

## SANCTIONS AGAINST PERPETRATORS OF TERRORISM

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Since the title for this panel is "Presidential Uses of Force and *Other Sanction Strategies*," I will begin with "other sanction strategies"—that is, other than use of force. I would rather not be cast in the role of the dove on the panel to comment on illegitimacy of uses of force (presidential or otherwise), because I do not want to rule out or necessarily oppose presidential uses of force for counter-terrorism purposes in all circumstances. Indeed, I find myself in considerable agreement with Professor Reisman's lecture. Although I have disagreed with some of his writings and positions on uses of force in other contexts, I share a large measure of support for the positions he has articulated today. Thus, I will focus on other nonforcible legal strategies.

As lawyers we should view the problem of legal responses to terrorism as multifaceted, requiring diverse strategies. Military strategies are not necessarily the preferred course of action but rather one among many strategies that can complement the array of other available techniques. Professor Reisman has already brought out some of the nonforcible approaches. Where he and I would differ is more in terms of emphasis or perhaps the sequencing of these techniques—that is, the priority or preference in which the respective techniques of coercion should be deployed.

Terrorism is first and foremost a law enforcement problem. The United States must and does vigorously participate in the many multilateral treaties that are designed to suppress international terrorism through cooperative law enforcement. The most recent, as Professor Reisman has mentioned, is the new International Convention for the Suppression of Terrorist Bombings, opened for signature in January 1998.<sup>1</sup> The Convention joins about a dozen multilateral treaties (on safety of civil aviation, crimes against diplomats, physical protection of nuclear material, hostage-taking, maritime piracy, and other topics) that follow a

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1. International Convention for the Suppression of Terrorist Bombings, *adopted* Jan. 9, 1998, 37 I.L.M. 249.

similar pattern. Broadly speaking, they all require states either to prosecute such crimes under their own laws or to extradite the accused to another state that will prosecute. If there is an area of substantial agreement on the panel, it would be on vigorously pursuing these law enforcement techniques.

Professor Reisman has criticized this network of treaties as being insufficient and perhaps ineffective; an issue also arises as to whether these treaties could be read as implicitly precluding a unilateral resort to force. I do not necessarily agree with the proposition that these treaties deal even by implication with regulating use of force. Evaluation of the permissibility of the use of force under international law calls for a different framework of analysis than interpretation of a law enforcement treaty.

Another kind of approach is the deployment of concerted strategies to deny actual or potential terrorists the material resources to carry out their plans. Among these strategies are economic sanctions, broadly defined as nonforcible measures to interrupt ordinary economic and financial relations with the perpetrators or sponsors of terrorism. The antiterrorism components of U.S. sanctions laws (or put differently, the economic sanctions components of U.S. antiterrorism laws) have become quite numerous. They include provisions for the control of exports and regulation of imports,<sup>2</sup> ineligibility for foreign assistance,<sup>3</sup> restrictions on armed forces procurement and arms exports,<sup>4</sup> requirements that the United States oppose loans or credits from international financial institutions to state supporters of terrorism,<sup>5</sup> and other measures.

Against whom are such measures of economic denial to be directed? In the first instance they can certainly be directed at state supporters of terrorism. Indeed, for some years the Secretary of State has been required by law to maintain a list of the states that are designated as supporters of international terrorism.<sup>6</sup> For some time, seven states have been so designated: Cuba, Iran, Iraq, Libya, North Korea,

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2. See, e.g., Export Administration Act of 1979, 50 U.S.C. app. § 2405 (1994); International Security and Development Cooperation Act of 1985, 22 U.S.C. § 2349aa-9 (1994).

3. See 22 U.S.C. § 2371 (1994).

4. See 10 U.S.C. § 2327 (1994); 22 U.S.C. § 2780 (1994); 50 U.S.C. app. § 2405(j) (1994).

5. See 22 U.S.C. § 286e-11 (1994).

6. See 50 U.S.C. app. § 2405(j).

Sudan, and Syria.<sup>7</sup> This somewhat eclectic list is probably both underinclusive and overinclusive and has probably also been shaped at least as much by U.S. foreign policy interests unconnected with terrorism as by the fight against terrorism itself. For example, the designation of Cuba to the list in the early 1980s may have had something to do with Cuban support for terrorism during that period, but the motivation was more generally the global cold war struggle.<sup>8</sup> The maintenance of Cuba on that list throughout the 1990s has been more a consequence of U.S. foreign policy interests in the aftermath of the cold war, and not so much a result of direct attribution to Cuba of ongoing sponsorship for terrorist acts (apart from the shooting down of the Brothers to the Rescue aircraft in 1996,<sup>9</sup> which U.S. officials did denounce as an act of terrorism).<sup>10</sup> The designation of a state as a sponsor of terrorism has effects within the U.S. domestic legal system in that it makes possible the bringing of some types of civil lawsuits in the United States that would otherwise be barred by foreign sovereign immunity. Professor Reisman referred to this in his lecture, and I will discuss it further below,

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7. See 31 C.F.R. § 596.201 (1998).

8. See GARY HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 328 (2d ed. 1990) (illustrating the Reagan Administration's views of Cuba as an instigator of Marxist revolution in Central America).

9. See generally Joseph W. Glannon & Jeffery Atik, *Politics and Personal Jurisdiction: Suing State Sponsors of Terrorism Under the 1996 Amendments to the Foreign Sovereign Immunities Act*, 87 GEO. L. J. 675 (1999) (suggesting that the Cuban Air Force shooting down of two unarmed civilian aircraft on a humanitarian mission constituted an act of terrorism).

10. For the assertions of ongoing Cuban support for terrorism, see Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), 22 U.S.C.A. § 6021(14) (West Supp. 1999) ("The Castro government threatens international peace and security by engaging in acts of armed subversion and terrorism such as the training and supplying of groups dedicated to international violence."); 22 U.S.C.A. § 6022(3) (West Supp. 1999) ([One of the] "purposes of this Act [is] . . . to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft of property from United States nationals by the Castro government, and the political manipulation by the Castro government of the desire of Cubans to escape that results in mass migration to the United States[.]"); 22 U.S.C.A. § 6046(a)(10) (West Supp. 1999) ("The response chosen by Fidel Castro, the use of lethal force, was completely inappropriate to the situation presented to the Cuban Government, making such actions a blatant and barbaric violation of international law and tantamount to cold-blooded murder."); and 22 U.S.C.A. § 6046(b)(3) (West Supp. 1999) ("The Congress urges the President to seek, in the International Court of Justice, indictment for this act of terrorism by Fidel Castro.") (enacted in the immediate aftermath of the Brothers to the Rescue incident).

including a recent suit against Cuba arising out of the Brothers to the Rescue incident.<sup>11</sup>

Although state sponsorship is a very important part of the problem, terrorism is multifaceted; groups or individuals not necessarily sponsored by states can likewise commit terrorism. United States law does authorize and indeed instruct the Secretary of State to maintain a list of groups that are sponsors of international terrorism.<sup>12</sup> Designation as a terrorist group has a variety of consequences under U.S. law, including that group members will have restrictions on their ability to obtain visas to enter the United States and, once here, will risk deportation.<sup>13</sup> A designated group also loses access to fundraising possibilities in the United States and becomes vulnerable to techniques such as the freezing or the blocking of its assets.<sup>14</sup>

A comprehensive list of some thirty such groups was issued in October 1997.<sup>15</sup> Under the Antiterrorism and Effective Death Penalty Act of 1996, legal procedures are available for a group so designated to challenge its designation,<sup>16</sup> as has been done, for example, by the Liberation Tigers of Tamil Eelam, a group that has been waging a struggle in Sri Lanka.<sup>17</sup> Some characterize the Liberation Tigers as a terrorist group, but their claim is that they are engaged in a legitimate self-determination struggle.<sup>18</sup>

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11. See *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239, 1242, 1253 (S.D. Fla. 1997) (finding that Cuba, in blatant violation of international law and basic human rights, shot down two unarmed civilian aircraft, killing four people, and awarding compensatory damages and punitive damages of approximately \$187 million).

12. See Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1189 (Supp. IV 1998).

13. See the "terrorist activity" provision of the Immigration Act of 1990, 8 U.S.C. § 1227(a)(4)(B) (Supp. IV 1998); see also *Reno v. American-Arab Anti-Discrimination Comm.*, 119 S.Ct. 936, 938 (1999) (rejecting alien's challenge to deportation on the ground that the government believed the alien to be a member of an organization that supports terrorist activity); 22 U.S.C. § 2723 (1994) (allowing denial of visas on grounds of terrorist activities).

14. See 8 U.S.C. § 1189(a)(2)(C) (Supp. IV 1998); 18 U.S.C.A. 2339B(a)(2)(A) (West Supp. 1999).

15. See 62 Fed. Reg. 52,650 (1997) (listing, for example, the Armed Islamic Group, Aum Shinrikyo, Japanese Red Army, and Shining Path terrorist organizations).

16. See 8 U.S.C. § 1189(b)(1) (Supp. IV 1998).

17. *Liberation Tigers of Tamil Eelam v. United States Dep't of State*, No. 97-1670 (D.C. Cir. 1999). Oral argument in this case (consolidated with a case brought by another designated group) was heard on March 5, 1999. Decision was rendered after the date of this symposium, *sub nom.* *People's Mojahedin Org. of Iran v. United States Dep't of State*, 182 F.3d 17 (D.C. Cir. 1999).

18. See *id.* at 24.

In principle, these kinds of questions and challenges are capable of legal determination in U.S. judicial proceedings.<sup>19</sup>

Individuals can also be personally designated under the Antiterrorism Act. On August 20, 1998, almost contemporaneously with the launching of the cruise missile strikes against sites in Sudan and Afghanistan that were alleged to be training camps in his terrorist network, Osama bin Ladin was specially designated as an individual sponsor of terrorist activity.<sup>20</sup>

Afghanistan, although it became the object of cruise missile attacks in August of 1998, had not, as of that time, been designated as a state sponsor of terrorism; it was not on the list of the seven "terrorist" states. It is somewhat anomalous that the United States would make a military strike against the territory of Afghanistan, on the ground that Osama bin Ladin was allegedly being sheltered there or carrying out his activities from bases in that territory, yet our government had not resorted to the procedure for publicly identifying Afghanistan as one of the states that are believed to be state sponsors of terrorism. Nor was that nonforcible procedure invoked simultaneously with resort to the military techniques. Indeed, as of the time of this symposium, the United States has yet to identify Afghanistan as a state sponsor of terrorism.<sup>21</sup> Perhaps this failure to name Afghanistan as a state sponsor of terrorism is explicable in terms of the distinction developed in Professor Reisman's lecture between a state that actively supports terrorism and a state that is merely a "failed state," in which terrorists might possibly take refuge. Afghanistan may be an example of the latter rather than the former category.

I do differ with my colleagues on the panel on the priority to be given to nonforcible techniques in relation to military force. It is my position as an international lawyer that force should ordinarily be a last rather than a first resort. Even though the presumption in favor of exhausting nonforcible means can occasionally be overcome, that should

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19. *But see id.* at 24–25 (holding that the Secretary of State's findings of terrorist activity on the part of the groups had "substantial support" in the administrative record but not otherwise addressing the substantive legal and factual issues).

20. *See* Exec. Order No. 13,099, 63 Fed. Reg. 45,167 (1998).

21. Subsequent to this symposium, President Clinton ordered economic sanctions against the Taliban of Afghanistan, including blocking of property and prohibiting transactions with the Taliban, on the grounds that it provided a safe haven and base of operations for bin Ladin and his organization within Afghan territory. *See* Exec. Order No. 13,129, 64 Fed. Reg. 36,759 (1999).

be the extraordinary, highly exceptional case. Without prior resort to nonforcible measures in relation to Afghanistan, missile strikes against that country may well be of questionable legitimacy—or at least may appear less legitimate than might have been the case if nonforcible means had first been exhausted.

Turning to the strengthening of economic pressure against state sponsors of terrorism, we may take note that in the Antiterrorism and Effective Death Penalty Act of 1996, Congress added a measure to open up a possibility that had not previously been available against state sponsors of terrorism, namely, bringing civil suits directly against the state itself.<sup>22</sup> Professor Reisman observed in his lecture that a number of suits in U.S. courts, including some arising out of the Lockerbie bombing,<sup>23</sup> had been unsuccessful in the United States because the courts had found that Libya, as a sovereign defendant, was presumptively immune under the Foreign Sovereign Immunities Act of 1976, and the presumption of immunity had not been overcome.<sup>24</sup> In response to the frustration with the lack of progress in obtaining redress for such tragedies as the Lockerbie bombing, Congress created a new type of civil remedy against certain state sponsors of terrorism in the 1996 Antiterrorism Act.<sup>25</sup>

The 1996 statute selectively lifts sovereign immunity on certain claims, namely those in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage-taking, or for the provision of resources or material support for such an act.<sup>26</sup> Such suits cannot be brought against all foreign states, but only against that handful of states that have been designated by the executive branch as state sponsors of terrorism. In terms of this panel's theme of *presidential* use of sanctions strategies,

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22. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 104 Stat. 1241 (1996) (codified at 28 U.S.C. § 1605(a)(7) (Supp. II 1996)).

23. See Christopher C. Joyner & Wayne P. Rothbaum, *Libya and the Aerial Incident at Lockerbie: What Lessons for International Extradition Law?*, 14 MICH. J. INT'L. L. 222, 222-23 (1993) (referring to the 1988 terrorist bombing of Pan American flight 103 over Lockerbie, Scotland).

24. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 246 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997) (rejecting the argument that the explosion of the U.S.-registered aircraft occurred on U.S. territory for purposes of the tort exception to foreign sovereign immunity).

25. See 28 U.S.C. § 1605(a)(7).

26. See *id.*

Congress has empowered the President, through the Secretary of State, to designate state sponsors of terrorism. By means of that technique, Congress has opened the courthouse doors to the possibility of bringing lawsuits against those and only those foreign states.

When Congress passed the 1996 statute, one of the proponents stated in floor debate: "We can bring the Libyan government to justice by voting for this bill."<sup>27</sup> It is too soon to know whether that ambitious aspiration will be achieved, but we can evaluate, at least preliminarily, the experience of the first few years. Under this statute we now have several reported decisions and some attempts to execute judgment.

The case of *Alejandro v. Cuba*<sup>28</sup> arose out of the Brothers to the Rescue incident in February of 1996, when Cuban fighter planes shot down two small, unarmed civilian aircraft flying in international airspace over the Florida Straits. The four Miami-based Cuban-American pilots lost their lives. Only three of them are capable of being plaintiffs under the new statute, because in addition to the restriction on the defendants (that they must have been designated as sponsors of terrorism), there is also a restriction on the plaintiffs, in that the victim or the claimant (the legal representative through whom the victim claims) must be a U.S. national.<sup>29</sup> One of the four pilots did not qualify under this limitation. Cuba, which has been designated as a state supporter of international terrorism since 1982 and therefore was covered by the 1996 provision lifting the sovereign immunity of such states, did not defend the lawsuit, and a default judgment was entered.<sup>30</sup> Efforts are now underway to execute the judgment;<sup>31</sup> but since Cuba's assets in the United States have been blocked under the Trading with the Enemy Act since the early 1960s,<sup>32</sup> and since there are

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27. 142 CONG. REC. H3599 (daily ed. April 18, 1996) (statement of Rep. Ros-Lehtinen).

28. 996 F. Supp. 1239 (S.D. Fla. 1997).

29. See 28 U.S.C. § 1605(a)(7)(B)(ii).

30. See *Alejandro v. Republic of Cuba*, 996 F. Supp. 1239, 1242 (S.D. Fla. 1997).

31. See, e.g., *Alejandro v. Telefonica Larga Distancia de Puerto Rico*, 183 F.3d 1277 (11th Cir. 1999). In a ruling handed down after the date of this symposium, the court held that garnishment of certain debts owed to a Cuban telecommunications company was unavailable because the company was a separate corporate entity and not an alter ego of the Cuban government. See *id.* at 1278.

32. See Trading with the Enemy Act of 1917, 50 U.S.C. app. § 1 (1994); Cuban Assets Control Regulations, 31 C.F.R. § 515.201 (1999) (containing regulations promulgated under the Trading with the Enemy Act).

numerous plaintiffs still awaiting compensation on their expropriation claims out of the same corpus of assets,<sup>33</sup> it is not clear whether plaintiffs will be able to achieve much more than a symbolic victory.

A second suit, *Flatow v. Iran*, involves the death of an American citizen, Alisa Flatow, in a terrorist incident attributed to the sponsorship of Iran, another state on the terrorist list.<sup>34</sup> That suit has also reached a default judgment with uncertain prospects for recovery.<sup>35</sup>

Another set of cases is more interesting from a legal and constitutional point of view because the defendant, Libya, has litigated them vigorously. The cases arise out of the Lockerbie explosion. As previously mentioned, an earlier case arising out of the Lockerbie aircraft disaster had been dismissed on grounds of Libya's sovereign immunity.<sup>36</sup> After Congress changed the law to lift the sovereign immunity of states designated as sponsors of terrorism, a group of plaintiffs renewed a suit for money damages and added a claim for punitive damages,<sup>37</sup> which are ordinarily barred under the Foreign Sovereign Immunities Act.<sup>38</sup> But ordinary rules do not apply in the cases covered by the 1996 antiterrorism amendments.<sup>39</sup>

In the latest of these cases, Libya argued that the 1996 act was unconstitutional on several theories.<sup>40</sup> One contention was that Congress cannot constitutionally delegate to the Secretary of State the authority to determine the jurisdiction of the federal courts by deciding which states can be sued as designated sponsors of terrorism.<sup>41</sup> The Second Circuit has rejected that constitutional challenge on the ground that Congress itself had determined the jurisdiction of the federal courts with full knowledge that

33. See, e.g., *Miranda v. Secretary of the Treasury*, 766 F.2d 1 (1st Cir. 1985); *Tole S.A. v. Miller*, 530 F. Supp. 999 (S.D.N.Y. 1981) (involving claims against frozen Cuban assets).

34. See *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998).

35. For an example of the thus far unsuccessful efforts to execute judgments see *Flatow v. Islamic Republic of Iran*, No. AW-98-4152, 1999 U.S. Dist. LEXIS 13759 (D. Md. Sept. 7, 1999).

36. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

37. See *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 761 (2d Cir. 1998), *cert. denied*, 119 S.Ct. 2337 (June 14, 1999).

38. See 28 U.S.C. § 1606 (1994) (foreign state "shall not be liable for punitive damages").

39. See 28 U.S.C.A. § 1605(a)(7) (West Supp. 1999).

40. See *Rein*, 162 F.3d at 761.

41. See *id.* at 763.



Libya was on the Secretary of State's list and the full expectation that suits like the Lockerbie claim would now have a federal forum.<sup>42</sup> Libya also attacked the Act as an unconstitutional *ex post facto* law.<sup>43</sup> The Second Circuit found it unnecessary to resolve that question on interlocutory appeal from denial of a motion to dismiss for lack of subject matter jurisdiction, because the *ex post facto* challenge would only have to be considered if the district court ultimately were to enter a final judgment awarding punitive damages.<sup>44</sup> I have long been interested in these constitutional arguments made by foreign states: one of my early forays into the constitutional law of foreign relations was an exploration of when (if ever) foreign states ought to be allowed to maintain claims grounded on the U.S. Constitution.<sup>45</sup> Perhaps in a future episode of the Lockerbie litigation the Supreme Court will finally address that question definitively.

Another tool available to the executive branch under U.S. immigration legislation and antiterrorism amendments is the denial of entry into the United States or the deportation of individuals believed to be involved with terrorist activities.<sup>46</sup> Obviously, this technique can be of high value in protecting the territory of the United States from terrorist acts and infiltration.

A recent Supreme Court decision, *Reno v. American-Arab Anti-Discrimination Committee*,<sup>47</sup> involved these aspects of U.S. immigration law. The affected aliens were eight individuals who were said to be affiliated with the Popular Front for the Liberation of Palestine, a group which the executive branch has designated as a terrorist organization, thereby bringing into play not only the antiterrorism provisions of the immigration laws but also prohibitions on fundraising within the United States.<sup>48</sup> The eight individuals had committed a variety of routine violations of immigration laws, such as overstaying the time limits on their visas.<sup>49</sup> When the government moved to deport them in the early

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42. *See id.* at 764.

43. *See id.* at 761.

44. *See id.* at 762.

45. *See* Lori Fisler Damrosch, *Foreign States and the Constitution*, 73 VA. L. REV. 483 (1987).

46. *See* 8 U.S.C. § 1227(a)(4)(B) (Supp. IV 1998) ("terrorist activity" provision of Immigration Act).

47. 119 S.Ct. 936 (1999).

48. *See id.* at 938-39.

49. *See id.* at 939.

1990s, they sued for an injunction based on what is essentially a selective prosecution claim, saying that the government had singled them out for deportation because of their advocacy of Palestinian causes.<sup>50</sup> The Supreme Court was asked to interpret the congressional intent with respect to closing off avenues of judicial relief for pursuing constitutional challenges to deportation.<sup>51</sup> The Court interpreted the statutory changes as foreclosing the possibility of pursuing such claims by way of collateral attack against deportation.<sup>52</sup>

Although the Court was asked to construe the statute to avoid doubts as to its constitutionality, the majority held that a selective prosecution claim in the context of deportation was not the sort of claim to which the usual canon of avoiding constitutional doubt would apply.<sup>53</sup> In other words, ordinarily a court will endeavor to construe a statute to avoid raising a serious constitutional question; but here, in a passage that the dissenters (and many academic commentators) criticize as having addressed a nonfrivolous constitutional question in a procedurally improper way,<sup>54</sup> the Court opined that aliens in irregular status simply have no constitutional right to be free from selective enforcement of the immigration laws.<sup>55</sup>

Finally, we may turn to uses of force in the context of the War Powers Resolution<sup>56</sup> and the constitutional law governing unilateral uses of force by the United States. I will formulate a few succinct propositions. The first has to do with what I think is the constitutional minimum: when U.S. armed forces are going to be engaged in significant combat entailing substantial or at least potentially significant casualties, Congress is constitutionally required to authorize U.S. participation. This is what the framers called “war” and what they meant in the War Powers Clauses of Article I of the Constitution.<sup>57</sup> It is also close to what the War Powers Resolution calls “hostilities.”<sup>58</sup> If President Bush had gone forward without congressional authorization in the Gulf War

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50. *See id.* at 938.

51. *See id.*

52. *See id.* at 947.

53. *See id.* at 938, 945.

54. *See id.* at 954–55 (Souter, J., dissenting).

55. *See id.* at 945.

56. Pub. L. No. 93–148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541–1548 (1994)).

57. *See* U.S. CONST. art. I, § 8, cls. 11–16.

58. Pub. L. No. 93–148, §§ 2(a), 4(a)(1), 5, 87 Stat. 555–57.

of 1991, it would have been a major violation of our constitutional allocation of authority. However, Congress did authorize that particular engagement, in a proper exercise of its constitutional prerogative.<sup>59</sup>

Another equally incontrovertible proposition is that under the existing corpus of statutory law and the expectations of Congress and the public, the President does have great latitude to deploy and redeploy the vast military apparatus of the United States in noncombative postures, as long as he keeps the Congress informed. He needs to report to Congress under the provisions of the War Powers Resolution that deal with changes in deployment when troops are introduced into foreign territory, airspace or waters while equipped for combat.<sup>60</sup> But apart from reporting, it is only hostilities or imminent involvement in hostilities that trigger substantive legal requirements under the War Powers Resolution. If hostilities or imminent hostilities are not involved—if troops are equipped for combat but not actually fighting—Congress does not assert any prerogative of prior approval.<sup>61</sup>

The Kosovo situation is not strictly speaking within the scope of this panel, as terrorism in the traditional sense does not appear to be involved, but it is very much in the news now. One proposal is to send a peacekeeping force to Kosovo that would not be in a combatant posture. In my view, the constitutional analysis of U.S. participation in such a force is that the President could go ahead, as he did in the case of the implementation force in Bosnia-Herzegovina, without necessarily obtaining affirmative approval from the Congress. Congress's prerogative would come into play only if combat were to break out, upon the occurrence of actual or imminent hostilities, which I hope would not be the situation with a ground presence in Kosovo.<sup>62</sup>

Between these propositions lies a vast gray area where it is misleading to think in terms of certainties and where it is uncomfortable for me to be cast in the role of arguing against

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59. See Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991), *reprinted in* 50 U.S.C.A. § 1541 note (West Supp. 1999).

60. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 § 4(a)(2) and (3) (1973).

61. This is an inference from the structure of the War Powers Resolution and the consequences it attaches only to actual or imminent "hostilities."

62. *N.B.*: This paragraph deals with the situation as it appeared on the date of the symposium and not with the developments that began to unfold later in March of 1999.

the legality or the constitutionality of particular uses of force. Some of the techniques of military response to allegations of terrorism fall into this gray area, where it is very difficult to say as a bright-line matter either that the President has authority to respond or that he does not. To the extent that Congress has declared itself on the matter, it has used the trigger of “hostilities” in the War Powers Resolution; but it did not define that term. We do not have an authoritative interpretation of whether the launching of a cruise missile that disables a camp or factory—which may not result in casualties, at least not on the U.S. side—constitutes “hostilities” within the meaning of the War Powers Resolution. It is very much contested whether that kind of military action falls within the scope of presidential authority or whether Congress would assert a constitutional role.