

# Note

## **The Commander-in-Chief and the United Nations: Why the President Can Use the United Nations Security Council as the Constitutional Basis for Military Operations Short of War**

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### I. INTRODUCTION

When President Obama decided to enact a no-fly zone in Libya in 2011, the administration avoided going to Congress for authorization.<sup>1</sup> The decision was the subject of widespread public criticism, with many accusing the President of baselessly expanding executive power.<sup>2</sup> Of course, the administration’s

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1. Obama only engaged in minimal consultation with Congress and sought no authorization. See Felicia Sonmez, *Libya Conflict Sparks War Powers Debate in Senate*, WASH. POST 2CHAMBERS (Mar. 19, 2011), [http://www.washingtonpost.com/blogs/2chambers/post/libya-conflict-sparks-war-powers-debate-in-senate/2011/05/19/AFpb817G\\_blog.html](http://www.washingtonpost.com/blogs/2chambers/post/libya-conflict-sparks-war-powers-debate-in-senate/2011/05/19/AFpb817G_blog.html).

2. Charlie Savage, *Attack Renews Debate over congressional Consent*, N.Y. TIMES, Mar. 21,

use of military force without congressional authorization was the latest in a long line of instances where Presidents have utilized military force under their Article II power as Commander-in-Chief without going to Congress, which wields the power under Article I to “declare war.”<sup>3</sup>

However, the administration did offer a legal defense for its action; it had authorization from the U.N. Security Council (UNSC). In offering a legal defense of the administration’s position, the Office of Legal Counsel (OLC) argued that after the UNSC resolution, the “credibility and effectiveness [of the United Nations] as an instrument of global peace and stability were at stake in Libya.”<sup>4</sup> The memorandum cited a litany of instances in which the President had acted to enforce a UNSC resolution, dating back to the Korean War.<sup>5</sup> The OLC said there was a “longstanding U.S. commitment to maintaining the credibility of the United Nations Security Council and the effectiveness of its actions to promote international peace and security” and that “the use of military force in Libya was supported by sufficiently important national interests to fall within the President’s constitutional power.”<sup>6</sup> For OLC, the President’s power to use military force without congressional authorization was, at least in part, enabled by the President’s need to support the United Nations.

No scholar has sought to inquire whether the OLC opinion was correct. This Note fills that gap in the literature and asks whether authorization from the UNSC expands the President’s constitutional power to use military force without congressional authorization. That question, which lay at the heart of the war powers debate during the Libya intervention, has enduring importance for understanding the distribution of war powers in the constitutional order.

This Note argues that a UNSC resolution expands the scope of what type of military action the President can take under Article II without going to Congress by furnishing the President with a new type of ‘national interest’ that the President can take action to protect. Traditionally, the President’s Article II power to utilize military force has been tied to national interests, such as rescuing Americans abroad. The advent of a new U.N. Security Council resolution offers a new forum for creating a national interest that allows the President to utilize military force under Article II.

The UNSC resolution is not necessary for presidential action but it is sufficient for a limited scope of military operations that are “short of war,” such as

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2011, <http://www.nytimes.com/2011/03/22/world/africa/22powers.html>.

3. The Constitution’s allocation of power to the President as Commander-in-Chief sets up a tension with Congress’s power to “declare war.” Edwin Corwin described this distribution of power as an “invitation to struggle” that sets up an ongoing battle between the executive and legislative branches over their authority. EDWIN CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1957*, 171 (1957). While the President has some power to utilize military force, the Congress alone has the power to declare ‘war.’ This Note seeks to add further clarity to the boundary between presidential and congressional power by analyzing the potential role of a UNSC in increasing the President’s power to utilize military force.

4. Authority to Use Military Force in Libya, 35 Op. O.L.C. 12 (2011), <http://www.justice.gov/olc/opiniondocs/authority-military-use-in-libya.pdf> [hereinafter “Krass Memorandum”].

5. *Id.*

6. *Id.*

humanitarian interventions or airstrikes.<sup>7</sup> In short, a UNSC resolution can augment the President's constitutional power to use military force and allow the President to engage in limited military actions without congressional authorization. By analyzing the United States' entrance into the United Nations through the United Nations Participation Act and the historical practice of presidential war power, this Note argues that a UNSC resolution is constitutionally significant in determining the President's war power.

Despite John Hart Ely's observation in 1993 that there has been only cursory study of the relationship between the UNSC and presidential war power, not much has changed and there continues to be little scholarship in this area.<sup>8</sup> The topic receives limited treatment in the current war powers literature.<sup>9</sup> Scholars have analyzed the relationship between the UNSC and presidential war power in the United Nations Participation Act,<sup>10</sup> the Korean War,<sup>11</sup> the Gulf War,<sup>12</sup> and the interventions of the 1990s<sup>13</sup> as separate topics. However, no scholar has tried to analyze the historical practice in a broader scope. This Note builds on the existing literature by engaging in a broader study of the relationship between UNSC authorization and presidential war power.

Moreover, the Note engages with these historical episodes with more depth than other scholars by engaging in original archival research and conducting interviews with policymakers. While other scholars have largely focused on reading the text of OLC memoranda, they have avoided the archival work and review of legislative materials necessary to understand the deeper contours of executive-legislative relations. This Note makes a valuable contribution to our understanding of the historical practice of presidential war power.

The Note proceeds in four Parts. In Part II, the Note establishes a framework for analyzing presidential war power as a 'quasi-constitutional custom' rooted in historical practice beyond the text of the Constitution. This Part de-

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7. See Louis Henkin, *War Powers 'Short of War,'* 50 U. MIAMI L. REV. 201, 203-04 (1995) (arguing for a constitutional distinction between the uses of force that are "short of war" and full-scale war).

8. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 152 (1993).

9. See Matthew Waxman, *The Constitutional Power to Threaten War*, 123 YALE L.J. 102, 135 n.139 (forthcoming 2014) (offering a brief discussion of the United Nations and presidential war power).

10. See David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of the War Powers*, 70 U. COLO. L. REV. 1491 (1990); Jane Stromseth, *Rethinking War Powers: Congress, the President and the United Nations*, 81 GEO. L.J. 597 (1993).

11. This scholarship was a debate between Louis Fisher and Robert Turner in 1995. Fisher argued that Truman's actions were unconstitutional. Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 37 (1995). Turner responded that the actions were constitutional based on the authorization from the United Nations. Robert Turner, *Truman, Korea and the Constitution: Debunking the 'Imperial President' Myth*, 19 HARV. J.L. & PUB. POL'Y 533, 580-82 (1995).

12. The scholarship on the constitutional role of the UNSC authorization in the Gulf War consists of two main articles written at the time of the conflict. See Michael Glennon, *The Gulf War and the Constitution*, 70 FOREIGN AFF., Spring 1991, at 84 (arguing that the war was unconstitutional); Faiza Patel & Thomas Franck, *The Gulf Crisis in International and Foreign Relations Law: UN Police Action in Lieu of War*, 85 AM. J. INT'L L. 63 (1991) (arguing that the war was constitutional).

13. RYAN HENDRICKSON, *THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS* 22-34 (2002).

velops the historical methodology that the Note employs. In Part III, the Note argues that the United States designed the United Nations, ratified the Charter and enacted the United Nations Participation Act with the understanding that the President would be able to conduct military actions short of war through the United Nations without congressional authorization. In this Part, the Note offers a definition for what military action is short of war. In Part IV, the Note argues that the President does not have the constitutional power to wage a full-scale war based on a UNSC resolution without congressional authorization. In this Part, the Note analyzes the Korean War, which was waged without any congressional authorization and the Gulf War, in which the administration was forced to obtain congressional authorization despite having UNSC resolution. In Part V, the Note argues that there exists a ‘quasi-constitutional custom’ empowering the President to take military action short of war based on a UNSC resolution without congressional authorization. In this Part, the Note analyzes U.S. interventions in Somalia, Bosnia, and Haiti. In the Conclusion, the Note argues that this quasi-constitutional custom is an important evolution in the President’s war power and allows the United States to exercise global leadership. There is a national interest in upholding UNSC resolutions and the President must be able to utilize limited amounts of military force to ensure that UNSC resolutions are carried out. In applying this framework to contemporary war powers questions, such as potential intervention in Syria, the Note argues that the UNSC plays an important role in shaping presidential war power.

## II. QUASI-CONSTITUTIONAL CUSTOM AND THE WAR POWER

In interpreting the President’s power to use military force, there is a vast body of “quasi-constitutional custom” composed of the “body of historical precedent” stemming from past executive branch action that is the most important factor in constructing the boundaries of presidential power.<sup>14</sup> Though such precedent is not dispositive of presidential power in the way that judicial precedent is, the President’s war power is a topic that is rarely touched by the courts.<sup>15</sup> The quasi-constitutional custom is constantly evolving, with each new presidential action adding to its contours. The term includes the “institutional norms generated by the historical interaction of two or more federal branches with one another” and builds from how “historical sources ha[ve] contributed to the creation of a customary constitutional law in the realm of foreign affairs” that the branches observe.<sup>16</sup> Although quasi-constitutional custom cannot demand compliance, it serves to shape the scope of what actions are considered constitutionally legitimate in an area of law where the constitutional text is vague and the courts are largely absent. The struggle over the scope of the President’s war power is a battle fought between the executive and legislative branches where the terms of the debate are rooted in the historical relationship between the branches.

To begin, the vagueness of the constitutional text forces a debate over

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14. HAROLD KOH, *THE NATIONAL SECURITY CONSTITUTION* 70 (1990).

15. *Id.* at 68-69.

16. *Id.* at 70.

presidential war power to shift away from the Constitution's text and into the realm of historical practice that develops the quasi-constitutional custom. The Constitution is divided on the question of whether the President can order the use of force without Congress. Article I, Section 8 of the U.S. Constitution states that, "Congress shall have the Power . . . to declare War."<sup>17</sup> Yet, the Constitution also empowers the President as the "Commander-in-Chief" and holds open the possibility for the President to use force without congressional authorization.<sup>18</sup> The division of war powers between the President and the Congress arose at the Constitutional Convention from an antagonistic debate amongst the delegates. The original draft of the Constitution gave the Congress the power to "make war."<sup>19</sup> On August 17, 1787, the Constitutional Convention came to discuss this line of the draft. According to James Madison's notes on the convention, Charles Pinckney argued that the power to "make war" should be vested in the Executive because the Legislature's "proceedings were too slow" and Pierce Butler similarly argued, "for vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."<sup>20</sup> Offering a successful compromise, James Madison and Elbridge Gerry had "moved to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."<sup>21</sup> This opened up an area of acceptable executive use of force without congressional authorization and left the boundary between the President's power to use force and Congress's power to declare war unclear.

The Founders wanted to leave the Constitution's distribution of war-making power open for later generations to define through practice. As Abraham Sofaer explained, "The framers expected the branches to battle each other to acquire and to defend power."<sup>22</sup> The limited nature of what the Constitution said about war powers means that, as Harold Koh notes, "we should look beyond the Constitution's cryptic text to discover the broader constitutional principles that govern how Congress, the courts and the Executive should interact in the foreign policy process."<sup>23</sup> The battle between Congress and the President over the power to use military force has been "a sort of perennial [contest] . . . over their respective powers."<sup>24</sup> Presidential action forces a "constitutional showdown" between the executive and legislative branches because "the loca-

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17. U.S. CONST. art. I, § 8, cls. 1, 11.

18. Presidents have consued this power as allowing the President to utilize military force in manners that are short of war in contexts where the President is protecting a national interest abroad such as protecting U.S. citizens. These uses of force were fairly minor and for limited ends. See ARTHUR SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* 56 (2004) (discussing early presidential use of force short of war based on the President's commander-in-chief power to protect national interests with military force).

19. WILLIAM FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* (Aug. 7, 1787), available at [http://avalon.law.yale.edu/18th\\_century/debates\\_817.asp](http://avalon.law.yale.edu/18th_century/debates_817.asp).

20. *Id.*

21. *Id.*

22. ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* 60 (1976).

23. Koh, *supra* note 14, at 68.

24. Walter A. McDougall, *The Constitutional History of U.S. Foreign Policy: 222 Years of Tension in the Twilight Zone*, FOREIGN POL'Y INST. RES. SERIES 1 (Sept. 2010), <http://www.fpri.org/pubs/2010/McDougall.ConstitutionalHistoryUSForeignPolicy.pdf>.

tion of constitutional authority for making an important policy decision is ambiguous, and multiple [branches] have a strong interest in establishing that the authority lies with them.”<sup>25</sup> Although members of the President’s own party may support the President’s constitutional power to use force without congressional authorization, members of Congress who oppose the President or the intervention will utilize constitutional objections to this power to challenge the President.<sup>26</sup>

While the executive and legislative branches seek to control the war-making power, the judiciary has been largely absent in this area.<sup>27</sup> The Supreme Court has never taken a case seeking to prevent the President from using military force without a Declaration of War.<sup>28</sup> When congressmen have sought to challenge the President’s constitutional power to use military force, the courts have dismissed the cases and forced the members of Congress to use the legislative power to limit presidential power. In *Dellums v. Bush*, a group of congressmen sought an injunction against President George H.W. Bush to halt him from going to war without a Declaration of War.<sup>29</sup> Judge Harold Greene dismissed the case because the Congress had not taken all possible steps to halt the President from going to war.<sup>30</sup> In 2000, a group of congressmen sued President Clinton to halt the bombing campaign in Yugoslavia, but the D.C. Circuit dismissed the case because the “appellants lack[ed] standing” to bring the case.<sup>31</sup> In 2011, a group of congressmen sued President Obama to halt military action in Libya.<sup>32</sup> Judge Reggie Walton dismissed the case because the President was acting on his constitutional power as Commander-in-Chief.<sup>33</sup> The cases demonstrate how “courts often abstain from addressing questions surrounding the allocation of authority between Congress and the President.”<sup>34</sup>

The lack of judicial action does mean that the task of defining the President’s war power has largely fallen to the Congress and the President. This is an area of constitutional law where “quasi-constitutional custom” controls as the courts have been unwilling to significantly define the scope of the President’s war power. While some might think that without judicial interpretation,

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25. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 75 (2011).

26. Congress can make these objections both in an appeal to the public and even in lawsuits seeking to prevent the President from utilizing military force, such as in *Dellums v. Bush* and *Campbell v. Clinton*. Though acquiescence is also a major dimension in congressional approaches towards presidential use of force, this tends to follow initiation as the Congress agrees to fund a war it may not have supported at the time. See WILLIAM BANKS & PETER RAVEN-LATSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* 156 (1994).

27. Koh, *supra* note 14, at 134.

28. *Id.* at 189.

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

30. *Id.* at 1149 (establishing that “the Judiciary will undertake to render decisions that compel action by the President or the Congress only if the dispute before the Court is truly ripe, in that all the factors necessary for a decision are present then and there”).

31. *Campbell v. Clinton*, 203 F.3d 19, 24 (D.C. Cir. 2000).

32. *Kucinich v. Obama*, 821 F. Supp 2d 110 (D.D.C. 2011).

33. *Id.* at 122.

34. Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice & Legal Restraint*, 107 COLUM. L. REV. 1097, 1110 (2013).

this is not “law,” such a view would be mistaken.<sup>35</sup> As Louis Henkin noted, “the Constitution does not speak only to the courts . . . [E]ach of the political branches is likely to interpret the Constitution in substantial measure as it sees the national interest (and its own interests).”<sup>36</sup> Especially in the context of war powers, the constitutional interpretation from the political branches, largely shaped through quasi-constitutional custom, has been paramount.

In seeking to define the President’s constitutional war power, the executive branch has strongly relied on historical practice. The Executive employs *stare decisis* in its formulation of its own power within OLC memoranda.<sup>37</sup> Within the Executive, “historical practice does in fact occupy a central role in debates about the constitutional law of presidential power.”<sup>38</sup> This is especially true on war powers questions.<sup>39</sup> While the President could assert executive power without historical precedent, the historical practice is essential to “provide a reasoned explanation that is not dependent on the political valence of the controversy in question.”<sup>40</sup> These “invocations of historical precedent highlight the fact that institutional predecessors have reached the same conclusion” and demonstrate that the Executive’s actions are a logical continuation of historical practice.<sup>41</sup> In an area of constitutional interpretation where the courts are largely absent, historical practice is immensely important. Presidential power, as William Howard Taft noted, “is sometimes created by custom, and so strong is the influence of custom that it seems almost to amend the Constitution.”<sup>42</sup>

The OLC memorandum establishing the constitutionality of the intervention in Libya demonstrated the executive branch’s reliance on historical practice as a means of establishing the quasi-constitutional custom that the President could conduct limited military operations without congressional authorization. When President Obama initiated the intervention in Libya in 2011, the OLC relied heavily on historical practice to develop its constitutional support for the President’s action. The memorandum invoked a 1980 OLC memorandum, in which the office argued that there were many “instances of presidential uses of military force abroad in the absence of prior congressional approval.”<sup>43</sup> It noted that since then “instances of such presidential initiative have only multiplied, with Presidents ordering, to give just a few examples, bombing in Libya (1986), an intervention in Panama (1989), troop deployments to Somalia (1992), Bosnia (1995), and Haiti (twice, 1994 and 2004), air patrols and airstrikes in Bosnia (1993-1995), and a bombing campaign in Yugoslavia

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35. POSNER & VERMEUELE, *supra* note 25, at 3 (arguing that the President’s war power is largely beyond the limitations of law).

36. Henkin, *supra* note 7, at 202.

37. Trevor Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1148, 1149 (2012).

38. Bradley & Morrison, *supra* note 34, at 1115.

39. Curtis Bradley & Trevor Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 412, 419-21 (2012).

40. *Id.* at 428.

41. *Id.*

42. WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 135 (1916).

43. Krass Memorandum, *supra* note 4 (quoting Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980)).

(1999), without specific prior authorizing legislation.”<sup>44</sup> This historical analysis formed the core of the OLC’s argument for the constitutionality of the President’s use of force.

Though constitutional interpretation based on quasi-constitutional custom is primarily done within the province of the Executive, the courts have also examined historical reasoning when reviewing separation of powers questions where the constitutional text is silent. Justice Felix Frankfurter in *Youngstown* famously called history a “gloss” in the separation of powers debates:

[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.<sup>45</sup>

Frankfurter’s “gloss” framework has become central to how the courts interpret executive power. In *Dames & Moore*, the Supreme Court held that, “past practice does not, by itself, create power, but long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.”<sup>46</sup> The Court did not elaborate on the meaning of such acquiescence and no OLC opinion has sought to define what precisely the Court’s acquiescence in *Dames & Moore* required. The Court’s holding has been understood as meaning that if the President has engaged in a practice without congressional attempts to challenge the constitutionality of the practice, then the Congress has acquiesced in the constitutionality of the executive’s power over that matter.<sup>47</sup>

This Part has developed the basis for building an argument concerning presidential war powers through an examination of historical practice and quasi-constitutional custom. The Note proceeds through an examination of the historical practice that is central to the quasi-constitutional custom of presidential war powers and their relationship to the UNSC.

### III. THE CONSTITUTION AND THE U.S. ENTRANCE INTO THE UNITED NATIONS

The origins of the relationship between the United Nations and the President’s constitutional power to use military force are inextricably tied to the United States’ objectives in designing the United Nations during the Second World War, the drafting of the U.N. Charter and its ratification, and ultimately, the passage of the United Nations Participation Act. While the emergence of the United Nations has been recognized as an important moment in the creation of an international legal order, it also had profound ramifications on the United States’ constitutional order.<sup>48</sup>

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44. *Id.*

45. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

46. *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (internal quotations omitted).

47. *Bradley & Morrison*, *supra* note 39, at 433.

48. *See generally* PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND*

In this Part, the Note argues that the United States joined the United Nations on the understanding that the President would have the power to utilize military force vis-à-vis the UNSC without congressional authorization for limited “police actions” aimed at enforcing international law. While the scope of that power had not been directly defined, which led to later debates about the scope of the President’s power under the UNSC, the creation of the United Nations did augment the President’s power to use military force.

The debate over how an international organization would affect presidential power dated back to the debate over the League of Nations. The Senate rejected the League largely out of a fear that it would expand the President’s power to use military force.<sup>49</sup> The national mood at that time had been to reject international commitments and Senator Henry Cabot Lodge had used constitutional objections to defeat the ratification of the treaty.<sup>50</sup> By the outbreak of World War II, there was a shift in public opinion, and the Senate leaned more toward an internationalist position that was less concerned about constitutional safeguards on a system of collective security.<sup>51</sup> As the United States contemplated a United Nations for the postwar era, the Roosevelt administration sought to build a United Nations in which states would be able to react quickly to international crises, and in which the President would not have to wait for Congress to use the military to enforce a UNSC resolution.

#### A. *Dumbarton Oaks*

While the United Nations was not created until after World War II, the planning for it began in the midst of the war. The debate over presidential power in the United Nations was a crucial point of discussion between the President and Congress and between the United States and other Allied nations.

In 1944, the leaders of the Allies came together at Dumbarton Oaks for a conference to plan a potential United Nations. The consensus that emerged from the conference, and drove U.S. strategy in creating the United Nations, was that each nation’s leader would need the power to be able to commit to use military force in the United Nations without seeking further authorization from a legislative body.<sup>52</sup>

The Soviet Union entered the conference concerned that states, particularly the United States, would not be able to commit forces to the United Nations in an emergency. General Nikolai Slavin, the Deputy Commander of the Red Army, expressed concern that “some states might decide not to release their national [military] contingents in a crisis—thus duplicating the failure of the League of Nations.”<sup>53</sup> The Soviet delegation argued that the only solution was

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FUTURE OF THE UNITED NATIONS (2007) (describing the importance of the founding of the United Nations in international relations).

49. See JOHN MILTON COOPER, *WOODROW WILSON: A BIOGRAPHY* 372 (2009).

50. *Id.* at 506.

51. See ROBERT DIVINE, *SECOND CHANCE: THE TRIUMPH OF INTERNATIONALISM IN AMERICA DURING WORLD WAR TWO* (1967).

52. TOWNSEND HOOPES & DOUGLAS BRINKLEY, *FDR AND THE CREATION OF THE U.N.* 117 (1997).

53. ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS*

an international peacekeeping force that included an air force, which would be at the United Nations' disposal.<sup>54</sup> The Americans were not willing to accept this. Admiral Russell Wilson, a leading American representative, called for the establishment of a mechanism that would oblige the members, in the event of a crisis, to send troops to a U.N. mission.<sup>55</sup> The proposition was fully endorsed by the British and the Soviets did not reject it.<sup>56</sup> Introduced as a response against the Soviet plan, the proposal also had an unintended constitutional implication: the President would need to be able to commit U.S. forces to the United Nations without having to go back to Congress for authorization.

From a constitutional perspective, the plan gave the President the power to make military commitments to the United Nations that the Congress would be unable to alter. General Slavin raised this point with his American colleagues to understand how this would work within the U.S. system. To persuade the Soviet Union that Wilson's plan would actually work, the U.S. delegation claimed that the President would have the power in the U.N. system to order a military operation without having to wait on congressional authorization. Secretary of State Hull and Ambassador Edward Stettinius persuaded the Soviet delegation that this would work—but they then had to return to the Capitol to persuade the Senators of the wisdom, and constitutionality, of this idea.

For the Roosevelt administration, the United Nations would only work if the President could use military force under a UNSC resolution without having to go to Congress. Secretary of Hull saw this as the "only practicable way."<sup>57</sup> Senator Arthur Vandenberg argued that for a full-scale war, UNSC authorization would be "tantamount to a declaration of war," and would need congressional authorization.<sup>58</sup> However, Senator Vandenberg did grant that there were many military operations that the President should be able to use UNSC authorization without going to Congress:

[W]e might accept North and South America under the Monroe Doctrine as our primary responsibility in respect to the use of military force (just as we gave always done); and allow the President and his delegate to act for us, without congressional reference, in this primary field. But if the dispute discloses an aggressor who cannot be curbed on a regional basis—if it takes another world-wide war to deal with him—I do not see how we can escape the necessity for congressional consent.<sup>59</sup>

The position being put forward by the Senate was that the President would have the power to commence "regional" military operations but not a "world-wide war" through the United Nations without the Security Council.

The State Department agreed to this position in a formal memorandum

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AND THE SEARCH FOR POSTWAR SECURITY 148 (1990).

54. *Id.* at 146.

55. *Id.* at 149.

56. *Id.*

57. *Id.*

58. *Id.*

59. JOE MORRIS, THE PRIVATE PAPERS OF ARTHUR VANDENBERG 118 (1974).

developed by State Department Legal Adviser Green Hackworth in the Hackworth memorandum. Hackworth developed the department's legal position on this issue. The memorandum argued that under the United Nations, the use of force would be less than 'war' and would therefore not require congressional authorization. International uses of force within the U.N. system would be civil conflicts rather than war "in a legal sense," and thus would not require a Declaration of War from Congress.<sup>60</sup> The Hackworth Memorandum argued that the President would be able to use military force without congressional authorization in a U.N. system.<sup>61</sup> The memorandum was circulated by the State Department to the Senate Foreign Relations Committee.<sup>62</sup> Secretary of State Hull used the legal memorandum to tell the Senators that "the President would have the right to use those armed forces [in the United Nations] without further recourse to Congress."<sup>63</sup> Though the precise boundary of this power was disputed, the administration and the Senate agreed on this concept in its broadest strokes.

Secretary Hull directly engaged congressional leaders on the question of the President's power to use military force in the United Nations. He persuaded Senator Vandenberg to join the administration on this issue. "I said to the Senators that we were approaching the most critical stage of our peace undertaking," Hull recalled, and he warned them that the Soviet Union "was watching closely to see whether the American people were strongly behind our document or whether [the American people] were showing prime interest in this question [about presidential power] and forgetting the whole question of future peace."<sup>64</sup> He warned that the Soviet Union "would not adopt a plan" that "might not function as promptly as a threat to the peace called for."<sup>65</sup> He thought that "a United Nations organization should be founded to keep the peace, by force if necessary" and that the "United States should not only be part of it, but also take her share of the leadership in creating and maintaining it, with all the responsibilities such leadership entailed."<sup>66</sup> The administration wanted to construct a United Nations that could quickly take action against threats to the international peace and this required, at a constitutional level, presidential power to order military operations through the United Nations without congressional authorization.

#### B. *Roosevelt, the United Nations, and Presidential Power*

As the Dumbarton Oaks Conference concluded, the issue of presidential power to commit troops to the United Nations became an important issue in the 1944 presidential election. President Roosevelt pushed the framework developed at Dumbarton Oaks in a major address which solidified the administra-

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60. HILDERBRAND, *supra* note 53, at 150.

61. *Id.* at 150.

62. *Id.*

63. 2 CORDELL HULL, THE MEMOIRS OF CORDELL HULL 1696 (1948).

64. *Id.* at 1697.

65. *Id.*

66. *Id.* at 1699.

tion's position that the President would have broad power to order military operations under UNSC authorization without going to Congress.

The issue was raised in the campaign through the prodding of Senator Joseph Ball, a Republican internationalist from Minnesota. He promised to endorse whichever candidate would provide the most unequivocally affirmative answer to the question: "Should the vote of the United States' representative on the United Nations security council commit an agreed upon quota of our military forces to action ordered by the council to maintain peace without requiring further congressional approval?"<sup>67</sup> As a potential Republican supporter of Roosevelt, the administration was dedicated to winning over his support.

While the Roosevelt administration had supported strong presidential power in the U.N. negotiations, they had not yet taken a public position on the matter. With the endorsement of a Republican Senator in play, the President decided to make a public address on the issue and publicly commit the administration to the plan developed at Dumbarton Oaks.

In making the case for broad presidential power in the United Nations, Roosevelt relied on an analogy about a policeman needing to take action without the entire Town Hall approving the plan. In an address to the Foreign Policy Association, Roosevelt argued:

The Council of the United Nations must have the power to act quickly and decisively to keep the peace by force, if necessary. A policeman would not be a very effective policeman if, when he saw a felon break into a house, he had to go to the Town Hall and call a town meeting to issue a warrant before the felon could be arrested. So to my simple mind it is clear that, if the world organization is to have any reality at all, our American representative must be endowed in advance by the people themselves, by constitutional means through their representatives in the Congress, with authority to act.<sup>68</sup>

Roosevelt was arguing that the requirement of the United Nations to act "quickly and decisively" necessitated the President's ability to use force without going to Congress for authorization. The Town Hall analogy employed by Roosevelt revealed his strategy moving forward; the United Nations would be structured to take quick responses to international crises and that would require presidential power to use military force without congressional authorization. The speech elevated the Dumbarton Oaks framework into a cornerstone of the President's strategy in designing the United Nations. In invoking the notion that he wanted an international organization that would be designed "to act, and not merely to talk,"<sup>69</sup> Roosevelt tied the issue of presidential power in the United Nations to the ability of the United Nations to prevent a future war.

The President and the Senate shared an understanding that upon the entry into the United Nations the President would be able to utilize military force to carry out interventions of a limited scale without congressional authorization. A

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67. Golove, *supra* note 10, at 1514.

68. President Franklin Roosevelt, Address at a Dinner of the Foreign Policy Association (Oct. 21, 1944).

69. *Id.*

prominent group of internationalists, including some constitutional scholars, argued that the President could make a “relatively small force immediately available to the international council for action against aggressors without need of legislative action by the various states.”<sup>70</sup> This was an extension, they argued, of how “the President has always had the power under the Constitution to use force when he deemed it necessary” and thus “there can be [no] doubt of his constitutional right to utilize contingents of his armed forces for [the] purpose of “carry[ing] out a commitment for participation in international policing.”<sup>71</sup> James Grafton Rogers, a former Assistant Secretary of State and a legal scholar, noted that “the use of armed force for international police measures does not involve a declaration of war,” and therefore did not need congressional authorization when using force in the United Nations.<sup>72</sup> These scholars supported the emerging theory of constitutional interpretation that the President would be able to order limited military operations through the UNSC without going to Congress.

### C. *Ratifying the U.N. Charter and Presidential Power*

When the Senate debated ratification of the U.N. Charter, the Senators largely supported the idea that the President would be able to order limited military operations through the UNSC without going to Congress. Only a few Republican Senators expressed concerns about preserving the congressional right to declare war. Robert Taft, the leader of the isolationist Republicans, demanded that “some power be reserved to Congress to direct voting by our representative which involves a war.”<sup>73</sup> Other conservative Senators echoed his concerns.<sup>74</sup>

However, the vast majority of Senators were unconcerned with the possibility that the President could use the United Nations to circumvent Congress.<sup>75</sup> During the League of Nations debate in the Senate, Edward Corwin noted that the “Covenant instantly stirred up in many bosoms all kinds of doubts as to the constitutional competence of the treaty-making authority to put the United States into such an organization.”<sup>76</sup> By contrast, there was no large-scale effort during the Charter debate in the Senate to limit presidential power. The Senate had been shaped by “an enlarged conception of the adaptability of the Constitution to problems of government in the modern era, all of which had been con-

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70. John Davis, et al., *Congress May Authorize Extraterritorial Use of Force, but Constitution Is Held To Place Responsibility for Prompt Action Directly Upon the Executive*, N.Y. TIMES, Nov. 5, 1944, at E8.

71. *Id.*

72. JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION* 88 (1945).

73. Geoffrey Matthews, *Robert A. Taft: The Constitution and American Foreign Policy*, 17 J. CONTEMP. HIST. 507, 514 (1980).

74. 91 CONG. REC. 7156 (1945) (Senator Harlan Bushfield arguing against the “delegation of power to one man or to the Security Council, composed of 10 foreigners and 1 American, to declare war and to take American boys into war” and Senator Burton Wheeler arguing that the United Nations Charter could not be passed without a “Constitutional amendment.”).

75. Stromseth, *supra* note 10, at 605.

76. CORWIN, *supra* note 3, at 217.

firmed and reinforced by the developments of World War II.”<sup>77</sup> In this debate, the issue of presidential power to use force through the UNSC was largely accepted without controversy. Most Senators saw the President’s ability to quickly respond to a crisis through the United Nations as essential to ensuring a postwar peace and the development of an international legal order that the United States had failed to create after World War I.

In the Senate Foreign Relations Committee’s report on the U.N. Charter, they expressed their support for the President’s power to use military force through the United Nations. The committee’s report strongly supported the notion that the President could use the United Nations as the basis for utilizing military force:

[A]ny reservation to the Charter, or any subsequent congressional limitation designed to provide, for example, that employment of the armed forces of the United States to be made available to the Security Council . . . could be authorized only after the Congress had passed on each individual case would clearly violate the spirit of one of the most important provisions of the Charter . . . to provide forces which will be immediately available to the Security Council to take action to prevent a breach of the peace.<sup>78</sup>

The Senate, as the Committee argued, was “serv[ing] notice upon the world that as a nation we are prepared to carry out our obligations promptly and effectively.”<sup>79</sup> In a quest to demonstrate the seriousness of the United States’ commitment to the United Nations, the Senate sought to assert that the President would have the constitutional power to use military force without the constraints of obtaining a congressional resolution.

In the final debate, the Senate ratified the resolution with a clear understanding that they were expanding the framework for the President’s war power. John Foster Dulles, testifying in Congress as a witness for the administration, argued that “if we are talking about a little bit of force to be used for a police demonstration,” then the President would not need congressional approval.<sup>80</sup>

#### D. *The United Nations Participation Act and Presidential Power*

After the passage of the U.N. Charter by the U.S. Senate, the United Nations Participation Act (UNPA) was enacted to define the President’s power to use force through the United Nations. The UNPA provided congressional recognition of the President’s power to utilize military force without congressional authorization when the President acted through the UNSC.

Section 6 of the bill stated that “[t]he President shall not be deemed to re-

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77. *Id.* at 217-18.

78. S. Rep. No. 717-19, Report on United Nations Participation Act, *reprinted in* 1 U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON INTERNATIONAL RELATIONS, PROBLEMS OF WORLD WAR II AND ITS AFTERMATH 305 (1976).

79. *Id.*

80. S. FOREIGN REL. COMM., 79TH CONG. 655, THE CHARTER OF THE UNITED NATIONS (Comm. Print. 1945).

quire 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 or agreements the armed forces, facilities, or assistance provided therein.”<sup>81</sup> The President was only limited in that any forces deployed “in addition” to those specified in the agreements would require congressional authorization.<sup>82</sup>

The bill was a victory for the majority of the Senate who wanted to advance presidential power in the United Nations. While some Senators “insisted that Article 43 approach did not adequately protect the constitutional power of Congress to declare war,” they lost this debate.<sup>83</sup> The amendments introduced by conservative Senators seeking to limit the President’s power in the United Nations were defeated.<sup>84</sup> The proponents of the bill recognized that while there was a tradition of presidential use of military force without congressional authorization that the bill would build on, the President’s power through the United Nations would also go beyond this tradition to include a broader power to utilize military force to uphold Security Council resolutions. This was, as David Golove noted, a “moment of intense constitutional creativity” in which the President was claiming an enhanced power to use military force.<sup>85</sup> The Senate was recognizing presidential war power in a way that it had not done before. While there was a rich history of presidential use of force without congressional authorization, Senator Scott Lucas recognized that “[t]he truth of the matter here is that there are no precedents” for the broad recognition of presidential power that was at the core of the UNPA.<sup>86</sup> In the passage of the bill, the Senate was recognizing an expanded scope of presidential power that built on but ultimately exceeded the bounds of earlier instances of the President utilizing military force without congressional authorization. While isolationist senators raised concerns about the President’s ability to circumvent Congress through the United Nations, the UNPA was widely supported as a constitutional measure that was necessary to ensure that the UNSC could swiftly respond to an international crisis.<sup>87</sup>

The President emerged from the creation of the United Nations with an augmented power to utilize military force without congressional authorization. From Dumbarton Oaks and President Roosevelt’s Foreign Policy Association speech in 1944 through the ratification of the U.N. Charter and the enactment of the UNPA, there was a broad consensus that the President should have the power to utilize military force in the United Nations for operations short of full-scale war.

The UNPA should be interpreted as congressional recognition of the President’s power through the UNSC to conduct military operations that are

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81. S. FOREIGN REL. COMM., 79TH CONG. 655, UNITED NATIONS PARTICIPATION ACT OF 1945 (Comm. Print. 1945), as codified in 22 U.S.C. § 287d (2012).

82. *Id.*

83. Stromseth, *supra* note 10, at 616-17.

84. *Id.* at 617.

85. Golove, *supra* note 10, at 1504.

86. *Id.* at 1503 (quoting Senator Lucas during the debate over the UNPA).

87. *Id.* at 1518-19 (discussing the Senate’s broad support for passage of the UNPA).

“short of war.”<sup>88</sup> The “short of war” framework developed by Louis Henkin is useful in conceptualizing the boundary between presidential and congressional power in the UNPA.<sup>89</sup> While a full-scale war would be beyond the limits of what the President can do under the UNPA, “uses of force that do not rise to the level of war” due to “the level of intensity of fighting” would fit within the scope of presidential action that could be launched without Congress under the UNPA.<sup>90</sup> In enacting the UNPA, the Senate recognized the power of the President to take limited military action without seeking congressional authorization. While the precise boundary between war and use of force that is “short of war” within the scope of the UNPA cannot be judged precisely, this is where examination of quasi-constitutional custom and historical practice is essential.

The best standard for distinguishing war from military operations short of war is offered by State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin Hoffman (the Leigh-Hoffman framework). Their description of war as “a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces” in a manner that is continuous rather than “sporadic” offers a compelling definition for distinguishing war from conflicts that are short of war.<sup>91</sup> While the Leigh-Hoffman position, of course, followed the enactment of the UNPA and was not the language that shaped the framing of the statute, it encapsulates the general purpose of the statute.<sup>92</sup> Senator Vandenberg wanted to ensure that the President could take “regional” action without launching a “world-wide war,” which is consistent with this framework.<sup>93</sup> The standard is consistent with how the courts have upheld the President’s power to use military force in a manner short of full-scale war.<sup>94</sup> The UNPA was constructed to allow the President to take such action short of war without going to Congress. There are a number of factors that will affect this analysis: the potential humanitarian nature of the intervention, the number of U.S. casualties, the expense to the United States, and the duration of the conflict. Under Leigh-Hoffman, the most salient factors will be the number of U.S. casualties and whether the fighting is continuous over a prolonged period. If there are a huge number of U.S. casualties, a likelihood that is receding with a shift towards drones and

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88. Henkin, *supra* note 7, at 203 (describing the nature of a military operation that may be “short of war”). Henkin is not focusing on the UNPA but his framework applies in distinguishing military operations and full-scale war. *Id.*

89. *Id.*

90. *Id.*

91. Letter from Monroe Leigh, Legal Adviser, U.S. Dep’t of State, and Martin R. Hoffmann, General Counsel, U.S. Dep’t of Def., to Clement J. Zablocki, Chairman of Subcomm. on Int’l Sec. and Scientific Affairs of the H. Comm. on Int’l Relations, 94th Cong. 38-39 (1975) [hereinafter “Leigh-Hoffman” position].

92. While a general defense of purposivism as a methodology for the interpretation of a vague statute is beyond the scope of this note, see generally Michael Rosensaft, *The Role of Purposivism in the Delegation of Rulemaking Authority to the Courts*, 29 VT. L. REV. 611 (2004).

93. See *supra* note 58, at 150.

94. *Crockett v. Reagan*, 558 F. Supp. 893, 899 (D.D.C. 1982) (holding that the President has power to use military force but Congress’s power to declare war can prevent the President from entering a “situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop”).

other technologies that remove U.S. soldiers from the battlefield, that cuts towards the conflict being a war. Similarly, if there is ongoing fighting that is continuous rather than sporadic, that will cut towards the conflict being a war. A war requires a continuous conflict that sustains large number of casualties for the United States, whereas deployments that involve more sporadic violence are not war. Such a definition can be contentious because it excludes from the category of war uses of military force, such as drones, that rely on technologies that remove danger to U.S. troops and allow for sporadic engagement with opposing forces. While scholars may have differing views on the normative question of whether the United States should utilize such technologies, their utilization does not qualify as war.

The UNPA was constructed because the President and the Congress envisioned the United States' active participation in the United Nations as an essential national interest in the post-war era. There was a history of the President being able to take limited military action short of war to uphold strong American national interests, such as the protection of Americans abroad, before the enactment of the UNPA.<sup>95</sup> The UNSC resolution became another mechanism that could trigger a national interest that would allow the President to utilize congressional force without congressional authorization. However, that general ability of the President to utilize military force without presidential power was still checked by the Congress's constitutionally allocated power to declare war. Through 1945, the United States had never fought a significant conflict with a foreign nation over a prolonged period of time without congressional authorization and all of the major conflicts were preceded by declarations of war. The UNPA was intended to expand on the President's power to take limited military actions to protect a national interest, rather than to fundamentally change the constitutional order by allowing the President to launch a full-scale war without congressional authorization.

#### IV. U.N. SECURITY COUNCIL AUTHORIZATION AND FULL-SCALE WAR

While the UNPA was enacted with the understanding that it would augment the President's power to use military force, the scope of that power was not defined in the Act. As this Part will demonstrate, the President consistently seeks to interpret executive power so as to maximize presidential power and, thus, the Act set the stage for a broad assertion of the President's power to use military force through the United Nations without congressional authorization.

As a matter of quasi-Constitutional custom, this Part argues that UNSC authorization cannot function to replace congressional authorization for a full-scale war. A full-scale war is beyond the scope of the UNPA. The historical precedent from the Gulf War, in which the President was forced to obtain congressional authorization, demonstrates that the President cannot utilize the UNSC resolution as an independent basis for a full-scale war. The Korean War, in which UNSC authorization replaced congressional authorization, was an aberration from the general quasi-constitutional custom that a full-scale war re-

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95. Bradley & Morrison, *supra* note 39, at 464 n.224.

quires a declaration of war or some form of congressional authorization.

A. *The Korean War*

After enacting the UNPA in 1945, the Truman administration had the opportunity to define the limits of its power under the Act to utilize military force without congressional authorization. President Harry Truman and Secretary of State Dean Acheson were ardent supporters of executive power and were seeking to maximize presidential power in the early days of the Cold War.<sup>96</sup>

When North Korea commenced an attack on South Korea in June 1950, the President quickly made a decision to respond with a full-scale war in the Korean peninsula. He then had to determine whether to go to Congress for authorization. After obtaining UNSC authorization, the administration decided to invoke the U.N. framework to use military force without congressional authorization. Even though such a large-scale use of military force was far beyond what Congress had intended in the UNPA, the President was able to successfully invoke the UNSC resolution to support a constitutional theory that the President could use military force in Korea without congressional authorization.

On June 25, 1950, North Korean tanks crossed the border into South Korea.<sup>97</sup> President Harry Truman returned to Washington, D.C. from his home in Independence, Missouri and quickly agreed on a strategy with Secretary of State Dean Acheson. The United States would respond with military force, and it would do so through UNSC authorization.<sup>98</sup> The constitutional question of whether or not to seek congressional authorization was one of their central concerns and they quickly developed a strategy that would rely on the UNSC authorization as a mechanism for circumventing Congress.

On the evening of June 27, the UNSC met to consider the situation in Korea. With the Soviet delegate absent, UNSC Resolution 83 passed with only Yugoslavia voting against it. The American-drafted resolution requested “that the Members of the United Nations furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”<sup>99</sup> The President now had legitimacy from the United Nations for an intervention, especially because the resolution called for member-states to intervene. By the time the resolution passed, American bombers were already attacking North Korean convoys and the orders for a larger military operation had gone out.<sup>100</sup> The administration ultimately obtained the support of the Security Council but did not wait for Security Council

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96. Dean Acheson was a lawyer by background who had served in the Treasury Department during the advent of the New Deal. He was respected as a legal realist and was one of the many young lawyers in the Roosevelt administration who embraced a broad interpretation of executive power. See generally ROBERT BEISNER, *DEAN ACHESON: A LIFE IN THE COLD WAR* (2005) (discussing Acheson's early work after Harvard Law School at Covington & Burling and in the Roosevelt administration).

97. See DAVID HALBERSTAM, *THE LONGEST WINTER: AMERICA AND THE KOREAN WAR* 1 (2007) (discussing the history of U.S. involvement in the Korean War).

98. Meena Bose, *Leading Through Multilateralism: The United Nations and the National Security Legacy of President Truman*, in *THE NATIONAL SECURITY LEGACY OF HARRY TRUMAN* 141, 156 (Michael Devine & Robert Wolz eds., 1990).

99. S.C. Res. 83, para. 6 U.N. Doc. S/RES/183 (June 27, 1950).

100. Fisher, *supra* note 11, at 32.

authorization to commence the use of force.

In their first major public appearances since the outbreak of the war, American policy-makers expended considerable effort in clarifying the legal status of the American intervention as a U.N. action that did not require congressional authorization.

First, Secretary of State Dean Acheson defended the constitutionality of the military action based on the President's need to support the United Nations. Acheson emphasized that the U.S. intervention was in response to U.N. resolutions in a speech:

The President has enunciated the policy of this Government to do its utmost to uphold the sanctity of the Charter of the United Nations and the rule of law among nations. We are, therefore in conformity with the resolution of the Security Council of June 25 and June 27, giving air and sea support to the troops of the Korean government.<sup>101</sup>

Second, President Truman argued for expansive executive power to use force under the United Nations in his press conference where he termed the war a 'police action.' In a press briefing, a reporter asked: "Mr. President, everybody is asking in this country, are we or are we not at war?" and Truman succinctly responded: "We are not at war."<sup>102</sup> When asked if he could "elaborate" on this, Truman responded:

The Republic of Korea was set up with the United Nations help. It is a recognized government by the members of the United Nations. It was unlawfully attacked by a bunch of bandits which are neighbors of North Korea. [sic] The United Nations Security Council held a meeting and passed [a resolution] on the situation and asked the members to go to the relief of the Korean Republic. And the members of the United Nations are going to the relief of the Korean Republic to suppress a bandit raid on the Republic of Korea.<sup>103</sup>

Truman emphasized the illegality of the North Korean "bandit" raid. The next question was, "would it be correct, against your explanation, to call this a police action under the United Nations?" and Truman agreed that this would be correct.<sup>104</sup> Like Acheson's argument, Truman was emphasizing that this was not a war, which would require congressional authorization, but only a police action responding to an illegal attack.

Truman was seeking to utilize the "police action" concept to his strategic advantage. A "police action," as historian Steven Casey characterizes the phrase, "encapsulated the notion that the war was not the result of North Korea's drive for unification but rather the product of an illegal challenge to inter-

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101. Dean Acheson, *Speech to The American Newspaper Guild*, HARRY TRUMAN DIGITAL COLLECTION, June 29, 1950, 23 Dep't of State Bull. 41 (1950), [http://www.trumanlibrary.org/whistlestop/study\\_collections/koreanwar/index.php](http://www.trumanlibrary.org/whistlestop/study_collections/koreanwar/index.php).

102. President Harry Truman, The President's News Conference (June 29, 1950), *available at* <http://teachingamericanhistory.org/library/document/the-presidents-news-conference-of-june-29-1950/> (last visited Mar. 4, 2014).

103. *Id.*

104. *Id.*

national peace and security.”<sup>105</sup> In using the language of a police action, President Truman was creating the impression that his actions were part of a long tradition of presidential authority to carry out “police actions” without congressional authorization.

As the war went on, the administration sought to use a presidential address to Congress and a State Department legal memorandum to further the idea that the President could use force without congressional authorization through the United Nations. President Truman offered a keynote address to Congress in which he refused to ask for authorization but instead continued to advance this theory that the President can take military action through the United Nations. To further this argument, the State Department Legal Adviser, Adrian Fisher, constructed a memorandum advancing the constitutionality of the war.

When President Truman addressed Congress on the constitutional basis for the war in July, he emphasized that the United States was acting to support the United Nations. He argued that this meant that the President did not need congressional authorization. “The prompt action of the United Nations to put down lawless aggression and the prompt response to this action by free peoples all over the world,” President Truman argued, “will stand as a landmark in mankind’s long search for a rule of law among nations.”<sup>106</sup> He emphasized that the intervention in Korea was not a U.S. military action but an action taken “under the flag of the United Nations [with] a unified command [that] has been established for all forces of the members of the United Nations fighting in Korea.”<sup>107</sup> For President Truman, the United States was lending assistance to a U.N. mission and the President could do this without congressional authorization.

As the constitutional basis for utilizing military force, the President’s power to act through the United Nations was the major argument put forward by the administration. Following the President’s speech, the State Department’s Legal Adviser offered a major defense of the constitutionality of the war which centered its analysis on the President’s power under the UNPA to take military action to support a UNSC resolution without going to Congress. The memorandum, authored by State Department Legal Adviser Adrian Fisher (Fisher memorandum) was a major statement of presidential war power after the development of the United Nations. Though the Fisher memorandum has not garnered significant scholarly attention, it served as an important executive branch legal interpretation that signaled an expansive interpretation of the President’s power to uphold the UNPA.

First, the Fisher memorandum offered an expansive interpretation of the President’s traditional Article II power to utilize military force without congressional authorization to protect a national interest. He argued that “the

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105. STEVEN CASEY, *SELLING THE KOREAN WAR: PROPAGANDA, POLITICS AND PUBLIC OPINION IN THE UNITED STATES* 28 (2010).

106. President Harry Truman, Radio and Television Address to the American People on the Situation in Korea (July 19, 1950), *available at* [www.trumanlibrary.org/calendar/viewpapers.php?pid=823](http://www.trumanlibrary.org/calendar/viewpapers.php?pid=823) (last visited Mar. 4, 2014).

107. *Id.*

Armed Forces have been used to protect specific American lives and property” without congressional sanction, and that “United States forces have been used in the broad interests of American foreign policy, and their use could be characterized as participation in international police action.”<sup>108</sup> Fisher was setting the stage for his argument by depicting a broad presidential power to utilize military force to protect a national interest. He created a list of 85 occasions where the President had utilized military force without congressional authorization as the historical basis for his claim.<sup>109</sup>

Second, the Fisher memorandum proceeded to argue that upholding a UNSC resolution was a sufficient national interest that the President should be able to use military force without any congressional authorization. The President was acting, according to Fisher, for “the preservation of the United Nations” which “is a cardinal interest of the United States.”<sup>110</sup> The memorandum argued that “[t]he President’s action seeks to accomplish the objectives of both [United Nations] resolutions.”<sup>111</sup> Without an intervention, “[t]he continued defiance of the United Nations by the North Korean authorities would have meant that the United Nations would have ceased to exist as a serious instrumentality for the maintenance of international peace.”<sup>112</sup> Fisher concluded that the “the continued existence of the United Nations as an effective international organization is a paramount United States interest” and this allowed the President to use force without congressional authorization.<sup>113</sup>

In this two-step argument, the Fisher memorandum was constructing a theory for an expansive interpretation of the President’s power in the U.N. system. According to this constitutional interpretation, the United States’ interest in the U.N. system allowed the President to take military action of any size in order to ensure that the United Nations was effective. Fisher did not make any distinction between full-scale war and military action short of war. According to his theory, the President could take military action of any size through the UNSC without any congressional authorization.

The constitutional theory advanced by President Truman, Acheson, and Fisher gained large-scale acceptance in the Senate and with legal scholars. For the most part, the Senate acquiesced to the President’s constitutional position. The most conservative Republican Senators, including Robert Taft, protested that the President’s action was unconstitutional but most of the Senate supported the President’s position.<sup>114</sup> The administration’s position became accepted as legal doctrine. Philip Jessup, an esteemed legal scholar and State Department lawyer, reflected after the war that “the recent fighting in Korea” demonstrated that there was now a “third legal status intermediate between peace and

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108. Adrian Fisher, *Authority of the President to Repel the Attack in Korea*, 23 DEP’T ST. BULL. 173, 174 (1950).

109. *Id.* at 177-78.

110. *Id.* at 173.

111. *Id.* at 176.

112. *Id.* at 177.

113. *Id.*

114. See RICHARD HAYNES, *THE AWESOME POWER: HARRY S. TRUMAN AS COMMANDER-IN-CHIEF* 173-76 (1973) (discussing the Senate’s debate on the constitutionality of the Korean War).

war.”<sup>115</sup> There was no need for a declaration of war, he argued, because it would only “raise the international temperature and thus be undesirable.”<sup>116</sup> The position advanced by President Truman, Acheson, and Fisher was largely accepted.

B. *The Truman Administration’s Flawed Interpretation of the UNPA*

The Truman administration’s theory of broad presidential power to use force through a UNSC resolution was a strong divergence from the quasi-constitutional custom concerning the President’s use of military force and a misreading of the UNPA. The Fisher memorandum cited an array of over 125 earlier instances where the President had utilized military force to uphold a U.S. interest without congressional authorization but the vast majority of these instances were small naval engagements that military officers had commenced without any authorization from the President.<sup>117</sup> This attempt to situate a full-scale war within a list of minor battles was a problematic interpretation of historical practice.<sup>118</sup> Quasi-constitutional custom requires that when an administration asserts the constitutional power to undertake the use of force without congressional approval, the use of force should be congruent with the earlier instances that the administration relies on to demonstrate the historical practice. Here, the administration was trying to use precedents of minor uses of force as the constitutional basis for a full-scale war. This was clearly beyond the limits of the quasi-constitutional custom of the President using military force in a limited sense to protect U.S. interests abroad.

The administration tried to push a full-scale war into the narrow framework for presidential power that the UNPA had attempted to create. The Senate had envisioned the President’s power to use military force as responding to small crises, not a full-scale land-war. While the Senate envisioned the President taking a limited “police action,” that would be similar to the minor uses of force that the term was used to describe in the Western Hemisphere, a full-scale war was beyond the scope of what the Senate had intended with the UNPA. Of course, this was an inherent danger in the construction of the United Nations and the UNPA. To a large degree, conservative Senators such as Robert Taft were right; when the President was given the power to use military force in an undefined set of circumstances to support a UNSC resolution, the President interpreted that power to offer the most expansive executive power possible. President Truman saw the Presidency as “a sacred and temporary trust, which he was determined to pass on unimpaired by the slightest loss of power or prestige.”<sup>119</sup> In seeking to protect presidential power, the Truman administration advanced an expansive theory of the President’s power in the era of the United

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115. Philip C. Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War?*, 48 A. J. INT’L L., 98, 98-100 (1954).

116. *Id.* at 102.

117. SCHLESINGER, *supra* note 18, at 54.

118. STEPHEN GRIFFIN, *LONG WARS AND THE CONSTITUTION* 78 (2013) (critiquing the Fisher memorandum’s methodology).

119. SCHLESINGER, *supra* note 18, at 131 (quoting DEAN ACHESON, *PRESENT AT THE CREATION: MY YEARS AT THE STATE DEPARTMENT* 415 (1969)).

Nations. That theory was a misreading of the historical practice and marked a departure from the quasi-constitutional custom.

### C. *The Gulf War*

The constitutional theory that UNSC resolutions could expand the President's constitutional power to use military force lay dormant for the rest of the Cold War. With the tension between the Soviet Union and the United States, the UNSC did not authorize any uses of force by the United States during the Cold War—it was only by accident that the Soviet delegate failed to show up to veto the resolution authorizing the Korean War. Instead, the United States continued to utilize military force under the President's Article II power as Commander-in-Chief and on limited congressional authorizations such as the Gulf of Tonkin Resolution.<sup>120</sup>

The question of the relationship between UNSC resolutions and presidential power became central in the lead-up to the Gulf War. The Bush administration tried to invoke the historical practice from the Korean War that the President could utilize UNSC resolutions as a substitute for any congressional authorization. At one level, the Gulf War episode demonstrated the limits of historical gloss in the Bush administration's failure to deploy the argument that the Truman administration. However, more fundamentally, the Gulf War episode demonstrated the centrality of historical gloss in the war powers debates precisely because the reason that the Truman framework was rejected by the Senate was that it lacked a stronger rooting in the historical practice of the Executive.

Ultimately, the Bush administration failed in this strategy and they were forced to obtain a last-minute resolution from Congress. Though the President and his advisers, particularly Secretary of Defense Dick Cheney, ardently fought to conduct the war through the UNSC authorization, the Bush administration ultimately went to Congress to request authorization. The failed attempt by the Bush administration to utilize the UNSC to launch a full-scale war demonstrated the limits of the Korean War in reshaping the quasi-constitutional custom surrounding the war power. The Korean War, as discussed earlier, marked a massive expansion of the type of conflict that the President can fight via a UNSC resolution without congressional authorization.

The Bush administration's failure to replicate the Truman administration's strategy demonstrated that, within the quasi-constitutional custom, the United States was unwilling to accept that the President could use a UNSC resolution to launch a full-scale attack. At the same time, the United States quickly obtained resolutions of condemnation from the United Nations. The United States quickly secured a UNSC resolution condemning the attack with the support of all Security Council members with the exception of Yemen.<sup>121</sup> The Soviet Union and China surprised U.S. officials by supporting the resolution of

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120. See generally ELY, *supra* note 8 (describing the Johnson administration's constitutional framework for fighting the Vietnam War).

121. S.C. Res. 660, para. 1, U.N. Doc. S/RES/660 (Aug. 2, 1990).

condemnation.<sup>122</sup> UNSC Resolution 660 demanded “that Iraq withdraw immediately and unconditionally all its forces” from Kuwait.<sup>123</sup> The United States continued to build support with further UNSC authorizations. UNSC Resolution 665 was particularly important because it authorized the use of force in a naval blockade of the Iraqi coast.<sup>124</sup> The blockade then commenced without any congressional authorization.<sup>125</sup>

The diplomatic effort culminated with the vote at the UNSC on Resolution 678, which would authorize the use of force against Iraq to repel the invasion. The resolution passed with support from the Chinese and Russian delegates and it set January 15, 1991 as a deadline for Iraqi withdrawal from Kuwait and authorized Member States, including the United States, to “use all necessary means” to repel the invasion and “restore international peace and security in the area.”<sup>126</sup> The President was now armed with a UNSC resolution that gave him the highest level of international authorization to use military force.

While the resolution was a great success for the Bush administration, it had a far cooler reception amongst Democrats on Capitol Hill, who understood that the UNSC authorization could enable the President to go to war without congressional authorization. Senator Edward Kennedy wanted to give economic sanctions more time to work and felt that the January 15, 1991 deadline did not give sanctions enough time to work.<sup>127</sup> Congressman Lee Hamilton, the Chairman of the House Foreign Relations Subcommittee on the Middle East, expressed concerns that the U.N. resolution had no “protection for congressional authority to declare war.”<sup>128</sup> For the Democrats, the U.N. resolution endangered their ability to slow the march to war and give sanctions sufficient time to work.

As President Bush began to deploy troops to Saudi Arabia, the administration and their supporters in the Senate relied on the UNSC resolution and the UNPA as the constitutional basis for this action. The President had allies in the Senate who were willing to support him on the basis of his U.N. backing. Senator Rudolph Boschwitz, a Republican from Minnesota, thanked the administration for building a “U.N. [that] is finally acting in the way we had always hoped it would,” and he deplored calls for Congress to authorize the use of force because “that kind of debate, in my judgment, would be terribly divisive. It could take days and weeks, and I think that American lives in Saudi Arabia could clearly be jeopardized.”<sup>129</sup> Senator Patrick Moynihan of New

122. RICHARD HAASS, *WAR OF NECESSITY, WAR OF CHOICE: A MEMOIR OF TWO IRAQ WARS* 61 (2009).

123. S.C. Res. 660, *supra* note 121.

124. S.C. Res 665, para. 1, U.N. Doc. S/RES/665 (Aug. 25, 1990).

125. Michael Gordon, *Confrontation in the Gulf*, N.Y. TIMES, Aug. 17, 1990, at A19 (demonstrating that the date of the blockade predated the passage of any authorizing resolution).

126. S.C. Res 678, para. 1, U.N. Doc. S/RES/678 (Nov. 29, 1990).

127. Walter Pincus, *Hill Split over When and How to Deal with UN Resolution*, WASH. POST, Nov. 30, 1990, at A16.

128. *Id.*

129. *U.S. Policy in the Persian Gulf: Hearings before the Comm. on Foreign Relations*, 101st Cong. 114 (1990) (statement of Rudy Boschwitz, U.S. Sen.).

York tried to persuade colleagues to support the constitutional theory that the administration could take military action without the need for congressional authorization. “When [the Senators] were sitting in our rooms, talking about a Persian Gulf Resolution[,]” Moynihan explained, “[w]e said that the President is invoking international law. A treaty is the ‘supreme law of the land.’”<sup>130</sup> Moynihan sought to persuade his Senate colleagues that under the UNPA, “the United States would make available to the Security Council certain forces . . . [and] Congress would have no further say in the matter.”<sup>131</sup> The Senators who supported the war favored the argument that the President could rely on the UNSC authorization as a substitute for congressional authorization.

As the war became increasingly imminent, Senate Democrats who opposed the war began to push back and argue that the UNSC resolution was an insufficient substitute for congressional authorization. Senator Edward Kennedy argued, “It is not enough for President Bush to go to the United Nations to get approval for the use of military force in the Persian Gulf. He must also come to Congress.”<sup>132</sup> He noted further that “[t]he United Nations cannot decide when America goes to war. Under the Constitution, only Congress and the administration can make that decision for our country.”<sup>133</sup>

The question of whether the UNSC resolution could substitute for congressional authorization played out in a debate between Senator Kennedy and Secretary of Defense Cheney. The Senate Foreign Relations Committee, chaired by Kennedy, called for a series of hearings on the war powers question, and Cheney was the star witness for the administration’s position. Cheney studied the precedent from the Korean War and concluded, as he later explained to the author in an interview, “Truman had committed the force and gone to war in Korea basically under Article 51 of the U.N. Charter and didn’t need and didn’t seek a congressional resolution.”<sup>134</sup> “The U.S. Senate had ratified the U.N. Charter” and he explained to the author that, “under Article 51 of the Charter, we were justified, even obligated, to come to the assistance of a member state, that had been invaded.”<sup>135</sup> Cheney went to the hearings to defend the position that President Bush, like President Truman, could launch a full-scale war solely through UNSC authorization without going to Congress.

At the hearings, Secretary Cheney lost this argument to Senator Kennedy.<sup>136</sup> “I do not believe the President requires any additional authorization from the Congress before committing U.S. forces to achieve our objectives in the Gulf,” Cheney declared.<sup>137</sup> Cheney argued that there “have been some 200

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130. *Id.* at 120.

131. Senator Daniel Patrick Moynihan, Remarks During the Annual Meeting of the American Society of International Law: The Gulf War: Collective Security, War Powers, and Laws of War, (Apr. 17, 1991).

132. *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications: Hearings Before the S. Armed Serv. Comm.*, 101st Cong. 136 (1990) (statement of Edward Kennedy, U.S. Sen.).

133. *Id.* at 345.

134. Interview with Richard Cheney, U.S. Sec’y of Def., in McLean, VA (Feb. 12, 2012).

135. *Id.*

136. *U.S. Policy in the Persian Gulf: Hearings before the Committee on Foreign Relations*, 101st Cong. 698, 701-02 (1990) (statement of Richard Cheney, U.S. Sec’y of Def.).

137. *Id.* at 701.

times, more than 200 times, in our history when Presidents have committed U.S. forces, and on only five of those occasions was there a prior declaration of war.”<sup>138</sup> Cheney, much like the Fisher memorandum, was attempting to invoke a laundry list of minor uses of force to justify the President’s ability to launch a full-scale war without congressional authorization. Kennedy saw a weakness in this argument and attacked. The Senator responded that, “we are not talking about Libya, not about Grenada, not about Panama” because there were “440,000 American troops who are over there” preparing to attack Iraqi forces.<sup>139</sup>

The Cheney-Kennedy debate was about the nature of quasi-constitutional custom. Like the Truman administration, Cheney was attempting to claim that this full-scale war was constitutionally analogous to the many small uses of force that the Executive had taken throughout American history. Kennedy came away from the hearings having defeated Cheney’s construction of the quasi-constitutional custom and he was able to begin to mobilize Senate opposition to the idea of going to war without congressional authorization. Opposition to the administration’s idea that they could go to war without congressional authorization continued to grow.<sup>140</sup>

President Bush carefully weighed his options and decided to seek congressional authorization. In the January 8<sup>th</sup> meeting where the President made this decision, the legal advisers said that as a matter of law the President would have sufficient constitutional power to use military force under UNSC authorization. However, the advisers conceded that the argument was unlikely to hold water in a public debate. Deputy Attorney General William Barr said that, “the President has full authority to conduct military operations as the commander in chief, regardless of whether Congress voted a resolution of support.”<sup>141</sup> Turning to quasi-constitutional custom, Barr told the President that, “the situation most closely resembl[ing] the current crisis was the Korean War, when Truman acted without Congress under a United Nations resolution somewhat similar to the current one.”<sup>142</sup> However, there was no other precedent that supported this massive use of force without congressional authorization.

Even as Bush made the decision to go to Congress for authorization, Secretary Cheney continued to press the argument that the President could use military force based on the UNSC authorization alone. “We had ample precedent,” Cheney argued, with “Truman in Korea [and the] U.N. Charter. The Kuwaitis, a U.N. member had come and asked us for assistance. The Senate had already ratified the U.N. Charter by a two-thirds vote [in 1945] and had made provisions for that.”<sup>143</sup> With that, he argued that the administration was “perfectly

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138. *Id.* at 702.

139. *Id.*

140. GARY HESS, *PRESIDENTIAL DECISIONS FOR WAR: KOREA, VIETNAM, THE PERSIAN GULF AND IRAQ* 122 (2009).

141. BOB WOODWARD, *THE COMMANDERS* 357 (2002).

142. *Id.*

143. Interview with Richard Cheney, Sec’y of Def., (Mar. 16-17, 2000), *available at Interview with Richard B. Cheney*, GEORGE H.W. BUSH ORAL HISTORY PROJECT, MILLER CTR., UNIV. OF VA 87, [http://web1.millercenter.org/poh/transcripts/ohp\\_2000\\_0316\\_cheney.pdf](http://web1.millercenter.org/poh/transcripts/ohp_2000_0316_cheney.pdf).

justified in going forward with the forces we had at our command without any additional authorization by the Congress.”<sup>144</sup>

The argument put forward by Cheney, for an incredibly expansive interpretation of the President’s power under the UNPA, failed. The President decided that there was insufficient constitutional precedent to justify a full-scale invasion without congressional authorization and he went to Congress to obtain a resolution. Many Democrats came to support the resolution, even against the wishes of the party’s leadership.<sup>145</sup>

With a close vote, the Congress passed the resolution authorizing the use of force just days before the invasion was set to commence.<sup>146</sup> When the attacks commenced on January 15, they had obtained both UNSC and congressional authorization.<sup>147</sup>

The Bush administration had failed in their attempt to turn the precedent from the Korean War into the core of U.S. quasi-constitutional custom. The Korean War remained alone as a single instance where the President used the UNSC to authorize a large-scale use of military force. President Bush’s decision to obtain congressional authorization under immense political backlash was an important constitutional juncture. It signaled that the precedent from the Korean War was an aberration from the President’s long-standing power as Commander-in-Chief to utilize limited military force to protect U.S. interests abroad. Of course, if President Bush had decided to go to war without congressional authorization this also would have become part of our historical practice. However, the widespread Senate opposition would have lessened the importance of the Gulf War as a constitutionally relevant historical episode because quasi-constitutional custom requires that Congress acquiesce to the President’s assertion of force.<sup>148</sup> The Gulf War ultimately demonstrated how a debate over historical practice between the Executive and the Congress could come out in favor of the Congress when the Executive lacked a strong historical practice for utilizing military force in the manner President Bush sought.

#### V. U.N. SECURITY COUNCIL AUTHORIZATION AND MILITARY ACTION SHORT OF WAR

While the Gulf War demonstrated that the President could not utilize UNSC resolutions as the constitutional basis for full-scale wars, the humanitarian interventions of the 1990s signaled a return to the original understanding of the UNPA. In interventions in Somalia, Haiti and Bosnia, the President argued that upholding a UNSC authorization was a core national interest that allowed

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144. *Id.*

145. Sara Fritz & William Easton, *Congress Authorizes Gulf War*, L.A. TIMES, Jan. 13, 1991, [http://articles.latimes.com/1991-01-13/news/mn-374\\_1\\_persian-gulf](http://articles.latimes.com/1991-01-13/news/mn-374_1_persian-gulf).

146. *Id.*

147. Chuck Alston, *The Gulf War: Bombers Heading for Baghdad As Hill Leaders Got Word*, CONG. Q., Jan 19, 1991, [www.cq.com/doc/weeklyreport-WR102402391?](http://www.cq.com/doc/weeklyreport-WR102402391?) (explaining how congressional leaders were consulted in the lead-up to the war).

148. See *Dames & Moore v. Regan*, 453 U.S. 654, 657 (1981) (discussing the requirement that the historical practice must be “known to and acquiesced in by Congress” for it to have strong constitutional impact).

the President to take military action short of war without congressional authorization. This historical practice developed a quasi-constitutional custom that was consistent with the original vision of the UNPA; the President could use limited amounts of military force to uphold UNSC resolutions and ensure international peace.

A. *Somalia*

A few months after the commencement of the Gulf War, the United States carried out a military intervention in Somalia. When the Bush administration intervened in Somalia, they again looked to authorization from the United Nations to buttress their claims that the intervention was constitutional without congressional authorization. While that argument failed in the Gulf War because it was a full-scale war, the argument succeeded in the more limited intervention in Somalia. Assistant Attorney General Thomas Flanigan justified the constitutionality in an OLC memorandum. He argued that “maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest, and will promote the United States’ conception of a ‘new world order.’”<sup>149</sup> By December 1992, the United States had deployed over 20,000 soldiers to support the U.N. mission there without any congressional authorization.<sup>150</sup> In this instance, the Bush administration succeeded in utilizing a UNSC resolution as the constitutional basis to utilize military force. Their argument was that the President could use a limited amount of military force to protect the vital U.S. national interest in upholding a UNSC resolution.

B. *Haiti*

When President Bill Clinton entered office in 1993, there was uncertainty as to whether he would pursue a strong interpretation of executive power. There was a concern amongst the incoming lawyers, as Assistant Attorney General Walter Dellinger of the Office of Legal Counsel recounted in an interview with the author, that the “administration would be willing to give away the whole house because they were so accustomed to being in Congress.”<sup>151</sup> Instead, the administration took a hard position on maintaining and expanding executive power. Though he had opposed the Gulf War as unconstitutional, Dellinger was now accepting the need to protect executive power. He embraced the “long tradition of Executive Branch [lawyers] defending the President’s authority to deploy U.S. forces.”<sup>152</sup>

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149. Auth. to Use U.S. Military Forces in Som., 16 Op. O.L.C. 6, 6 (1992).

150. RYAN HENDRICKSON, THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS 23 (2002).

151. Interview with Walter Dellinger, former Acting U.S. Solicitor General, in Washington, D.C. (Sep. 10, 2010).

152. Walter Dellinger, former Acting U.S. Solicitor General, Remarks at Federalist Society Conference on Separation of Powers and Foreign Policy (Nov. 11-13, 1999), available at FEDERALISM & SEPARATION OF POWERS PRACTICE GROUP NEWSLETTER, Winter 2000.

The administration's first major use of force came in 1994 with a deployment to stabilize Haiti. UNSC Resolution 940 authorized Member States to depose the Cedras junta that had seized power in a coup in 1991.<sup>153</sup> The Clinton administration ordered the deployment of U.S. troops in September 1994 to oust the Cedras regime and reinstate the democratically elected Aristide administration. As the Clinton administration prepared for the use of force, Republican leaders, particularly Senator Robert Dole, challenged the President's constitutional rationale.<sup>154</sup> With the looming possibility of a congressional vote against the use of force, the administration decided to rely on the UNSC resolution as the constitutional basis to utilize military force.

In responding to a formal inquiry from congressional Republicans, Walter Dellinger laid out the case for the constitutionality of the President's actions based on UNSC authorization. He wrote, "the deployment was to have taken place, and did in fact take place, with the full consent of the legitimate government of the country involved," and also was in accord with UNSC Resolution 940 authorizing the intervention.<sup>155</sup> The legal authorization, as Dellinger argued, was derived from the invitation of the Haitian regime and U.N. authorization.

President Clinton himself came to defend the President's power to use force without congressional authorization. He noted that "every President and all my predecessors in both parties have clearly maintained that they did not require, by Constitution, did not have to have congressional approval for every kind of military action."<sup>156</sup> The Clinton administration came to rely on UNSC authorization as a major mechanism for utilizing military force without congressional authorization.

### C. *Bosnia*

When President Clinton decided to deploy over 20,000 peacekeepers to Bosnia in 1995, he relied on UNSC authorization as constitutional justification and avoided going to Congress for authorization.<sup>157</sup> As the administration had done in Haiti, it turned to Walter Dellinger to defend the constitutionality of using military force without congressional authorization. In his OLC memorandum, Dellinger noted that the United States had "initiated an intensive diplomatic effort that produced a peace agreement among the warring parties in Bosnia," which now "depends on the presence of an international military force that would maintain the cease-fire and the separation of forces."<sup>158</sup> The United States had, as Dellinger argued, already made a pledge that the President now

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153. S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).

154. Norman Kempster, Editorial, *U.S. Has Authority to Launch Haiti Invasion*, L.A. TIMES, July 18, 1994, at A4.

155. Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 177 (1994).

156. President Bill Clinton, News Conference with President Jimmy Carter, General Colin Powell, and Senator Sam Nunn on Haiti (Sep. 19, 1994).

157. Paul Richter, *Republicans Balk at Sending U.S. Troops to Bosnia*, L.A. TIMES, Sep. 30, 1995, [http://articles.latimes.com/1995-09-30/news/mn-51604\\_1\\_senior-republican](http://articles.latimes.com/1995-09-30/news/mn-51604_1_senior-republican).

158. Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (Nov. 1995).

had the power to uphold. The President could use force, Dellinger argued, because of the importance of “maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest.”<sup>159</sup> The administration sent the peacekeepers without congressional authorization based on the argument that the President could take military action short of war in order to uphold the important national interest of supporting the UNSC.

At the same time that the administration was advancing this position, the House Republicans were attempting to pass a bill that would limit the President’s ability to deploy U.S. forces under U.N. command.<sup>160</sup> After the bill passed the House, the White House requested that the OLC examine the constitutionality of the issue and Walter Dellinger issued a memorandum arguing that this bill would be an unconstitutional infringement on the President’s Article II power.<sup>161</sup> The OLC memorandum stated that the bill “is impermissibly undermining the President’s constitutional authority with respect to the conduct of diplomacy” because commitments to the United Nations are within the President’s power to conduct foreign relations.<sup>162</sup> While the issue of U.S. troops fighting under U.N. command was a sub-set of the broader debate over the constitutional implication of U.S. participation in military action sanctioned by the UNSC, the OLC’s defense of the practice reaffirmed the centrality of the President’s Article II power to engage with the United Nations in a manner that is outside the purview of Congress. Just as many senators had supported the UNPA because it would allow the President to conduct diplomacy with the United Nations unfettered by interference from Congress, the OLC was now defending the President’s ability to place U.S. troops under U.N. command, allowing the President to conduct military operations without interference from the United Nations.<sup>163</sup>

#### D. *Developing a Quasi-Constitutional Custom*

These interventions in Somalia, Bosnia, and Haiti developed the quasi-constitutional custom, consistent with the original UNPA, that the President can conduct military action short of war based on a UNSC resolution. In these interventions, a Republican and then a Democratic president cited a national interest in upholding the U.N. system as providing the President with a compelling basis to take limited military action without congressional authorization.

Of course, the precise boundary between war and military action short of war will continue to be blurry and will be debated during subsequent interven-

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159. *Id.*

160. Steve Daley, *GOP-led House Votes to Limit U.S. Role in U.N. Peacekeeping*, CHI. TRIB., Feb. 17, 1995, [http://articles.chicagotribune.com/1995-02-17/news/9502170276\\_1\\_peacekeeping-house-republicans-foreign-policy](http://articles.chicagotribune.com/1995-02-17/news/9502170276_1_peacekeeping-house-republicans-foreign-policy).

161. *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. O.L.C. 182, 183 (May 1996).

162. *Id.*

163. Golove, *supra* note 10, at 1503 (discussing the support for the UNPA based on a commitment to the President’s power to negotiate at the United Nations).

tions. However, the test from the Leigh-Hoffman letter serves as an important framework. If there is a large-scale conflict between opposing military units over an extended period of time, that is likely a war for which the President will need congressional authorization. In military operations that do not involve opposing forces going to battle, such as limited airstrikes or a humanitarian intervention, the operation is short of war, and the President can rely on UNSC authorization as a constitutional basis for using military force. This alternative authorization was the objective of the UNPA and these interventions have developed that quasi-constitutional custom.

## VI. CONCLUSION

If the President can turn to the United Nations to authorize the use of force without the need to go to Congress, does this mean the President is beyond the limits of the Constitution?<sup>164</sup> Are we left with a President with limitless power beyond the scope of the law?<sup>165</sup> In the context of the intervention in Libya, where the President used UNSC authorization to buttress his constitutional claim to Article II power without any congressional authorization, is Obama guilty of fighting an “illegal war” and “ignoring the U.S. Constitution and the rule of law?”<sup>166</sup> I argue that, to the contrary, there exists a tradition of recognizing the President’s constitutional power to utilize military force short of war when there is a U.S. national interest at stake. Exercising this power through a UNSC resolution is part of that tradition

The distribution of war powers within the Constitution was split between the branches and was intended to shift with the evolving needs of the nation. The quasi-constitutional custom evolved based on which branch won successive disputes in the ongoing “invitation to struggle” between the branches for the control of the war power. The founders intended the President to have some power to use military force without congressional authorization but did not specify the boundaries. The boundaries were set to evolve based on the nation’s evolving requirements.<sup>167</sup>

The ability of the United States to support the United Nations became a central dimension of the United States’ superpower status after World War II. As one of the main architects of the institution, and with a seat on the Security Council, the United States sought to ensure that the United Nations would be a forum for the peaceful resolution of disputes and, when necessary, an institution in which collective action against violators of international law could be authorized and carried out swiftly.<sup>168</sup> The President always had the ability to

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164. Fisher, *supra* note 11, at 32 (arguing that the President Truman utilized the U.N. Security Council to circumvent Congress and unconstitutionally expand the scope of presidential war power).

165. See generally BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010) (critiquing the rise of presidential power and arguing that this poses a major threat to the constitutional order).

166. Bruce Ackerman & Oona Hathaway, *Obama’s Illegal War*, FOREIGN POL’Y, June 1, 2011, [http://www.foreignpolicy.com/articles/2011/06/01/obamas\\_illegal\\_war](http://www.foreignpolicy.com/articles/2011/06/01/obamas_illegal_war).

167. Sofaer, *supra* note 22, at 60.

168. See generally KENNEDY, *PARLIAMENT OF MAN*, *supra* note 48 (discussing the objectives of the founding of the United Nations).

use limited amounts of military force to support U.S. national interests abroad and supporting the United Nations became a new national interest that the President could protect through the use of limited amounts of military force.

The ability of the President to use military force short of war through a UNSC resolution has important implications for the President's war power in the modern era. The United States is moving toward fighting "small wars" or what the Pentagon calls "low-intensity conflicts."<sup>169</sup> All across the globe, the United States is shifting towards uses of force that are short of war. During the Obama administration, the strategy to combat Al Qaeda has been to utilize drone strikes and Special Forces operations in nations from Pakistan to Yemen.<sup>170</sup> To justify the constitutionality of these actions, the President has relied on the Authorization for Use of Military Force (AUMF), which allowed the President to use military force against "Al Qaeda and Associated Forces."<sup>171</sup> The United States has continued to send small groups of soldiers to assist in various efforts through the President's power. President Obama sent 100 Special Forces to Uganda to battle the Lord's Resistance Army<sup>172</sup> and 200 Marines to Guatemala to assist in the drug war.<sup>173</sup> However, there has been a growing critique of the Obama administration's stretch of its interpretation of the AUMF to allow drone strikes and even of the President's power to send small amounts of troops to use military force around the globe.<sup>174</sup>

If the President were able to obtain authorization from the United Nations for these missions, this would augment the President's constitutional power to use force by expanding the national interest at stake in each circumstance. These operations are short of war within the Leigh-Hoffman framework, which means that the UNSC resolution would provide a strong, if not entirely sufficient, constitutional basis for the President to use force without congressional authorization. As with the Dellinger memoranda, the executive branch would be in its best position to cite other national interests that are at stake in addition to the UNSC resolution.

A UNSC resolution would have the greatest impact on the war powers debate when the United States considers taking sizeable military operations against foreign powers, such as potential military action in Syria. For military action in Syria, the United States has considered taking action that would fall

169. See generally MAX BOOT, *THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER* (2003) (arguing that small wars have been a central part of U.S. foreign policy).

170. See MARK MAZETTI, *THE WAY OF THE KNIFE: THE CIA, A SECRET ARMY AND A WAR AT THE ENDS OF THE EARTH* 266, 308 (2013) (describing the growth of U.S. military operations to combat terrorism outside of Afghanistan and Iraq).

171. Jack Goldsmith, *The Growing Problem of Extra-AUMF Threats*, *LAWFARE* (Sep. 30, 2010, 11:53 PM), <http://www.lawfareblog.com/2010/09/the-growing-problem-of-extra-aumf-threats/> (describing the Obama administration as relying on the AUMF as the "primary basis" for the legal authority for counter-terrorism operations).

172. David Jackson, *Obama Dispatches 100 Troops to Africa*, *USA TODAY*, Oct. 10, 2011, <http://content.usatoday.com/communities/theoval/post/2011/10/obama-dispatches-100-troops-to-uganda/1#.Un5iFznaZUQ>.

173. *200 U.S. Marines Join Drug War in Guatemala*, *CBS NEWS* (Aug. 30, 2012 5:13 AM), <http://www.cbsnews.com/news/200-us-marines-join-drug-war-in-guatemala/>

174. See, e.g., Tom Hayden, *The Threat of an Imperial Presidency*, *THE NATION* (Mar. 11, 2013), <http://www.thenation.com/article/173289/threat-imperial-presidency>; Ashley Parker, *'Imperial Presidency' Becomes Rallying Cry for Republicans*, *N.Y. TIMES* (Mar. 31, 2014).

short of war within the Leigh-Hoffman framework.<sup>175</sup> President Obama, even when he went to Congress to request an authorization to use military force, maintained that the President had the constitutional power to act without going to Congress based on the Executive's power as Commander-in-Chief.<sup>176</sup>

If the President were able to get Russia and China to refrain from vetoing a UNSC resolution authorizing the use of force in Syria, which he was not able to, this would have dramatically shifted the war powers debate.<sup>177</sup> With a UNSC resolution, the President would have been able, like with the intervention in Libya, to argue that the United States had a compelling national interest to support the United Nations and that the President could, therefore, use military force without congressional authorization.

Of course, many legal scholars think that the UNSC cannot have an impact on the constitutional distribution of the war power, but their argument is flawed. Robert Bork, commenting on the Korean War, argued that "the President's Constitutional powers can hardly be said to ebb and flow with the veto of the Soviet Union in the Security Council."<sup>178</sup> While Bork rejected the idea that a foreign nation could have an impact on the U.S. Constitution's distribution of power, this is the logical extension of the United States' accession to the United Nations. When the President can persuade the other members of the Security Council to authorize the use of force short of war, such as in Libya, he will not need to go to Congress for authorization. As counterintuitive as it may seem to Bork, the Russian or Chinese Ambassador at the United Nations can shape the constitutional distribution of the war power. Of course, this is a one-way street; while the UNSC cannot detract from the President's Article II power to utilize military force, it can expand the President's power through UNSC authorization.

The argument may not appeal to a war-weary public after a long decade in Afghanistan and Iraq. There has always been a current in the public's views on foreign policy that is skeptical of uses of force that do not serve narrowly defined national interests. This Note's argument is not that every time the United Nations authorizes the use of force, the use of force is inherently in the national interest. Rather, the Note posits that when the President elects to utilize military force to uphold a UNSC resolution, he is operating with expanded constitutional power. The argument, thus, is not a normative claim about when and how the United States should be engaging in military interventions but solely a constitutional analysis of the President's power to utilize military force under

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175. Charlie Savage, *Obama Tests Limits of War Power in Syrian Conflict*, N.Y. TIMES, Sep. 8, 2013, at A1 (concerning the war powers debates over various military operations in Syria).

176. See Sam Kleiner, *From the Gulf of Tonkin to Syria: The Limits of Legislative Entrenchment in AUMFs*, VAND. J. TRANSNAT'L L. ONLINE (2013), <http://www.vanderbilt.edu/jotl/2013/09/from-the-gulf-of-tonkin-to-syria-the-limits-of-legislative-entrenchment-in-aumfs/> (discussing the Obama administration's defense of their constitutional power to conduct military operations in Syria without congressional authorization).

177. Michelle Nichols, *Russia, China Veto U.N. Security Council resolution on Syria*, REUTERS (July 19, 2012), <http://www.reuters.com/article/2012/07/19/us-syria-crisis-un-idUSBRE8610UD20120719> (describing how Russia and China vetoed three UNSC resolutions authorizing military action against Syria).

178. Robert H. Bork, *Comments on Symposium on United States Action in Cambodia*, 65 AM. J. INT'L L. 79, 81 (1971).

such circumstances. In this context, it is important to appreciate that under the Leigh-Hoffman framework, use of force in cases such as the limited airstrikes in Libya are fundamentally distinct from the invasions of Iraq or Afghanistan. Though the use of airstrikes can be deadly, the sporadic nature of the engagement and the limited U.S. casualties separates these uses of force from wars.

While most scholars assume that the battle over presidential war power is a tug-of-war fought along Pennsylvania Avenue between the White House and the U.S. Capitol, the UNSC plays an important role in shaping the constitutional distribution of war powers that has been largely ignored. While the President cannot launch a full-scale war solely through a UNSC resolution, the President may utilize a UNSC resolution as the constitutional basis to use military force short of war, as defined in the Leigh-Hoffman framework, based on an expansion of the type of 'national interest' that is at stake through a UNSC resolution. The quasi-constitutional custom, based on the founding of the United Nations and interventions in Somalia, Haiti, Bosnia, and now Libya, demonstrates that the President has the constitutional power to use military force short of war to enforce a UNSC resolution. While the Obama administration's OLC memorandum laying out the constitutional case for the President's power to use military force in Libya was widely criticized, this Note has offered a defense of its use of the UNSC resolution in defining the scope of the President's war power. The President has the constitutional power to enforce a UNSC Resolution with military action short of war.