International Security and the War Powers Resolution

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WAR POWERS RESOLUTION

In recent history, the authority to commit U.S. troops to theaters of conflict has shifted from Congress to the President. After the Vietnam War, the War Powers Resolution was written to reestablish balanced authority over war between the political branches of government. In the post-Cold War era, forces frequently are deployed as part of multilateral U.N. operations. This trend creates two contradictory needs: first, the need for the Executive to be able to act swiftly and decisively in formulating military commitments to the United Nations, and second, the need for Congress to authorize potentially long-term military deployments. To reconcile these contradictory needs, the President should be required to consult with a small group of key congressional actors before committing U.S. troops to multilateral U.N. military operations. There are both legal and security rationales for this. Centrally, Executive-congressional consultation re-solidifies the constitutional allocation of war powers and may bolster U.S. credibility in multilateral operations.

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INTRODUCTION

The disintegration of Cold War bipolarity fundamentally has altered the dynamics of international security. As centrifugal political forces unleash new threats to international politics, policymakers devise new solutions from existing paradigms of diplomatic and strategic thought. The end of the Cold War and the construction of the United Nations ("U.N.") as a framework for bolstering world security through multilateral military initiatives have each contributed to a new debate about the constitutionality of the American Executive's ability to deploy military force independent of congressional authorization.¹

American military deployments are increasingly part of a multilateral U.N. Security Council ("Security Council") effort to counter threats to international security and human rights.² Arguably, this creates a mandate for a greater centralization of the war power³ in the Executive, with authority to act swiftly and

¹ In this Note, "multilateral" refers to military operations pursued by two or more states. "Unilateral" refers to the Executive when it deploys troops into hostile or potentially hostile theaters of combat without congressional authorization. Thus, the Executive can unilaterally deploy troops as part of a multilateral military operation.


³ "War Power" is defined as "[t]he constitutional authority of Congress to declare war and maintain armed forces (U.S. Const. art. I, § 8, cls. 11-14), and of the President to
decisively through the American delegate to the U.N.\textsuperscript{4} Such an argument seeks to expand executive authority in military affairs by relying on the President’s constitutional role as “Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States.”\textsuperscript{5} Alternatively, the trend towards multilateral U.N. military actions may bolster the mandate for Congress to assert a stronger role in the use of the U.S. military to pursue U.N. objectives. If American military involvement is challenged by congressional discontent or even by congressional approval when approval comes too slowly to give certainty to American commitments, the commitment to protect international security may prove unenforceable when the Security Council decides to counter a belligerent state.\textsuperscript{•} This argument seeks to expand legislative authority in military affairs by relying on the legislature’s constitutional power to declare war and maintain military forces.\textsuperscript{6} Arguably, a swift framework for assessing legislative approval would enhance international security by allowing for a more rapid deployment.

This Note addresses whether the War Powers Resolution ("the Resolution")\textsuperscript{7} should be reinterpreted in light of the post-Cold War trend of Presidents to deploy military force pursuant to Security Council Resolutions. Part I of this Note provides background on the constitutional principles of war powers jurisprudence. Part II delineates modern developments affecting war power jurisprudence, including the role of the Resolution in the U.N. framework for enhancing collective security. Part III analyzes the need for a new approach for applying the Resolution to U.S. military deployments under the aegis of collective security schemes. This Part also explores the realist theory of international relations to illustrate the dynamics of collective security and their effect on war powers jurisprudence. The Note concludes that the Resolution should be reformulated to require executive consultation with a limited group of legislators before major troop deployments are authorized under multilateral security schemes.

Both the executive and legislative branches have a constitutional role to play in the use of force, but the legislative branch has primacy in committing forces to hostile theatres. History reveals, however, a shift in the war power from the legislative to the

\textsuperscript{4} See Jane E. Stromseth, \textit{Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era}, 50 U. MIAMI L. REV. 145, 159 (1995) [hereinafter Stromseth, \textit{Collective Force}]("[T]he President may determine that aggression short of an attack or imminent attack against the United States poses a threat to the country’s security that is serious enough to warrant dispatching American forces into combat within a time frame that precludes prior approval from Congress.").

\textsuperscript{5} U.S. CONST. art. II, § 2, cl. 1.

\textsuperscript{6} See U.S. CONST. art. I, § 8, cl. 11-14.

executive branch. Executive authority in Vietnam revealed a strong need for Congress to check executive power. An amended view of war powers and the Resolution should now be constructed to meet the modern parameters of international politics. A small subset of Congress should have the ability to play an influential role in executive troop commitments in a way that does not unconstitutionally impair the President's ability to commit U.S. forces quickly to multilateral operations.

I. CONSTITUTIONAL PRINCIPLES OF WAR POWER JURISPRUDENCE

A. Introduction to War Power Jurisprudence

Modern constitutional scholars disagree on which branch of government the Framers endeavored to vest with the power to initiate military hostilities. Under the Constitution, the government's power in foreign affairs is divided between the legislative and the executive branches of government; the judiciary has largely refrained from taking an active role in foreign affairs.\(^8\)

This debate is undergirded by the separation of powers doctrine, which holds that power must be divided among different branches of government, thus mitigating the ability of one branch to usurp all governmental power to the detriment of liberty.\(^9\) It

\(^8\) See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 276 (1997) (noting that war power issues are likely to be dismissed by courts as political questions). The Supreme Court has held: "the conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

\(^9\) See, e.g., CHERMERINSKY, supra note 8, at 1 ("The division of powers among the branches was designed to create a system of checks and balances and lessen the possibility of tyrannical rule."). The doctrinal mandate for a separation of governmental power is often attributed to the writings of John Locke and Charles Louis de Secondat, the Baron de Montesquieu. See Suri Ratnapla, John Locke's Doctrine of the Separation of Powers: A Re-Evaluation, 38 AM. J. JURIS. 189, 220 (1993) (defending the idea that John Locke's ideas influenced the origins of the doctrine of separating governmental power against academic critics who argue otherwise).

John Locke asserted:

But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a perpetual Execution, or an attendance thereunto: Therefore 'tis necessary there should be a Power always in being, which should see to the Execution of the Laws that are made, and remain in force. And thus the Legislative and Executive Power come often to be separated.

JOHN LOCKE, SECOND TREATISE ON GOVERNMENT § 144, at 382-83 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

Montesquieu asserted:
is useful to begin by analyzing the basis of arguments used by scholars to evaluate the constitutional division of war power.¹⁰

B. The Text of the Constitution

The text of the Constitution provides the starting point for an exploration of the war power. Article I provides an extensive basis for legislative power in foreign affairs. The legislature is vested with an impressive list of powers in foreign affairs, including the power:

1. “To declare War, grant Letters of marque and Reprisal, and make Rules concerning Captures on Land and Water;”¹¹
2. “To raise and support Armies;”¹²

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.


¹⁰ War power jurisprudence is a rich field for scholarly debate. Professor Erwin Chemerinsky notes that “the Constitution is an invitation to a struggle over control over the power to declare and to conduct wars.” CHEMERINSKY, supra note 8, at 207. In addition, he notes that resolutions to the debate are unlikely to come from the judiciary since “the Court’s view [is] that . . . foreign policy disputes constitute a political question.” Id. at 208. Thus, the debate is largely left to political actors and legal scholars.

¹¹ U.S. CONST. art. I, § 8, cl. 11. A letter of marque and reprisal is “a license authorizing a private citizen to engage in reprisals against citizens or vessels of another nation.” BLACK’S LAW DICTIONARY 917 (7th ed. 1999). Congress has not granted such letters since the 19th century. See id. In European legal history, these letters allowed subjects to seek redress for claims by a foreign subject during times of peace or war. The recipient was authorized to seize another nation’s property or person(s). After the 18th century, governments stopped granting letters to individual subjects but continued to grant letters to naval vessels and private ships. This practice often led to war. See Charles A. Lofgren, War-Making Under the Constitution: The Original Understanding, 81 YALE L.J. 672, 693 (1972) (analyzing the Framers’ understanding of English ideas about waging war, pursuing reprisals, and safeguarding liberty); see also Jules Lobel, Covert War and Congressional Authority: Hidden War and Forgotten Power, 134 U. PA. L. REV. 1035 (1986) (analyzing letters of marque under international law).

3. "To provide and maintain a Navy;"¹³
4. To regulate land and naval military forces;¹⁴
5. "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;"¹⁵
6. To provide for organizing a militia;¹⁶
7. "To regulate Commerce with foreign Nations;"¹⁷
8. To regulate naturalization;¹⁸
9. "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;"¹⁹ and
10. To give advice and consent to the executive branch in making treaties and appointing ambassadors.²⁰

In addition, the Supreme Court has held, "Although there is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."²¹ The Legislature’s extensive powers in national security are not plenary, however. The Constitution creates an "invitation to struggle"²² between the legislative and executive branches, which are each given spheres of autonomy within an interdependent structure of national security power. The Executive has the power:

1. To act as the "Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States,"²³

¹³ Id. art. I, § 8, cl. 13.
¹⁴ See id. art. I, § 8, cl. 14.
¹⁵ Id. art. I, § 8, cl. 15.
¹⁶ See id. art. I, § 8, cl. 16.
¹⁷ Id. art. I, § 8, cl. 3.
¹⁸ See id. art. I, § 8, cl. 4.
¹⁹ Id. art. I, § 8, cl. 10.
²⁰ See id. art. II, § 2, cl. 2.
²¹ Perez v. Brownell, 356 U.S. 44, 57 (1958); see also CHEMERINSKY, supra note 8, at 205 (analyzing the legislature’s abilities in foreign policy).
²³ U.S. CONST. art. II, § 2, cl. 1.
2. To repel sudden attacks;  

3. To "take Care that the Laws be faithfully executed;"

4. To receive ambassadors; and

5. To appoint ambassadors and to make treaties with foreign nations with the advice and consent of the Senate.

In addition, it must be stressed that history reveals more than 125 instances in which the President has authorized the use of military force, yet there have been only five congressional declarations of war. Typically, the Executive's actions can be linked to a congressional authorization or delegation to use force in specific circumstances.

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24 See id. art. I, § 10, cl. 3 (providing that a state can engage in war without the consent of Congress if it is invaded or if danger prohibits delay). Arguably, this power to engage in war without the consent of Congress can be claimed by the President when the nation is attacked, or when consultation with Congress is impossible. See STEPHEN DYCUS ET AL., National Security Law 11 (2d ed. 1997). This argument is bolstered by the statements made by delegates to the Constitutional Convention in Philadelphia. See infra note 42 and accompanying text (analyzing the statement of Connecticut's Constitutional Convention delegate Roger Sherman).

25 U.S. CONST. art. II, § 3. This clause includes laws that deal with national security. See DYCUS ET AL., supra note 24, at 10 (noting the constitutional division of power over foreign affairs between the executive and the legislative branches of government). The duty to execute the laws faithfully can entail an obligation to protect American citizens. See In re Neagle, 135 U.S. 1 (1890) (upholding the Executive's authority to protect a federal judge in the United States). The executive power to protect citizens may extend to citizens abroad. Under both customary and conventional international law, a state has the right to protect its citizens abroad. See LINDA A. MALONE, INTERNATIONAL LAW 153 (1998) ("[A]dvocates . . . [assert] that attacks on a state's nationals triggers a right of self-defense under a broad reading of [U.N. Charter] article 51 or as self-help under customary international law.").

26 See U.S. CONST. art. II, § 3.

27 See id. art. II, § 2, cl. 2.

28 See FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 145-51 (2d ed. 1989) (asserting that the historical pattern of presidential deployments of military forces without congressional authorization does not expand presidential war powers); Leonard C. Meeker, The Legality of United States Participation in the Defense of Vietnam, 54 DEP'T ST. BULL. 474 (1966) (asserting the constitutionality of the Executive's role in involvement in Vietnam based on the SEATO treaty, a multilateral security treaty ratified by the Senate that, Meeker argues, allows the President to determine when the treaty has been violated, necessitating American intervention); Henry P. Monaghan, Presidential War-Making, 50 B.U. L. REV. 19, 25-27, 30-31 (Special Issue 1970) (asserting that the historical pattern of presidential deployments of military forces without congressional authorization expands presidential war powers).

29 See Harold Hongju Koh, Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair, 97 YALE L.J. 1255, 1263 (June 1988) ("The vast majority of foreign affairs powers the President exercises daily are not inherent
Some scholars conclude that the textual division of war powers separates the President’s relatively limited ability to repel sudden attacks from the Legislature’s relatively broad ability to wage war. Based on the Constitution alone, “the text tilts decisively toward Congress.”

Other scholars disagree and assert that the Legislature’s power to issue a declaration of war is a limited power. This school of thought argues that a declaration of war is merely a formality of eighteenth-century international law, an argument that nullifies the assertion that the Framers’ intent was to vest the lion’s share of the war power in the Executive. An understanding of the legal ideas that guided the Framers’ thoughts provides additional material for analysis.

C. The English Legacy

Two schools of thought compete for viability in analyzing the Framers’ intent. Both schools invoke a different model of how the Framers viewed the English legacy of war power jurisprudence.

The first model argues that the Constitution must be read against the backdrop of three theorists who heavily influenced the legal thought of the Framers: Charles Louis de Secondat, the Baron de Montesquieu, John Locke, and William Blackstone. These eighteenth-century theorists believed that war power must lie constitutional powers, but rather, authorities that Congress has expressly or impliedly delegated to him by statute.”

See, e.g., Louis Fisher, Sidestepping Congress: Presidents Acting Under the UN and NATO, 47 CASE W. RES. L. REV. 1237, 1240 (1997) (“The constitutional framework adopted by the Framers for the war power is remarkably clear in its basic principles. The authority to initiate war lay with Congress. The President could act unilaterally only in one area: to repel sudden attacks.”).


[Eighteenth-century] [i]nternational law scholars agreed that a declaration of war was unnecessary either to begin or to wage a war, but rather was a courtesy to the enemy. . . . A declaration also served notice on allies of the enemy that they might become accessories to the war. A declaration constituted something of a complaint in the international dispute resolution process of the seventeenth and eighteenth centuries.

Id.

See id. at 198-204 (analyzing the writings of Locke, Montesquieu, and Blackstone as favoring the authority of the Executive to wage war); see also David I. Lewittes, Constitutional Separation of War Powers: Protecting Public and Private Liberty, 57 BROOK. L REV. 1083, 1093 (1992) (arguing that “Madison, Montesquieu, and Blackstone agreed that the legislative and executive powers must be divided to preserve both public and private liberties”). Lewittes concludes, “A declaration of war is not required for defensive
with the executive branch because the legislative branch would be too slow and ineffectual in war. Invoking these theorists, the first model asserts that the Executive has primacy in the constitutional division of war powers.

John Locke wrote:

For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution ... therefore there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe.

Montesquieu wrote, "[O]nce an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing; its business consisting more in action than in deliberation." MONTESQUIEU, supra note 9, bk. XI, ch. 6, ¶ 62, at 212.

William Blackstone wrote:

The king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up not only by individuals, but even by the [e]ntire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.

1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 257 (Garland Publishing, Inc. 1978) (1783).

One justification for this argument is the idea that the Framers had fought the revolution to gain the rights enjoyed by 18th-century Englishmen. Thus, their creation of a constitutional division of war powers must be interpreted in conjunction with the ideas of Locke, Montesquieu, and Blackstone, each of whom had prominence in the English legal thought of the 18th century. The theorists vested the bulk of the war power in a sovereign or king, who the Framers replaced with the Executive. See Yoo, supra note 32, at 197-98. In addition, the Legislature may still operate as a check against executive power by wielding its power over the appropriation of funds for military use. See id. at 201-02 (noting that Montesquieu provides the Legislature with two checks against the Executive’s control of the military: (1) only the Legislature was granted the power to appropriate funds for military use, and (2) the Legislature could terminate authorization for the army).
The second model argues that the constitutional separation of the war power was written to purposely reject the ideas of Locke, Montesquieu, and Blackstone insofar as these theorists vested the war power in the Executive.\textsuperscript{36} Thus, the second model asserts that the Framers sought to vest the war power in the Legislature.\textsuperscript{37} Regardless of which model seems more compelling, the constitutional division of the war power is edified by turning to the views of the Framers themselves.

D. The Framers' Intent

1. The Constitutional Convention

In 1787, delegates from twelve of the thirteen original colonies met in Philadelphia to devise the structure of American government.\textsuperscript{38} Their deliberations survive from the records made by James Madison.\textsuperscript{39}

On August 17, 1787, the delegates accepted a proposal from James Madison and Elbridge Gerry.\textsuperscript{40} The proposal called for changing a single word in the draft of the Constitution: rather than allowing the legislature to "make" war, the proposal allowed the legislature to "declare" war.\textsuperscript{41} The discussion on the proposal suggests that the Framers believed they were centralizing the war power in the Legislature rather than in the Executive.

\textsuperscript{36} See, e.g., Fisher, \textit{supra} note 30, at 1238 ("Throughout the debates at Philadelphia and in the state ratifying conventions, delegates expressly rejected the [Lockean and Blackstonian model of] monarchical power over external relations.").

\textsuperscript{37} See id. at 1240 ("The constitutional framework adopted by the Framers for the war power is remarkably clear in its basic principles. The authority to initiate war lay with Congress.").

\textsuperscript{38} See generally\textsuperscript{\ldots} Catherine Drinker Bowen, \textit{Miracle at Philadelphia} (1966) (analyzing the history and politics of the convention). Rhode Island did not participate in the convention.

\textsuperscript{39} Some scholars assert that Madison's notes provide only a partial understanding of the Framers' intent to demarcate the war power between the executive and legislative branches of government. See, e.g., Lofgren, \textit{supra} note 11, at 675 ("The main report of the one debate which explicitly considered allocation of the war-making power occupies little more than one page out of the 1,273 which contain the printed records of the Convention."). Charles A. Lofgren notes that the delegates focused their efforts on creating a government that ameliorated the deficiencies of government under the Articles of Confederation, and "[c]riticism of the Confederation government \ldots had not included the complaint that the Confederation was deficient in its ability to commit the nation to war." \textit{Id.}

\textsuperscript{40} See James Madison, \textit{Notes on the Debates in the Federal Convention of 1787}, at 476 (Ohio Univ. Press 1966) (transcribing a portion of the debates held at the 1787 Constitutional Convention).

\textsuperscript{41} See \textit{id.}
First, Roger Sharman of Connecticut believed the Executive should repel but not initiate war.\textsuperscript{42} Sharman’s view supports the argument that the Executive should not have unilateral authority to initiate war.

Second, Elbridge Gerry of Massachusetts “never expected to hear in a republic a motion to empower the Executive alone to declare war.”\textsuperscript{43} Gerry’s view also supports the argument that the Executive should not have unilateral authority to initiate war.

Third, Oliver Ellsworth of Connecticut believed there was a difference between making war and making peace: it should be difficult to make war but easy to make peace. In addition, Ellsworth believed war to be a simple and overt \textit{declaration}, whereas peace is intricate.\textsuperscript{44} This supports the argument that the President should not have unilateral authority to initiate war for two reasons. First, it would be easier to make war if the President could initiate war without the support of Congress. Second, it suggests that the Framers believed war would require a declaration. Thus, Congress’ constitutional authority to declare war enhances its authority to initiate war and seemingly nullifies initiation by the Executive.

Fourth, George Mason of Virginia was against giving the war power to the Executive or to the Senate alone.\textsuperscript{45} Like Ellsworth, Mason believed it should be difficult to make war but easy to make peace.\textsuperscript{46} Mason’s view supports the argument that the Executive should not have unilateral authority to initiate war—again, because it would be easier to make war if the President could initiate it without the support of Congress.

Thus, the brief debate on the proposal suggests that the Framers endeavored to allocate the war power between a legislative branch with the power to initiate war and an executive branch with the power to repel sudden attacks.

2. The Ratification Debate

After the Constitutional Convention, the Constitution went to the states for ratification. This triggered debate between the Federalists, who favored the Constitution and its emphasis on a powerful national government, and the Antifederalists, who argued for vesting political power in state governments, rather than the national government.\textsuperscript{47} After the Constitution’s ratification, Federalist writings ascended as the canonical exposition of the Framers’ intent.\textsuperscript{48}

\textsuperscript{42} See id.
\textsuperscript{43} Id.
\textsuperscript{44} See id.
\textsuperscript{45} See id.
\textsuperscript{46} See id.
\textsuperscript{47} See CHEMERINSKY, supra note 8, at 10-11 (describing the ratification debate between Federalists and Antifederalists).
\textsuperscript{48} The Federalist Papers constitute the primary source of Federalist arguments. See id.
Federalist arguments concerning the war power were asserted by Madison and Hamilton. Madison's writing strongly suggests the war power lies with the Congress. After the convention, he reflected, "The [C]onstitution supposes, what the History of all [governments] demonstrates, that the Ex[ecutive branch] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[late]v[ative branch]."

Another Federalist, James Wilson, argued that the Constitution "is calculated to guard against [war]" because it limits the ability of a single man to "involve us in such distress" by vesting in the Legislature the power to declare war.

Hamilton's views survive in The Federalist Papers and they provide support for the Legislature's constitutional authority to wage war. In Federalist No. 69, Hamilton argued that the Constitution would vest the war power in the legislative rather than the executive branch by clarifying the Executive's role as Commander in Chief:

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces ... while that of the British King extends to the declaring of war and the raising and regulating of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.

at 11 (noting that the Supreme Court regularly cites The Federalist Papers on the Framers' intent). Federalists countered antifederalist discontent over the constitutional mandate for a Legislature with the power to maintain standing military forces by arguing that standing military forces would promote national security and deter surprise attacks. See Lofgren, supra note 11, at 687. Hamilton, a Federalist, argued:

The authorities essential to the care of the common defence are these: To raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support. These powers ought to exist without limitation; because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and variety of the means which may be necessary to satisfy them.


The Federalists, however, focused primarily on "defending the national government without regard to a particular branch." Lofgren, supra note 11, at 687.

49 Letter of April 2, 1798, to Thomas Jefferson in 6 THE WRITINGS OF JAMES MADISON 312 (Gaillard Hunt ed., 1906).

50 See Lofgren, supra note 11, at 685 (quoting James Wilson).

51 THE FEDERALIST NO. 69, supra note 48, at 353 (Alexander Hamilton).
This passage suggests the President has a military role once war is declared, but has no authority to initiate war. 52

E. Summary

Constitutional interpretation suggests that the Framers intended to vest the war power in the Congress rather than the President and to prohibit the President from unilaterally deploying troops to initiate war. The President, however, had important military roles: first, he could use force to repel sudden attacks; second, he would have political power over the military once war had been initiated. 53

As the next Part will reveal, the 200 years since the Constitution’s ratification have witnessed overlapping trends: first, an increase in the power of the executive branch vis-à-vis the legislative branch; second, an increase in the need of the executive branch to deploy troops quickly in response to security threats; and third, an increase in the viability of multilateral organizations, notably the U.N., as a state instrument for mitigating international security threats. These trends have influenced the modern formulation of the war power and shown the need to balance this formulation with viable approaches to international security.

52 See Lofgren, supra note 11, at 685 (noting that Hamilton, along with other Federalist supporters of the Constitution, construed the Executive to have narrow powers while the Legislature retained broad governmental power). Although Hamilton was sympathetic to the need for a strong Executive, Lofgren’s interpretation of Hamilton’s position in Federalist No. 69 is bolstered by Hamilton’s writing in Federalist No. 74. In Federalist No. 74, Hamilton asserts that the President is Commander in Chief “when called into the actual service of the United States,” because “[t]he direction of war” demands “power by a single hand.” THE FEDERALIST NO. 74, supra note 48, at 379-80 (Alexander Hamilton). Thus, the President’s authority begins when the military is called into service. A priori, the President’s authority cannot begin before this point; that is to say the Legislature must call the military into service before the President takes Commander in Chief authority. In addition, the Commander in Chief Clause gives the President power to “direct” war, and thus it presumably excludes the President from initiating war. This is bolstered by Hamilton’s writing in Federalist No. 72. In Federalist No. 72, Hamilton asserts that “the direction of the operations of war” fall under the Executive’s authority. THE FEDERALIST NO. 72, supra note 48, at 369 (Alexander Hamilton).

53 See FISHER, WAR POWER, supra note 2, at 7 (“The President never received a general power to deploy troops whenever and wherever he thought best, and the framers did not authorize him to take the country into full-scale war or to mount an offensive attack against another nation.”).
II. MODERN DEVELOPMENTS AFFECTING WAR POWER JURISPRUDENCE

A. The War Powers Resolution

American involvement in Vietnam was largely a product of executive decisions, and it drained American lives and resources in a way that seemed to conflict with the Framers’ intention to vest the war power in the Congress. As a consequence, Congress passed the War Powers Resolution ("the Resolution") during the end of American involvement in Vietnam. The Resolution was written by a Congress dissatisfied with the Executive’s ability to initiate and direct war, with little or no inclination to seek congressional approval. Thus, in passing the Resolution, Congress sought to set parameters on the Executive’s ability to commit military forces to combat. The Resolution codified limitations on the ability of the executive branch to initiate unilaterally or to engage in military hostilities.

First, the President, acting as Commander in Chief, can introduce U.S. military forces "into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" only on the basis of "(1) a declaration of

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54 See DYCUS ET AL., supra note 24, at 239-46 (providing a brief history of the war and its beginning).
55 The Resolution states:
It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

56 See, e.g., DYCUS ET AL., supra note 24, at 254 ("Not until 1971 was it disclosed that the President and his advisers had kept a great deal from Congress that might have affected its vote on the Gulf of Tonkin Resolution."). The Gulf of Tonkin Resolution was passed by Congress on August 7, 1964. See id. at 243. It resolved, “That the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” by the Communist regime in North Vietnam. See id.; see also Dante Fascell, War Powers and Congress, 50 U. MIAMI L. REV. 121, 124 (1995) (asserting that the purpose of legislators who passed the War Powers Resolution was to gain greater “communication between the Congress and the President” concerning the use of force). Dante Fascell was a representative from Florida and a sponsor of the Resolution. See id. at 121. He suggests that the congressional authorization of military deployment at the outset of Vietnam was suboptimal because Congress was unsure of who the United States was fighting: “the Chinese, the Russians, Ho Chi Min, Cambodia or Laos.” Id. at 122.
war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.\textsuperscript{58}

Second, the President must consult with Congress “in every possible instance” before introducing troops into hostilities or potentially hostile theaters.\textsuperscript{59} Furthermore, when the President deploys forces into such theaters, he is required to consult regularly with Congress for the duration of the deployment.\textsuperscript{60}

Third, if the President deploys troops without a congressional declaration of war, he must submit a report to Congress within forty-eight hours. The report must describe: (1) the necessity of U.S. troop deployment; (2) “the constitutional and legislative authority” for the deployment; and (3) the “scope and duration of the hostilities.”\textsuperscript{61}

Fourth, the President must withdraw the deployed troops after sixty days unless Congress (1) “has declared war,” (2) has extended the sixty-day time limit, or (3) is “unable to meet as a result of an armed attack upon the United States.”\textsuperscript{62} The President can extend this sixty-day period by an additional thirty days if there is an “unavoidable military necessity”\textsuperscript{63} to maintain a theater presence during the withdrawal.

In short, the Resolution creates procedural safeguards against unilateral executive action in military troop deployments. Scholars and legislators debate the constitutionality of the Resolution, evaluating whether it represents an unconstitutional attempt by the Legislature to delineate the constitutional authority of the Executive.\textsuperscript{64}

This debate continues today, but any pragmatic analysis must add

\textsuperscript{58} Id.
\textsuperscript{59} Id. § 1542.
\textsuperscript{60} See id.
\textsuperscript{61} Id. § 1543(a)(3). The consultation and reporting requirements of the Resolution have been criticized heavily for their wording. As Professor Koh asserts:

Even when enacted, legislation expressly designed to check executive adventurism has often failed because of faulty draftsmanship. The War Powers Resolution, the most ambitious piece of foreign affairs “framework legislation” enacted in the post-Vietnam era, offers three particularly glaring examples. First, the Resolution’s consultation requirements oblige the President to consult “in every possible instance,” but then allow the President to decide what that term should mean. Second, the Resolution requires the President to consult with “Congress” before he sends troops abroad, but does not specify how many Members must be consulted or how far in advance. Third and most seriously, the Resolution permits the President to file three different types of reports to Congress upon committing armed forces abroad, but only requires the removal of troops within sixty days when one of those three types has been filed.

Koh, supra note 29, at 1299 (quoting the Resolution).

\textsuperscript{62} War Powers Resolution, 50 U.S.C. § 1544(b).
\textsuperscript{63} Id. § 1544.
\textsuperscript{64} See, e.g., Stephen L. Carter, The Constitutionality of the War Powers Resolution, 70 VA. L. REV. 101, 101-02 (1984) (asserting that the Resolution is constitutional “because it
new variables into the equation. Paradoxically, Section 1547(a) of the Resolution states that no pre-existing treaty should be construed automatically to grant the President the authority to deploy troops unilaterally into situations where hostilities are imminent, while Section 1547(d)(1) states that the Resolution is not intended to alter pre-existing treaties. At the time the Resolution was passed, a pre-existing treaty, the U.N. Charter, arguably created an executive obligation to deploy troops into combat whenever the Security Council decided to endorse multilateral force deployments to counter belligerent acts of aggression. Some scholars assert that this argument is dubious, positing, "[T]he mutual security treaties entered into by the United States ... made clear that no party was committed automatically to come to the defense of any other party." In any event, the role of the U.N. in post-Cold War security considerations adds crucial variables into the modern interpretation of war powers. The central point is that, regardless of the Resolution's earlier constitutional status, the modern role of multilateral operations under the U.N. suggests a need to reformulate the Resolution.

defines the war power [and in so doing, merely defines] the word 'war' in Article I [of the Constitution]”; The War Powers Resolution: A Debate Between Professor John Norton Moore and Frederick S. Tipson, 70 A.B.A. J. 10, 10 (Mar. 1984) (providing arguments for and against the constitutionality of the Resolution). As Professor Chemerinsky notes, the debate on the constitutionality of the Resolution continues with little guidance from the courts. See CHEMERINSKY, supra note 8, at 275-78 (explaining judicial reticence in war power jurisprudence). One argument is that “[t]he Constitution gives the President some power to act on his own in foreign affairs. ... Congress may not use its control over appropriations ... to prevent the executive or judiciary from fulfilling Constitutionally mandated obligations.” Id. at 277 (quoting REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, S. Rep. No. 100-216, H. Rep. No. 100-433 (1987) at 473, 476 (Minority Report)).

65 See War Powers Resolution, 50 U.S.C. § 1547(a) (stating the guidelines for interpreting the Resolution).
66 See id. § 1547(d)(1) (limiting the applicability of the Resolution).
67 See U.N. CHARTER art. 42.
68 Michael J. Glennon, United States Mutual Security Treaties: The Commitment Myth, 24 COLUM. J. TRANSNAT’L L. 509, 524 (1986) [hereinafter Glennon, The Commitment] (rejecting the notion that treaties can violate constitutional structures of power). Glennon concludes:

[Mutual security] treaties—all of them—are clear in their express terms and equally clear in their legislative history that under no circumstances is any party required to take any military action. With regard to the United States this qualification carries an important corollary: none of the treaties confers any war-making power on the President that he would not have had in its absence. This means that he is given no additional power to introduce the armed forces into hostilities by any treaty, and it also means that, once the forces are involved in hostilities, he is given no additional power to carry out any otherwise unauthorized military operation.

Id. at 551.

The U.N. originated shortly after the end of World War II to provide the world community with a procedural mechanism to pursue common goals and to negotiate disputes.\(^{69}\) The locus of U.N. power lies in the Security Council.\(^{70}\) Under U.N. Charter Article 43, member states allocate their military troops to the Security Council when necessary for maintaining international peace and security.\(^{71}\) Under this original design, U.N. member-states would provide military forces pursuant to "special agreements" issued by the Security Council; the provision of these forces would allow the Security Council to deploy troops to counter a belligerent state.\(^{72}\) The special agreements authorizing the deployment of military forces would be "subject to ratification by the signatory states in accordance with their respective constitutional processes."\(^{73}\)

The U.N. Charter creates a framework for Security Council members to engage in intervention or peacekeeping activities.\(^{74}\) Consequently, Security Council negotiations under this framework are central to any U.N. response to international security threats. This situation requires the American U.N. delegate, an appointee of the Executive, to obtain authority to commit U.S. forces when such commitment is necessary for maintaining international peace and security.

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\(^{69}\) See Moore et al., supra note 22, at 194 (1990) (describing the origins of the U.N.). John Norton Moore notes that:

[C]entral to the [U.N.] Charter was the resolve that it would be realistic to enjoin states not to use force save in self-defense, because collective security would be provided to ensure that rights would not be denied in a manner which might threaten international peace. This collective security was to be provided by the [U.N.] itself.

Id. (citations omitted).

\(^{70}\) See id. at 195. The Security Council is made up of five permanent members and ten nonpermanent members. The permanent members are: (1) China, (2) France, (3) Great Britain, (4) the United States, and (5) Russia (which holds a seat as a permanent member that was initially held by the U.S.S.R.). Nonpermanent members rotate periodically and are chosen from the remaining states within the U.N. General Assembly. See id.

\(^{71}\) See U.N. Charter art. 43, para. 1; see also Stromseth, Collective Force, supra note 4, at 146 ("The Security Council’s repertoire of possible responses to threats to international peace and security is considerable. Under Chapter VII of the United Nations Charter, for example, the Security Council can authorize collective military action on a major scale . . . .").

\(^{72}\) See U.N. Charter art. 43, para. 1-3; see also Jane E. Stromseth, Rethinking War Powers: Congress, The President, and the United Nations, 81 Geo. L.J. 597, 598 (1993) [hereinafter Stromseth, Rethinking War Powers] (noting that the Security Council could use national contingents of military force once special agreements were reached; these contingents would operate "assisted by a U.N. Military Staff Committee comprised of the chiefs of staff of the five permanent Security Council members").

\(^{73}\) U.N. Charter art. 43, para. 3.

\(^{74}\) See id. art. 43, para. 1.
Simply stated, the efficacy of the Security Council to oppose aggression is reduced when the American U.N. delegate’s commitment of U.S. military resources can be voided by Congress. Presidents have argued that the role of the United States as a world leader can mandate military action, and they have further argued that the President has the authority to pursue such action as Commander in Chief.

C. The United Nations Participation Act

In 1945, Congress passed the United Nations Participation Act ("UNPA") to codify American obligations to the U.N. and the Security Council. Under the UNPA, the President acts through the American delegate to the U.N. to negotiate with the other Security Council members to determine common positions.

To protect against the unconstitutional deployment of American military personnel, the UNPA requires Congress to approve of special agreements before American military forces can be deployed in response to a Security Council call for military countermeasures under Article 43. Once Congress makes this authorization, the President can deploy American troops without a congressional declaration of war. Such actions were deemed to be "police actions" rather than military actions.

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76 See Stromseth, Rethinking War Powers, supra note 72, at 660 (noting that America’s foreign policy interests include “responding to threats to the U.N. Charter as they arise”). Stromseth also notes that the Truman Administration argued that “requiring specific approval in each case before U.S. special-agreement forces could be used would undercut the effectiveness of the Security Council, which needed to know in advance the forces it could depend on in an emergency.” Id. at 607.

77 For example, when President George Bush reflected on his ability to deploy military troops to the Persian Gulf pursuant to a Security Council consensus to thwart aggression, he said, “Though I felt after studying the question that I had the inherent power to commit our forces to battle after the U.N. resolution, I solicited congressional support before committing our forces to the Gulf war . . . ; I didn’t have to get permission from some old goat in the United States Congress to kick Saddam Hussein out of Kuwait.” Fisher, supra note 30, at 1268 (1997) (quoting 1 PUB. PAPERS 13-14 (1991) and 1 PUB. PAPERS 995 (1992-93)).


79 See id. § 287.

80 See id. § 287(d).

81 UNPA section 287(d) states: The President is authorized to negotiate a special agreement or agreements with the Security Council which shall be subject to the approval of the Congress by appropriate Act or joint resolution . . . to be made available to the Security Council.
acts of war. By balancing the needs of the executive and the legislative branches under the U.N. Charter, this system was intended to provide the Security Council with forces that could be used in emergencies.

Two crucial points must be stressed. First, existence of the special agreement scheme evidences the importance of congressional authorization for the President to utilize military force under the sponsorship of the U.N. Second, the American delegate to the U.N. must have authority to commit American military personnel quickly to U.N. operations. Without this authority, the United States cannot use the U.N. as a forum for pursuing a foreign policy designed to bolster international security.

Id. § 287(d) (emphasis added).

This approach reflects the conclusions Congress reached in ratifying the U.N. Charter. Cf., Stromseth, Collective Force, supra note 4, at 155 ("[T]he Senate gave its advice and consent to the U.N. Charter on the understanding that any special agreement making American forces available to the Security Council would be approved by Congress in advance.").

See Stromseth, Rethinking War Powers, supra note 72, at 608-10. Congress saw legitimacy in the distinction between a "war" and a "police action." The Senate Foreign Relations Committee Report validated this view by distinguishing a police action:

Preventive or enforcement action by these forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of Congress to declare war.


However, referring to military conflict as a "police action" rather than a "war" does not immunize an executive decision from a constitutional attack:

There can hardly be room for doubt that the framers...never imagined that they were leaving [the authority] to the [E]xecutive to use the military and naval forces...for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as [the President] refrained from calling his action war or persisted in calling it peace.

John Bassett Moore, in 5 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 196 (1944) (emphasis added).


If the American delegate to the U.N. has little authority to commit troops because neither he nor the President holds the power to commit troops to armed conflict, the ability of the United States and the U.N. to counter security threats falls drastically. Requiring the
D. Cold War Polarity and the Special Agreement Problem

The efficacy of the U.N. Charter Article 43 special agreement system was nullified by the dynamics of Cold War political tension within the Security Council. Special agreements never became a mechanism for U.N. activity. Cold War political divisions created a politically divided Security Council, which seldom had the ability to reach a consensus on collective security measures. As a result, the Security Council became another front for diplomatic tension. This effectively nullified the special agreement as an instrument for giving Congress authority over American military commitments to multilateral deployments under the Security Council.

Article 43’s ineffectiveness was lamentable from a constitutional perspective that mandates congressional inclusion in foreign affairs. Congress passed the UNPA with delegate to wait for the often sluggish pace of Congress to reach a conclusion may help fan the flames of aggression. See generally CONNIE PECK, THE UNITED NATIONS AS A DISPUTE SETTLEMENT SYSTEM 234-35 (1996) (providing suggestions for bolstering the efficacy of the U.N.’s ability to initiate peacekeeping missions). Peck explains:

Whenever a peacekeeping operation is established, the [U.N.] Secretary-General is obliged to go through the same procedure of approaching a range of suitable governments to request their assistance. Delays are inevitable as governments go through the necessary steps to determine if they wish to contribute troops . . . . Lengthy procurement and bidding procedures slow down the “start up” of such operations, as does the mismatch between troops and equipment which results from the ad hoc manner in which the operations are constructed. In the meantime, the situation often deteriorates badly, complicating the military and humanitarian situation and making the peacekeepers’ job more difficult when they do finally arrive.

Id. at 233 (emphasis added). Peck’s assertions about peacekeeping are equally valid for any type of U.N. intervention; the military utility of rapid force deployment is high. See, e.g., Margaret P. Karns & Karen A. Mingst, The Evolution of United Nations Peacekeeping and Peacemaking: Lessons from the Past and Challenges for the Future, in WORLD SECURITY: CHALLENGES FOR A NEW CENTURY 200 (Michael T. Klare & Yogesh Chandrani eds., 1998) (analyzing the history of U.N. intervention and noting that the U.N. mission into Somalia was disadvantaged by the world community’s dilatory response).

See PECK, supra note 84, at 2 (analyzing the effects of the Cold War on the Security Council). Peck points out that ideological tension undermined the ability of the U.N. to enhance collective security, the primary rationale for its foundation:

Once the Cold War had begun in earnest, neither bloc wanted the international organization to have any say in its geopolitical sphere. Both refrained from bringing problems from its side of the divide to the Council, and when the rival bloc tried to have them considered, resolutions were vetoed before any action could be taken. Thus, even major conflicts, such as the war in Vietnam, were never raised in the Council. Moreover, problems not involving the superpowers reached the Council’s agenda only after they had attained crisis proportions, at which point it was usually too late to intervene effectively.

Id. at 2.
the belief that American commitments to use significant military force for U.N.-authorized deployments would be the product of an Article 43 special agreement.\textsuperscript{86} When Article 43 became ineffective as a result of Cold War politics, the Security Council simply shifted to using Article 42 as the basis for the use of force.\textsuperscript{87} Article 42 is a more general provision that allows the Security Council to take action by air, sea, or land forces when necessary to maintain or restore international peace and security after peaceful measures have failed.\textsuperscript{88} Unlike Article 43, it does not require explicitly a special agreement, nor does it require deployments to be made “in accordance with [each Nation’s] respective constitutional processes.”\textsuperscript{89}

While the utilization of Article 42 ostensibly reinvigorated the possibility of multilateral deployment during Cold War bipolarity, it did so without mandating the congressional inclusion required under the Constitution and expected under the UNPA.\textsuperscript{90} Cold War bipolarity eviscerated the viability of Article 43 and replaced it

\textsuperscript{86} See supra notes 81-82 (analyzing congressional perceptions of Security Council procedures for military force deployments).


[T]he practice of the Security Council has evolved other means for taking coercive measures, including the use of police forces raised ad hoc in response to a specific threat to peace. . . . What emerges from the institutional history of the years of stasis is not evidence that the Council’s policing functions have fallen into desuetude but, on the contrary, that the central idea of a globally sanctioned police action was never abandoned; that the failure to implement Article 43 merely led to organic growth and the alternative creation of police action through invocation of Article 42, which does not require special agreements.

\textit{Id.} While this position may justify the Article 42 basis for Security Council military initiatives as a matter of international law, it does not address whether the Article 42 basis squares with constitutional divisions of power between the executive and legislative branches of government.

\textsuperscript{88} See U.N. CHARTER art. 42.

\textsuperscript{89} Id., art. 43 para. 3; compare id. art. 42 (no requirement for a special agreement) with id. art. 43 para. 3 (requirement for a special agreement).

\textsuperscript{90} See DYCUS ET AL., supra note 24, at 298 (analyzing the legislative history of the UNPA). Dycus notes:

A majority in the Senate also were persuaded that special agreement forces [made pursuant to article 43] would be used only in a “police action” of such limited scope and duration that it would not constitute a “war” in either an international or constitutional sense. [President Harry S Truman’s] Secretary of State John Foster Dulles testified that Congress’s [sic] war powers would not be implicated if “we are talking about a little bit of force to be used as a police demonstration. . . . [But] if this is going to be a large volume of force which is going to put a big drain on the resources of the United States or commit us to
with Article 42 as the justification for force deployments, excluding Congress and shifting the constitutional allocation of war powers from Congress to the President.\textsuperscript{91}

To summarize, the Cold War era witnessed the fall of congressional authority over military deployment and created constitutional problems for military deployments that are amplified in the post-Cold War era. As the next Part will illustrate, the Gulf War revealed that security threats can create a mandate for U.N. or U.S. intervention.

III. ANALYSIS

A. The Problem: Balancing the Framers' Intent for a Legislative War Power with the International Security Mandate for Executive Authority

The Framers' desire to vest the war power in the Congress could not anticipate the collective security scheme delineated by the U.N. Charter and UNPA. Notwithstanding that the President's modern control over war conflicts with the Framers' intent, the problem is not the increase in executive power. There are compelling reasons for the Executive to hold a quantum of war power that contradicts the Framers' intent. Presidential authority to make troop commitments to U.N. operations is necessary because the viability of policies designed to enhance great and costly adventures, then the Congress ought to have a voice in this matter."

\textit{Id.} (quoting The Charter of the United Nations: \textit{Hearings Before the Senate Comm. on Foreign Relations, 79th Cong. 655 (1945) (statement of John Foster Dulles))}.

\textsuperscript{91} See Michael J. Glennon, \textit{The Constitution and Chapter VII of the United Nations Charter}, 85 AM. J. INT'L L. 74, 78 (1991) (analyzing the UNPA). Glennon answers a central question: If Article 42 does not require special agreements and congressional authorization as prerequisites to military force deployments, but Article 43 does, which article is binding? Glennon asserts that Articles 42 and 43 must be interpreted in light of their purposes: "The only provision authorizing use of armed force by the Security Council, Article 42, immediately precedes the only provision relating to the raising of armed forces by it, Article 43." \textit{Id.} at 77. In addition, Glennon notes:

The prevailing view in Congress when the UNPA was enacted was that the only mandatory way for the Security Council to raise armed forces was pursuant to special agreements concluded under Article 43... The President, prior to directing an American vote in the Security Council requiring the use of force by the United States, was expected to seek congressional approval if that approval would otherwise be required. The Charter was seen as conferring no additional authority on the President to use United States armed forces in hostilities; the President could not, by an affirmative vote in the Security Council, confer upon himself power to use armed force that he would not otherwise possess. The text of the UNPA makes that clear, as does a review of its legislative history.

\textit{Id.} at 78.
international security and thwart aggression may depend on the ability of the President's U.N. delegate to make concrete commitments in Security Council negotiations.\textsuperscript{92} Rather, the problem remains that the historical increase in the Executive's war power has taken place without a viable framework for checking that power.\textsuperscript{93} Most profoundly, the Resolution has not been construed to balance two contradictory demands of the post-Cold War world: the Constitution demands that Congress have authority to initiate war, but American obligations under the U.N., as well as American foreign policy, both demand that the President must have authority to commit troops to military hostilities. The War in the Persian Gulf against Iraq illustrates these points.

The Persian Gulf War was precipitated by Iraqi leader Saddam Hussein's 1990 invasion of Kuwait.\textsuperscript{94} President Bush quickly deployed a force that grew to more than 500,000 troops to thwart the aggression; this initial deployment was made without consulting Congress as a whole; however, he did consult, from the outset of the deployment, with selected members of Congress.\textsuperscript{95} After American troops had

\textsuperscript{92} See \textit{supra} note 84.

\textsuperscript{93} See \textsc{lois fisher}, \textsc{constitutional conflicts between congress and the president} 326 (1985) ("More threatening [than the trend towards Presidential authority] is executive activity cut loose from legislative moorings and constitutional restrictions—presidential action no longer tethered by law.").

\textsuperscript{94} See \textit{generally}, \textsc{dycus et al}., \textit{supra} note 24, at 322 (analyzing U.S. involvement in the Persian Gulf).

\textsuperscript{95} See Eileen Burgin, \textit{Rethinking the Role of the War Powers Resolution: Congress and the Persian Gulf War}, 21 J. LEGIS. 23, 30 (1995) (explaining that President Bush justified his disinclination to seek congressional approval by saying "I cannot consult with 535 strong-willed individuals. I can't do it, nor does my responsibility under the Constitution compel me to do that." \textit{Id.} (quoting George F. Seib, \textit{Secret Diplomacy May Become the Pitfall for President Bush}, WALL ST. J., Dec. 3, 1990, at A10)); \textsc{fisher}, \textit{supra} note 30, at 1264 (noting that President Bush created a multinational alliance and sought the support of the Security Council to support military action against Iraq). For a primary account of President Bush's relations with Congress during the Persian Gulf War, see \textsc{george bush & brent scowcroft}, \textsc{the world transformed} (1998). Before Congress had given specific authorization for the United States to use force against Iraq, President Bush was concerned about the possibility that Congressional discontent might undermine the success Bush had achieved in garnering an international coalition to deter Iraqi aggression. \textit{See id.} at 398 ("If a congressional resolution to use force against Iraq failed, it would undermine not only our credibility and our political leadership of the coalition, but also the international efforts to reverse the invasion."); \textit{see also} \textsc{dycus et al}., \textit{supra} note 24, at 323:

Congress was not in session at the time [of the August 2, 1990 deployment], and the President did not call it back. On August 10, however, [President Bush] sent a letter to the Speaker of the House and the President Pro Tempore of the Senate 'in accordance with my desire that Congress be fully informed and consistent with the War Powers Resolution.' The letter stated that he had dispatched U.S. forces 'equipped for combat' to respond to the Iraqi
been deployed, President Bush garnered support for military action in Kuwait from the Security Council. As a consequence, the Security Council passed Resolution 678, which justified military action against Iraq to restore the security of Kuwait and the Middle East. President Bush used Resolution 678 and the Security Council’s support for a military offensive to justify the executive initiation of war. After American troops were deployed, President Bush sought and received approval for his action from Congress.

‘threat’ along the Kuwaiti-Saudi Arabian border, ‘pursuant to my constitutional authority to conduct our foreign relations and as Commander in Chief.’ He added that he did ‘not believe that involvement in hostilities is imminent.’

On August 28, President Bush briefed selected members of Congress at the White House about Operation Desert Shield.

See Fisher, supra note 30, at 1264 (noting that President Bush’s Secretary of State, James Baker, reflected, “From the very beginning, the President recognized the importance of having the express approval of the international community if at all possible.”) (quoting JAMES A. BAKER III, THE POLITICS OF DIPLOMACY 304 (1995)).

See Fisher, supra note 30, at 1265 (explaining that the Security Council’s November 29, 1990 passage of Resolution 678 authorized all member states to use “all necessary means” to force Iraqi troops out of Kuwait, and all necessary means included military action). Fisher also asserts that “Although the Security Council ‘authorized’ each nation to act militarily against Iraq, the resolution did not compel or obligate member nations to participate.” Id.

See id. at 1266-68 (analyzing the Bush Administration’s arguments for executive authority to initiate military hostilities against Iraq). President Bush’s Secretary of Defense, Richard Cheney, asserted to Congress:

As a general proposition, I can think that the notion of a declaration of war to some extent flies in the face of what we are trying to accomplish here. And what we are trying to accomplish is to marshal an international force, some 26, 27 nations having committed forces to the enterprise, working under the auspices of the United Nations Security Council.

Arguably, the Bush Administration had made it politically unwise for Congress to oppose the Security Council’s authorization for force. See John J. Kavanagh, Note, U.S.
Some congressional representatives and military personnel felt President Bush's actions were an unconstitutional usurpation of the war power by the Executive and a violation of the War Powers Resolution. Problematically, the executive initiation of military force in the Gulf War left discontented representatives without legal redress.\textsuperscript{100} It seems clear that the Resolution must be interpreted to reconcile contradictory goals: securing legislative authority to initiate war and securing the efficacy of the Executive to implement international security schemes under a U.N. aegis.

B. The Solution: International Security and the Mandate for Reviving Congressional Authority Under the War Powers Resolution

Foreign policy considerations demand that American forces be rapidly deployable, but a well-grounded approach to determine how force deployments should be authorized must recognize that foreign policy interests are placed in jeopardy when the President acts without congressional consultation. Disagreements about policy...
between legislative and executive leadership create strife which reduces the ability of the United States to speak to the world community with a single voice. This situation is amplified when executive-legislative disagreement is created by force deployments made pursuant to a Security Council consensus. The weight of U.S. commitment is reduced when Security Council states know that American forces can be withdrawn if Congress chooses to override the Executive's force commitment.

In light of this circumstance, there are grounds for amending the Resolution's consultation requirement to accommodate a modern scenario: when the Security Council deliberates on an Article 42 decision to authorize military force, the executive branch should be required to consult with congressional leaders before agreeing to commit troops to foreign engagement in any deployment that has an estimated military duration beyond sixty days. The ideal procedure for executive-legislative consultation can only be formulated by political bargaining between the executive and the legislative branches—although one compelling possibility would be to create a congressional consultative group, consisting of a core of bipartisan congressional leaders, who could grant approval for short-term deployments. This proposal has the advantage of expanding Congress' role in the decision-making process, while preserving a low threshold for swift decision making.

C. The Rationales: Congressional Consultation, Law, and International Security

The Congressman who sponsored the Resolution noted, "You cannot separate law and politics." This idea carries weight in national security, when military

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101 See generally Richard F. Grimmett, Multinational Peacekeeping Operations: Proposals to Enhance Congressional Oversight (updated Nov. 25, 1996) (<http://www.fas.org/man/crs/95-006.htm>) (analyzing various proposals for enhancing the role of Congress in military deployments). This core group of leaders could grant a tentative approval, subject to overturn by Congress, for commitments limited to military estimates; the time duration of approval could be extended as necessary.

One scholar suggests a consultative group comprised of 18 congressional members: the Speaker of the House, the House Majority Leader, the House Minority Leader, the President pro tempore of the Senate, the Senate Majority Leader, the Senate Minority Leader, along with the chairman and ranking members of the following committees: Senate Foreign Relations, House Foreign Affairs, Senate Armed Services, House Armed Services, Senate Intelligence, and House Intelligence. See FISHER, WAR POWER, supra note 2, at 194 ("This core group of eighteen should be expanded, depending on the issue, to include other members of Congress who have special expertise and experience. However, consultation is not a legal substitute for full congressional action."). One approach to international relations theory suggests that national security concerns would be enhanced by including the leading committee members from committees relevant to national security. See infra notes 111-28 and accompanying text (discussing the realist theory of international relations).

102 Fascell, supra note 56, at 123.
intervention may be compelling for foreign policy reasons, and congressional consultation may appear to create obstacles to force commitments. It follows that the viability of reform in the modus vivendi between Congress and the President in war powers should be analyzed under two frameworks: (1) legal considerations on the constitutionality of war powers reform; and (2) political considerations that evaluate the international security implications of prioritizing congressional consultation.

1. The Legal Rationale

In the famous Steel Seizure Cases in 1952, Justice Jackson’s concurrence formulated three analyses of presidential authority. First, when the President acts pursuant to an express or implied congressional authorization, the President’s authority is at its maximum. Second, when the President acts with an absence of express approval or disapproval from Congress, the President’s action must fall within his independent powers. Additionally, there is a “zone of twilight,” in which the President and Congress may have overlapping authority or in which authority is uncertain. In such circumstances, congressional inaction may invite presidential authority. In this area, any actual “test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.” Third, when the President acts in contradiction to the will of Congress, he “can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

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103 See Younstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (holding that the President cannot seize a private steel company to facilitate munitions production).

104 See id. at 635 (Jackson, J., concurring) (“When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”).

105 See id. at 637 (Jackson, J., concurring).

106 Id. (Jackson, J., concurring). Justice Jackson stated:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.

Id. (Jackson, J., concurring).

107 Id. (Jackson, J., concurring). Justice Jackson stated:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 637-38 (Jackson, J., concurring).
Justice Jackson’s framework provides a compelling legal lens through which American military force commitments to multilateral operations should be viewed. Typically, an executive decision to commit forces to a U.N. intervention lies in the “zone of twilight” of Justice Jackson’s second scenario. Both the textual bifurcation of the war power under the Constitution and the Framers’ intent suggest a constitutional overlap in the power to make military decisions. In addition, Congress may be acquiescing to the authority of the President because it lacks the political capital or certainty to challenge a military intervention, especially one that may have support in the world community. Finally, party membership may determine loyalties to the favor or disfavor of an executive usurpation of the war power.\footnote{See id. at 654 (Jackson, J., concurring) ("[R]ise of the party system has made a significant extraconstitutional supplement to real executive power. . . . Party loyalties and interests . . . extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.").}

When the Executive consults with a core group of congressional leaders before deploying American troops into theaters of risk, the executive action moves asymptotically from Justice Jackson’s first scenario, where executive action moves in a constitutionally tenuous “zone of twilight,” towards Justice Jackson’s second scenario, where the Executive’s constitutional authority maximized because it is supported by an express or implied congressional authorization. While this consultation does not authoritatively establish congressional support, or prohibit Congress from later calling for a reduction in American military engagements, it bridges the gap between the Framers’ mandate for congressional authority over war and the security mandate for the U.N. delegate to make reliable U.S. commitments for military intervention that fall short of declared wars.\footnote{Cf. Koh, supra note 29, at 1326-35 (advocating for a congressional group that could consult with the Executive in the foreign policy areas in which Congress shares authority as part of a structural reformulation of authority in foreign affairs). As Professor Koh notes, there are significant benefits to this type of structural reformulation political jurisdiction in foreign affairs: [A core group of congressional members] could provide the Executive with the benefit of its deliberative judgments without demanding unacceptable sacrifices in flexibility, secrecy, or dispatch. . . . Moreover . . . this core group would consist of congressional leaders who would be directly accountable to the entire membership, and who would have the stature to express to the President views that might not come from his own subordinates. Id. at 1327.} In the absence of such consultation, executive authority runs unchecked. As Justice Jackson observed, “[O]nly Congress itself can prevent power from slipping through its fingers.”\footnote{Youngstown Sheet & Tube, Co., 343 U.S. at 654 (Jackson, J., concurring).}
2. The International Security Rationale

In addition to a legal basis for including Congress in military decisions made pursuant to a Security Council Resolution, national security considerations drawn from international relations theory ("IR") further bolster the necessity of congressional support for military commitments.\(^{111}\)

Two main schools of thought structure the modern debate in IR: the "neoliberal" school and the "realist" school.\(^{112}\) Neoliberalism provides a rich source of ideas to justify the viability of multilateral U.N. intervention as a means to international stability.\(^{113}\) Realism provides a more compelling basis for analyzing national security decisions, however, because realism has wielded more influence on political thought than has neoliberalism.\(^{114}\)

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\(^{111}\) See Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335, 340 (describing how international law and international relations can each contribute to the study of each other).


\(^{113}\) See generally id. at 4 (delineating neoliberalism's assumptions that evince support for the viability of the U.N. as an instrument for international order: (1) "[w]ar and injustice are international problems that require collective or multilateral action rather than national efforts to eliminate them;" (2) "[i]nternational society must reorganize itself institutionally to eliminate the anarchy that makes problems such as war likely;" and (3) "[t]his goal is realistic because history suggests that global change and cooperation are not only possible but empirically pervasive."). Thus, neoliberalism's focus on international institutions accords with its conclusion that the U.N. provides an effective instrument to bolster international security as an institution, rather than as a framework for facilitating state action. In contrast, realism asserts that international organizations are useful in international politics, but they are not viable as institutions independent of powerful states; powerful states use international institutions as an instrument for affecting their national interests. See REALISM: RESTATEMENTS AND RENEWAL, at xv (Benjamin Frankel ed., 1996) (analyzing the realist interpretation of international organizations). Benjamin Frankel asserts:

Realists do not say that [international] institutions or conventions are not helpful. Institutions and agreements increase the knowledge states have of other states' capabilities, they facilitate negotiations and ease exchanges and interactions. This, however, is all they do. Institutions and conventions do not foster new consciousness or fundamentally alter the anarchic state of international relations. No state will sacrifice its interests (endanger its security, undermine its welfare, jeopardize its future) in order to serve a larger community.

Id.; see also infra notes 121-22 and accompanying text (analyzing the anarchical nature of the international political system).

\(^{114}\) See KEGLEY, supra note 112, at 6 (contrasting the influence of realism and neoliberalism on security decisions). Charles W. Kegley, Jr., asserts:
Realist theory has its origins in Thucydides, who asserted that the cause of the Peloponnesian War centered on disparities in power between Athens and Sparta.115 In its modern form, realism posits four assumptions about international politics relevant to war powers analysis.116 Each of these assumptions can be linked with a

Leaders and scholars alike organized their thoughts and images almost exclusively in terms of [realism]. This reliance on realism to explain and predict international developments was understandable. Realism found a fertile ground in which to flourish during the conflict-ridden fifty-year period between 1939 and 1989. The lust for power, appetite for imperial expansion and struggle for hegemony, a pervasive arms race, and obsession with military security were in strong evidence. Realism accounted for these phenomena better than did any other theoretical perspective.

Id.

Kegley also asserts that neoliberalism provides a viable challenge to realist thought after the Cold War. See id. This assertion may be true in academic circles, but war power analysis is still best predicated on a realist paradigm. Until congressional actors begin to assert a neoliberal vision of world politics, a realist vision will more accurately reflect the parameters of legislative thought on national security issues.

Recent events suggest realism remains in force. For example, in contrast to neoliberalism, realism rejects the viability of international organizations as a means of achieving international security, independent of state power. See id. at 5 (delineating realism’s assumptions that evince opposition to the viability of the U.N. as an instrument for international order: “Never entrust the task of self-protection to international organizations or to international law.”). If it ever abandoned realism, Congress has returned to realist assumptions emphasizing the state, rather than international organizations, such as the U.N., as the central instrument for mitigating international security threats. See, e.g., Grimmett, supra note 101, at 3 (“As costly multinational peacekeeping operations under the aegis of the United Nations in Somalia and Bosnia have failed to produce the desired outcomes, support in Congress and the country for American participation in these operations has declined.”).

115 See, e.g., Mark V. Kauppi, Thucydides: Character and Capabilities, in ROOTS OF REALISM 142 (Benjamin Frankel ed., 1996) (noting the influence Thucydides has had on realist thought). Kauppi notes:

While realists of all persuasions lay claim to Thucydides, those realists known as power transition theorists have made the strongest case. Power transition theorists convincingly argue that the essence of Thucydides’ explanation for the outbreak of the Peloponnesian War in 431 B.C. involves the shift in relative capabilities between two powerful countries.

Id. For the canonical history of the Peloponnesian War reflecting realist ideas, see THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR (Rex Warner trans., Penguin Books 1954) (ca. 400 B.C.) (analyzing the Peloponnesian War between Ahens and Sparta in the fourth century B.C.).

116 See generally REALISM: RESTATEMENTS AND RENEWAL, supra note 113 (offering an exposition of modern realism and its implications for international politics); ROOTS OF REALISM, supra note 115 (offering a history of realist thought in international relations); KENNETH N. WALTZ, MAN, THE STATE, AND WAR (1959) (offering a realist interpretation of international relations); KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS
rationale for reformulating the Resolution to affect greater congressional consultation in decisions to use force.

The first assumption of realism is that states, rather than international organizations, are the central units of international politics; international organizations “merely reflect the interests of their member states.”117 This has implications for war powers jurisprudence. If states are the central units of international politics, even in multilateral military action, then it is imperative that the international actors (states) enhance their credibility with their allies and adversaries; otherwise, neither will believe them. As one scholar notes, “Credibility is the currency of diplomacy.”118 Consequently, this creates a security rationale to include Congress in decisions to engage in multilateral deployments, because a Congress that challenges an executive deployment made without congressional approval will reduce U.S. credibility in the international community.119

The second assumption of realism is that states pursue their national interests in an international political system that is anarchic.120 It is important to note that this does not mean the international system is in chaos.121 States are inclined towards peaceful cooperation when it is in their interest to do so. There is no authority above states, however, to prevent a state from invoking force when it discerns force to be an effective means of achieving its national interests.122 This proposition has

(1979) (offering an exposition of the theoretical principles of realist thought).

118 Glennon, The Commitment, supra note 68, at 548.
119 For example, in Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990), analyzed supra note 100, congressional representatives challenged an executive deployment. Until a congressional challenge to an executive deployment has been resolved to allow the deployment, it would be illogical for a foreign state to feel confident that the United States’ deployment will be maintained. This undermines the benefits the United States might receive from making a commitment to engage in multilateral peacekeeping operations.
120 See REALISM: RESTATEMENTS AND RENEWAL, supra note 113, at xv (analyzing realist assumptions about international relations).
121 See id. ("A state of anarchy is not a war of all against all. Wars are costly, and their results are unpredictable, so states have an incentive to pursue their interests by other means. . . . When it is no longer in a state's interest to abide by a [peaceful] convention, the state withdraws from the convention . . . .").
122 See, e.g., WALTZ, MAN, THE STATE, AND WAR, supra note 116, at 160 (describing the international political system). Neorealist Kenneth Waltz describes the realist analysis of the anarchical system in world politics:

A state will use force to obtain its goals if, after assessing the prospects for success, it values those goals more than it values the pleasures of peace. Because each state is the final judge of its own cause, any state may at any time use force to implement its policies. Because any state may at any time use force, all states must constantly be ready either to counter force with force or to pay the cost of weakness. The requirements of state action are, in this view, imposed by the circumstances in which all states exist.
implications for war powers jurisprudence. Congress is better suited to assess multilateral deployments as a means to achieve national interests in an anarchical political system.\textsuperscript{123} Congressional actors have an interest in being responsive to their electors that transcends presidential accountability.\textsuperscript{124} In addition, if significant military action is within U.S. interests, then major military deployments should preserve an enhanced role for Congress because a "national interest," by definition, must be derived from the will of the Congress, and \textit{a priori}, from the will of the governed.

The third and fourth assumptions are closely linked, and they build from the first two realist assumptions about international politics. Specifically, the third assumption of realism is that states seek to maximize their security or their power.\textsuperscript{125} The fourth assumption of realism is that the international system is responsible for state conduct on the international scene.\textsuperscript{126} Thus, in an international political system predicated on anarchy, """"[S]overeign nations are moved to action by what they regard as their national interests rather than by the allegiance to a common good which, as a common standard of justice, does not exist in the society of nations.""""\textsuperscript{127} This proposition has implications for war powers jurisprudence. An international political system predicated on anarchy creates a mandate for garnering security. Security is enhanced when commitments to collective security schemes are not subject to subsequent nullification by a discontent Congress. This represents an IR corollary to Justice Jackson’s first category of presidential power: when the President acts pursuant to an express or implied congressional authorization, the President’s authority is at its maximum. Through a realist lens, this suggests that when

\begin{footnotesize}
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\item \textsuperscript{123} See Cyrus R. Vance, \textit{Striking the Balance: Congress and the President Under the War Powers Resolution}, 133 U. PA. L. REV. 79, 91 (1984) ("Presidents, mired in the executive responsibilities of government, sometimes lose touch with the tide of domestic political opinion. The unadorned views of wise individuals outside the executive branch can play an important and useful role.").
\item \textsuperscript{124} As Thomas Jefferson wrote, """"We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."""" REVELEY, supra note 31, at 106 (quoting Thomas Jefferson).
\item \textsuperscript{125} See \textit{REALISM: RESTATEMENTS AND RENEWAL}, supra note 113, at xv (analyzing realist assumptions about IR).
\item \textsuperscript{126} See id. Realists’ views on the anarchical nature of international politics reveal two schools of thought: offensive realism and defensive realism. Offensive realists argue that the scarcity of security causes states to adopt offensive strategies, often resulting in war. Defensive realists argue that security is readily available, causing states to adopt defensive strategies. See id.
\item \textsuperscript{127} MICHAEL JOSEPH SMITH, \textit{REALIST THOUGHT FROM WEBER TO KISSINGER} 145 (1986) (quoting HANS MORGENTHAU, \textit{POLITICS AMONG NATIONS} (1948)).
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presidential action and congressional authorization support a military force deployment, security is maximized.128

CONCLUSION

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.129

128 This conclusion relies on theoretical constructions about collective action in international relations, illustrated by the Stag Hunt parable originally formulated by Jean-Jacques Rousseau. See Abbott, supra note 111, at 368 n.174 (analyzing the Stag Hunt parable). Abbott explains:

In the parable, all members of a group of primitive hunters prefer to eat venison. All must cooperate in order to capture a stag; if one hunter “defects,” the stag will escape. Whenever a hunter sees a hare pass by, however, he is tempted to leave the group and pursue it. A single hunter can catch a hare, and will eat lightly, but the others, if they continue after the stag, will not eat at all. If all abandon cooperation and hunt rabbits, all will eat lightly. [Realists] use [the] Stag Hunt to illustrate the difficulty of international cooperation.

Id. The theoretical implications of the Stag Hunt reveal that collective action, which may bolster the payoff of all actors, is only feasible when all actors have assurance that no other actor will defect. See id. at 368. (“[I]f one suspects that another player is likely to cease cooperating, defection guarantees that one will at least avoid the worst outcome.”).

This argument creates a security rationale for greater congressional inclusion in military deployments. If Congress can either support or nullify an executive deployment because its views were not factored into the initial deployment decision, mutual security operations are threatened. Congress could choose to cry “foul” and recall U.S. military forces. This amounts to a U.S. defection. Other actors lack the assurance to stay in the game and “hunt the stag,” because they lack assurance that the United States will not defect. Furthermore, the mere potential of defection is enough to threaten the collective effort. Congressional misgivings about the wisdom of executive military action, reported worldwide, ostensibly reduce the assurance that other states (actors) have that the United States will not defect from a multilateral operation. Note that during the Persian Gulf War, President Bush feared the possibility that congressional discontent over the use of force against Iraq might undermine U.S. leadership of the multilateral coalition against Iraq, which would undermine efforts to reverse Iraqi aggression. See supra note 95 (analyzing President Bush’s consultation with Congress during the Persian Gulf War).

History reveals a flow of military authority from the Congress to the President. This trend should be tempered by considerations about the constitutionality of unilateral executive authority and the consequences that executive authority, voidable by a discontent Congress, would have on collective security efforts. A balance must be struck between swiftness, secrecy, accountability, and constitutional authority.

Requiring the Executive to consult with a core group of legislative actors is one possible approach to balance constitutional and diplomatic imperatives. There are sound legal and strategic reasons to reinvigorate Congress’ role in decisions to deploy military forces in multilateral operations. Admittedly, there are no perfect solutions, but the Constitution combines with collective security considerations to mandate that war powers interpretations facilitate a consensus between the political branches of government before forces are deployed into hostile theaters.

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