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I. INTRODUCTION

After Iraq invaded Kuwait on August 2, 1990, the United Nations became the focus of a successful international effort to expel Iraqi forces from Kuwait. The end of the Cold War and the new spirit of cooperation between the United States and the Soviet Union had revitalized the United Nations as an instrument of international peace and security. To some degree, agreement replaced stalemate in the Security Council, and with agreement came political and military support from member nations. Thus, for the first time since the Korean War, the United Nations was willing and able to fulfill its avowed purpose and take “effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace” in order to “maintain international peace and security.”

Most nations have expressed strong support for the United Nations new role. In the United States, both the Republican President and the Democratic Congress heralded the resurgence of the United Nations as the beginning of a new world order and vowed to use the organization in the future. In the rush to celebrate the victory in the Gulf War, however, many in the United States Government and the American press have forgotten difficult questions raised by war and the United Nations new role.

Perhaps the most troublesome issue arose after the Security Council passed Resolution 678 on November 29, 1990. Resolution 678 de-

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1. U.N. CHARTER art. 1, ¶ 1.
manded that Iraq comply with Resolution 660, which had condemned the invasion, demanded an immediate and unconditional withdrawal of Iraqi forces, and called upon Iraq and Kuwait to begin immediate negotiations to resolve their disputes. More importantly, Resolution 678 authorized all member states of the United Nations to use “all necessary means” to implement Resolution 660 unless Iraqi forces withdrew from Kuwait before January 15, 1991. Shortly after the passage of Resolution 678, President Bush claimed that he had the constitutional authority to use military force to implement the Resolution without congressional authorization. Although Congress ultimately authorized the use of military force, the questions raised by the President’s claim remain


6. Text of Congressional Joint Resolution on Use of Force, N.Y. TIMES, Jan. 14, 1991, at A11. The full text of the resolution is as follows:

   To authorize the use of United States Armed Forces pursuant to United Nations Security Council Resolution 678.

   WHEREAS the Government of Iraq without provocation invaded and occupied the territory of Kuwait on August 2, 1990; and

   WHEREAS both the House of Representatives (in H.J. Res. 658 of the 101st Congress) and the Senate (in S. Con. Res. 147 of the 101st Congress) have condemned Iraq’s invasion of Kuwait and declared their support for international action to reverse Iraq’s aggression; and

   WHEREAS, Iraq’s conventional, chemical, biological, and nuclear weapons and ballistic missile programs and its demonstrated willingness to use weapons of mass destruction pose a grave threat to world peace; and

   WHEREAS the international community has demanded that Iraq withdraw unconditionally and immediately from Kuwait and that Kuwait’s independence and legitimate government be restored; and

   WHEREAS the U.N. Security Council repeatedly affirmed the inherent right of individual or collective self-defense in response to the armed attack by Iraq against Kuwait in accordance with Article 51 of the U.N. Charter; and

   WHEREAS, in the absence of full compliance by Iraq with its resolutions, the U.N. Security Council in Resolution 678 has authorized members states of the United Nations to use all necessary means, after January 15, 1991, to uphold and implement all relevant Security Council resolutions and to restore international peace and security in the area; and

   WHEREAS Iraq has persisted in its illegal occupation of, and brutal aggression against Kuwait; Now, therefore, be it

   Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

   Section 1.
unanswered. If accepted, his claim creates a new justification for the President's use of force without congressional authorization and expands Presidential control over the war power at the expense of Congress' authority.

Implicit in the President's claim is the assumption either that he already had the constitutional authority to use military force without congressional authorization, or that the Security Council Resolutions gave him such constitutional authority. Three distinct theories support the President's claim: The first holds that the President must implement a Security Council resolution because of his constitutional duty to take care that the laws of the United States be faithfully executed; the second that the President may implement a Security Council resolution under his own authority, either because the Constitution gives him the power to initiate war or because military action to implement a Security Council

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**SHORT TITLE**

This joint resolution may be cited as the "Authorization for Use of Military Force Against Iraq Resolution."

Section 2.

**AUTHORIZATION FOR USE OF U.S. ARMED FORCES**

(a) AUTHORIZATION. — The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.

(b) REQUIREMENT FOR DETERMINATION THAT USE OF MILITARY FORCE IS NECESSARY. —

Before exercising the authority granted in subsection (a), the President shall make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that —

(1) the United States has used all appropriate diplomatic and other peaceful means to obtain compliance by Iraq with the United Nations Security Council resolutions cited in subsection (a); and

(2) that those efforts have not been and would not be successful in obtaining such compliance.

(c) WAR POWERS RESOLUTION REQUIREMENTS. —

(1) SPECIFIC STATUTORY AUTHORIZATION. — Consistent with section 8(a) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS. — Nothing in this resolution supersedes any requirement of the War Powers Resolution.

Section 3.

**REPORTS TO CONGRESS**

At least once every 60 days, the President shall submit to the Congress a summary on the status of efforts to obtain compliance by Iraq with the resolutions adopted by the United Nations Security Council in response to Iraq's aggression.

resolution does not constitute war within the meaning of the Constitution; the third that the President may use force to implement a Security Council resolution because Congress delegated the power to declare war to the President when it ratified the United Nations Charter.

This Note examines the President's claim that he had the constitutional authority to use military force to implement Resolution 678 without congressional authorization and concludes that the President's claim has no merit. More specifically, this Note examines the three theories described above and finds that they fail to support the President's claim. The first theory fails because there was no obligation for the President to take care to faithfully execute Resolution 678. The Security Council authorized, but did not obligate, the United States to use all necessary means (and not necessarily military force) to implement Resolution 678. Further, the Security Council has no authority to obligate the United States to use military force because the United States has never signed a special agreement under Article 43 of the U.N. Charter. The second theory fails because the conflict in the Persian Gulf was a war within the meaning of the Constitution and only Congress has the constitutional power to declare war. Even assuming that the conflict in the Persian Gulf was not a war within the meaning of the Constitution, the President may not contravene the will of Congress as it has been expressed in the War Powers Resolution. Finally, while the entire Congress may delegate the power to declare war under certain circumstances, the Senate alone cannot do so through the treaty process. The whole Congress must participate in the delegation of an enumerated power. In fact, Congress did delegate the power to declare war to the President by passing the United Nations Participation Act. The Act requires, however, that the President negotiate a special agreement with the Security Council, the whole Congress consent to such agreement, and the President ratify it. Since this has not happened, the President does not have the power to declare war based on the third theory.

II. THE PRESIDENT'S CONSTITUTIONAL DUTY

Some commentators argue that Resolution 678 was a legal obligation of the United States and that, therefore, the President had to implement it because of his constitutional duty to faithfully execute the laws of the United States. This argument is based upon article II, section 3 of the Constitution, which requires that the President "take Care that the Laws be faithfully executed." As described in the Supremacy Clause of

8. U.S. Const. art. II, § 3.
the Constitution, the term "Laws" includes treaties as well as acts of Congress: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ." The Supreme Court, in interpreting the Supremacy Clause, has stated: "By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land . . . ." Therefore, it is well established that the President must enforce treaties entered into by the United States in the same way as the Constitution and other federal laws.

The United Nations Charter is a treaty consented to by the Senate, ratified by the President, and implemented by the full Congress. Thus, it is the supreme law of the land and the President must take care that the Charter be faithfully executed. By extension, the President also must enforce any obligations arising under the Charter, including obligations which take the form of Security Council resolutions.

The Constitution, however, does not require the President to execute Security Council resolutions or Charter provisions that do not obligate, but merely authorize or recommend. Further, the Constitution prohibits the President from executing Security Council resolutions or Charter provisions which are inconsistent with the Constitution.

Therefore, the threshold question is whether Resolution 678 obligated the President to use military force to expel Iraqi forces from Kuwait. Assuming that the Security Council obligated member states to use military force, a further question is whether the Security Council had the authority under the United Nations Charter to so obligate the President. A careful reading of both Resolution 678 and the United Nations Charter demonstrates that the Security Council did not and could not obligate the President to use military force. Therefore, the Constitution did not require the President to faithfully execute Resolution 678.

9. U.S. Const. art. VI, cl. 2.
13. See Note, Congress, the President, and the Power to Commit Forces to Combat, 81 Harv. L. Rev. 1771, 1776 (1968) [hereinafter Power to Commit Forces]. ("Since international law as well as statutes and treaties had long been considered part of the 'laws' to which the 'faithfully executed' clause refers any interests evidenced by those laws became a potential subject for presidential protection by force.").
14. See Geoffroy v. Riggs, 133 U.S. 258, 267 (1890) (treaty not construed to "extend so far as to authorize what the Constitution forbids ").
A. Obligations Arising Under Security Council Resolution 678

The language of Resolution 678 clearly indicates that the Security Council did not intend to oblige member nations. Resolution 678 in pertinent part:

AUTHORIZES member states cooperating with the Government of Kuwait, unless Iraq on or before Jan. 15, 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement the Security Council Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area . . . .15

Rather than "ordering" or "calling upon" member nations to take action, Resolution 678 merely "authorizes" action.16 Furthermore, Resolution 678 does not require member nations to use military force, but only authorizes "all necessary means."

15. S.C. Res. 678, supra note 2. The full text of Resolution 678 is as follows:

THE SECURITY COUNCIL,

RECALLING AND REAFFIRMING its Resolutions 660 (1990), 661 (1990), 662 (1990), 664 (1990), 665 (1990), 666 (1990), 667 (1990), 669 (1990), 670 (1990), 674 (1990) and 677 (1990),

NOTING that, despite all efforts by the United Nations, Iraq refuses to comply with its obligation to implement Resolution 660 (1990) and subsequent resolutions, in flagrant contempt of the Council,

MINDFUL of its duties and responsibilities under the Charter of the United Nations for the maintenance and preservation of international peace and security,

DETERMINED to secure full compliance with its decisions,

ACTING under Chapter VII of the Charter of the United Nations, 1.

1. DEMANDS that Iraq comply fully with Resolution 660 (1990) and all subsequent relevant resolutions and decides, while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of good will, to do so

2. AUTHORIZES member states cooperating with the Government of Kuwait, unless Iraq on or before Jan. 15, 1991, fully implements, as set forth in paragraph 1 above, the foregoing resolutions, to use all necessary means to uphold and implement the Security Council Resolution 660 and all subsequent relevant Resolutions and to restore international peace and security in the area

3. REQUESTS all states to provide appropriate support for the actions undertaken in pursuance of paragraph 2 of this resolution and

4. REQUESTS the states concerned to keep the Council regularly informed on the progress of actions undertaken pursuant to paragraphs 2 and 3 of this resolution

5. DECIDES to remain seized of the matter.

Thus, the Security Council left the decision of whether to take action and what action to take to each member nation. The option of war in support of Resolution 678 was a "discretionary national decision," subject to the constitutional processes of each member nation. Under the constitutional processes of the United States, Congress decides whether the United States will go to war. Therefore, the argument that the Constitution required the President to faithfully execute Resolution 678 because it is an obligation of the United States fails.

B. Obligations Arising Under the United Nations Charter

Even assuming that the Security Council intended to obligate member nations of the United Nations to use military force to expel Iraqi forces from Kuwait, the question still remains whether the Security Council had the authority under the United Nations Charter to so obligate member nations.

Article 39 of the U.N. Charter requires that the Security Council first "determine the existence of any threat to the peace, . . . or act of aggression" and then "make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Commentators generally interpret this article to mean that the Security Council has "unrestricted discretion to determine whether a threat to the peace, a breach of the peace or an act of aggression [has] in fact occurred." Once the Security Council has made such a finding, it can either make recommendations or decide to take measures under Articles 41 and 42. The import of the word "decide" in Article 39 is that the Security Council may obligate member nations to take measures under Articles 41 and 42.

Therefore, the Security Council appears to have the authority to bind member nations both as to its characterization of "a threat to the

17. Scheffer, supra note 16. Professor William W. Van Alstyne of Duke University Law School stated that:

Whether those means are to be war rather than continuation of the collective economic blockade, or any other form of sanction, or nothing at all, is left to each state to decide. Engaging American armed forces in war, therefore, is an issue for the constitutional processes of the United States and does not come from the United Nations at all.

Van Alstyne, supra note 16.


20. BENTWICH & MARTIN, supra note 19, at 90; GOODRICH & HAMBRO, supra note 19, at 300.
peace, a breach of the peace, or an act of aggression" and as to the ac-
tions it decides are necessary. Article 25 of the Charter bolsters this in-
terpretation: "The Members of the United Nations agree to accept and
carry out the decisions of the Security Council in accordance with the
present Charter."\(^{21}\)

The only limitation on the Security Council's power to bind member
states is the requirement that any measure taken by the Security Council
be "in accordance with Articles 41 and 42, to maintain or restore inter-
national peace and security."\(^{22}\) Under Article 41, the Security Council
"may call upon the Members of the United Nations" to apply economic
and diplomatic sanctions.\(^{23}\) If the Security Council considers such sanc-
tions inadequate, Article 42 authorizes it to "take such action by air, sea,
or land forces as may be necessary to maintain or restore international
peace and security[,]" including "demonstrations, blockade, and other
operations by air, sea, or land forces of Members of the United Na-
tions."\(^{24}\) Thus, Article 42 authorizes the Security Council to use military
forces composed of units from member states to maintain or restore in-
ternational peace and security.

It appears that Articles 39 and 42 could be read together to em-
power the Security Council to require contributions of military forces
from member nations when necessary. However, Article 43 specifies the
manner in which the Security Council can raise those forces.\(^{25}\) It re-
quires member nations to "undertake to make available to the Security
Council, on its call and in accordance with a special agreement or agree-
ments, armed forces, assistance, and facilities, including rights of pas-
sage, necessary for the purpose of maintaining international peace and
security."\(^{26}\) The agreements "shall govern the numbers and types of
forces, their degree of readiness and general location, and the nature of
the facilities and assistance to be provided."\(^{27}\) Further, such agreements
shall be between the Security Council and the member nations and "sub-

\(^{21}\) U.N. Charter art. 25.
\(^{22}\) U.N. Charter art. 39.
\(^{23}\) U.N. Charter art. 41. Article 41 provides that:
The Security Council may decide what measures not involving the use of armed force
are to be employed to give effect to its decisions, and it may call upon the Members of
the United Nations to apply such measures. These may include complete or partial
interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and
other means of communication, and the severance of diplomatic relations.
\(^{24}\) U.N. Charter art. 42.
\(^{25}\) Goodrich & Hambro, supra note 19, at 316.
\(^{26}\) U.N. Charter art. 43, \(\parallel\) 1.
\(^{27}\) Id. \(\parallel\) 2.
ject to ratification by the signatory states.”

Thus, Article 43 conditions the Security Council’s authority to require troops from member nations upon the existence of a special agreement between the Security Council and the same member nations. In other words, the Security Council has no power to obligate member nations to provide military forces to implement Security Council decisions unless those member nations expressly agreed to be so obligated.

Further, Article 43 requires that the member nations ratify any agreement “in accordance with their respective constitutional processes.” Thus, any special agreement between the Security Council and the United States must be approved by the Senate, ratified by the President, and implemented by the full Congress before being valid. Only then may the Security Council obligate the United States to provide military forces to implement a Security Council resolution, and then only to the extent specified in the special agreement. No member nation has ever concluded a special agreement with the Security Council pursuant to Article 43. Accordingly, the Security Council cannot obligate the United States or any other member nation to provide military forces to implement Security Council decisions.

The drafters of the Charter recognized that some time might pass before the Security Council concluded any special agreements and attempted to provide an interim method for maintaining or restoring international peace and security. Thus, Article 106 provides that the parties to the Four-Nation Declaration and France shall, in accordance with the provisions of paragraph 5 of the Declaration, consult with one another and as occasion requires with other members of the United Nations “with a view to such joint action on

28. Id. ¶ 3.
29. D.W. Bowett, UNITED NATIONS FORCES 277 (1964). See also Finn Seyersted, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 161-62 (1966); REVIEW OF THE UNITED NATIONS CHARTER: COMPILATION OF STAFF STUDIES PREPARED FOR THE USE OF THE SUBCOMMITTEE ON THE UNITED NATIONS CHARTER OF THE COMMITTEE ON FOREIGN RELATIONS, S. Doc. No. 164, 83d Cong., 2d Sess. 195 (1955); Bentwich & Martin, supra note 19, at 97-98. In addition, even if a member nation signs a special agreement, “no Member of the Organization is obligated under Article 42 to employ 'armed forces, assistance, and facilities' in excess of those specifically provided for in the 'special agreement or agreements' mentioned in Article 43.” Goodrich & Hambro, supra note 19, at 316.
30. U.N. CHARTER art. 43, ¶ 3.
32. Goodrich & Hambro, supra note 19, at 629.
33. The United States, the United Kingdom, the Soviet Union, and China were signatories to the Four-Nation Declaration, signed in Moscow on October 30, 1943. Goodrich & Hambro, supra note 19, at 629 n.2.
behalf of the Organization as may be necessary for the purpose of maintaining international peace and security."³⁴

The Security Council cannot legally bind any member nation under Article 106 because it only requires that the United States, the United Kingdom, the Soviet Union, China, and France "consult." Article 106 does not require any action by those nations. Furthermore, it directs these five nations to act, not in support of the Security Council, but in place of the Security Council, under their own authority and collective judgment. Therefore, Article 106 does not bind the United States nor justify the President's use of force without congressional authorization.

Another provision of the Charter which the President has cited to support his use of military force to expel Iraqi forces from Kuwait without the Congress' consent is Article 51.³⁵ Article 51 preserves a member nation's inherent right of individual and collective self-defense until the Security Council has taken measures necessary to maintain international peace and security.³⁶ Secretary of State James Baker claimed, during a hearing before the Senate Foreign Relations Committee, that a request from the legitimate government of Kuwait empowered the President to use military force to expel Iraqi forces from Kuwait under Article 51.³⁷ This claim fails for several reasons. First, nothing in Article 51 obligates the United States to aid Kuwait. It only says that a member nation may aid another member nation under attack. Second and more importantly, this right to aid another member nation under attack without interference from the Charter exists only "until the Security Council has taken

³⁴. U.N. Charter art. 106. Article 5 of the Four-Nation Declaration declared as follows:

That for the purpose of maintaining international peace and security pending the re-establishment of law and order and the inauguration of a system of general security, they will consult with one another and as occasion requires with other Members of the United Nations with a view to joint action on behalf of the community of nations. Declaration of Four Nations on General Security, Moscow, October 30, 1943, 9 Dep't St. Bull. 308 (1943), reprinted in Goodrich & Hambro, supra note 19, at 629.


³⁶. Article 51 of the U.N. Charter declares that:

Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

the measures necessary to maintain international peace and security."

When the Security Council passed Resolution 660 on August 2, 1990, condemning the invasion of Kuwait and demanding that Iraq withdraw immediately, any right the United States had under Article 51 to aid Kuwait disappeared.

In sum, even if the Security Council had intended to obligate member nations to use force to expel Iraqi forces from Kuwait, it would have had no legal authority to do so under the United Nations Charter. While the Security Council can decide to use military force under Article 39 and then implement that decision under Article 42, it cannot require member nations to provide military forces unless those nations have previously bound themselves in a special agreement ratified according to their constitutional processes. Since no member nation has ever concluded a special agreement, the Security Council has no authority to require member nations to provide military forces. A request to use military force in the absence of any special agreement is not legally binding. Therefore, the United States may honor or reject that request through the normal constitutional processes for deciding whether to go to war—a vote of Congress. Since the Constitution only requires the President to enforce binding obligations, and Resolution 678 was not such an obligation, the President had no duty to faithfully execute it.

III. THE PRESIDENT'S POWER TO ORDER THE USE OF FORCE WITHOUT CONGRESSIONAL AUTHORIZATION

The President and his supporters have argued that the President has the power to use military force to implement Resolution 678 without the consent of Congress. They make two arguments. First, they argue that the President has the power to initiate hostilities, even if they amount to war. In the alternative, they concede that the President does not have the power to initiate hostilities which amount to war, but argue that he can initiate hostilities of a more limited nature, such as a "police action" to implement a Security Council resolution.

The first argument fails because the plain meaning of the text, his-

38. U.N. CHARTER art. 51.
40. See BENTWICH & MARTIN, supra note 19, at 107. See also Anthony Lewis, Abroad at Home: The Logic of War, N.Y. TIMES, NOV. 12, 1990, at A19.
41. Glennon, supra note 31.
42. See Scheffer, supra note 16; Van Alstyne, supra note 16.
43. The Great Debate, supra note 5. See Fed. of Am. Sci., supra note 7.
tory of the drafting, and judicial interpretation of the Constitution all declare that only Congress has the power to begin a war. The second argument fails as well because the type and magnitude of force contemplated by the President to implement Resolution 678 clearly constituted war within the meaning of the Constitution. Even if one assumes that such use of force did not constitute war, however, the President's constitutional authority to take action which would threaten war is severely limited when Congress has prohibited such action. Since Congress expressly regulated, in the War Powers Resolution, any use of force by the President, which might threaten war, the President does not have the constitutional authority to initiate hostilities which might do so.

A. The Conflict in the Gulf: War or Police Action?

Some commentators have argued that any use of military force under the authority of a Security Council resolution is not a war but a police action.44 They argue that the United Nations Charter, in effect, outlaws offensive war, and substitutes police action as a means of defending countries against illegal aggression.45 Therefore, any use of military force by President Bush to implement Security Council Resolution 678 would be a police action and not war, no matter how many planes, tanks, troops, and casualties were involved.

The police action theory derives from Articles 2 and 42. Proponents argue that Article 2 of the United Nations Charter outlaws offensive war.46 Article 2 requires that all member nations "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."47 Further, Article 2 states that member nations "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations."48 Proponents of the police action theory further argue that the Charter substitutes police action under Article 42 for war as a means of defending countries against illegal aggression.49

The police action theory is problematic. It focuses the debate on superficial semantics and through definitional sleight-of-hand effectively

45. Id.
46. Id.
47. U.N. CHARTER, art. 2, ¶ 3.
48. Id. ¶ 4.
49. Franck, supra note 44.
nullifies Congress' constitutional power to declare war. The police action theory assumes that the United Nations Charter can change the definition of "war" as used in the Constitution—that a treaty can amend the Constitution. If the Framers of the Constitution had meant to allow for a definition of "war" different from the definition understood by them, however, they would have so indicated. Even if one does not accept the argument that the Constitution should be interpreted according to the "original intent" of the Framers, one still would be bound by the modern definition, established by years of common usage and judicial interpretation.

The original intent of the Framers indicates that "war," as used in the Constitution, is defined by quantitative and qualitative factors. The assumption that war involves great physical and economic sacrifice and serious moral and legal consequences is implicit in the Framers' decision to vest the power to declare war in Congress. The Framers recognized, first, that a war involves a large economic and physical commitment of the nation's resources; and, second, that a war in which the United States deliberately takes hostile and deadly action against another nation involves serious moral and legal consequences. Since the American people would bear the economic and physical burdens and the moral and legal consequences, the Framers determined that the people should decide whether the nation would go to war. Therefore, only Congress, the branch of government most representative of the people, should have the power to commit the nation to war.

The courts also have considered the definition of war. During the 19th century, the Supreme Court took a very broad view of the definition of war. In Bas v. Tingy, Justice Washington declared that "every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war." This attempt to define war in terms of magnitude and political content is supported both by the intent of the Framers of the Constitution and by the practical realities of representative government. See also Power to Commit Forces, supra note 13, at 1774-75.

50. Donald E. King & Arthur B. Leavans, Curbing the Dog of War: The War Powers Resolution, 18 Harv. Int'l L.J. 55, 59-60 ("This attempt to define war in terms of magnitude and political content is supported both by the intent of the Framers of the Constitution and by the practical realities of representative government."). See also Power to Commit Forces, supra note 13, at 1774-75.

51. King & Leavans, supra note 50, at 59-60; Power to Commit Forces, supra note 13, at 1774-75 (A definition of war "in the context of the constitutional allocation of power to use force in foreign relations must be determined with reference to the purpose of the war-declaring clause: To safeguard the United States against unchecked executive decisions to commit the country to force.").

52. Power to Commit Forces, supra note 13, at 1775.

53. Id.; see also King & Leavans, supra note 50, at 59-60.

54. Bas v. Tingy, 4 U.S. (4 Dall.) 37, 40 (1800) (limited naval engagements between the United States and France constitute war).
In *Prize Cases*, the Supreme Court stated that "[w]ar has been well defined to be, 'that state in which a nation prosecutes its right by force.' "\(^{55}\)

Modern courts have defined war by focusing on the size and duration of the conflict,\(^{56}\) while also recognizing qualitative factors.\(^{57}\) The military court in *United States v. Bancroft*\(^{58}\) applied both quantitative and qualitative factors to find that even Korea, the conflict cited most often as the classic example of a United Nations police action, was "war" within the meaning of the Uniform Code of Military Justice.\(^{59}\)

In October of 1990, a month before the Security Council passed Resolution 678, the President had decided to launch a large-scale air attack and ground offensive to expel Iraqi forces from Kuwait if peaceful means failed.\(^{60}\) By almost any definition of war, a huge offensive— involving thousands of planes, tanks, and artillery pieces; over a million men and women; and the high probability of thousands of deaths and tens of thousands of wounded—is a war. Such an offensive clearly would be war within the meaning of the Constitution. A federal court agreed. Twelve members of Congress brought an action, *Dellums v. Bush*, to enjoin the use of military force in the Persian Gulf without congressional authorization.\(^{61}\) The court declared: "'[H]ere the forces involved are of such magnitude and significance as to present no serious claim that a war would not ensue if they became engaged in combat.' "\(^{62}\) The court stated that it was "not prepared to read out of the Constitution the clause grant-

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59. *Id.* at 5. The court declared that:

We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the very nature of the present conflict; the manner in which it is carried on; the movement to, and the presence of large numbers of American men and women on, the battlefields of Korea; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping our Army, Navy and Air Force in the Korean theatre of operations.

One commentator examining the legal status of the conflict in Korea also concluded that it was a war in the classic definition of the word. A. Kenneth Pye, *The Legal Status of the Korean Hostilities*, 45 Geo. L.J. 45, 50 (1956).
62. *Id.* at 1145.
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ing to the Congress, and to it alone, the authority 'to declare war.'

In sum, such a use of military force did constitute war.

B. The President's War Power

Supporters of the President argue that the President has the power to initiate war either through his position as Commander in Chief or implicitly through the aggregate of his powers under the Constitution. The President's position as Commander in Chief, however, does not give him the power to initiate war. Furthermore, the aggregate of the President's powers as Commander in Chief, Chief Executive, primary representative of the nation in foreign affairs, and as the official responsible for ensuring that the laws are faithfully executed, is not enough to overcome the constitutional directive that only Congress has the power to initiate war.

Although many Presidents have cited the Commander in Chief clause in support of their uses of the military, the text and legislative history of that clause indicate that it authorizes only the "supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy . . . ." The President's role as the "first General and Admiral of the Confederacy" is limited to the execution of policy made by the President in his other roles and by Congress. He has authority to direct the military in time of war and deploy the military in time of peace, but little else. The real utility of the Commander in Chief clause is that it gives effect to the President's other powers, such as the power to control the day-to-day activities of foreign affairs.

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63. Id. at 1146. The court stated:
   Given these factual allegations and the legal principles outlined above, the Court has no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a "war" within the meaning of Article I, Section 8, Clause 11, of the Constitution. To put it another way: the Court is not prepared to read out of the Constitution the clause granting to the Congress, and to it alone, the authority "to declare war."

64. U.S. CONST. art. II.

65. King & Levans, supra note 50, at 59.


68. See LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 50-51 (1972). See generally Power to Commit Forces, supra note 13, at 1775, 1785 (the Commander in Chief provision "ought to play a rather meager role").

69. King & Leavans, supra note 50, at 60.

70. HENKIN, supra note 68 at 54 (It is "plausible to urge that while as Commander-in-Chief the President's policy initiatives are limited, he can use the troops he commands in support of his other substantive powers.").
The Constitution, true to the theory of separation of powers, does not vest the control of foreign affairs in any one branch. While all three branches participate in making foreign policy, the President has the most direct and influential role. The President has the executive power of the United States, the "Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . ." Further, the President "shall receive Ambassadors and other public Ministers . . . ." Congress, on the other hand, has a less direct but still influential role through its legislative powers. It has the power to "lay and collect . . . Duties, . . . regulate Commerce with foreign Nations, define and punish maritime crimes and violations of international law, and declare war." Finally, the judiciary plays an indirect and relatively minor role in foreign affairs. These few and sparse provisions have proved little more than a starting point in the quest to define such a vast power. Instead, events, experience, and expediency have defined the constitutional power over foreign affairs.

In dividing the foreign affairs power, much has been made of then-Congressman John Marshall's statement that: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." According to Edward Corwin, a former professor at Yale, however, all Marshall really meant was that the President is an instrument of communication with other governments. The President is simply the "mouthpiece of a power of decision that resides elsewhere."

The debate in 1793 between two of the Framers of the Constitution,

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71. U.S. Const. art. II, § 1, cl. 1.
73. U.S. Const. art. II, § 3.
74. U.S. Const. art. I, § 8, cl. 11.
75. U.S. Const. art I, § 8, cl. 3.
76. U.S. Const. art. I, § 8, cl. 10.
77. U.S. Const. art I, § 8, cl. 11.
78. U.S. Const. art. III, § 2, cl. 1. Judicial powers found in this clause include cases affecting ambassadors, admiralty, and maritime jurisdiction and controversies between the U.S. or its citizens and a foreign nation or citizen.
79. Henkin, supra note 68, at 37 ("The structure of the government, the facts of national life, the realities and exigencies of international relations, the practices of diplomacy, have afforded Presidents unique temptations and unique opportunities to acquire unique powers.").
81. Id., at 208.
82. Id.
James Madison and Alexander Hamilton, played a significant role in shaping views of whether the President or Congress has primary control of foreign relations. Madison argued that the power over foreign affairs meant the power in some situations to choose war or peace. He reasoned that, since the Constitution gave Congress the power to declare war, it also must have given Congress control of foreign policy. Hamilton, on the other hand, argued that the power to determine foreign policy is inherent in the executive power. Hamilton thus believed that the President at least had the power to initiate foreign policy even if Congress, in the exercise of its concurrent and independent powers, refused to implement it. Hamilton's view, for the most part, has prevailed because of the President's advantages in unity, speed, secrecy, and control of information. The Supreme Court ratified the President's assumption of the foreign affairs power in *United States v. Curtiss-Wright Export Corp.* when it spoke of "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . ."*

In practice, the broad authority to initiate foreign policy for the United States, combined with the authority under the executive power to implement policy and the authority as Commander in Chief to deploy military forces, has enabled the President to protect foreign policy interests of the United States with military force even where there is no formal legal basis for such action, such as an obligation arising under a treaty or statute. This power to use force is limited, however. Two commentators have summed up the President's power to use force by

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83. *Power to Commit Forces, supra* note 13, at 1777. See generally *Corwin, supra* note 79, at 210-11.

84. Hamilton argued that the words of limitation in the Constitution's grant of the legislative power and the lack thereof in the Constitution's grant of the executive power indicated a general grant of power. Further, the grant of legislative power is emphasized and modified by the enumerations which follow. Therefore, executive power included the direction of foreign policy. *Henkin, supra* note 67, at 42-43; see also *Corwin, supra* note 79, at 209.


88. *Power to Commit Forces, supra* note 13, at 1777. See also *James Grafton Rogers, World Policing and the Constitution* 79 (1945) ("The President . . . seem[s] not to have doubted [his] authority to fight in pursuance of national interests. Congress and the American public have accepted that view of executive responsibility, duty and scope. The Constitution has been interpreted by practice. This means of interpretation, even among lawyers, is almost conclusive.").
dividing it into three categories: First, the President has exclusive control over all peacetime deployments which do not threaten war; second, only Congress has the power to declare war or to initiate hostilities amounting to war under the Constitution; finally, the President and Congress have concurrent authority over the use of military force which threatens war, but does not amount to war under the Constitution. Therefore, through the aggregate of his powers, the President has concurrent authority with Congress over the use of military force in at least some circumstances.

C. Congress’ War Power

Since the Constitution divides the control over the use of the military between the President and Congress, any attempt to determine the extent of the President’s control must include an examination of Congress’ powers in this matter. Even if the President may use military force without congressional authorization in some circumstances, the plain meaning of the text, the history of the drafting, and interpretation of the Constitution by the Courts all support the conclusion that only Congress has the power to declare war or to initiate hostilities amounting to war under the Constitution.

The Constitution vests in Congress extensive control over the military, including the power to declare war, to raise and support military forces, and to make rules for their governance and regulation. Congress’ power to declare war is more than just a purely formal power to “declare” war; it is the power to “initiate” war. This explicit and unambiguous grant of power over the use of military force, coupled with the absence of any similarly explicit and unambiguous grant to the President, strongly indicates that the Constitution gives to Congress, and only to Congress, the power to authorize the use of military force which amounts to war.

89. See generally King & Leavans, supra note 50, at 65-68 (the authors discuss at length the three-tiered standard summarized infra notes 109-115 and in the accompanying text).
90. Id. at 62.
91. Id. at 59.
92. Id. at 64.
93. Id.; Power to Commit Forces, supra note 13, at 1777 (“The President is recognized as possessing a wide variety of powers, the exercise of which does not constitute an infringement on congressional power to initiate war despite the possibility that his acts may provoke another country to resort to war.”).
94. King & Leavans, supra note 50, at 59.
95. U.S. CONST. art. I, § 8, cl. 11-16.
96. Power to Commit Forces, supra note 13, at 1774.
Furthermore, the language of the Constitution indicates that Congress controls not only the declaration of an all-out war, but more limited uses of military force as well: Congress has the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."\textsuperscript{97} Thus, Professor Leonard G. Ratner of the University of Southern California Law Center has concluded that "[t]he specification of war as an area of congressional competence indicates legislative pre-eminence in the formulation of war-peace policy . . . ."\textsuperscript{98}

The Framers of the Constitution also appear to have intended that Congress have the primary role in controlling the use of force. During the Constitutional Convention of 1787, the original draft of the Constitution gave Congress the power to "make" war. The Convention voted to substitute "declare" for "make" in order to give the President the power to repel sudden attacks.\textsuperscript{99} This vote could lead to the inference that, prior to the substitution of this word, the President did not even have the power to repel sudden attacks. Therefore, the Framers arguably may have intended Congress to have control over all uses of military force except the use of military force to repel sudden attacks. There is also evidence that the Framers felt strongly that war was not something into which the nation should rush. For example, James Mason of Virginia "was for clogging rather than facilitating war."\textsuperscript{100} Finally, the Framers intended to "vest the power: to embark on war in the body most broadly representative of the people."\textsuperscript{101} Elbridge Gerry of Massachusetts stated that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."\textsuperscript{102}

The courts generally have upheld the view that Congress has the exclusive power to declare war and at least some control over other uses of military force.\textsuperscript{103} In \textit{Talbot v. Seeman}, Chief Justice John Marshall declared:

The whole powers of war being, by the Constitution of the United

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\textsuperscript{97} U.S. CONST. art. I, § 8, cl. 11. See Leonard G. Ratner, \textit{The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles}, 44 S. CAL. L. REV. 461, 465 (1971) ("The constitutional purpose underlying the power to declare war implies preeminent congressional authority over all military action." (emphasis added)).

\textsuperscript{98} Ratner, \textit{supra} note 96, at 463.

\textsuperscript{99} \textit{The Records of the Federal Convention of 1787}, at 318 (Max Farrand ed., 1911) [hereinafter \textit{The Records}] (Roger Sherman of Connecticut stated: "The Executive should be able to repel and not to commence war.").

\textsuperscript{100} \textit{Id.} at 319.

\textsuperscript{101} \textit{Power to Commit Forces, supra} note 13, at 1773.

\textsuperscript{102} \textit{The Records, supra} note 99, at 318.

\textsuperscript{103} \textit{Talbot v. Seeman}, 5 U.S. (1 Cranch) 1 (1801).
States, vested in Congress, the acts of that body alone can be resorted to as our guides in this inquiry. It is not denied, nor in the course of the argument has it been denied, that Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial war, in which case the laws of war, so far as they actually apply to our situation, must be noticed.\(^{104}\)

Thus, Marshall recognized Congress' constitutional control over not only war, but also "partial war." In the *Prize Cases* decision, Justice Grier wrote for the majority of the Supreme Court that: "[The President] has no power to initiate or declare war against a foreign nation . . . ."\(^{105}\)

In the last few decades, the courts have reaffirmed the view that the President's power is limited. The Second Circuit stated during the Vietnam War that:

>[T]he power to commit American military forces under various sets of circumstances is shared by Congress and the executive. History makes clear that the congressional power 'to declare War' conferred by Article I, Section 8, of the Constitution was intended as an explicit restriction upon the power of the Executive to initiate war on his own prerogative which was enjoyed by the British sovereign.\(^{106}\)

Last year, as a result of President Bush's assertion that he can initiate war without congressional authorization, the District Court for the District of Columbia declared: "[I]f the War Clause is to have its normal meaning, it excludes from the power to declare war all branches other than the Congress."\(^{107}\)

Therefore, although the Constitution vests in the President vast powers, through the aggregate of which the President has concurrent authority with Congress over the use of military force under some circumstances, the Constitution vests the power to initiate war only in Congress. The plain meaning of the text of the Constitution, the comments and history surrounding its drafting, and the courts' interpretation of it all affirm this conclusion.

**D. The President's Power to Initiate Military Action Not Amounting to War**

As shown above, the use of military force to implement Security Council Resolution 678 amounted to war under the Constitution, and only Congress could authorize such use. Assuming that the use of mili-

104. *Id.* at 28 (emphasis added).
tary force to implement Security Council Resolution 678 threatened war but did not amount to war, the President and Congress had concurrent power. In such a case the Constitution provides no clear answer as to whether the President may use military force without congressional authorization. Justice Jackson argued convincingly in *Youngstown Sheet & Tube Co. v. Sawyer* that any express or implied opposition by Congress makes the President's constitutional authority extremely doubtful. Because Congress expressly precluded such actions in the War Powers Resolution, the President probably had no constitutional authority to use force to implement Resolution 678 even if such use merely threatened war or was a "police action."

In his classic analytical framework set forth in *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson argued that: "Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."

Accordingly, he divided Presidential actions into three categories. The President's power to take the particular action depends upon the category into which the action falls.

First, the President's power is at its maximum when he "acts pursuant to an express or implied authorization of Congress" because his authority "includes all that he possesses in his own right plus all that Congress can delegate."

Second, the President's power is uncertain when he acts "in absence of either a congressional grant or denial of authority" because "he can only rely upon his own independent powers."

There exists, however, "a zone of twilight" in which the President and Congress may have concurrent authority, or in which the distribution of authority is uncertain. In this zone, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . . Any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."

Finally, the President's power is "at its lowest ebb" when he "takes measures incompatible with the expressed or implied will of Congress" because he has only "his own constitutional

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108. King & Leavans, *supra* note 50, at 64.
110. *Id.* at 635.
111. *Id.*
112. *Id.* at 637.
113. *Id.*
114. *Id.*
powers minus any constitutional powers of Congress over the matter."115

In this situation, the courts can uphold exclusive Presidential control only by precluding Congress from acting on the matter. Therefore, the courts should scrutinize the President's claim with caution in order to avoid upsetting "the equilibrium established by our constitutional system."116

Congress expressed or, at the very least, implied its opposition to the use of military force by the President through the War Powers Resolution of 1973.117 The War Powers Resolution, enacted over President Nixon's veto on November 7, 1973, requires the President to consult with Congress "in every possible instance" before introducing military forces into a situation of actual or imminent hostilities.118 It also requires the President to report to Congress within 48 hours after sending military forces into a situation of actual or imminent hostilities, or into a foreign nation when equipped for combat (except when such forces are only for supply, replacement, repair, or training), or into a foreign nation in numbers which substantially enlarge United States combat forces already there.119 The President must terminate any use of such military forces within 60 days after the report is submitted or required to be submitted (though he may extend this period by 30 days if he feels that the military forces cannot be withdrawn safely within the 60-day limit) unless Congress declares war, enacts specific legislation, extends the 60-day period, or is unable to meet because of an armed attack. Congress may terminate the use of military forces at any time by concurrent resolution.120 Although there is some controversy over the matter, the Resolution's main provisions are "plainly constitutional."121

The War Powers Resolution applied to the military deployments in the Persian Gulf. The President sent military forces into a situation of actual or imminent hostilities, into a foreign nation when equipped for combat, and into a foreign nation in numbers which "substantially enlarged United States combat forces there." Yet, the President refused to acknowledge that the Resolution controlled his actions in any way.122

115. Id.
116. Id. at 638.
118. Id. § 3, 87 Stat. 555.
119. Id. § 4, 87 Stat. 555-56.
120. Id. § 5, 87 Stat. 556-57.
Under Justice Jackson's standard then, the President took measures incompatible with the expressed or implied will of Congress. Therefore, the President's constitutional authority to use force was "at its lowest ebb."\(^{123}\)

The War Powers Resolution raises another issue. Because section 5 allows the President up to 90 days to use military force without congressional authorization,\(^{124}\) some commentators have argued that the President had at least implicit congressional authorization to use military force, perhaps even to prosecute hostilities amounting to a war, on his own authority for up to 90 days.\(^{125}\) If the President had wanted the benefit of this grace period, he had to recognize the constitutionality of the Resolution and prepare to comply fully with its provisions, including immediately removing military forces from a conflict or zone of potential conflict if Congress had so directed or the 90-day period had expired. Since President Bush refused to recognize or formally comply with the War Powers Resolution,\(^{126}\) he could not argue that he could have used military force for up to 90 days without congressional authorization.

**IV. THE UNITED NATIONS CHARTER AND DELEGATION OF THE WAR POWER**

Some commentators have argued that because the Senate ratified the United Nations Charter and the full Congress passed the United Nations Participation Act, Congress in effect delegated the power to declare war to the President through the treaty-making process. Under this theory, the President may exercise this power at his discretion. Thus, the President could have implemented Security Council Resolution 678 without congressional authorization. This argument raises a number of questions. First, does the Constitution permit Congress to delegate the...
power to declare war? If so, does the Constitution permit the Senate alone to delegate this power by ratifying a treaty? Third, did Congress in fact delegate the power to declare war to the President through the United Nations Charter and the United Nations Participation Act?

The question of whether Congress can delegate its power to declare war is fraught with controversy. The Supreme Court has declared that "Congress cannot delegate legislative power to the President . . . ."127 At the same time, however, the Court has allowed Congress to delegate certain portions of legislative power so long as Congress retains the essentials of the legislative function or "the determination of the legislative policy and its formation and promulgation as a defined and binding rule of conduct . . . ."128 Further, the court found that these "essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective."129

The Supreme Court eroded the general rule against Congress' delegation of the legislative power even more in United States v. Curtiss-Wright Export Co.,130 where it held that the restraints on such delegation do not apply to external affairs. A number of commentators have criticized the rationale of United States v. Curtiss-Wright Export Co.,131 but its conclusion appears to be accepted, at least in practice.132

One caveat, however, is that a treaty cannot override the Constitu-
tion and any delegation by Congress of the war power without any conditions or restraints whatsoever, almost certainly would be unconstitutional. In practice, however, delegation by treaty would include some sort of conditions, restraints, or policy guidelines, either express or implied from the treaty as a whole, and thus probably would be constitutional.

Assuming that Congress can delegate the power to declare war, however, the next question is whether it can do so solely through the treaty-making process alone. Can the Senate alone delegate the power to declare war to the President? Since the Constitution vests the power to declare war in the full Congress, the Senate alone cannot delegate the power without the consent of the House. The Framers specifically rejected giving the Senate the power to declare war. Therefore, the Senate should not be able, in effect, to declare war through its treaty-making power and thwart the Framers intent. Professor Corwin stated: "Today it is the overwhelming verdict of practice, at least, under the Constitution, that no treaty provision which deals with subject-matter falling to the jurisdiction of Congress by virtue of its enumerated powers can have the force of the 'law of the land' until Congress has adopted legislation to give it that effect." Since the power to declare war is an enumerated power, a treaty provision delegating this power to the President is not law until the entire Congress has adopted legislation delegating this power.

Finally, the question remains whether Congress in fact did delegate the power to declare war to the President through the United Nations Charter and the United Nations Participation Act. Section 287d of the United Nations Participation Act authorizes the President to negotiate special agreements with the Security Council in accordance with Article 43. These agreements are subject to the "approval of the Congress by appropriate Act or joint resolution." Once Congress has approved the special agreements, however, the President does not "require the authorization of the Congress to make available to the Security Council on

by Congress authorizing their use cannot be an improper delegation of legislative powers.") (emphasis in the original).

136. TOTAL WAR, supra note 132, at 153.
its call in order to take action under Article 42” the armed forces, facilities, or assistance provided for by the special agreements. Finally, Section 287d provides that, except as authorized by special agreement, “nothing herein contained shall be construed as an authorization to the President by the Congress to make available to the Security Council for such purpose armed forces, facilities, or assistance in addition to the forces, facilities, and assistance provided for in such special agreement or agreements.”

The Act does delegate the power to declare war to the President, but only within the narrow confines of a special agreement between the United States and the Security Council which must be independently negotiated and approved by the full Congress. Since the United States and the Security Council have not negotiated any such special agreement, the delegation of power is ineffective and the President had no power to declare war under the U.N. Charter.

Section 8 of the War Powers Resolution further undermines the theory that Congress delegated the power to declare war to the President. Section 8 declares that the President should not infer any authority to introduce military forces “into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances” from “any treaty heretofore or hereafter ratified.” The President may only introduce military forces into hostilities or into situations where involvement in hostilities is clearly indicated by the circumstances where the legislation implementing the treaty specifically authorizes such authority and states that it is intended to constitute specific statutory authorization within the meaning of the War Powers Resolution. Congress could not have made a more unequivocal statement of its position on the matter. Moreover, since it concerns a delegation of an enumerated power of Congress, this statement is binding upon the President.

V. CONCLUSION

President Bush had no power under the Constitution to use military force to implement Security Council Resolution 678 without authorization from Congress. First, the theory that the President’s duty to take care that the laws be faithfully executed required him to enforce an obligation of the United States fails because there was no such obligation under Resolution 678. The Security Council merely authorized, but did

139. Id.
140. Id.
not obligate, the United States to use all necessary means, not necessarily military force, to implement Resolution 678. Further, there was no obligation under the United Nations Charter because the Security Council had no authority to obligate the United States to use military force unless the United States has bound itself through a special agreement under Article 43. The United States has never done so.

Second, the conflict in the Persian Gulf was a war within the meaning of the Constitution. Therefore, since Congress, and only Congress, has the power to declare war under the Constitution, the President could not have used military force without congressional authorization. Even assuming that the conflict in the Persian Gulf was not a war within the meaning of the Constitution, however, the President probably did not have the power, whether from the Commander in Chief clause or implied from the aggregate of his powers, to order the use of military force to implement Resolution 678 in direct contravention of the will of Congress as expressed in the War Powers Resolution.

Finally, while it appears that Congress can delegate the power to declare war under certain circumstances, the Senate alone cannot do so through the treaty process. Instead, the full Congress must participate in the delegation of an enumerated legislative power. Congress did delegate the power to declare war to the President through the United Nations Participation Act, but only where the President negotiated a special agreement with the Security Council, the full Congress consented to such agreement, and the President ratified it. Since the United States and the Security Council have never executed a special agreement under Article 43, the President did not have the power to declare war in the Persian Gulf.

The Constitution leaves much unsaid and ambiguous. For the past two-hundred years, Presidents have exploited this ambiguity to increase their control over the war power at the expense of Congress. In order to prevent this accretion of power from upsetting the constitutional equilibrium, Congress, the press, and the American people should scrutinize each new Presidential claim. The President's claim that he had the power to use force to implement Resolution 678 cannot withstand such scrutiny. If accepted, this claim would give the President a new and potentially immense power wholly inconsistent with the Constitution. The more the United Nations comes to play an active role and seeks to "maintain international peace and security" through the Security Council, the more opportunities the President will have to use force without congressional authorization. Ironically, the rebirth of one venerated document could undermine another venerated document.