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U.S. War Powers and the United Nations
Security Council

INTRODUCTION

The constitutionally-mandated division of war powers in the United States has promoted a healthy democratic rivalry between the President and Congress, but has also caused ambiguity in the vital power to protect national security.¹ This domestic constitutional issue is further complicated by an increasing global reliance in the post Cold War era on the United Nations (U.N.) and the collective security provisions in its Charter.² The United Nations has added another dimension to the debate on the power to involve U.S. forces in foreign conflicts, raising important issues under both U.S. law and the U.N. Charter.

Article I of the U.S. Constitution gives Congress the power to declare war, raise and support Armies, to provide and maintain a Navy and to make rules for the regulation of these forces.³ According to Article II, "[t]he President shall be Commander in Chief of the Army and Navy of the United States."⁴ A general consensus exists among constitutional scholars that the Framers sought to provide a balance between the President and the Congress with regard to war powers, installing a "democratic check" on the President, in contrast to the historical unilateral war-making powers of kings.⁵ The controversial War Powers Resolution of 1973 (WPR), enacted over President Nixon's veto at the end of the Vietnam War, was designed to constrict further the President's ability to introduce U.S. military forces into hostilities without congressional approval.⁶ Congress intended the WPR to compel it to reassert its constitutional duty regarding war and peace.⁷ It took this action in response to charges that it had been avoiding this duty since

¹ See U.S. CONST. art. I, § 8, art. II, § 2.
⁴ Id. art. II, § 2.
⁵ See, e.g., Jane E. Stromseth, Rethinking War Powers: Congress, the President and the United Nations, 81 GEO. L.J. 597, 597 (1993) [hereinafter Stromseth, Rethinking].
the 1950s when President Truman sent troops to Korea as part of a U.N. police action without formal, explicit congressional authorization. This intention has not been realized in practice as every President since Nixon has routinely denied that he needs authority from Congress to introduce military forces into hostile situations abroad. Like President Truman in the Korean War, Presidents Bush and Clinton have dispatched U.S. armed forces to execute U.N. Security Council Resolutions in the Persian Gulf and Haiti respectively without formal, explicit congressional approval.

The collective security system of the United Nations was devised in 1945 in an effort to restrain the unilateral use of force that had resulted in World War II and to create a mechanism to prevent war and to resolve disputes peacefully. If this effort to avoid aggression failed, the U.N. Security Council could recommend or take action in the form of economic and diplomatic measures, escalating to the authorization of collective military action to restore peace. The Cold War prevented the full implementation of the U.N. collective security system in every situation because the competing interests of the United States and the Soviet Union precluded effective cooperation.

The end of the Cold War has raised expectations around the world for the United Nations to help resolve internal conflicts in places such as Somalia and Haiti and to respond to international conflicts such as Iraq’s invasion of Kuwait in 1990. These rising expectations, whether realistic or not, have led to a call for a bolstering of the power and resources at the disposal of the U.N. Security Council so that it is better prepared to face these increasing burdens. A formalization of the U.N. security apparatus under Article 43, with its provisions for special

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10 Stromseth, *Rethinking*, supra note 5, at 598.

11 U.N. CHARTER arts. 39, 42. The five permanent members of the U.N. Security Council are the United States, Great Britain, France, China and Russia (which replaced the Soviet Union upon its demise).

12 Notable exceptions include the Korean Crisis in June, 1950 when the Soviet representative was absent during the Security Council vote, sanctions against Southern Rhodesia in 1965, and an arms embargo against South Africa in 1977. Stromseth, *Rethinking*, supra note 5, at 598 n.10.


14 See id.
agreements to make troops available on an “on-call” basis for U.N. purposes, is viewed as one way of dealing with these rising expectations.\textsuperscript{16} The formal arrangements would be a realization of the original structural plan for collective security under the U.N. Charter.\textsuperscript{17}

The recent increase in scope and frequency of Security Council-authorized actions involving military force which have been undertaken without congressional approval and the calls for the implementation of Article 43 of the U.N. Charter raise questions about the legality of these U.N. actions under U.S. law. As the U.N. is increasingly looked to for authority before the commencement of military action, the implications of responding to mandates of the U.N. Security Council must be examined, with special attention placed on any transfer of U.S. war powers to an international body such as the United Nations.\textsuperscript{18} Several notable questions arise from this issue.

The first is whether the congressional power to declare war is transferred to the President or the U.N. when U.S. armed forces participate in U.N. military actions without congressional approval.\textsuperscript{19} Even before this issue is addressed, however, it must be determined whether a U.N.-mandated military action should legally be considered war, thus requiring congressional authorization, or if it is not war at all and congressional authorization is therefore unnecessary.\textsuperscript{20} Participation in U.N. military actions by U.S. forces also raises the question of the legality of those forces serving under non-U.S. command.\textsuperscript{21} The answer to this question is, in turn, based on whether the Constitution allows the President to delegate his powers as Commander in Chief to a foreign or international body.\textsuperscript{22} A careful examination of the legality of the U.N. collective security system in the context of the U.S. Constitution is necessary to clarify the ambiguities that consistently arise when the United States contemplates participation in U.N. military actions.

Part I of this Note provides a brief history of U.S. war powers and the U.N. collective security system. This section discusses the ongoing

\textsuperscript{16} See U.N. Charter art. 43.
\textsuperscript{17} See id.
\textsuperscript{19} See id.
\textsuperscript{21} See Glennon & Hayward, supra note 18, at 1575, 1586.
\textsuperscript{22} Id. at 1575.
war powers debate between the President and Congress both before and after the passage of the 1973 War Powers Resolution (WPR) and the impact of the U.N. system on this debate. Part II provides case studies of U.S. actions taken under U.N. auspices in Korea, the Persian Gulf and Haiti. Part III analyzes the unique characteristics of U.N. actions in the context of the war powers laws of the United States and examines the implications of certain proposals for changes to both the U.N. collective security system and U.S. war powers laws. This Note concludes that, as the Founding Fathers intended, presidential primacy in foreign affairs has succeeded in practice for 200 years despite attempts by the Congress to impose constraints and should continue. The Congress has a constitutionally guaranteed role in war powers and foreign affairs, but the WPR is an unnecessary, ineffective, and ultimately unconstitutional way to play it. In the face of the increasing importance of the U.N. collective security system, the current ad hoc system will continue to preserve freedom of action and serve U.S. interests, providing a constitutional way for the United States to participate in international police actions under Chapter VII of the U.N. Charter.


A. The History of War Powers in the United States

The struggle between the President and the Congress over war powers has continued throughout American history as the Constitution granted powers over foreign affairs to each but neglected to provide a final word on which would be dominant. It is therefore quite helpful to look to the original intent of the Founding Fathers for guidance. These men were influenced most heavily by Locke, Montesquieu and Blackstone, who espoused the benefits of executive dominance in foreign affairs. Professor Louis Henkin has observed: "[t]he executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu, and Blackstone."25

24 Robert F. Turner, Repealing the War Powers Resolution 53 (1991). Locke, Montesquieu, and Blackstone argued that legislative bodies lacked the competence to manage foreign affairs because they lacked the essential qualities of unity of design, secrecy, speed, and dispatch. Id.
It should be noted that Article I, Section 1 of the Constitution provides that "all legislative powers herein granted shall be vested in a Congress of the United States . . . ." while Article II is more expansive, granting "the executive power" to the President.\(^{26}\) This important difference made it necessary for the Founders to enumerate each foreign affairs power of Congress, while allowing them to deliver the greater part of the executive foreign affairs power to the President in one short sentence of Article II.\(^{27}\) The President's broad grant of executive power was similar to that of English kings, but the Constitution checked against abuse in several notable areas.\(^{28}\) For example, the Senate was given the power to approve or deny treaties and diplomatic appointments by the President (to ensure the suitability of those appointments), and the Congress as a whole was given the power to declare war and raise and support armies.\(^{29}\) The Founding Fathers considered these grants of power to be an exception to the extensive executive powers granted to the President and were therefore expected to be interpreted narrowly.\(^{30}\)

The Constitution is more explicit in naming the President the "Commander in Chief of the Army and Navy of the United States, and of the militia of the several states . . . ."\(^{31}\) The lack of debate at the Constitutional Convention on this very important issue demonstrates a degree of consensus among the Founders that this power should lie with the President.\(^{32}\) While James Madison was known to be concerned about the concentration of power in the executive, he favored deleting language in the draft Constitution empowering Congress to "make war" and replacing it with "declare war" as this would leave to the executive the power to repel sudden attacks.\(^{33}\) The language was in fact replaced, and because nothing in the constitutional debates indicates that the Framers intended a congressional declaration to precede every use of the military by the Commander in Chief, there was an implicit granting to the President of some measure of power to defend national security without a congressional declaration of war.\(^{34}\)

\(^{26}\) U.S. Const. art I, § 1, art. II, § 1 (emphasis added).
\(^{27}\) Turner, supra note 24, at 55.
\(^{28}\) Id.
\(^{29}\) See U.S. Const. art. I, § 8, art. II, § 2.
\(^{30}\) Turner, supra note 24, at 55.
\(^{31}\) U.S. Const. art II, § 1.
\(^{33}\) Id. at 50.
\(^{34}\) Id.
The Constitution's ambiguous delineation of war powers actually came up quite early in American history in the context of the vexing problem of undeclared war.\(^{35}\) In the midst of the Napoleonic Wars in 1798, President John Adams faced the refusal of France to recognize American rights of neutrality as it captured and destroyed U.S. merchant ships trading with the British.\(^{36}\) Adams used the newly-formed U.S. Navy to fight off the French in an action that he characterized as "neither peace nor war" while deflecting great pressure from Congress for a formal declaration of war.\(^{37}\) President Thomas Jefferson also used the Navy to battle pirates along the Barbary Coast of North Africa for eight months before Congress recognized the existence of a state of war and sanctioned a military response.\(^{38}\)

Justice Washington, writing for the Supreme Court in an 1800 case arising from the naval conflicts with the French, had a prime opportunity to rule on this issue and attempted to characterize the differences between declared war and undeclared war respectively as "solemn" and "imperfect war":

If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation . . . . In such a war, all the members act under a general authority, and all the rights and consequences of war attach to their condition.

But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission.\(^{39}\)

A study performed by the Library of Congress found more than 210 cases in which U.S. armed forces were used abroad between 1798 and 1983.\(^{40}\) The study found that the U.S. Congress issued a declaration of

\(^{35}\) Arthur Schlesinger, Jr., Congress and the Making of American Foreign Policy, 51 FOREIGN AFF. 72, 83 (1972). Between 1700 and 1870 in Europe and America, there were at least 107 cases of hostilities that began without a formal declaration of war and only 10 cases where a formal declaration of war preceded hostilities. Id.

\(^{36}\) See Lehman, supra note 9, at 76.

\(^{37}\) Id.

\(^{38}\) Id. at 76–77.

\(^{39}\) The Eliza, 4 U.S. 37, 39–40 (1800).

\(^{40}\) Lehman, supra note 9, at 57–58.
war only five times during this period, with four of those declarations coming after hostilities had already broken out.41

The cause of the ambiguity in the division of war powers lies with the ambiguous wording of the Constitution itself, which has allowed the gradual accumulation of powers by strong executives.42 Periods of presidential independence in military affairs occurred during the terms of strong men responding to unusual circumstances: Adams, Jefferson, and Madison in the early period, Polk in the Mexican-American War, Lincoln in the Civil War, Theodore Roosevelt on the Panama Canal, Wilson in World War One, Franklin Delano Roosevelt in World War Two, and Truman in Korea.43 These periods of alternating congressional and presidential dominance over war powers suggest that the powers exercised by strong presidents in critical times are personal attributes which are not transferable to the Presidency itself.44

Congressional reactions with deep incursions into presidential power often follow periods of presidential primacy in war powers.45 Several instances of this pattern have occurred throughout American history.46 The most glaring intrusion into executive power has been the passage of the WPR in 1973, which was followed by the weak presidencies of Gerald Ford and Jimmy Carter.47

Congress enacted the WPR after the Vietnam War in an effort to recoup some of the war powers that it believed it had lost to strong executives over the years.48 The WPR’s stated purpose is to “insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces . . . .”49 The Resolution was intended to limit the President’s role as Commander in Chief to circumstances in which a declaration of war, specific statutory authorization or national emergency exists.50 Other sections do, however, seem to permit the President to

41 Id. at 58.
42 See U.S. Const. art. I, § 8, art. II, § 2.
43 Lehman, supra note 9, at 78–79.
44 See id. at 79.
45 Id.
46 See id.
47 See id.
50 Id. § 1541 (c).
use military force without congressional authorization for up to ninety days.51 Procedures were devised to constrain presidential actions and to help achieve these objectives: initial and regular consultation with Congress, written reports to Congress and the “sixty-day clock.”52 Section 1542 of the WPR calls for consultation with Congress in every possible instance prior to introducing U.S. armed forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,” and regularly until the matter is resolved.53 While he is not legally required to do so, the President would be well advised to keep Congress informed because a cooperative relationship resulting in understanding and approval contributes greatly to the potential long term success of foreign policy initiatives.54 The President, however, is not an agent of Congress and cannot be required to consult with it on matters that the Constitution has assigned to his own purview.55

Section 1543 of the WPR includes the reporting requirements for instances in which U.S. Armed Forces equipped for combat are introduced into a hostile environment in the absence of a declaration of war.56 The President must submit a report to Congress within forty-eight hours.57 This report must detail the circumstances, the authority for, and the estimated scope and duration of the involvement.58

Section 1544 of the WPR has proven to be the most controversial and constitutionally problematic section.59 The provision states that within sixty calendar days after a report is submitted under Section 1543, the President shall terminate use of the armed forces unless Congress has either declared war, authorized continuation of the action, or cannot meet because of an attack on the United States.60 The

52 See 50 U.S.C. §§ 1542, 1543(a), 1544(b). Section 1544 of the WPR originally included possible congressional actions in the form of concurrent resolutions (simple majorities in each House of Congress) to remove forces, but the Supreme Court’s ruling in Immigration and Naturalization Service v. Chadha invalidated it when it declared unconstitutional the power of Congress to invalidate actions of the Executive Branch by resolution (legislative veto). See id. § 1544(c); Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919, 944–59 (1983).
54 See Turner, supra note 24, at 110–11.
55 Id. at 110.
57 Id.
58 Id.
59 Lehman, supra note 9, at 95.
60 50 U.S.C. §§ 1543(a), 1544(b).
President may extend the sixty-day period to ninety days upon determining (and certifying to Congress in writing) that the continued use of armed force is necessary for safety reasons in the process of removing the deployed forces. The final provision of Section 1544 allowing a legislative veto over the President's use of the armed forces, even during the first sixty or ninety days, was invalidated when the legislative veto was declared unconstitutional by the Supreme Court.

The primary question raised by the WPR's consultation and reporting requirements concerns the instances and points at which these requirements are activated. Consultations are required when introducing armed forces into "hostilities" or "imminent involvement in hostilities." The ambiguity of the word "hostilities," however, leads to ambiguity in standards. This ambiguity raises the question of how early the President must approach Congress for discussions for them to qualify as consultations under the WPR. There is no "bright-line" standard because it is nearly impossible to set a time limit due to the uncontrollable nature of foreign affairs. The sixty-day clock also presents problems arising from the difficulty in determining the beginning and end of the time period, especially when hostilities are sporadic.

As a result of the vagueness of the WPR, the President has, in practice, ignored and avoided his requirements under the resolution. In the quarter century that has passed since the WPR was enacted, history has shown that Congress behaves just as it did before, supporting presidential action when probability for success is high and it is

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61 Id. § 1544(b).
62 See supra note 52 and accompanying text. The separability provisions of § 1548 served to save the remaining sections of the WPR even after the legislative veto provision was invalidated. See 50 U.S.C. § 1548.
63 Hall, supra note 32, at 106.
64 50 U.S.C. § 1542. A Federal District Court was tasked with defining "hostilities" when it was asked to determine whether U.S. troops in El Salvador were facing imminent "hostilities" but found the issue "nonjusticiable." See Crockett v. Reagan, 558 F. Supp. 893 (D.D.C.), aff'd, 720 F.2d 1355 (D.C. Cir.), cert. denied, 467 U.S. 1251 (1982).
66 Hall, supra note 32, at 107.
67 See id.
68 Id. at 111. During President Reagan's 1987 deployment of the Middle East Force to the Persian Gulf, the forces were not intentionally introduced to hostilities until the September 21 attack on the Iran Ajr, five months after deployment. Id. at 106. After this date, hostilities were neither imminent nor clearly indicated, so even if the attack on the Iran Ajr started the sixty-day clock, the clock stopped because the hostilities ended. Id. at 106-07.
69 Lehman, supra note 9, at 97.
politically expedient to do so.\textsuperscript{70} The WPR is not a necessary instrument for Congress to become involved in the war-making process because its war powers are determined by the Constitution rather than by its own resolutions.\textsuperscript{71} Congress might more effectively address the war powers issue on an \textit{ad hoc} basis rather than with the WPR, since this would enable it to “address [the] substantive issues . . . without [the] procedural distractions.”\textsuperscript{72}

B. \textit{The History of the United Nations Collective Security System}

The idea of collective security dates back at least to 478 B.C. when a group of Greek city-states combined under the leadership of Athens to counter Persia.\textsuperscript{73} A more recent example is the Holy Alliance of Austria, Russia, and Prussia, which was formed in 1815 with the purpose of interceding to protect conservative monarchies from insurrections.\textsuperscript{74} The U.N. collective security provisions, however, are rooted in the League of Nations Covenant of 1919.\textsuperscript{75}

The fatally flawed provisions of Articles 16 and 17 of the League Covenant called upon member states to contribute to a multi-national force upon the recommendation of the League Council when a country’s act of war violated the Covenant.\textsuperscript{76} This collective security plan failed because member states were not required to follow the recommendations of the Council, which had no standing force of its own.\textsuperscript{77} In the wake of World War II, therefore, states endeavored to make the United Nations a body which could not only recommend, but could also take action.\textsuperscript{78}

Aware of the shortcomings of the voluntary measures of the League of Nations, the U.N. Security Council received the authority to issue binding decisions to counter aggression and threats to the peace under Chapter VII of the U.N. Charter.\textsuperscript{79} Chapter VII outlines a steadily increasing level of responses to address the actions of rogue states.\textsuperscript{80}

\textsuperscript{70} \textit{Id.}
\textsuperscript{71} \textit{Hall, supra} note 32, at 127.
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} Glennon & Hayward, \textit{supra} note 18, at 1576. Collective security involves countries combining to create a collective force. \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{See League of Nations Covenant} arts. 16–17.
\textsuperscript{77} \textit{See Glennon & Hayward, supra} note 18, at 1576–77.
\textsuperscript{78} \textit{See Stromseth, Rethinking, supra} note 5, at 598.
\textsuperscript{80} U.N. Charter arts. 39–51.
The Security Council must first recognize that a breach of the peace exists and then decide which actions should be taken in accordance with Articles 41 and 42. At the same time, the Security Council must take provisional measures to prevent an aggravation of the situation. Non-military measures in the form of an interruption of economic or diplomatic relations, communications, or travel provide the first level of coercion. These sanctions are designed to create an increasingly unpleasant atmosphere for the aggressor and encourage him to cease his activity. In practice, however, these sanctions usually fall short of their goal, because either the target endures their effect or members do not fully implement them. Aware of the fact that economic sanctions might prove inadequate, the Security Council has been granted the power to take such military action “as may be necessary to maintain or restore international peace and security.”

The boldest and most far-reaching provision of Chapter VII was Article 43, which envisioned special agreements under which member states would make armed forces available to the Security Council on its call. These agreements were to be negotiated as soon as possible and ratified by member states according to their respective constitutional processes. A Military Staff Committee consisting of the Chiefs of Staff of the five permanent members of the Security Council were to advise and assist the Council on the use and command of the forces at its disposal.

The Truman Administration and the Seventy-Ninth Congress recognized that the Charter’s provisions for the collective use of force raised war powers concerns under the U.S. Constitution. Several senators argued that the war powers of Congress were being transferred unconstitutionally to the Security Council or to the American representative on the Security Council who is appointed by the President. Senators wary of the Charter suggested that a Senate reservation to the Charter

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81 Id. art. 39.
82 Id. art. 40.
83 Id. art. 41.
84 BAEHR & GORDENKER, supra note 79, at 66.
85 Id.
86 See U.N. CHARTER art. 42.
87 Id. art. 43.
88 Id.
89 Id. art. 47.
91 Id.
be included that would require congressional re-authorization for each new force commitment as a check on presidential power. \(^{92}\) Supporters of the Charter contended that this reservation would violate the Charter’s spirit and the President’s constitutional role as Commander in Chief. \(^{93}\) The objections were taken into consideration, but the majority of the Congress supported the Charter with the belief that the United States could provide a limited number of forces to the Security Council under an Article 43 special agreement for police actions, while still preserving the power of Congress to declare war in instances warranting the large-scale mobilization of U.S. forces. \(^{94}\)

The difficulty of defining the scope of the President’s “police” power under the Charter might be alleviated by clarifying these definitions in the actual Article 43 special agreement. \(^{95}\) This agreement would describe the number, type and degree of readiness of units to be dedicated to the Security Council and would have to be approved by Congress according to the United Nations Participation Act. \(^{96}\) If the President wanted to increase the number of forces delegated to the Security Council, he would have to obtain additional authorization from Congress. \(^{97}\)

In 1946, the Security Council summoned the Military Staff Committee and tasked it with drafting a model Article 43 agreement. \(^{98}\) Under the Committee’s model agreement, member states would designate a portion of their domestic forces for U.N. missions but would continue to house, maintain and command those forces until a crisis arose. \(^{99}\) Upon being called by the Security Council for service, the units would retain their own commanders but would fall under the operational control of a Supreme Commander appointed by the Council. \(^{100}\) The United States was supportive of Article 43, but was committed to preserving its right to maintain its own independent forces for deployment and intended to utilize its Security Council veto to dictate when forces could be called upon. \(^{101}\)

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\(^{92}\) Glennon & Hayward, supra note 18, at 1580.

\(^{93}\) Id.

\(^{94}\) See Stromseth, Rethinking, supra note 5, at 604.

\(^{95}\) Stromseth, Treaty Constraints, supra note 90, at 86; see also U.N. Charter art. 43.

\(^{96}\) Stromseth, Treaty Constraints, supra note 90, at 86.

\(^{97}\) Id.

\(^{98}\) Glennon & Hayward, supra note 18, at 1581.

\(^{99}\) Id. at 1582.

\(^{100}\) Id.

\(^{101}\) See id. at 1584.
The realities and rivalries of the Cold War soon brushed away the idyllic visions of the U.N. Charter, and the intentions of Article 43 were never fulfilled. While U.N. Secretary General Boutros Boutros-Ghali has recently called for Article 43 agreements to be negotiated and for members to designate troops for peace enforcement, the Security Council has had to rely on the willingness of member states to provide troops on an *ad hoc* basis for U.N. missions.\(^{102}\)

II. The Intersection of the U.N. Charter and U.S. War Powers Laws in Practice

Even without the formalized U.N. collective security structure as outlined by Article 43, significant legal issues have arisen from U.S. participation in U.N. missions under Chapter VII. In the absence of specific agreements or “contracts” under Article 43, the debate over the definition of “police power” and the point (if any) at which the President’s use of armed forces requires congressional approval in U.N. actions has never been answered. The legal requirements under the war powers provisions of U.S. law and legal justifications for the participation of U.S. armed forces in U.N. missions will be examined in case studies of three significant U.N. missions in which the United States has participated: Korea, the Persian Gulf and Haiti.

A. Korea

Korea was the first instance of the use of force by the U.N.\(^{103}\) In reality, however, it was a reaction by the United States and fifteen other states to preserve South Korea after an invasion by communist North Korea.\(^{104}\) From the outset of the hostilities, the Korea conflict set a troubling precedent for the champions of strong congressional war powers.\(^{105}\)

The U.N. action in Korea provided the first test of the President’s authority to deploy U.S. armed forces to execute a Security Council resolution authorizing the creation of a “police force.”\(^{106}\) The Security Council had decided under Article 39 that a breach of the peace had


\(^{103}\) BAEHR & GORDENKER, *supra* note 79, at 69. The Soviet Representative to the U.N. was not present at the vote and was thus unable to veto the proposed action. *Id.* at 70.

\(^{104}\) *Id.*

\(^{105}\) Stromseth, *Rethinking*, *supra* note 5, at 621.

\(^{106}\) Franck & Patel, *supra* note 20, at 70.
occurred and called upon North Korea to withdraw its forces. 107 As the Security Council lacked its own forces, it had to call upon U.N. member states two days later to render assistance to the South Korean government to repel its neighbor’s attack and restore peace and security to the region. 108

The dispatch of troops to Korea by President Truman without congressional approval caused debate in the Senate. 109 President Truman argued his authority to send troops for the U.N. action on several grounds. First, he argued that his role as Commander in Chief permitted him to take military action to protect the broad interests of U.S. foreign policy. 110 Second, he argued that the U.N. Charter is a treaty which he has a duty to faithfully execute, and that any U.N. action is an “international police action” rather than an act of war and therefore, the power of Congress to declare war does not apply. 111 A majority of the Senate supported the constitutionality of Truman’s actions and agreed that the United States had a duty to discharge its obligations to the Security Council. 112 Senator William Knowland of California supported Truman stating:

[The President] has been authorized to do it under the terms of our obligations to the United Nations Charter. I believe that he has the authority to do it under his constitutional power as Commander in Chief of the Armed Forces of the United States.

Certainly the action which has been taken to date is not one which would have required, or one in which I believe it was desirable to have, a declaration of war, as such, by the Congress of the United States. What is being done is more in the nature of a police action. 113

The Congress seemed convinced by Truman’s characterization of the Korean deployment as a U.N. police action rather than U.S. war-

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107 S.C. Res. 82, supra note 8, at 4.
108 S.C. Res. 83, supra note 8, at 5. President Truman had already decided to commit U.S. forces before the Security Council approved the formation of a U.N. military force to defend South Korea. Stromseth, Rethinking, supra note 5, at 621.
109 Franck & Patel, supra note 20, at 71.
110 Stromseth, Treaty Constraints, supra note 90, at 87.
111 Id.
112 Franck & Patel, supra note 20, at 71.
113 96 Cong. Rec. 9540 (1950).
making.\textsuperscript{114} When several Senators offered to bring a joint congressional regulation authorizing the use of U.S. troops, they were not encouraged by the President or other members of Congress who seemed to believe that such an authorization was unnecessary.\textsuperscript{115} On June 30, 1950, the Senate overwhelmingly passed an appropriation of a large aid package for U.S. allies, with $16 million specifically designated for Korea and the Philippines.\textsuperscript{116}

The failure of Congress to assert its role in the decision to deploy troops to Korea can be explained by several political, if not legal reasons.\textsuperscript{117} First, almost every member of Congress agreed with the concept of sending U.S. forces to counter the attack by North Korea.\textsuperscript{118} Second, most members agreed with the necessity to act quickly in an emergency and realized that forces had to be deployed before the situation in Korea deteriorated further.\textsuperscript{119} Third, almost all members of Congress saw the need to stand behind the President and convey a sense of solidarity as troops were sent overseas to fight.\textsuperscript{120} There was also a strong sense that the very survival of the U.N. depended on the United States, and most assumed that a prompt U.N. "police action" was the best way to avoid a possible third world war.\textsuperscript{121}

Likewise, the Supreme Court, while not asked to address the constitutionality of President Truman's actions directly, chose to avoid the issue of his actions in \textit{Youngstown Sheet & Tube Co. v. Sawyer}.\textsuperscript{122} In \textit{Youngstown}, the Court found the President's seizure of the steel mills to support the effort in Korea unconstitutional, but did not find that he had entered this situation without constitutional authority.\textsuperscript{123} In a concurring opinion, Justice Jackson wrote that he would "indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."\textsuperscript{124}

\textsuperscript{114} Franck & Patel, \textit{supra} note 20, at 71.
\textsuperscript{115} Id.
\textsuperscript{116} See 96 Cong. Rec. 9546.
\textsuperscript{117} See Stromseth, \textit{Rethinking}, \textit{supra} note 5, at 630.
\textsuperscript{118} Id.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id. at 631 (citing 96 Cong. Rec. 9334 (statement of Sen. Smith)).
\textsuperscript{122} Franck & Patel, \textit{supra} note 20, at 71; see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
\textsuperscript{123} Youngstown, 343 U.S. at 585–89; Franck & Patel, \textit{supra} note 20, at 71.
\textsuperscript{124} Youngstown, 343 U.S. at 645 (Jackson, J., concurring).
While the reaction to Truman’s swift response to the Korea crisis and his belief that he had the unilateral authority to send U.S. forces abroad for “police actions” was generally supportive at the time, some scholars claim that he did not have that legal authority.\(^{125}\) Michael Glennon, Professor of Law at University of California at Davis, for example, argues that the exclusive framework within which the President could introduce the armed forces into hostilities under the authority of the Security Council was the system involving Congress as outlined by Article 43.\(^{126}\) He emphasizes that the possibility of an alternative system was never discussed.\(^{127}\)

Glenonn also contends that since the Security Council merely recommended action in Korea under Article 39 of the Charter rather than passing a resolution requiring action under Article 42, the United States was not legally bound.\(^{128}\) The President would have had a case for acting unilaterally in fulfillment of a legal obligation to the Security Council only if the resolutions had been binding.\(^{129}\) Glennon’s views are also supported by Arthur Schlesinger who has written that the “U.N. resolutions . . . justified American military action under international law, [but] they could not serve as a substitute for the congressional authorization required in national law by the Constitution.”\(^{130}\)

B. The Persian Gulf

Following Iraq’s invasion of Kuwait in August 1990, the U.N. responded with a series of increasingly forceful actions that eventually became the most far-reaching enforcement actions in the history of the organization.\(^{131}\) These actions included numerous economic and diplomatic sanctions intended both to impair the Iraqi war machine and to isolate its regime from the world community.\(^{132}\)

President Bush announced on August 8, 1990, that he was sending a large contingent of U.S. forces to Saudi Arabia and the Persian Gulf as part of “Operation Desert Shield” to counter any further aggression.
by Iraq. The next day, President Bush reported to Congress “consistent with” the WPR, stating that he did not believe U.S. involvement in hostilities was imminent. This statement ensured that the sixty-day clock of the WPR would not start ticking.

The President was strongly supported by Congress even though he had not formerly consulted with it before deploying troops. In October 1990, the House and the Senate both passed legislation supporting the President’s actions but not supporting war. Members made it clear, however, that while they were behind the President in his efforts to resolve the crisis, they were not providing him with a “blank check.”

At the Administration’s encouragement in November, 1990, the U.N. Security Council passed Resolution 678. This resolution increased the pressure on Iraq by authorizing member states to use “all necessary means” to implement the Council’s resolutions and to restore peace and security in the area unless Iraq complied with the provisions of the U.N. resolutions and withdrew from Kuwait by January 15, 1991.

President Bush and members of his administration claimed that he did not need congressional authorization to use force to implement the U.N. resolutions. Secretary of Defense Richard Cheney pointed to Korea as an illustration of “well established principles” concerning the President’s authority to send troops into combat. In an appearance before the Senate Foreign Relations Committee in December, Secretary of State James A. Baker III acknowledged that U.N. Resolution 678 did not require the use of force, and that any decision to use force would be made “at the top political levels of the countries making up the multinational force.” He also stated that the

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133 Stromseth, Rethinking, supra note 5, at 641. Within three months, 230,000 American troops were deployed in the region. Id.
136 Stromseth, Rethinking, supra note 5, at 641.
138 Stromseth, Rethinking, supra note 5, at 641.
140 Id.
141 Burgin, supra note 137, at 27.
142 Stromseth, Rethinking, supra note 5, at 645.
Bush Administration had made no decision to ask Congress for a declaration of war or a resolution of support and noted that "as a co-equal branch of Government the Congress could, if it chose to do so, express itself on this issue." 144

The President was placing a strong emphasis on the historical practice of unilateral presidential actions. 145 The Administration also stressed that a declaration of war is not required when the country is participating as part of an "international force" operating under U.N. authorization. 146 The Administration put far less emphasis on the Security Council Resolutions as a basis for legal authority for the President's actions. 147 It is probable that this was a calculated move designed to preserve freedom of action for the U.S. military in the Gulf from any U.N. command structure that might be established. 148

Many members of Congress, however, were not so quick to yield the war powers issue to the President and urged him to seek congressional approval. 149 When Congress reconvened in January, President Bush did request a congressional resolution supporting "the use of all means necessary to implement U.N. Security Council Resolution 678." 150 The President's letter, however, did not refer to any obligation under the WPR and simply asked for Congress to "join" with and "express its support" for him "at this critical time." 151

The debate on whether the President was legally obligated to receive authorization from Congress when participating in a U.N. operation was taken up by legal scholars. 152 Thomas Franck, editor-in-chief of the American Journal of International Law and Faiza Patel, a Fellow at New York University School of Law, claim that the operation in the Persian Gulf, as with Korea, was a U.N. "police action" which had been established by the U.N. Charter as an exclusive alternative to the traditional war system. 153 They contend that the Senate rejected the traditional war

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144 Id.
145 Stromseth, Rethinking, supra note 5, at 647.
146 Id.
147 Id.
148 Id.
149 See Burgin, supra note 137, at 27.
151 Id.
152 See, e.g., Franck & Patel, supra note 20, at 64; Glennon, supra note 126, at 74. These articles are among several appearing in the AMERICAN JOURNAL OF INTERNATIONAL LAW under the heading "Agora: The Gulf Crisis" in which legal aspects of the response to Iraq's invasion of Kuwait were explored.
153 See Franck & Patel, supra note 20, at 64.
system upon ratification of the U.N. Charter, thereby legislating the implementation of the new U.N. police power.\textsuperscript{154} The possible claim that the WPR under Section 1547(a)\textsuperscript{155} rescinded the United States' obligation under Article 42 of the U.N. Charter is countered by Section 1547(d)(1) of the WPR itself, which declares that nothing in the WPR "is intended to alter . . . the provisions of existing treaties."\textsuperscript{156} In a case involving the closing of the PLO Observer Mission to the UN, in which a conflict arose between a treaty and a later statute, the Court ruled that the statute takes precedence only if the Court can discern "the clearest of expressions on the part of the Congress" to override the treaty obligation.\textsuperscript{157} There is no evidence which indicates that Congress intended the WPR to eliminate the United States' obligation to carry out the decisions of the Security Council under Article 42.\textsuperscript{158} Franck and Patel conclude that the Council's resolutions validated a "police action" and that while it would be prudent for the President to consult with Congress, he is not obliged to do so because the U.N. system was created to make a state's unilateral decision to go to war unnecessary.\textsuperscript{159}

Professor Glennon argues, as he did with regard to war powers authority in the Korean War, that U.N. Resolution 678 authorizing action in the Gulf imposed no obligation on the United States to use force.\textsuperscript{160} He characterizes Resolution 678 as "permissive" rather than "obligatory," and thus there was no requirement that the President "take care" that a permissive decision by the Security Council be faithfully executed as part of a binding treaty.\textsuperscript{161} As the Resolution is voluntary, it is left to the discretion of the member states of the U.N. whether or not to cooperate with the Government of Kuwait.\textsuperscript{162} Glennon continues to argue that only under the proposed special agreements of Article 43 of the U.N. Charter may Congress prospectively approve of the use of force without requiring subsequent approval.\textsuperscript{163}

\textsuperscript{154} Id. at 65.
\textsuperscript{155} 50 U.S.C. § 1547(a). Section 1547 states that the authority to introduce the armed forces of the United States into hostilities shall not be inferred from any provision of a law unless the provision specifically authorizes the introduction of such forces and states that it is intended as specific statutory authorization under the Resolution. Id.
\textsuperscript{156} Id. § 1547(d)(1).
\textsuperscript{157} United States v. Palestine Liberation Org., 695 F. Supp. 1456, 1468 (S.D.N.Y. 1988); see also Franck & Patel, supra note 20, at 72–73.
\textsuperscript{158} Franck & Patel, supra note 20, at 73.
\textsuperscript{159} Id. at 74.
\textsuperscript{160} Glennon, supra note 126, at 75; see also S.C. Res. 678, supra note 139, at 1565.
\textsuperscript{161} Glennon, supra note 126, at 75.
\textsuperscript{162} Id. at 82.
\textsuperscript{163} Id. at 86.
thus concludes that it is doubtful that the Charter empowers the Council to require the use of force absent an Article 43 agreement. If a resolution to use force does come before the Security Council, the President cannot permit the U.S. representative to vote for it unless Congress has granted authorization or the particular use of force falls clearly within the President’s exclusive constitutional power.

Despite the unresolved debate on whether Congressional consent was required by law, Congress responded to President Bush’s letter with a joint resolution on January 12. The resolution authorized the use of force pursuant to Security Council Resolution 678 in light of the President’s determination that “the United States had used all appropriate diplomatic and other peaceful means to obtain” Iraq’s compliance with the Security Council’s resolutions and “those efforts have not been and would not be successful in obtaining such compliance.”

According to one analyst, the resolution amounted to “a conditional declaration of war.”

President Bush’s decision to seek congressional support and the fact that Congress voted to authorize war might suggest some degree of “political accommodation.” Under this “model” of the division of war powers, the President needs congressional approval before committing substantial numbers of troops authorized by the U.N. Security Council. The scope of the operation and the relative degree of sacrifice and risk involved trigger the congressional power to declare war. The President’s actions throughout the crisis and his strong statements afterward, however, suggest that this political accommodation was not the case.

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164 Id. at 88.
165 Id.
167 Id.
168 Stromseth, Rethinking, supra note 5, at 650 (citing Memorandum from David Ackerman, Legislative Attorney, Congressional Research Service to Rep. Fascell, 137 Cong. Rec. H446 (daily ed. Jan. 12, 1991)).
169 Id. at 654.
170 Id.
171 See id.
172 Remarks of President George Bush to the Texas State Republican Convention in Dallas, Texas, 28 Weekly Comp. Pres. Doc. 1119, 1120–21 (June 20, 1992). President Bush later stated, “I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.” Id.
President Bush did not engage in meaningful consultation with members of Congress on events in the Gulf as per the WPR and never sought the opinion of Congress before making a decision.173 As an aide to the President commented, “[i]t’ll be easier to get the U.N. to agree than Congress.”174 Meanwhile, another aide pointed out, “[i]t’s true we’ve promised to consult Congress if there’s a war. In other words, we’ll phone them after the first bombs have been dropped.”175

The Administration did not consult with Congress on its choice to seek the Security Council Resolution authorizing the use of “all necessary means” to expel Iraq from Kuwait.176 President Bush explained this course of action saying, “I cannot consult with 535 strong-willed individuals. I can’t do it nor does my responsibility under the Constitution compel me to do that.”177 The President took this position while it was clear that Security Council Resolution 678 and the deadline imposed by it would set in motion developments affecting U.S. forces and their risk of involvement in hostilities.178

In order for the model of “political accommodation” to work, Congress must assert its constitutional power and the President must be willing to accept that assertiveness.179 The Congress, however, did not do its part in forcing the President to comply with the consultative and reporting requirements of the WPR.180 Although members of Congress introduced legislation pertaining to both the application and circumvention of the WPR reporting requirements, the Congress as a whole did not address the President’s disregard for the law in a manner intended by the sponsors of the WPR until January.181 The late Senator John Heinz, speaking in January stated:

I believe that it is unfortunate that we shirked that [War Powers] responsibility for months. There is more than enough blame to go around: we in the Congress wanted to play a waiting game, and the President supported that game

173 Burgin, supra note 137 at 28; see also 50 U.S.C. § 1542.
175 Id.
176 Burgin, supra note 137, at 30.
177 Id.
178 Id.
179 Stromseth, Rethinking, supra note 5, at 655.
180 Burgin, supra note 137, at 33.
181 Id.
since it provided him with the latitude he needed and wanted in dealing with the United Nations and Iraq.\textsuperscript{182}

When Congress finally decided to act in January, the skillful advance work of the Bush Administration had ensured that members of Congress voting against the mission would face the politically unpalatable option of voting against a U.S.-led mission that was supported by a majority of foreign countries in the U.N.\textsuperscript{183} As former Secretary of the Navy John Lehman wrote, "Desert Storm drove the final nail into the War Powers Resolution."\textsuperscript{184}

C. Haiti

The deployment of troops to Haiti by President Clinton in September, 1994 is a unique case for the war powers debate in several respects. The most obvious point is that the planned military invasion was aborted hours before it was to take place, becoming instead a "consensual" operation.\textsuperscript{185} The more interesting point is the unique way in which the Clinton Administration justified its actions, taking a different stance from the positions of previous administrations which had also encountered the war powers debate.\textsuperscript{186}

In the weeks leading up to the Haiti operation, President Clinton echoed the claims of his predecessors regarding the powers of the President as Commander in Chief of the armed forces, stating, "[I]ke my predecessors of both parties, I have not agreed that I was constitutionally mandated to get" congressional approval before taking military action.\textsuperscript{187} It was therefore surprising that the legal opinion on the deployment, put forth in a letter to congressional leaders by Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel, was almost deferential in tone.\textsuperscript{188}

\textsuperscript{183} See Burgin, supra note 137, at 35. An Administration official asked, "How could our Congress not support something that Ethiopia was supporting? That the Soviet Union was supporting?" Id. at 35 n.80 (citing U.S. NEWS & WORLD REP., TRIUMPH WITHOUT VICTORY 198-99 (1992)).
\textsuperscript{184} LEHMAN, supra note 9, at 53.
\textsuperscript{186} Id. at 60.
The Dellinger letter presents three arguments supporting the President’s plan for an invasion of Haiti. First, it contends that the planned deployment was consistent with the “sense of Congress” as expressed in the Defense Appropriations Act of 1994. Second, it maintains the deployment satisfied the requirements of the War Powers Resolution. The Administration’s final claim is that after examining the circumstances, nature, scope and duration of the anticipated deployment, it determined that the operation was “not a ‘war’ in the constitutional sense.”

The first contention declared that it was the “sense of Congress” that the President did not need to seek prior authorization once he had made certain required findings and reported them to Congress as he had done. Scholars have criticized this statutory argument as “implausible” because it bases the legality of the invasion on an obscure piece of legislation dating from a year earlier. The tenor of the debate in Congress in the months preceding the deployment, however, certainly did not support the idea that Congress had already granted authorization to a troop deployment to Haiti.

The Dellinger letter then claims that the WPR recognizes the right of the President to deploy armed forces into hostilities or situations where they are likely to be encountered, provided that he notify Congress within forty-eight hours of introducing the armed forces. The Administration views the intention of the WPR as the prevention of long, drawn-out conflicts such as Vietnam, rather than “prohibiting the President from using or threatening to use troops to achieve important diplomatic objectives where the risk of sustained military conflict was negligible.” Professor Lori Damrosch of Columbia University Law School argues that this construction of the WPR allows the President to do anything he wishes on his own, as long as he can accomplish his goals in sixty or ninety days of hostilities. She argues that compliance with the WPR’s procedural requirements can in no way substitute for the constitutional duty to obtain congressional authority before engag-

189 *Id.*
190 *Id.*
191 *Id.*
192 *Id.* at 123.
194 *Id.* at 62.
195 Dellinger Letter, *supra* note 188, at 123; see also 50 U.S.C. § 1543(a)(1)-(3).
196 *Dellinger Letter, supra* note 188, at 124.
197 Damrosch, *supra* note 185, at 63-64.
ing U.S. forces in combat, at least where nothing prevents a timely congressional decision.\textsuperscript{198}

The claim in the Dellinger letter that the deployment was not a "war" is based on the nature, scope and duration of the deployment as well as the belief that the legitimate government of Haiti had given full consent.\textsuperscript{199} Dellinger states that the lawful government of President Aristide had granted approval for the deployment, and when coupled with its expected limited nature, scope and duration, the deployment did not rise to the level of "war."\textsuperscript{200} Damrosch criticizes this view because it again implies that the President can do anything he likes as long as it is resolved quickly.\textsuperscript{201}

Conspicuous by its absence in Dellinger's defense of the Administration's action in Haiti is the claim that congressional consent to a military action might not be required when the U.N. Security Council has already granted its approval.\textsuperscript{202} The Senate seems to have attempted to pre-empt this claim by including an amendment to the 1995 Defense Appropriations Bill (which passed unanimously) stating that "[i]t is the sense of the Senate that the United Nations Security Council Resolution 940 . . . does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution."\textsuperscript{203} The Dellinger letter avoids discussion of the Security Council mandate and its effect, if any, on the legal authority of the President.\textsuperscript{204}

\section*{III. Possibilities for the Future}

\subsection*{A. Special Agreements Under Article 43}

The enactment of Article 43 agreements, as envisioned by the U.N. Charter and under which the United States would make a commitment to supply troops at the request of the Security Council, would formalize the current \textit{ad hoc} process for U.N. military missions.\textsuperscript{205} This formalization, however, would present at least two potential problems in the

\textsuperscript{198} Id. at 64.
\textsuperscript{199} Dellinger Letter, supra note 188, at 125.
\textsuperscript{200} Id. at 126.
\textsuperscript{201} Damrosch, supra note 185, at 66.
\textsuperscript{202} Id. at 67.
\textsuperscript{203} See 140 CONG. REC. S10,433 (daily ed. Aug. 3, 1994).
\textsuperscript{204} See Dellinger Letter, supra note 188, at 122–26.
\textsuperscript{205} See U.N. CHARTER art. 43.
United States. The first would be the placement of U.S. troops under foreign command and the second would be the delegation of the President's powers as Commander in Chief to the Security Council. 206

Under an Article 43 agreement, American armed forces would be delegated to the Security Council and could conceivably fight under foreign command. 207 American forces did serve under foreign command in World Wars I and II, but this occurred only in short-term emergency situations which would not provide a precedent for an Article 43 agreement. 208 During the World Wars, the United States was fighting a particular enemy in a particular war in an alliance from which it could have withdrawn. 209 An Article 43 agreement would present a different situation as it involves permanent Security Council command over certain U.S. forces. 210

The issue of Security Council command over U.S. forces raises a constitutional issue as it appears to conflict with the President's role as Commander in Chief. 211 An initial commitment of U.S. forces for a single, narrowly defined military operation under an Article 43 force agreement may not be unconstitutional if the American chain of command were preserved. 212 While troops would be on call for Security Council duty, the United States could use its veto in the Council to block any proposal for action, thus insuring that any enforcement action would proceed with the approval of the U.S. President. 213

A problem might arise, however, if U.S. forces are already involved in a U.N. action and the President is prevented from bringing the troops home at will. 214 The termination of Security Council actions requires another decision by the Council which then faces a veto by any of its five permanent members. 215 The President cannot make an independent decision to withdraw U.S. troops because they are under the command of the Security Council upon their activation. 216

206 Glennon & Hayward, supra note 18, at 1584, 1587.
207 Id. at 1584.
208 Id. at 1586.
209 Id.
210 Id.
211 See U.S. Const. art. II, § 2.
212 Glennon & Hayward, supra note 18, at 1594.
213 Id.
214 Id.
215 Id.
216 See U.N. Charter arts. 43, 46, 48.
In light of these potential problems and the political difficulties of placing U.S. forces under foreign commanders, perhaps a modified Article 43 agreement would be more feasible. One option is an agreement under which the United States would be permitted to maintain its constitutional war powers processes and the right to withdraw its troops unilaterally.217 Another option is the idea of "policy declaration" which was proposed by President Bush and essentially consists of a promise by the United States that it is U.S. policy (rather than legal obligation) to commit troops for Security Council actions.218 The problem with these approaches is that other nations might also seek similar concessions, and the result would be no different from the ad hoc arrangement which has existed for the past fifty years.

B. Congressional Concerns

The experiences over the past twenty years have demonstrated the flaws of the WPR and the need for it to be either discarded completely or overhauled in order to accommodate the increasing use of U.N. Security Council actions to counter aggression and respond to crises around the world. If it is to be retained, the WPR must more clearly delineate authority between the President and the Congress, and provisions for the implementation of Security Council Resolutions must somehow be incorporated into its complex set of procedures. The difficulty in accomplishing this task might demonstrate the virtue of presidential primacy in these issues and thus provide an impetus for abolishing the WPR altogether.

Congress is indeed a "major architect of the international system and an indispensable player in U.S. operations within it."219 In order to support the U.N. system of collective security, Congress needs to support the executive in ways that send a clear message of national resolve.220 While Congress was granted the power to declare war by the Constitution, the document does not speak of the division of war powers with regard to the discharge of obligations in a collective security system.221 Since Korea, however, history and practice demon-
strate that the balance of power in this area has shifted toward the President.\footnote{222}{See id.}

This is not to imply that the President can proceed uninhibited in matters of collective security. No President can or should conduct extended military operations abroad without the wide support that Congress reflects.\footnote{223}{Id.} Congress wields impressive power through its constitutionally-granted power over appropriations.\footnote{224}{U.S. Const. art. I, § 8.} During the Vietnam War, which was prosecuted by several Presidents without a declaration of war by the Congress, Senator J.W. Fulbright of Arkansas advocated what he termed “fencing in” the President’s ability to use appropriated funds as a way for Congress to influence the fighting.\footnote{225}{Walter Pincus, The Fulbright Fix, Wash. Post, Jan. 2, 1996, at 15. Fulbright wrote into law the administration’s stated plans for troop numbers, military activity and timing. Id.}

Senator Fulbright’s goal was not to convince the President to accept the views of Congress because he believed this would impinge on the President’s prerogative to conduct foreign policy and serve as Commander in Chief.\footnote{226}{Id.} His aim was instead to compel the President to reconsider his policies if his original plans and estimates were incorrect.\footnote{227}{Id.} If the President’s plans did go awry, he would then have to approach Congress to explain the failure and request additional appropriations.\footnote{228}{Id.}

Unlike the constitutionally questionable and procedurally complicated WPR, the “Fulbright Approach” is based on the straightforward, non-contested power of the Congress to “raise and support” the armed forces of the United States.\footnote{229}{U.S. Const. art. I, § 8.} This approach allows Congress to exert a limited degree of influence in foreign affairs as the Founding Fathers intended.\footnote{230}{See supra note 24 and accompanying text.} By virtue of its simple constitutional grounding, it may be applied universally in foreign affairs including U.S. participation in U.N. missions.

\section*{Conclusion}

The United Nations, while rightfully disparaged for its ineffectiveness on many global issues, has made a positive contribution for peace
and security by outlawing war and establishing a collective security system under Chapter VII of the U.N. Charter. The United States has been able to use the U.N. system to its advantage in Korea, the Persian Gulf and Haiti by pulling together member states to contribute forces for international police actions while fulfilling U.S. foreign policy objectives at the same time. The relative success of this ad hoc collective security system has demonstrated that a more formal system under Article 43, with national forces set aside for Security Council duty, is unnecessary. The current informal system also avoids the constitutional complications of the Article 43 system by allowing the President to retain his role as Commander in Chief of U.S. forces. This arrangement preserves freedom of action and permits the United States to decline involvement in conflicts where a vital national interest is not at stake.

While the congressional power to declare war has been rendered obsolete under the U.N. system and the WPR represents a failed attempt to encroach upon the President’s right to conduct foreign policy, Congress has an important supporting role to play in foreign affairs. Congress should abolish the controversial and procedurally complex WPR and instead exercise its influence in foreign affairs through its power of the purse. As the prospects for the long term success of initiatives often turn on the dependability of financial and political support from Congress, the President will continue to have a strong interest in consultations and cooperation. The balance of power that the Founding Fathers envisioned thus continues to be maintained in the post-Cold War collective security system.

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