitutional processes") *with id.* at art. 2 (expressing no additional ratification requirements).

299. *See* TURNER, *supra* note 14, at 89. Turner suggests that "use of armed force in helping to enforce the prohibition against the use of aggressive force contained in article 2(4) of the U.N. Charter . . . might also be authorized by the President's Article II, Section 3, constitutional duty to 'take Care that the Laws be faithfully executed . . . .'" *Id.*

300. Article 2 of the U.N. Charter imposes an obligation upon the member states against the use of force and does not express any right to member nations to individually enforce these obligations against other member nations that may violate them. *See* U.N. CHARTER art. 2, para. 4 (stating that "[a]ll members shall refrain . . . from the threat or use of force). *See also* U.N. COMMENTARY, *supra* note 22, at 72-76 (reciting that Article 2(4) "stipulates a clear obligation on the member states," forbidding even the "threat of military force").

301. TURNER, *supra* note 14, at 89.

302. *Cf.* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, at 103-04 (June 27) (discussing the U.S.'s argument that Articles 51 and 52 provide an exception to the Article 2 principles).

303. U.N. CHARTER art 52.

304. *Id.*

305. *Id.* at art 51.

306. For example, in 1989, President Bush claimed that the invasion of Panama is an "exercise of the right of self defense recognized in Article 51 . . . ." Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on United States Military Action in Panama, PUB. PAPERS 1734 (Dec. 21, 1989). Earlier, in 1986, President Reagan claimed that the air strikes against Libya were "fully consistent with Article 51." Address to the Nation on the United States Air Strike Against Libya, PUB. PAPERS 468 (Apr. 14, 1986).

ever, to argue that Article 51's self-defense clause provides a general exception to the Article 2's limitations, Presidents have broadened Article 51's definition so as to justify the use of military force not only if the U.S. is attacked but also if any U.S. global interest is attacked.[307] While the inclusion of such global interests may seem justified under Article 51 by various Supreme Court holdings decided before the ratification of the U.N. Charter,[308] this broadened interpretation is not within the meaning of Article 51 as held by the U.N. International Court of Justice (ICJ) in *Nicaragua v. The United States*.[309]

In that case, the Republic of Nicaragua brought an action against the U.S. for assisting the Contras in their attempt to overthrown the Nicaraguan government.[310] Ultimately, the ICJ found that the U.S.'s training and supplying of the Contras violated international law and primarily the principles of Article 2.[311] Furthermore, the court held that Article 51 did not justify the U.S.'s actions because Article 51 does not provide a right to assist others simply because the assisting country believes it necessary.[312] Rather, the ICJ found that for individual self-defense to be justified, a nation must first be subject to an actual armed attack, and for collective self-defense to be justified, the nation under attack must request assistance against that armed attack.[313] Because the U.S. failed to meet either of these requirements, the ICJ found that neither Article 51 nor Article 52 justified the U.S.'s violation of the principles in Article 2.[314]

While the U.S. claims that this decision is not legally binding,[315] the decision strongly suggests that Article 51's self-defense

307. For example, for the Libyan bombing mission to be considered consistent with Article 51, as President Reagan claimed, the isolated disco bombing in Germany would have to be considered an "armed attack" against Germany. *See White House Lays "Direct Responsibility" in Blast in Berlin to Quaddafi*, N.Y. TIMES, Apr. 15, 1986, at A1 (discussing the U.S. bombing raid as being retaliation for the terrorist bombing in Berlin).

308. *See, e.g.* The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) (finding that the President is charged with the duty to determine the nature of the attack and "bound to resist force by force"). Under this rationale, it may be argued that the President is the only one to determine when a member is under attack and if the situation is a matter of self-defense.

309. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4 (June 27).

310. *Id.* at 21-22.

311. *Id.* at 99, 146-47 (deciding that the U.S. breached its obligations under international law in various ways).

312. *Id.* at 104.

313. *Id.* at 103-04.

314. *Id.* at 146-47.

315. *See* Letter from Charles Schultz, U.S. Secretary of State, to U.N. Secretary General (Oct. 7, 1985) *available in* CARTER & TRIMBLE, *supra* note 21, at 323 (refuting the compulsory jurisdiction of the International Court of Justice thereby relieving the legal effect of the order on the U.S.).

clause will not legally justify any presidential use of force simply because it is branded as defensive. Therefore, except when military actions are taken in response to direct attacks against the U.S. or the U.S. is specifically requested by a country under attack, all other non-U.N. related presidential uses of force should be considered inconsistent with the U.N. Charter and a direct violation of the President's constitutional duty to enforce it.

b. U.N. Authorized Military Actions and U.S. Law

When the President deploys troops in accordance with U.N. authorized missions he is no longer violating the U.N. Charter, however, the President finds himself in another constitutional dilemma because such unilateral deployments violate the "unambiguous statutory language" of the UNPA.[316] As previously discussed, the UNPA essentially forbids the President to deploy troops to U.N. authorized missions in the absence of an Article 43 "special agreement" unless congressional approval is received. In *Youngstown*, Justice Jackson generally described the President as being in his "lowest ebb" of constitutional authority when he is in direct conflict with Congress.[317] Therefore, it follows that when the President deploys troops to fulfill Chapter VII, Article 42 missions without congressional authority he is in his "lowest ebb" of constitutional authority, and in the words of Justice Jackson, is "most vulnerable to attack and in the least favorable of possible constitutional postures."[318] While some may be quick to argue that the *Youngstown* analysis should not apply to issues of foreign affairs, it should. First, Jackson's analysis was not limited to strictly domestic affairs[319] and the Supreme Court has subsequently applied his presidential analysis to international affairs.[320] Second, even if the analysis is limited to domestic affairs, recent Presidents admit that the lines between domestic and foreign affairs is blurring to such a point that it now seems reasonable to conclude that the

316. FISHER, *supra* note 14, at 84-85.

317. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

318. *Id.* at 640.

319. *Id.* at 635-38. The three part test advanced by Jackson does not make distinctions for domestic or international affairs. *Id.* Jackson implied this by interpreting *Curtiss-Wright* to mean that while the President may act in foreign affairs without congressional authority he may not act "*contrary* to an Act of Congress." *Id.* at 635 n.2 (emphasis added).

320. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 668 (1981) (Rehnquist, J.) (stating that "Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing [p]residential authority to act *in any given case*.") (emphasis added). *See also* United States v. Guy W. Capps, 204 F.2d 655, 659 (4th Cir. 1953) *aff'd* United States v. Guy W. Capps, 348 U.S. 296 (1955) (applying Jackson's analysis to the President's power to regulate international trade where Congress has constitutional power).

President's continued violation of the UNPA is not strictly a foreign affairs issue and therefore outside the analysis in *Youngstown*.[321]

Despite the UNPA limitations, presidential supporters may argue that the limitations within the UNPA have been modified concerning the initial deployment of troops to U.N. missions as a result of the subsequent enactment of the War Powers Resolution (WPR).[322] The WPR, enacted in 1971, imposes requirements upon the President before and during troop deployments.[323] However, it may be argued that the WPR authorizes the President to unilaterally commence and maintain hostilities for sixty days before requiring congressional authorization.[324] However, even if this understanding of the WPR is accepted as true, the sixty day allowance would not apply to U.N. missions. As stated by the Supreme Court, when two statutes potentially cover the same situation, the one more specific to that situation will control.[325] Based on this principle, the UNPA which deals with, and only with, U.N. deployments, would have control over U.N. missions rather than the WPR that deals with military deployments in general. As a result, because the UNPA forbids the unilateral deployment of troops to Chapter VII, Article 42 missions, the WPR's potential sixty day allowance has no significance to U.N. missions. Furthermore, even if the UNPA did not apply to the first 60 days of a

321. For example, in 1992, President Bush stated that one "cannot separate foreign policy from domestic." Interview With Harold Green of KABC-TV in Los Angeles, California, PUB. PAPERS 1629 (Dec. 17, 1991). However, the opposite conclusion can also be drawn. If everything is now to be considered foreign affairs, under the *Curtiss-Wright* analysis, the President would have unlimited power in all affairs. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-16 (1936) (holding that the President does not require affirmative grants of power from the Constitution to conduct foreign affairs).

322. War Powers Resolution, 50 U.S.C. § 1541 (1994). Similar to the analysis on treaties, a subsequent inconsistent statute will nullify a prior statute or part thereof. *See, e.g.*, New York Telephone Company v. New York State Department, 440 U.S. 519, 567 (1979) (stating that a subsequent statute may repeal or modify a previous statute).

323. *See* 50 U.S.C. § 1543 (requiring in part that the President present a writing to Congress setting forth the circumstances and authority for the military deployment when he expects U.S. soldiers to enter hostilities).

324. *C.f.* 50 U.S.C. § 1544(b) (providing that "[w]ithin sixty calendar days after a report is submitted or is required to be submitted pursuant to Section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Forces . . . unless the Congress" has authorized the mission or is "physically unable" to provide such authorization); Conyers v. Reagan, 765 F.2d 1124, 1125 (D.C. Cir. 1985) (dismissing suit on grounds of mootness because the presidential military deployment ended before the sixty days stipulated in the WPR).

325. Edmond v. United States, 117 S. Ct. 1573, 1578 (1997) (stating that "[o]rdinarily, where a specific provision conflicts with a general one, the specific governs").

U.N. related mission, the WPR expressly prohibits the unilateral enforcement of treaty obligations by the President as a means to justify troop deployments.[326] So no matter which statute controls, the end result would largely be the same and as a result the President would find himself in violation of U.S. statutory law and ultimately operating in his lowest "ebb" of constitutional authority.[327] Yet, perhaps even more startling, where Congress has laid down specific procedures to deal with such military crisis, the President is still allowed to continually violate them.

V. CONGRESS, THE COURTS, AND THE LEGACY OF "NEW'S WORLD ORDER"

Certainly, the current state of presidential war making remains unclear. However, it is not without limitations, and it must be realized that in relationship to unilateral presidential deployments on U.N. missions or otherwise, the President is potentially acting unconstitutionally or at least in his 'lowest ebb' of constitutional authority. Nevertheless, such a realization would not have surprised the Founding Fathers; in fact they anticipated it.[328] As previously discussed, this is why our government is one of separated powers. Though, what the Founding Fathers did not seem to have anticipated is the apparent apathy of the Courts and especially Congress to check such arbitrary uses of presidential military force.[329] This Part briefly examines the role of the other two

326. 50 U.S.C. § 1547 (a)(2). This Section states that "[a]uthority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred . . . (2) from any treaty . . . unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces . . . ." *Id.*

327. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (stating that when the President acts inconsistent with Congress' express will, "he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter").

328. The Declaration of Independence makes clear that the Founding Father were well aware of the tyranny that can develop when all power resides in a single leader. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (declaring that the "History of the present King of Great-Britain is a History of repeated Injuries and Usurpations, all having in direct object the Establishment of an absolute Tyranny over these States"). Thomas Jefferson stated that the "powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others." SOFAER, *supra* note 14, at 18-19. *See also Youngstown*, 343 U.S. at 650 (Jackson, J., concurring) (stating that the Founding Fathers "knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation").

329. *Cf.* FISHER, CONFLICTS, *supra* note 107, at 87 (stating that Madison "could not foresee the vast quality of legislative power to be delegated to the President . . .").

branches of government in allowing the development of presidential war making and discusses the policy implications of the Michael New case that all branches of the government should consider before allowing or ordering military deployments.

A. *The Courts and the Political Question Doctrine*

Despite hearing cases on presidential war powers in the past, the Judicial Branch has generally taken a "back seat" in determining the proper balance of such powers in recent decades.[330] As a result, some claim that the Court has indirectly allowed a broadening of the President's war powers.[331] Much of the rationale for not hearing war power cases is based on the political question doctrine. However, this legal doctrine is often criticized and generally accepted as having nothing to do with politics.[332] The basic premise of this doctrine is that the courts should not hear a case if "there is a lack of judicially discoverable and manageable standards for resolving" the issue.[333] More recently, the courts have found other reasons for not hearing war power questions, holdings that plaintiffs lack standing[334] or that cases lack controversy.[335]

---

330. WESTERFIELD, *supra* note 14, at 25. Westerfield argues that the Supreme Court has been "reluctant" to decide cases either for or against the President or Congress and, despite the attention that the war power debate gets from academics, there have been relatively few cases brought to the courts. *Id.* Fisher claims that even though the courts can help to clarify constitutional issues, they have "consistently refused to reach the merits in war power cases." FISHER, *supra* note 14, at 197-98.

331. *See, e.g.*, Yoo, *supra* note 44, at 184 (claiming that the courts failure to hear war power cases has allowed the President to expand his war making potential).

332. *See, e.g.*, ELY, *supra* note 14, at 55 (stating that the "'political question doctrine' is a little like the 'Holy Roman Empire' - not simply because it's doubtful that it even exists any more . . . but also because it's not clear that any of the label's words was ever applicable").

333. Ange v. Bush, 752 F. Supp. 509, 512 (D.D.C. 1990) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)) Additionally, the Court in *Baker* listed five other rationales for not hearing cases under the political question doctrine. *Baker*, 369 U.S. at 217. These are: (1) finding a "textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) the "impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion;" (3) the "impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of the government;" (4) an "unusual need for unquestioning adherence to a political decision already made;" or (5) the "potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.*

334. *See, e.g.*, Dornan v. United States Secretary of Defense, 851 F.2d 450, 451 (D.C. Cir. 1988) (holding that the plaintiff lacked standing); Pietsch v. Bush, 755 F. Supp. 62, 66 (D.N.Y. 1991) (holding that even though the plaintiff claimed that he was made "an accessory to murder against his will" as a result of the Gulf War, he failed to establish a "distinct and palpable injury" and therefore lacked standing).

While the Supreme Court has indicated that it will not sit quietly by in an "instance of a manifestly unauthorized exercise of power,"[336] presently the courts would seem more determined to allow Congress and the President to settle the war powers dispute alone.

Despite the many courts that have refused to hear or decide cases dealing with the war power issues, one district court judge indicated that President Bush's troop deployment to Iraq could have been enjoined if a majority of Congressmen had brought the action.[337] However, it is not clear that courts should hear such cases even if they could overcome the political question doctrine[338] because the Constitution already provides Congress with all the power necessary to effectively enjoin military action through the power of the purse.[339]

B. Congress and Politics as Usual

Ultimately, the reason for the President's usurpation of war power is directly attributable to a lack of congressional resistance.[340] Many courts and commentators have argued that Con-

335. *See, e.g., Ange*, 752 F. Supp. at 514 (holding that the plaintiff's claim was not ripe because the threat that the President may be involving the U.S. in a war without congressional approval is purely speculative).

336. *Baker*, 369 U.S. at 216. While this statement indicates that the Court will step into separation of powers controversies, the phrase "manifestly unauthorized" is not defined by the Court in *Baker*. *Id.*

337. Dellums v. Bush, 752 F. Supp. 1141, 1151 (D.D.C. 1990). The *Dellums* court reasoned that because only a majority of Congress could declare war, only a majority of Congress could properly request a court to enter an order to prevent one. *Id.*

338. *See, Ange*, 752 F. Supp. at 514 (indicating that the court should not meddle in the allocation of constitutional powers between the President and Congress). *But see* Holtzman v. Schlesinger, 414 U.S. 1316, 1317 (1973) (Douglas, J., on reapplication to vacate stay order) (arguing that the Court should have granted certiorari even though generally the "Judiciary is probably the least qualified branch" to determine foreign policy issues); Da Costa v. Laird, 405 U.S. 979 (1972) (Douglas, J., dissenting) (arguing in favor of issuing a writ of certiorari).

339. *See* U.S. CONST. art I, § 9, cl. 7 (providing that Congress shall have power over the appropriation of money). Fisher argues that because Congress holds the power of the purse, it can effectively end any military action in which the President enters U.S. forces without congressional authority. FISHER, *supra* note 14, at 200. *C.f.* Drinan v. Nixon, 364 F. Supp. 854, 858 (D. Mass. 1973) (reasoning that courts should only decide separation of power cases if there is a "clear conflict between the branches . . . ").

340. Despite the failure of past Presidents to seek congressional authority to deploy troops, Ely argues that Congress had failed "either to tighten obvious loopholes in the relevant legislation or even to enforce existing requirements." ELY, *supra* note 14, at 49. Further, some commentators have called the present state of affairs between Congress and the President a "*conspiracy*," whereby each branch enhances their "political fortunes" at the expense of the American people. *Id.* at 54 (emphasis added). In reference to Vietnam, President Ford stated that, "to pretend that [Congress] had been innocent bystand-

gress' continual funding of the President's military deployments is really a silent endorsement of the President's customary unilateral use of force.[341] However, it is more likely that Congress is in a position where it may be reactionary.[342] Such a position allows the benefit of hindsight, and only after the President has acted, do congressmen either endorse or criticize the military action depending on its overall public support.[343]

Though this may be a somewhat cynical view of the legislature, others have promoted the alarming idea that Congress is simply no longer interested in participating with military deployments.[344] Nevertheless, it should be noted that Congress has not completely taken itself out of the picture, especially in recent decades. First, statutes such as the WPR, the UNPA, and more recent proposals such as the United States Armed Forces Protection Act of 1996 [345] and The Peace Powers Act of 1995,[346] indicate an attempt by Congress to regain a role in war making, even though such attempts are sometimes viewed as potentially unconstitutional.[347] Furthermore, as practiced most recently in Somalia, Congress has not forgotten the power of the purse to end military actions.[348]

---

ers and that the entire mess was President Nixon's or his White House predecessor's fault [is] simply not the truth." TURNER, *supra* note 14, at viii.

341. *See, e.g.*, Orlando v. Laird, 443 F.2d 1039, 1043 (2d Cir. 1971) (stating that continual funding is congressional authorization); WESTERFIELD, *supra* note 14, at 141-47 (arguing that Congress did indirectly support the military deployment to Iraq before they formally passed the resolution in support of it).

342. ELY, *supra* note 14, at 49.

343. *See* TURNER, *supra* note 14, at 159, 160 (claiming that "[p]residential initiatives that are perceived by the public as being successes are routinely praised - irrespective of clear violations of the war powers statute - while otherwise similar operations that fail are denounced as executive lawbreaking" and that "congressional response to war powers issues has reflected an unwillingness to be held accountable for risky decisions").

344. ELY, *supra* note 14, at 47. *See* TURNER, *supra* note 14, at 160 (citing former Senator Thomas Eagleton, in reference to the Vietnam War, as stating that "[f]inally . . . I came to the conclusion that Congress really didn't want to be in on the decision making process as to when, how, and where we go to war").

345. United States Armed Forces Protection Act of 1996, H.R. 3308, 105th Cong. (1996) (requiring that U.S. armed forces be under U.S. control during U.N. missions).

346. Peace Powers Act of 1995, S. 5, 104th Cong. (1995) (requiring that U.S. armed forces to be under U.S. control during U.N. missions and that the President advise Congress at least 15 days before a U.N. military deployment).

347. *See, e.g.*, TURNER, supra note 14, at 117 (suggesting that the WPR may be unconstitutional).

348. 107 Stat. 1475, § 8151(b)(2)(B) (requiring that funds for Somalia would terminate in March 3, 1994). *See also* Boland Amendment, 98 stat. 1935, sec. 8066(a) (1984) (limiting money made available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involve in military operations in Nicaragua). Even though Rea-

Nevertheless, unless Congress enforces such legislation through the courts or has the courage to reduce funds prior to full deployment, Congress will have done nothing less than allow the President to accomplish what the Founding Fathers were dead set against: the unrestricted deploying of U.S. armed personnel into hostilities by a single individual.[349]

C. The Michael New Legacy: "New's World Order"

Michael New's defense team gathered a vast amount of evidence to indicate that the presidential order deploying New's unit to Macedonia lacked constitutional authority.[350] Yet, in spite of this, New found no relief by relying on the two branches of government that are constitutionally empowered to keep the President's abuses in check.[351] Moreover, beyond the constitutional arguments against such unilateral presidential deployments, a powerful policy argument seems to be overlooked concerning soldiers' morale when sent to battle without express congressional support. Whether New's displeasure with such deployments was unique, or simply a reflection of the overall attitude among soldiers is unclear. Though the chance of other soldiers coming for-

---

gan signed the Boland amendment, he stated that "Congress had overstepped its powers and that the administration would pursue its course in Nicaragua.". FISHER, CONFLICTS, *supra* note 107, at 220.

349. *Cf.* 2 RECORDS, *supra* note 84, at 318. At the Constitutional Convention of 1787, delegate Elbridge Gerry stated that he "never expected to hear, in a republic, a motion to empower the Executive alone to declare war." *Id.*

350. *Court Martial*, *supra* note 7, §§ iii-v. The Michael New defense team has advanced four interrelated issues to support the illegality of New's deployment to Macedonia. *Id.* First, they claim that the order to wear the United Nations uniform is contrary to Army regulations and the Constitution. *Id.* § iv. This is based on Army Regulation, AR 670-1, that prohibits the wearing of any foreign badges or insignias on a U.S. military uniform unless those symbols have gained congressional approval. *Id.* Next, the defense team claims that the deployment is contrary to the UNPA because, despite claims that the deployment was made under U.N. Chapter VI, the evidence supports that it was actually under U.N. Chapter VII. *Id.* § v; *see also* 142 CONG. REC. H3213 (daily ed. Mar. 29, 1996). Representative Bartlett stated:

> [O]f these 97 U.N. Security Council resolutions [concerning the Bosnia mission], 27 of these resolutions specifically refer to chapter 7. They say that it is a chapter 7 operation. Interestingly, not one of them, not one of them refers to [the Bosnia] operation as the chapter 6 [operation] that the President said it was.

Id. Third, the defense team claims that placing U.S. military personnel under U.N. tactical control is a violation of the President's duty as Commander-in-Chief. *Court Martial*, *supra* note 7, § iii. Finally, the Team argues that the President has overstepped his constitutional power by delegating his Executive Power to the U.N. *Id.* § v.

351. *See* U.N. CONST. art. 1, § 9, cl. 7 (providing Congress the power to either provide or eliminate funding for all military missions); *id.* at art. III, § 2 (providing the courts with the power to hear all cases arising from the Constitution, laws of the United States and treaties).

ward is probably remote as New's dishonorable discharge most likely acted as a strong deterrence to stem further questioning by soldiers of such unilateral military deployments.

However, the potential that such concerns are more common place than publicized should not be viewed as strictly theoretical. This is supported by statements of the district judge in the *New* case suggesting that allowing New a stay would "create a good deal of confusion about the lawfulness of such deployments." [352] If this potential for confusion is indicative of soldiers' attitudes concerning such military deployments, then the President, Congress, and the Courts should consider this when dealing with issues of military deployments.[353] Vietnam has tragically shown what can happen when soldiers and a nation lose faith in the purposes and authority for a military action.[354] While today's army is all volunteer, there is no reason to think that a similar lack of morale could not again develop if military deployments continually fail to enjoy support from all branches of the government. It is for this reason, perhaps even more than the constitutional arguments, that a process must be developed that works with the modern need for military force while also protecting and preserving the imperative checks and balances inherent in the Constitution.

VI. "THAT WHICH DESTROYETH KINGS"[355]

While the Constitution provides each branch with the power and responsibility to keep the others in check, if even one branch disregards its constitutional duty, the whole system fails the American public.[356] This Comment proposes that Congress take

352. United States v. Perry, 1996 WL 420175 at *2 (D.D.C. 1996). *See also* United States v. Perry, 919 F. Supp. 491, 497 (D.D.C. 1996) (stating that the consequence of finding in favor of New would hurt military "discipline, obedience and confidence"). Furthermore, the district court found that New had, in light of the UNPA, "raised important issues on the merits" concerning the legality of a presidential order calling for the deployment of troops in accordance with U.N. missions. *Perry*, 1996 WL 420175 at *1.

353. *C.f.* Holtzman v. Schlesinger, 414 U.S. 1316, 1318 (1973) (Douglas, J., on reapplication to vacate stay order) (emphasizing the inappropriateness of the President taking "life in violation of the Constitution").

354. *See* WESTERFIELD, *supra* note 14, at 4 (stating that "[t]he Vietnam experience permanently traumatized the world and left a psychological scar that is visible every time a president goes before the American people to brief them on planned or current foreign intervention with American troops"). *See also* EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 175 (1982) (describing the need for both the President and Congress to work together as the "Vietnam War's most important lesson . . .").

355. *Proverbs* 31:3 (King James).

356. *C.f.* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593-94 (1952) (Frankfurter, J., concurring) (stating that the importance of maintaining Congress' role in military deployment is to ensure that the presidency does not develop into a dictatorship).

two actions to protect against potential arbitrary use of the military effectively, while also ensuring that the U.S. maintain its present capability to handle any international crisis. First, Congress should utilize the courts to interpret the U.N. Charter in light of U.S. statutes and determine whether U.N. Security Council resolutions calling for military force authorize the President to deploy troops without congressional authorization. Second, Congress should create a list of perquisites that must be met before Congress will politically and financially support a presidential military deployment, whether related to the U.N. or otherwise.

A. Judicial Interpretation

While utilization of the courts is by no means a necessity for Congress to reassert itself in the process of military deployments, it would assist in clarifying the duties and obligations under the U.N. Charter. The purpose would not be to define the President's power either as Commander-in-Chief, Chief Executive or even his proper role in foreign affairs. It seems obvious that the courts would not hear such a case.[357] Rather, Congress would be utilizing the courts in a manner in which they are accustomed: the interpretation of treaty obligations,[358] and their relationship to congressional legislation.[359]

The importance of this action is twofold. First, the problem of unilateral presidential troop deployments to fulfill U.N. Security Council resolutions is not one that Congress may properly solve by itself. It may be argued quite correctly that if Congress opposed a U.N. related presidential troop deployment it could terminate it by

357. While courts have heard cases involving these issues in the past, *e.g., Youngstown*, 343 U.S. 579 (1952); United States v. Curtiss-Wright Export Corp. 299 U.S. 304 (1936), in recent decades the courts have consistently refused to hear such cases. *See, e.g.*, Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987).

358. The Supreme Court often interprets treaties. *See, e.g.* United States v. Stuart, 489 U.S. 353, 370 (1989) (interpreting a treaty between Canada and the U.S. and holding that the convention did not require a summons for IRS investigations); Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 190 (1982) (interpreting a treaty between Japan and the U.S. and holding that the treaty's plain meaning would be enforced); Kolovrat v. Oregon, 366 U.S. 187, 195 (1961) (interpreting a treaty between Serbia and the U.S. and holding that the deceased's personal property could go to Serbian relatives).

359. *See* U.S. CONST. art. III, § 2. This Section provides that "[t]he judicial Power shall extend to all Cases . . . arising under . . . Laws of the United States, and Treaties made, or which shall be made under their authority . . . ." *Id. See, e.g.* Diggs v. Schultz, 470 F.2d 461, 465-66 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1975) (finding that in relationship to a Security Council resolution, a subsequent congressional act which is in "blatant disregard" of a Security Council resolution shall not be considered a violation of a treaty obligation because it invalidates the resolution as it concerns the U.S.).

eliminating its funding.[360] However, while this would end the military mission, it would not solve the underlying problem because if the U.S. is truly obligated to fulfill Security Council resolutions the elimination of funds would potentially be a violation of international law.[361] Therefore, without judicial interpretation, Congress is in the dark as to whether it may properly use its constitutional powers to limit such U.N. related presidential troop deployments.

Secondly, until the courts interpret the U.N. Charter, there is the strong possibility that the President is incorrectly relying on U.N. Security Council resolutions as authority for military deployments, and as a result is acting contrary to the Constitution. For even if it is assumed that mutual security treaty obligations could justify a presidential military deployment without congressional authorization, a literal reading of the Charter seems to indicate that the Security Council cannot presently create a legally binding Article 42 troop deployment resolution. However, even if it could legally obligate the U.S. without the "special agreements" discussed in Article 43, the UNPA would nullify this obligation because it requires that "special agreements"[362] exist before the President may unilaterally fulfill a Security Council mission.[363]

However, judicial interpretation will not in and of itself increase Congress' role in military deployments.[364] Therefore, no matter whether the courts ever define the obligations under the U.N. Charter as binding or otherwise, if the constitutionally intended balance of the war powers is to be restored, Congress must find a practical way to reassert itself into the decision making process without unduly handicapping the U.S. military's effectiveness.

---

360. *See* U.S. CONST. art I, § 9, cl. 7 (providing that Congress shall have power over the appropriation of money). Fisher argues that because Congress holds the power of the purse, it can effectively end any military action in which the President enters U.S. forces without congressional authority. FISHER, *supra* note 14, at 200.

361. *C.f.* Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 944-45 (D.C. Cir. 1988). In a similar situation, the court questioned whether Congress' decision to disregard an ICJ decision under Article 94 would "pass muster under international law" finding that such action "may well violate principles of international law." *Id.* at 934.

362. United Nations Participation Act of 1945, 22 U.S.C. § 287d (1994 & Supp. 1996) (requiring that congressional approval be obtained before the President can deploy troops to a U.N. mission).

363. *C.f.* Reid v. Covert, 354 U.S. 1, 18 (1957) (finding that subsequently enacted legislation will nullify an inconsistent international agreement).

364. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring) ("I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems.").

B. Imposed Congressional Standards

For Congress to reassert itself in the decision making process, it should establish a list of prerequisites that must be met before Congress will politically, and more importantly, financially support a presidential military operation.[365] The purpose of creating such prerequisites is to encourage that prior to a troop deployment both the legislative and executive branches of government fulfill their constitutional duties with respect to military operations. The importance of Congress' involvement in this process was of the utmost concern to the Founding Fathers and should not be disregarded today. Congressional involvement is still the only immediate way to fight against the potential for unrestricted presidential use of force.[366]

The creation of prerequisites would not necessarily indicate that the President is required to receive prior congressional authorization before every proposed troop deployment. Rather the prerequisites should simply be designed to influence, however strongly, the President's decisions concerning potential deployments. When the President felt a threat to national security that he believed justified unilateral action he could immediately determine whether Congress is likely to share this view and financially support the deployment. In this way, Congress could still influence the President in situations that were deemed to require immediate military action.

Yet, equally as important, the incorporation of Congress into the troop deployment process would greatly assist the President. While this may seem counter intuitive, the creation of such prerequisites would provide a measure of consistency and predictability concerning the potential for congressional support when the President contemplated using military force for critical situations or when negotiating with foreign governments. Even though the President may already consult with Congress generally in such situations, the creation of prerequisites would work to make the process more formal and ensure that a greater number of Senators and Representatives have an effective opportunity to voice their opinions concerning the sending of U.S. soldiers into harms way. Ultimately, the effectiveness of such a list would be based on the prerequisites Congress chose to include.

Admittedly the idea that simply creating a list of prerequisites will solve all war powers controversies sounds either naïve, idealistic or perhaps both. Yet, such a congressionally created list

365. *See* FISHER, *supra* note 14, at 192, 199-201 (calling also for Congress to take a more active part in U.S. war making by utilizing its constitutional powers of the purse).

366. *C.f. Reid*, 354 U.S. at 40 (stating that "[o]urs is a government of divided authority on the assumption that in division there is not only strength but freedom from tyranny").

of prerequisites should succeed where other plans have failed and is not as open to attack as one may initially believe. First, despite the reasoning in *Curtiss-Wright* defining the President as the "sole organ of the federal government in the field of international relation,[367] the Founding Fathers intended for Congress to take part in foreign affairs. The Constitution provides that Congress shall regulate commerce between the U.S. and foreign nations,[368] have the power to change the U.S.'s international legal standing through declarations of war,[369] and have the power to fund or to eliminate funding for any U.S. foreign operation, military or otherwise.[370] Additionally, the Constitution provides that the Senate must provide advice and consent before any treaty may be ratified[371] and approve the nominations of Secretaries of State and all Ambassadors.[372] Furthermore, the *Curtiss-Wright* opinion, which worked to bolster the President's predominance in foreign affairs, should no longer be considered relevant to modern day issues. This is because the distinction drawn by the Court between foreign and domestic affairs is becoming more and more difficult to define and recent Presidents have even commented that very little if any difference exists today between these two concepts.[373]

Furthermore, such set of prerequisites would not necessarily handicap the U.S. military's ability to act in today's modern world even with the threats from new military technology. As previously mentioned the prerequisites should not be so cumbersome as to infringe on the President's ability to unilaterally defend against imminent threats to national security. The prerequisites should, however, outline what is to be considered an imminent threat to national security. Furthermore, because many deployments are now proposed weeks or even months before U.S. soldiers are deployed or enter hostilities, incorporating Congress into the decision making process should not cause an unnecessary delay to such missions.[374] Additionally, such a list of prerequisites would have

367. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (finding that the President is the "sole organ of the federal government in the field of international relations . . .").

368. U.S. CONST. art. 1, § 8, cl. 3.

369. *Id.* at cl. 11.

370. *Id.* § 9, cl. 7.

371. *Id.* at art. II, § 2, cl. 2.

372. *Id.*

373. *See, e.g.*, Interview With Harold Green of KABC-TV in Los Angeles, California, PUB. PAPERS 1629 (Dec. 17, 1991) (President Bush stating that one "cannot separate foreign policy from domestic").

374. *See, e.g.*, WESTERFIELD, *supra* note 14, at 125, 159 (reporting that President Bush first started deploying troops to the Persian Gulf on August, 7 1990 but they did not enter actual hostilities until January 16, 1991 when Bush commenced the attack on Iraq). Further indicative of the advanced planning time for modern military deployments is President Clinton's recent statement that any attack against Iraq would not be until the end of the Mus-

no similarity to neutrality statutes which are often criticized as actually encouraging aggression by foreign governments.[375] Rather than limiting war, the list of prerequisites is simply intended to change the process by which the U.S. goes to war. While it is possible that some proposed missions may not occur despite strong presidential support, it is equally as true that other international crises will receive U.S. military assistance resulting from congressional support even if they would not normally merit presidential support.

In addition, potential ambiguity in the prerequisites will not necessarily negatively affect Congress potentially for becoming involved in the troop deployment process. In fact, such ambiguity may actually increase Congress' role in military deployments. This would likely occur in situations when a proposed mission does not clearly meet the prerequisites and the President would decide to gain further congressional support rather than risk reduced funding or no funding after the operation has begun. However, the potential for such ambiguity could be greatly reduced by incorporating and improving upon language in recently published presidential standards,[376] proposed legislation,[377] and previously enacted statutes like the WPR.[378]

Yet, despite the potential similarities between such prerequisites and previous statutory schemes, the prerequisites should not be subject to constitutional attack. Unlike the WPR, the proposed prerequisites would not attempt to create new powers or infringe on any existing congressional or presidential powers. [379] Rather,

---

lim holy month of Ramadan. Tim Weiner, *U.S. Lists Options on use of Force in Iraq Standoff*, N.Y. TIMES, Jan. 25, 1998, at A1. However, even if the Proposal slowed non-emergency military deployments, this "clogging" of the deployment process would not be out of line with attitudes of the Founding Fathers. *See, e.g.* 2 RECORDS, *supra* note 84, at 319.

375. *See* TURNER, *supra* note 14, at 129 (discussing how neutrality acts are "counter productive as an instrument for promoting peace" because they actually undermine the effectiveness of military deterrence to maintain peace through force).

376. *See, e.g.*, Bureau of Int'l Org. Affairs, U.S. Dep't of State, Pub. No. 10161, The Clinton Administration Policy on Reforming Multilateral Peace Operations, Presidential Decision Directive 25 (1994) (stating in part that the President will report to Congress monthly on U.N. operations and command structures of proposed U.N. military missions). Congress should find little opposition to including such provisions in the proposed prerequisites because the President already agreed to meet such requirements.

377. *See, e.g.*, United States Armed Forces Protection Act of 1996, H.R. 3308, 105th Cong. (1996); Peace Powers Act, S. 5, 104th Cong. (1994).

378. *See* War Powers Resolution 50 U.S.C. § 1543 (a) (1994) (imposing a reporting requirement on the President when troops enter hostilities). Similar to this WPR section, the proposed prerequisites could require similar reporting within certain time periods if Congress is to continue funding the mission.

379. *C.f. id.* § 1544 (c) (requiring the President to remove troops engaged in hostilities without a declaration of war if directed by a congressional concurrent resolution). This provision allows Congress a legislative veto which ap-

the prerequisites would simply be utilizing the power of the purse in a manner intended by the Founding Fathers,[380] and the authority to create such prerequisites should arguably fall firmly within Congress' right to make rules and regulations concerning all the allocated powers in the Constitution.[381]

Lastly, and by far the most apparent problem that may exist if such prerequisites were created is whether Congress actually would or could enforce it. The first aspect that may be problematic to the effective enforcement of such prerequisites is the influence of individual and party politics.[382] While such pressures may be felt, fortunately recent congressional action concerning military deployments indicates that partisan politics can be put aside when soldiers' lives are put at risk.[383] Nevertheless, it is not hard to imagine that a President could deploy troops into a situation that fails to meet the prerequisites but also does not allow Congress the practical ability to eliminate funding without exposing the U.S. deployed troops to increased risk.[384] However, in such situations, Congress may expose the President's indiscretion to public attack by indicating that the deployment did not meet the prerequisites and thereby subjecting the President to negative publicity. Ideally the potential political attack would be so great on the President for failing to meet the prerequisites that Congress could still effectively influence an ongoing mission despite the practical inability to eliminate funding.

Secondly, Congress may fear a court determination finding that U.N. Security Council troop deployments are presently binding because it would bolster the President's claims for unilateral war making. However, even if the courts did find such military deployment resolutions binding, Congress may nullify an other-

---

pears to be unconstitutional after the Supreme Court ruled a similar legislative veto unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). TURNER, *supra* note 14, at 117.

380. *See* U.S. CONST art. I, § 9 (Congress' power to control funding). *See also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring) ("While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command.").

381. U.S. CONST art. I, § 8 ("To make Rules for the Government and Regulation of the land and naval forces").

382. *C.f.* Ange v. Bush, 752 F. Supp. 509, 514 (D.D.C. 1990) (stating that many of Congress' powers to control the President may not be "politically popular for legislators").

383. *See, e.g.*, 140 CONG. REC. S10397-489 (daily ed. Aug. 3, 1994) (voting unanimously that the U.N. Security Council resolution calling for deployment of troops to Haiti does not provide presidential authority for such a deployment).

384. *See, e.g.*, Dellums v. Bush, 752 F. Supp. 1141, 1149 (D.D.C. 1990) (finding that the remedy of cutting or eliminating funds to the military operation are "not available to [the congressmen] either politically or practically").

wise binding Security Council resolution.[385] Yet admittedly, congressional nullification of such Security Council resolutions would most likely hurt the U.S.'s credibility in international affairs especially if the President either supported or even proposed the subsequently nullified U.N. resolution. However, the President can reduce the potential for such congressional nullification if the prerequisites are met before the President proposes a militarily related U.N. resolution. Even in the rare instance when a Security Council member other than the U.S. proposes military action, the President could veto the proposed mission if it did not sufficiently meet the prerequisites and thereby decrease the potential for subsequent congressional nullification of a Security Council resolution.[386]

While the creation of such prerequisites will not solve every military deployment problem, it will provide a standard by which Congress can effectively become incorporated into the military deployment decision making process. While such prerequisites may be designed in any number of way, it would be important to create a standard that aims not to control the President, but rather focuses on achieving a balance whereby both congressional and presidential concerns are considered before troops are deployed into combat. Only through such a balance can the system envisioned by the Founding Fathers to protect against arbitrary use of the military be revived.

CONCLUSION

Recent developments in the Persian Gulf region signal the potential that U.S. soldiers will again be involved in a military conflict with Iraq.[387] Whether the U.S. chooses to act with or without the U.N., Congress has ample time to use its constitutional powers to effectively influence the parameters and goals of the eventual mission. However, if Congress does nothing[388] and allows the President to unilaterally risk the lives of U.S. soldiers, it will be nothing less than a tragedy. No longer should the American public

385. *See, e.g.*, Diggs v. Schultz, 470 F.2d 461, 465-66 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1975) (finding that subsequently enacted legislation invalidates a U.N. Security Council Resolution). Further more, the *Diggs* court found that "[u]nder our constitutional scheme, Congress can denounce treaties if is sees fit to do so, and there is nothing the other branches of government can do about it". *Id.* at 466.

386. *See* U.N. CHARTER art. 27, para. 3 (requiring that a Security Council resolution receive at least nine votes in favor and no vetoes from the five permanent members).

387. Douglas Jehl, *A Naval 'Big Stick' Is Brandished*, N.Y. TIMES, Feb. 5, 1998, at A4 (discussing the increased tensions between the U.N. and Iraq).

388. *C.f.* Barbara Crossette, *Clinton and G.O.P. Diverge on Iraq Goal*, N.Y. TIMES, Feb. 5, 1998, at A1 (reporting that bi-partisan politics may jeopardize Congress' ability to provide express authority for the proposed attack on Iraq).

tolerate political bickering by Congress over the issue of presidential war making, whether related to U.N. Security Council resolutions or otherwise. Especially in a time when Presidents seem unlikely to enforce self imposed restrictions, the courts consistently hold that they will not intervene unless Congress does so first, and the potential for continued military deployments is becoming even greater.[389] Congress' reluctance to deal with unilateral presidential war making may be attributed to politics or perhaps the concern that it will lessen its ability to effectively fight presidential deployments if in the future a court finds such presidential action constitutional. Yet if this course of events were to occur, it would be no less ironic than a Greek tragedy, for this country would have done nothing more than produce what it fought so hard to escape: a King.

389. Since the break up of the Soviet Union, the U.N. Security Council has greatly increased it role in deploying troops. Stopford, *supra* note 62 , at 685. In 1987, the U.N. sponsored five operations that deployed 10,000 personnel. *Id.* at 696. The 1987 missions cost member states $233 million. *Id.* By 1994, the U.N. operated 17 missions which deployed over 80,000 troops and cost member states over $3.5 billion of which the U.S. paid for over one third. *Id.* at 696-97. Despite the increase in U.N. mission, the U.S. is presently having trouble gaining international support for the Iraq mission. Barbara Crossette, *The 7-Year Gnaw: Iraq Sees Sanction Backers Straying*, N.Y. TIMES, Jan. 23, 1998, at A6. As a result, Present Clinton stated that the U.S. may be prepared to act with or without the U.N. Security Council. Tim Weiner, *Clinton's Warning to Iraqis: Time for Diplomacy May End*, N.Y. TIMES, Jan. 22, 1998, at A6.