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UN Wars, US War Powers

John C. Yoo*

Pressure on traditional notions of US sovereignty are nowhere clearer than in the area of national security. In a number of areas, such as arms control, the Clinton administration has sought to achieve US foreign policy goals through multilateral international institutions. Pursuing national security through international organizations confers certain advantages for US policymakers, such as allowing the United States to act under the aegis of multilateralism, which submerges the prominence of US national interests and allows for the use of collective military resources. Acting through such alliances, however, raises policy and constitutional difficulties that pose problems for US notions of democratic accountability and the separation of powers. This paper will address these issues by describing the impact of multilateral interventions, such as those in Kosovo, Bosnia, and Haiti, upon the US system of war powers.¹

In none of these cases did the Clinton administration receive congressional authorization for the use of force abroad. While the administration has failed to issue a defense of the legality of the Kosovo intervention, President Clinton has claimed that he enjoys the constitutional authority under the commander-in-chief clause to use force without congressional consent.² Further, the President has justified these military interventions more often on the need to uphold our obligations to the United Nations ("UN") or the North Atlantic Treaty Organization ("NATO"), than upon

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1. For a fuller discussion of the constitutional issues, see John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U Pa L Rev 1673 (2000); and John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const Commen 87 (1998). Many of the broader constitutional and policy issues are discussed in Jeremy Rabkin, *Why Sovereignty Matters* (AEI Press 1998).

2. US Const Art II, § 2.

congressional approval. While he has often signaled that he would welcome congressional support, he also has made clear that he would implement his military plans without it. President Clinton has refused to acknowledge that the War Powers Resolution (“WPR”) restricts his discretion. In fact, the Clinton administration’s use of the military in these long-term interventions has rendered the WPR a dead letter.

I.

In recent decades, no President has used force abroad as much as President Clinton. In March 1999, President Clinton ordered 31,000 US servicemen and women to engage in air operations against Serbia, the largest and most powerful province of the former Yugoslavia, to prevent the “ethnic cleansing” of Albanians living in Kosovo. As part of an operation sponsored by NATO, 7,000 US ground troops then entered Kosovo on June 10, 1999, after NATO bombing had forced Serbia to withdraw its forces. It is unclear when they will be withdrawn, as NATO’s goals include not just ending war but building a new nation in Kosovo. President Clinton never received congressional authorization for the use of force in Kosovo or Serbia, nor did Congress declare war. US troops engaged in hostilities well past the sixty-day time limit imposed by the WPR.

US intervention was triggered by events in the spring of 1999.³ In early March, Serbian military forces began a broad offensive aimed at driving the Albanian population out of the province. On March 23, after the Clinton administration’s efforts at negotiation had failed, the Senate passed a concurrent resolution authorizing the President to “conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia (Serbia and Montenegro).”⁴ On March 24, US warplanes, in conjunction with other NATO forces, began attacking Serbian forces in Kosovo.

In a nationally televised address, President Clinton argued that air strikes were necessary to protect innocent Albanians, to prevent the conflict from spreading to the rest of Europe, and to act with our European allies in maintaining peace.⁵ President Clinton declared that the military’s mission would be “to demonstrate NATO’s seriousness of purpose,” to “deter an even bloodier offensive against innocent civilians in Kosovo,” and “to seriously damage the Serbian military’s capacity to harm the people of Kosovo.”⁶ When air strikes did not convince Serbia to withdraw its forces, NATO air and missile operations expanded beyond Serbian military units in Kosovo

3. These facts are taken from *Campbell v Clinton*, 52 F Supp 2d 34, 39 (D DC 1999).

4. S Cong Res 21, 106th Cong, 1st Sess (Mar 23, 1999).

5. Address to the Nation on Air Strikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 Weekly Comp Pres Doc 516 (Mar 24, 1999).

6. *Id.*

to military, strategic, and civilian targets within Serbia itself, such as air defense, electrical, communications, and government facilities.

Hewing to the pattern set during previous administrations, presidential initiative in war-making produced congressional financial support but nothing more. On the same day that air strikes began, the House of Representatives passed a resolution by a 424 to 1 vote that declared its support for US troops, but refused to authorize the use of force.⁷ On March 26, President Clinton sent a message to Congress claiming that the Milosevic regime had violated the UN Charter, UN Security Council resolutions, and NATO resolutions, and justifying his unilateral decision to use force on his "constitutional authority to conduct US foreign relations and as Commander-in-Chief and Chief Executive." On April 28, the House of Representatives first rejected, by a vote of 427 to 2, a proposal to declare war upon Yugoslavia.⁸ It then rejected, by a tie 213 to 213 vote, a Senate resolution authorizing the use of force.⁹ By 290 to 139, the House also defeated a concurrent resolution that would have required the President to remove all US troops from Yugoslavia operations.¹⁰ It then passed a bill that barred the use of any funds for the deployment of US forces in Yugoslavia without specific congressional authorization,¹¹ which the Senate refused to enact. On May 20, Congress doubled the Administration's request for emergency funding for Yugoslavia war operations, to the tune of \$11.8 billion, but without authorizing the war.¹²

The conclusion of the Kosovo conflict highlighted the WPR's impotence in constraining presidential decision-making. Bombing attacks against Serbian targets both in Kosovo and in Serbia proper did not end until June 10, 1999, seventy-nine days after the war first began and nineteen days after the Resolution's sixty-day clock had ended.¹³ As part of the peace terms accepted by Serbia, NATO sent 50,000 troops, 7,000 of them American, into Kosovo to maintain peace and security during the transition to Kosovar self-government.¹⁴ Although an American, General Wesley

7. H Res 130, 106th Cong, 1st Sess (Mar 24, 1999) in 145 Cong Rec 47, H1660-69. After recognizing that President Clinton had sent US armed forces to operate against Serbia, the resolution merely declared that "the House of Representatives supports the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia and recognizes their professionalism, dedication, patriotism, and courage."

8. HR J Res 44, 106th Cong, 1st Sess (Apr 28, 1999) in 145 Cong Rec 59, H2427-41.

9. HR Con Res 21, 106th Cong, 1st Sess (Apr 28, 1999) in 145 Cong Rec 59, H2441-52.

10. HR Con Res 82, 106th Cong, 1st Sess (Apr 28, 1999) in 145 Cong Rec 59, H2376-2400.

11. HR 1569, 106th Cong, 1st Sess (Apr 28, 1999) in 145 Cong Rec 59, H 2400-14.

12. Emergency Supplemental Appropriations Act, Pub L No 106-31, 113 Stat 57 (1999), codified at 7 USC § 1427(a).

13. Address to the Nation on the Military Technical Agreement on Kosovo, 35 Weekly Comp Pres Doc 1074 (June 10, 1999).

14. Letter to Congressional Leaders Reporting the Deployment of United States Military Personnel as Part of the Kosovo International Security Force, 35 Weekly Comp Pres Doc 1107 (June 12, 1999).

Clark, directed the bombing campaign, US troops in the peacekeeping force served under both US and non-US NATO command under the ultimate authority of a British general.¹⁵ Congress never authorized the use of US troops, which will have been deployed to the region for more than a year by the summer of 2000. Congress, however, agreed to provide supplementing appropriations for a long-term military presence in Kosovo. In other words, Congress could have stopped the war, if it had the political will to do so, merely by *refusing* to appropriate the funds to keep the military operations going.

As they consistently have throughout the postwar period, the federal courts refused to adjudicate the constitutionality of the President's unilateral use of force or his violation of the WPR's terms. During the Kosovo bombing campaign, twenty-seven House members sued President Clinton on the ground that he had usurped Congress's power to declare war and infringed the WPR by conducting air strikes without congressional authorization.¹⁶ Dismissing the action, the District Court for the District of Columbia found that the legislators did not have Article III standing to challenge the President's action because Congress, as a whole, had not acted to terminate the intervention.¹⁷ *Campbell v Clinton* followed in the wake of earlier decisions of the DC District Court, including two opinions rendered during the Persian Gulf War that had found similar challenges nonjusticiable.¹⁸ On appeal, Judge Silberman wrote for a unanimous panel of the DC Circuit that the congressional plaintiffs in *Campbell* lacked standing. Judge Silberman also wrote separately to make clear his conclusion that inter-branch struggles over war powers present nonjusticiable political questions. Judicial reluctance to enter the fray is consistent with historical practice, as the Supreme Court has never agreed to reach the merits of any challenge to presidential war-making authority abroad.¹⁹

Kosovo represents the culmination of several trends in the US use of force over the last eight years. In 1994, pursuant to UN mandate, President Clinton planned a military intervention in Haiti, despite a unanimous Senate resolution declaring that he had no authorization to do so. Stating that he had sufficient independent constitutional authority, Clinton sent 20,000 US troops to supervise Haiti's transition

15. *Id.*

16. *Campbell*, 52 F Supp 2d at 39.

17. *Id.* at 43.

18. See, for example, *Dellums v Bush*, 752 F Supp 1141 (D DC 1990) (challenge by Congressmen to deployment in Persian Gulf War held to be unripe); *Ange v Bush*, 752 F Supp 509 (D DC 1990) (challenge by National Guard sergeant to orders deploying him to Persian Gulf held to be a nonjusticiable political question).

19. Of course, the Court has addressed the question of how far the commander-in-chief power extends domestically. See *Youngstown Sheet & Tube v Sawyer*, 343 US 579 (1952). *Youngstown*, however, did not review President Truman's authority to initiate and wage the Korean War without formal congressional authorization.

to a democratic government in violent conditions. Five years later, those troops are only now finishing the wind-down of their deployment.²⁰ In 1993, the administration began its long involvement in the Balkans by sending US warplanes to enforce a no-fly zone over Bosnia-Herzegovina. That same year, the President dispatched US troops to Macedonia as part of a UN peacekeeping operation. In February 1994, sixty US warplanes conducted air strikes against Serbian targets to end the conflict in Bosnia, again pursuant to UN authorization. In December 1995, President Clinton ordered the deployment of 20,000 US troops to Bosnia to implement a peace agreement; at least 6,000 US servicemen and women remain there today.²¹ In addition to the Balkans, President Clinton has engaged in several limited uses of force: against Iraq (twice) and against terrorist targets in Afghanistan and the Sudan, mostly through the use of air strikes by warplanes and cruise missiles. In all of these crises, the administration acted without statutory authorization, sometimes in the face of House or Senate resolutions opposing the intervention and instead claimed support from the UN or NATO. Troops have participated in several of these operations well beyond the time limits demanded by the WPR with little congressional sanction or efforts at enforcement.

The recent past suggests that the modern practice of war-making has freed itself from the partisanship that afflicted earlier struggles over foreign policy. Before the Clinton administration, war power disputes invariably assumed party lines, with Republicans defending executive power and Democrats asserting that all hostilities required legislative authorization. Republicans controlled the Executive branch for all but four of the twenty-four years between the presidencies of Nixon and Clinton, while Democrats controlled the House for that entire period. After President Clinton's electoral victories in 1992 and 1996, however, Democrats in Congress have lost their fire on the war powers issue—it is astonishing how Democratic Congressmen who vociferously attacked aid to El Salvador or escorting oil tankers in the Persian Gulf or the Grenada, Panama, and Persian Gulf Wars have been so obviously inconsistent under the Clinton administration—while other Democrats in the Executive branch defend presidential war powers with all of the fervor of their Republican predecessors.²² The only governmental critics of the modern system of war powers are Republican congressmen who began service only after the 1994 elections and thus are not bound by earlier statements on war powers under Republican presidents. Practice under the Clinton administration seems to have established, for the first time since Vietnam, true bipartisan precedents in both Congress and the

20. Steven L. Myers, *Full-Time US Force in Haiti to Leave an Unstable Nation*, NY Times A1 (Aug 26, 1999).

21. Id.

22. See, for example, Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U Miami L Rev 107, 109–10 (1995).

Presidency in favor of a flexible system of war powers characterized by executive initiative and legislative funding approval.

II.

Kosovo may represent a theoretical shift, one that the Clinton administration has accelerated if not started, in the US way of war. During the Reagan and Bush administrations, the United States often intervened unilaterally, quickly, and in pursuit of purely US interests. Invasions in Grenada and Panama, for example, occurred without any significant multilateral participation, were executed within the sixty-day WPR period, and did not receive Security Council approval. Although the Persian Gulf War was conducted pursuant to Security Council resolution, the operation was still predominantly American in force structure, military organization, and political leadership. Throughout these interventions, the United States used force to defend its security interests: maintaining its hegemony in certain regions of the world, containing the influence of its Cold War adversary, and retaliating against attacks on itself and its allies.

Intervention during the Clinton years has been anything but unilateral, swift, and purely in the national self-interest. In Bosnia and Kosovo, US forces participate as part of an international military structure, sometimes under foreign command. Operations are no longer short. Deployments in Haiti and Bosnia have continued for years, rather than weeks. US troops may well be stationed in Kosovo even longer. Lengths of deployments have increased as the goals of the deployments have become more diffuse. Earlier interventions usually sought a decisive victory over the military forces of another nation or the replacement of an unfriendly regime. Under the Clinton administration, however, civilian leaders have employed military force for more delicate objectives, such as rebuilding nations, enforcing international peace, or maintaining the status quo. In Kosovo and Somalia, US objectives even included preventing human rights abuses or humanitarian crises that occurred wholly within the sovereign territory of another nation. These goals fall well short of the military and political victories sought by earlier administrations.

To be sure, the record of postwar interventions provides other examples of US military participation in international organizations. Both the Korean War and the Persian Gulf War were authorized by the UN Security Council. Because of the strategic imperatives involved, however, it seems safe to conclude that UN approval may have been necessary for purposes of international opinion, but that Security Council refusal to authorize the use of force would not have prevented the United States from intervening. The Clinton administration has given this record a new and potentially significant twist. Under Clinton, the approval of the UN or other international organizations has become the foundation upon which justifications for intervention are built. In sending troops to Haiti and Bosnia, for example, President Clinton expressly relied upon the need to carry out UN Security Council resolutions

as support rather than domestic legal mandates. Although he could not rely upon the Security Council for approval of the Kosovo bombings, President Clinton still justified the intervention by appealing to our NATO obligations.²³ As he declared when announcing the bombing campaign, "America has a responsibility to stand with our allies when they are trying to save innocent lives and preserve peace, freedom, and stability in Europe."²⁴ One has the impression that without UN or NATO approval, the United States was unlikely to have intervened in any of these cases.

It seems that the recent rise in cooperation with international organizations is not just for the sake of "window dressing." In many other areas, such as the environment, crime, and arms control, problems that were once viewed as wholly within the powers of individual nations to address have become international in scope. Developing solutions to these problems may require multilateral structures to be fully comprehensive and effective. Correspondingly, policy initiatives have created new forms of international cooperation that include multiple parties, create independent international organizations, and pierce the veil of the nation-state and seek to regulate individual private conduct. Globalization and its attendant effects, however, place new stresses on our domestic constitutional and political system. Novel forms of international cooperation increasingly call for the transfer of rulemaking authority to international organizations that lack American openness and accountability. Collective action may require the United States to vest legal authority in institutions and individuals that are free from the legal and political controls that apply to US officers and institutions. Multilateral action may alter domestic decision-making processes on foreign policy, due to the need to comply with international obligations. Changes in domestic political and constitutional structures may be necessary to achieve the full benefit of multilateralism.

Events in Kosovo serve as a prime example of the sharpening tension between international cooperation and the domestic legal system. Kosovo presented problems of regional and even international significance. Historically, the Balkans have been a tinderbox for broader European wars. Restoring international peace and stability in the wake of these wars has required the United States to expend lives and resources. US and European policymakers feared that conduct that would once have been considered domestic only in nature now threatened to cause wider disruptions to European security. For example, Serbia's course of repression produced a stream of refugees that might have destabilized neighboring countries, and ultimately our European allies. Widespread human rights violations not only offended European and international norms, but might have even provoked intervention by regional powers, raising the possibility of conflict between greater powers and even NATO allies.

23. Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 Weekly Comp Pres Doc 516 (Mar 24, 1999).

24. *Id.*

Responses to this transnational problem required a multilateral solution. No individual European nation had the military or political wherewithal to end Serbian aggression. It was equally unlikely that the United States would unilaterally intervene so far from home in a nation with close cultural and historical ties to its former Cold War enemy, where its direct national interests were hard to define. Operating through the multilateral structure of NATO allowed member nations to gather their collective resources to address the common security risk posed by events in Kosovo. Multilateralism allowed the NATO nations, particularly the United States, to submerge the identification of any single nation's interest as dominant in the operation. NATO presented a less threatening front to nations such as Russia that sympathized with Serbia and might have feared an intervention so close to its own borders. NATO allies could share the risks and burdens of difficult tasks such as nation-building, a job which no single nation may have the determination and resources to handle. Kosovo signaled the transformation of NATO from a defensive alliance, whose primary goals were to contain Soviet expansionism and to promote European reconstruction, to a multilateral organization that now engages in pro-active operations to preempt threats to regional security.

III.

Notwithstanding these benefits, international cooperation raises difficult policy and legal problems. Kosovo in particular raises three issues worth discussion. First, does US participation in multilateral war-making without congressional consent violate the Constitution's allocation of war powers? Here, I also will ask whether UN or NATO wars alter the systems of government accountability that we have developed in the war-making area. Second, how closely can the United States continue to integrate its military into the armed forces of an international organization? Here, I will discuss whether the President can and should place US military units under the command of foreign officers. Third, how do treaty obligations and international law norms affect the war calculus under constitutional law and domestic policy? Here, I will ask whether the President's need to uphold treaty obligations gives him any greater constitutional or political authority vis-à-vis Congress, and whether the United States need adhere to international norms in implementing its foreign policy goals, as a constitutional or policy matter.

A. *War Powers.* International law scholars generally agree that unilateral presidential war-making without congressional authorization violates the Constitution. Prominent academics such as Louis Fisher, John Hart Ely, Michael Glennon, Louis Henkin, and Harold Koh have argued that the three branches of government have failed in their constitutional obligations by allowing the pattern and

practice of the recent past to continue.²⁵ As they conceive it, the Constitution bars the President from initiating offensive wars (but not defensive ones) unless Congress affirmatively authorizes the use of force. Further, federal courts have the duty to enforce this shared allocation of the war power. These scholars rest their arguments almost wholly on two interrelated claims. First, the text of the Declare War Clause vests Congress with the authority to decide on the initiation of all forms of military hostilities. Second, pro-Congress scholars assert, the Framers intended to transfer this power from the Executive to the Legislature because they believed that a multi-member legislature would be less prone to excessive war-making than a single executive.

These scholars leave little room for doubt in their conclusions. As Professor Ely declares, "there is a clarity of the Constitution on this question."²⁶ While he admits "the 'original understanding' of the document's Framers and ratifiers can be obscure to the point of inscrutability," he abruptly declares that "in this case, . . . it isn't."²⁷ Professor Koh maintains that "the Constitution did not permit the President to order US armed forces to make war without meaningfully consulting with Congress and receiving its affirmative authorization."²⁸ They support the WPR's limitations on the President's ability to use force for longer than sixty-days; if the WPR has any faults, in the eyes of these professors, it is that it is not tougher on the President.

Under this unbending approach, Kosovo clearly failed constitutional standards. President Clinton committed 31,000 troops to an air war that lasted seventy-nine days, well in excess of the limitations of the War Powers Resolution. He then sent 7,000 more troops for a long-lasting ground deployment in Kosovo itself. Congress never declared war, nor did it issue any kind of statutory authorization. Although Congress provided funding for the war and expressed its support for the troops, critics of presidential war-making authority have never accepted such actions as sufficient legislative authorization. Surprisingly, however, legal academics fell silent during the Kosovo intervention. As far as I can tell, no leading scholar raised questions during the Kosovo war about its constitutionality. This absence of criticism is puzzling and even embarrassingly inconsistent. If we apply the consensus view on war powers that prevails in the academy, Kosovo was an unconstitutional war.

25. See, for example, Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 SIU L J 931, 967-80 (1999); John H. Ely, *War and Responsibility* 47-67 (Princeton 1993); Michael J. Glennon, *Constitutional Democracy* 35-79 (Princeton 1990); Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs* 17-43 (Columbia 1990); Harold H. Koh, *The National Security Constitution: Sharing Power After the Iran-Contra Affair* 117-49 (Yale 1990).

26. Ely, *War and Responsibility* at 5 (cited in note 25).

27. *Id.* at 3.

28. Harold H. Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in *Dellums v. Bush**, 27 Stan J Intl L 247, 249 (1991); see also Koh, *National Security Constitution* at 47-67, 76-77 (cited in note 25).

If, however, we adopt a more pro-Executive approach, such as the one promoted by scholars such as Robert Bork,²⁹ Henry Monaghan,³⁰ Eugene Rostow,³¹ Phillip Bobbitt,³² Robert Turner,³³ and myself,³⁴ then Kosovo clearly fell within constitutional standards. These scholars generally agree that the President has the authority to use force unilaterally under the commander-in-chief or executive power clauses. They believe that the declare war clause provides Congress with the more limited power to define the nation's status under international law, and that Congress's checking power over executive war-making flows more naturally from the power of the purse. Rather than interpret the Constitution as imposing a fixed system on war-making, these scholars conclude that the Constitution has sufficient flexibility to allow the President to use national military power to shape international events. I have further argued that the evidence from the original understanding—the fact that Great Britain declared war only once in the many wars it fought in the pre-ratification period, that the Constitution represented an effort to expand executive powers, that the Federalists argued that Congress would use its funding powers to check executive military adventurism—buttresses this reading of the text.³⁵

Perhaps it is unreasonable to expect Congress to use its appropriations powers to cut off troops in the field. We should not mistake a failure of political will, however, for a violation of the Constitution. Congress undoubtedly possessed the power to end the Kosovo war—it simply chose not to use it. Affirmatively providing funding for a war, or at the very least, refusing to cut off previous appropriations, represents a political determination by Congress that it will allow the President to receive the credit for success or the blame for failure. If it chose to, Congress could use its constitutional powers over appropriations and the legal aspects of hostilities to leverage a greater political role for itself, just as it has in many domestic areas of regulation. Not wanting to appear to have failed to support the troops is a decision of political, not constitutional significance. Recent wars show only that Congress has refused to exercise the ample powers at its disposal and not that there has been an alarming breakdown in the constitutional structure.

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29. Robert H. Bork, *Erosion of the President's Power in Foreign Affairs*, 68 Wash U L Q 693, 695–701 (1990).
 30. Henry P. Monaghan, *Presidential War Making*, 50 BU L Rev 19 (1970).
 31. Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 Tex L Rev 833 (1972).
 32. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 Mich L Rev 1364 (1994).
 33. Robert F. Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in US Foreign Policy* (Brassey's 1991).
 34. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Cal L Rev 167 (1996); John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U Colo L Rev 1169 (1999); Yoo, 148 U Pa L Rev 1673 (cited in note 1).
 35. Yoo, 84 Cal L Rev at 242–49 (cited in note 34).

Constitutional law only answers the threshold questions about US cooperation in multilateral organizations. My reading of the Constitution's allocation of war powers indicates that the President has the freedom to use the US military to participate in collective security actions because he already has the unilateral authority to use force abroad without congressional authorization. That conclusion does not address the more difficult question whether coalition warfare makes for good US national security policy. Using international organizations to achieve security ends might amount to war-making by committee. As apparently happened in Kosovo, NATO's unanimous consent requirement essentially allowed those member nations most reluctant to use force to dictate the alliance's rules of engagement. Differing goals among the NATO nations may lead to a diffusion of war aims, as some nations may have wanted merely to convince Serbia to return to negotiations while other countries may have wanted to drive Serbia out of Kosovo. Confusion or disagreement over war aims may lead to ineffective strategic or tactical choices, or to an imbalance between military means and political ends. This effect may only be compounded when one of the aims of an intervention is to prove the political unity of the alliance itself. Political leaders may prove even less willing to undertake necessary military measures if those actions cause dissension with an alliance that is concerned about the appearance of solidarity.

Furthermore, a multilateral organization itself might have interests, or at least decision-making values, that differ from those of its members. For example, officers of international organizations might be more likely to respect international law, which gives such organizations their legal status and powers, than US military and political leaders, who might be willing to tolerate violations of international law in the course of achieving national security goals. International organizations such as NATO also might seek new missions that sustain or expand their power and existence; we certainly know this has been the case with domestic administrative agencies. It may be no mistake that Kosovo resulted in the transformation of NATO from a purely defensive alliance against a disappearing foe into a regional security arrangement that now acts out-of-area. A growing divergence between the goals, not just of other NATO or UN members and those of the United States but between those of the international organizations and of the United States, should give even more pause to US policymakers who see multilateral cooperation as the future of war.

B. *Foreign Command*. Similar issues arise with the manner in which US forces cooperate with international organizations. During Kosovo, for example, overall command remained with General Clark who served both as NATO's Supreme Allied Commander Europe and as commander-in-chief of the US European Command. Clark's dual roles meant that strategic command of US forces rested in the hands of a US general. US troops, however, could serve under Clark's non-American theater commanders, such as British General Michael Jackson, who commanded the 16,000 NATO troops stationed in Macedonia during the air war and then led the NATO ground forces that have occupied Kosovo. In other deployments ordered by President

Clinton, such as those in Somalia and Bosnia, US forces attacked military targets at the instruction of non-US commanders acting under the authority either of NATO or the UN.³⁶

It appears that President Clinton's willingness to send US troops into combat under non-US officers is unprecedented. American experience in modern alliance warfare suggests that while the political branches have allowed the transfer only of certain levels of command to non-US officers, they have reserved most forms of command—especially at the tactical level—solely for US military officers. Only US officers have exercised the authority to both coerce and discipline US units and troops.³⁷ Postwar conflicts do not appear to have changed this practice. Although the UN Charter calls for the creation of a UN military force composed of national units placed at the Security Council's policy, strategic, and operational command,³⁸ the ideal of an international military force died with the advent of the Cold War. In the two large-scale military conflicts sanctioned by the UN, the Korean War and the Persian Gulf War, US generals exercised strategic command over the allied military, while US officers maintained operational and tactical command over US troops. As purely US interventions, the use of force in places such as Vietnam, Grenada, and Panama did not raise questions of multilateral command.

Interventions in Bosnia, Somalia, and now Kosovo have departed from this practice. Responding to congressional efforts to stop this new policy,³⁹ the Clinton administration has claimed a broad constitutional power in the President to delegate military command authority to any person.⁴⁰ According to the administration, the President's Commander-in-Chief power allows him to select whomever he believes necessary for military success. Because "UN peacekeeping missions involve multilateral arrangements that require delicate and complex accommodations of a variety of interests and concerns, including those of the nations that provide troops or resources," the administration argues, a mission's success may depend on the

36. David Kaye, *Are There Limits to American Military Alliance?: Presidential Power to Place American Troops Under Non-American Commanders*, 5 *Transnatl L & Contemp Probs* 339, 438–43 (1995).

37. *Id.* at 428; see also Richard M. Leighton, *Allied Unity of Command in the Second World War: A Study in Regional Military Organization*, 67 *Pol Sci Q* 399, 402, 425 (1952).

38. UN Charter Art 43(1) (1945).

39. Congress considered legislation in 1996 to prohibit the expenditure of any funds for US armed forces that served under UN operational and tactical command. Section 3 of HR 3308, 104th Cong, 2d Sess (Apr 4, 1996), required that "funds appropriated or otherwise made available for the Department of Defense may not be obligated or extended for activities of any element of the armed forces that after the date of enactment of this section is placed under United Nations operational or tactical control." The bill defined UN command as command by an official acting on behalf of the UN in a peacekeeping or similar operation, where the senior military commander of the force is not an active duty US military officer.

40. *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Advisor to the National Security Council, May 8, 1996, <<http://www.usdoj.gov/olc/hr3308.wpd>> (visited Sep 16, 2000).

commander's nationality or on the "degree to which the operation is perceived as a UN activity" and not that solely of the United States.⁴¹

This practice has both constitutional and policy problems. First, the administration's legal justification for its recent multilateral command policy fails to account for the Constitution's limitation on the delegation of federal power outside of the national government.⁴² While the Supreme Court has recognized that the Constitution allows Congress to transfer its lawmaking power to the Executive branch, and while the President has broad discretion to delegate authority to his subordinates within the Executive branch, the Constitution nowhere permits the President, the treaty makers, or Congress to delegate federal power completely outside of the national government. In fact, placing US troops under foreign command runs counter to recent Supreme Court cases, which have held that the Constitution requires that only officers of the United States exercise substantial federal authority.⁴³ This law of conservation of federal power prevents the national government, as a whole, from concealing or confusing the lines of governmental authority and responsibility. When only US officers exercise federal power under federal law, the people may hold the actions of the government accountable. International or foreign officials, however, have no obligation to pursue US policy—they do not take an oath to uphold the Constitution, nor can any US official hold them responsible for their deeds. Allowing the transfer of command authority to non-US officers threatens the basic principle of government accountability.

Transfer of command authority to foreign commanders also has the effect of cutting Congress and the public out of the policy debate over the use of force. Although, as a formal matter, the President has plenary control over the military as Commander-in-Chief, Congress has other informal methods for overseeing and regulating the armed forces. It not only maintains lines of communication to officers in the services, but it can employ oversight hearings and make use of the press to gather information and influence national security policy. If the President, however, delegates command authority over US troops entirely outside of the federal government, neither Congress nor the public can determine whether foreign or international commanders are exercising their authority according to US standards, nor can Congress or the public enforce their policy wishes through the usual legal or political methods open when power is delegated within the Executive branch. If Congress or the people disagree with military policy or disapprove of the execution of a military operation, they have no political avenue to oversee the officers who are in command. They cannot demand that the President remove an officer for incompetence, failure to obey orders, or disagreement over policy.

41. *Id.* (emphasis omitted).

42. Consider Yoo, 15 Const Commen 87 (cited in note 1).

43. See *Buckley v Valeo*, 424 US 1 (1976).

Second, the lack of formal authority over foreign commanders may increase the possibility that the pursuit of US national interests will take a back seat to coalition goals. Any exercise of federal authority by an individual who is not a member of the Executive branch and thus not removable by the President prevents the President from fully controlling the implementation of national policy.⁴⁴ Once the President delegates authority to a foreign commander, he cannot issue orders to that commander, backed up by the threat of removal and discipline, as he could to an US officer, even though that foreign official may issue directives to subordinate US soldiers. Although they may hold the power of life and death over US soldiers, foreign commanders may hold very different allegiances and interests from those of US officers. Foreign commanders, for example, may have very different attitudes toward tactical strategies, acceptable casualty rates, and the amount of violence to inflict when using force. In fact, as the Clinton administration has noted, the independence of such foreign commanders from US control is one of the *raison d'être* for international enforcement actions. One of the very purposes of multilateralism is to create the impression that a military operation represents the policy of a neutral international organization, rather than that of the world's remaining superpower. It seems, however, that indulging the appearance of multilateralism makes it almost inevitable that foreign commanders will pursue goals that deviate from pure US interests.

C. *International Law and Domestic Politics*. Kosovo raises issues of constitutional dimension concerning the relationship between international organizations and law on the one hand, and US domestic law and institutions on the other. Many international law and politics scholars have argued that fulfilling our treaty obligations could provide the President with the constitutional authority to use force without further congressional authorization.⁴⁵ Such claims raise two significant questions: whether Congress is obliged to support presidential war-making when treaty obligations are at stake, and whether the President can take the United States into war in violation of international law. Practice during the Kosovo war indicates, contrary to the claims of many international law scholars, that the President gains little additional constitutional authority when acting pursuant to treaty, and that he remains free to violate international law in the national interest.

The presence of a treaty obligation does not enhance the President's war powers, because, as I have argued earlier, he already enjoys unilateral authority to use force abroad. This provides no comfort, however, to those who believe that Congress must

44. See Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale LJ 541, 593-99 (1994).

45. See, for example, Thomas M. Franck & Faiza Patel, *Agora: The Gulf Crisis in International and Foreign Relations Law, UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 Am J Intl L 63 (1991). For a trenchant criticism of Franck and Patel, see Michael J Glennon and Allison R Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 Geo LJ 1573 (1994).

authorize all military hostilities. These scholars attempt to escape this problem by arguing that a treaty obligation can require Congress to support presidential war-making. According to some, a President armed with a Security Council Resolution could claim that Congress had the constitutional responsibility to fund any use of force authorized by the UN or NATO.⁴⁶ If treaties are laws of the land, these scholars argue, Congress has a constitutional duty to fulfill their terms even if it disagrees with executive foreign policy or the objectives behind the treaty.

I believe that this approach—essentially the theory underpinning the doctrine of self-executing treaties—upsets the constitutional balance between the treaty and the legislative powers.⁴⁷ The original understanding indicates that the Framers understood the legislative power to serve as a crucial check upon the Executive's control over foreign affairs generally, and the treaty power specifically.⁴⁸ While the Executive would enjoy the freedom to manage international relations, the legislative power—with its monopoly over the regulation of domestic affairs—would provide a crucial constitutional and political check on executive power and policies.⁴⁹ In light of this understanding, Congress remains free to exercise its constitutional authorities as it sees fit, regardless of the President's claims that he is upholding treaty obligations. Even if the UN or NATO directed its member nations to intervene militarily, and even if these directives were considered valid treaty obligations, Congress has the constitutional discretion to prevent the Executive from fulfilling those duties.

While refusing to fund actions necessary to fulfill our treaty obligations might violate international law, it does not violate the Constitution. By invoking our obligations under NATO, therefore, the President may have provided a political justification for the Kosovo war, but not one that could have constitutionally compelled congressional support. Whether Congress ought to have supported the Kosovo war for policy reasons is a different and more difficult question. On the one hand, it did appear that the credibility and unity of the alliance was at stake—if NATO had failed, fissures in the alliance and its failure of will would have been put on display. On the other hand, NATO's leaders themselves risked what fifty years of steady US leadership and North Atlantic cooperation had built. The alliance's political leadership chose to risk the alliance's unity for a conflict within the sphere of influence of its former Cold War adversary, on terrain that historically has frustrated numerous invaders and over issues that are the subject of centuries-old ethnic and religious hatreds. Because of America's political and military leadership in NATO, no

46. See, for example, Louis Henkin, *Foreign Affairs and the US Constitution* 250 (Clarendon 2d ed 1996).

47. For a more detailed explanation, see generally John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *Colum L Rev* 1955 (1999); and John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 *Colum L Rev* 2218 (1999).

48. Yoo, 99 *Colum L Rev* at 2221–33 (cited in note 47).

49. *Id.*

alliance decision could be imposed on the United States without the President's consent. But that does not answer the question whether Congress ought to have supported the President's decision, especially as US security interests became submerged into broader alliance goals.

US intervention raises a second, related question: whether the President has a constitutional duty to obey international law. It seems difficult to dispute that President Clinton violated international law—without domestic objection—by attacking a sovereign nation without Security Council approval. Under the UN Charter, a nation may not use force against another member state unless either it is acting in its self-defense or the action has received the authorization of the UN Security Council.⁵⁰ Unless one can make out the difficult claim that Serbian activities rose to the level of genocide and hence a crime against humanity that any nation has the right to stop, it initially seems that the tragedies in Kosovo represented internal Yugoslavian matters; the Charter forbids the resolution by force of these domestic matters. While one can make (and I might subscribe to) the argument that international law must recognize that a nation may use force to defend its vital national interests even if a cross-border invasion has not occurred, the UN Charter and most international legal scholars exclude this possibility. As Professor Henkin has argued: "By adhering to the Charter, the United States has given up the right to go to war at will."⁵¹

Under this approach, the Clinton administration's military attack upon Serbia violated international law. According to the views of many international lawyers, this should have made Kosovo presumptively unconstitutional. For example, many leading commentators argue that the President has a constitutional duty to enforce customary international law.⁵² While some admit that certain forms of constitutional or statutory authority might allow the President to violate international law,⁵³ others go farther in

50. UN Charter, Arts 2(4), 39, 42, 51 (cited in note 38).

51. Henkin, *Foreign Affairs* at 250 (cited in note 46).

52. The reasoning proceeds like this: International law—either through treaty or as federal common law—is part of the "Laws of the Land" under Article VI's Supremacy Clause. Article II's requirement that the President enforce the laws, according to these scholars, means that the President must obey international law. A President may not violate international law, just as he cannot violate a statute, unless he believes it to be unconstitutional. As Professor Henkin has written: "There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed." See Louis Henkin, *International Law as Law in the United States*, 82 Mich L Rev 1555, 1567 (1984); see also Louis Henkin, *The President and International Law*, 80 Am J Intl L 930, 936 (1986); Michael J Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Chief Executive Unconstitutional?*, 80 Nw U L Rev 321 (1985); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 Va L Rev 1071 (1985).

53. See, for example, Glennon, 80 Nw U L Rev at 325 (cited in note 52) (arguing that only when President acts pursuant to statutory authorization may he violate international law); and Henkin, 80

claiming that the President cannot violate certain forms of international law regardless of his domestic authority.⁵⁴ Although the inclusion of customary international law as federal common law is open to potentially crippling doubts,⁵⁵ such arguments might be on firmer ground when it comes to treaties, which are explicitly mentioned in the Supremacy Clause.⁵⁶ If foreign relations law scholars were correct about the binding nature of even customary international law on the Executive branch, then certainly courts could enjoin the President from violating a more concrete form of international law—namely the UN Charter—that had been adopted through the treaty process.

Despite these arguments, Kosovo demonstrates that international law imposed little restraint upon presidential action and that federal courts were not about to enforce treaty obligations so as to restrict the commander-in-chief power.⁵⁷ What was striking in the US public debate over Kosovo was the almost complete absence of any arguments, especially from international law scholars, that the war's apparent violation of international law should pose any domestic legal difficulties for President Clinton. Kosovo demonstrates why these theories about the domestic effects of international law are flawed. The constitutional text nowhere brackets presidential or federal power within the confines of international law. When the Supremacy Clause discusses the sources of federal law, it only enumerates the Constitution, "the Laws of the United States which shall be made in Pursuance thereof," and treaties, not international law. If the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court—not to mention self-executing against the Executive branch—then certainly non-treaty international law cannot bind the President as a constitutional matter.

Putting aside whether the Constitution requires the President to enforce international law, it is not clear that obeying international law is always in the best interests of the nation or of the larger cause of world peace. Relying upon

Am J Intl L at 936–37 (cited in note 52) (President "perhaps" might violate international law pursuant to commander-in-chief power).

54. Lobel, 71 Va L Rev at 1075 (cited in note 52).

55. Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997); Alfred Rubin, *Ethics and Authority in International Law* (Cambridge 1997); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L Rev 665 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 Vand L Rev 1205 (1988).

56. I have argued elsewhere that the inclusion of treaties in Article VI places duties upon the political branches to take measures to execute them, but they do not create a constitutional duty for the courts to execute treaties without implementing legislation. Consider Yoo, 99 Colum L Rev at 1955 (cited in note 47); and Yoo, 99 Colum L Rev at 2218 (cited in note 47).

57. In fact, it was telling that unlike previous conflicts, no prominent international law scholars stepped forward to criticize President Clinton's war in Kosovo as a violation of international law, and hence a violation of the Constitution, or to file a lawsuit on that basis.

international law and treaty obligations to block presidential war-making could undermine the President's control over foreign relations, his commander-in-chief authority, and even his freedom to participate in the making of new, progressive international norms. At the level of democratic theory, conceiving of international law as a restraint on presidential war-making would allow norms of questionable democratic origin to constrain actions validly taken under the US Constitution by popularly accountable national representatives. International law might prevent the United States from using methods that further its security interests, which, as was made clear in Kosovo, also serve broader international goals of peace and stability.

These difficulties with the argument that international law can constrain US war-making highlight a sharp contradiction in the internationalist approach to world affairs, one that afflicts not just legal scholars and lawyers, but the Clinton administration itself. Achieving the progressive goals of international law—ending human rights violations, restoring stability and peace based on democratic self-determination—often requires powerful nations to violate international law norms about national sovereignty and the use of force. This seems to be not just one of the lessons of the US victory in the Cold War, but also of our continuing post-Cold War military interventions. On the one hand, NATO action in Kosovo violated the UN Charter and, hence, international law. On the other hand, NATO acted to vindicate international human rights, a cause that has become international legal scholars' bete noire. In its early interventions, the Clinton administration sought to escape this paradox by acting through the UN, as he did in Somalia and Haiti. Kosovo, however, provided little recourse to international law because the UN Security Council failed to act and it was difficult to claim with a straight face that the use of force was necessary for our self-defense. If the United States is to play the role of world policeman, it may increasingly be the case that US efforts to promote world order and stability will come into conflict with international law norms. These norms, however, might not exist in any meaningful sense unless international peace is guaranteed first, and that might only come about through US political and military leadership.

It seems to me that many in the US legal community kept quiet about these difficulties because they believed the Kosovo conflict served a higher end—that of promoting a normative vision of international justice in which each individual is guaranteed a certain minimum of liberty and freedom. If other notions of international law, such as the principles of non-intervention and state sovereignty, get in the way, then so be it. The problems with this sort of reasoning reflect a central contradiction in international law scholarship today. International legal scholars were quick to harshly attack wars with objectives they opposed, such as US efforts to contain the spread of communism in Central America or to restore the balance of power in the Middle East or to maintain US hegemony in the Caribbean. To international lawyers, these conflicts reeked too much of Great Power politics and of an international system rooted in the military, political, and economic power of nation-states.

Wars that promote goals long sought by international lawyers, such as the advancement of universal human rights, do not provoke such criticism. International legal scholars have failed, however, to apply these principles in a uniform manner. International lawyers have not demanded intervention in many other situations, most notably the Russian offensive in Chechnya or the Chinese suppression of domestic political dissent, not to mention the wholesale violation of human rights by communist nations before and during the Cold War. This suggests either that enforcement of human rights depends upon power relationships, or that international law has yet to fully embrace a norm of humanitarian intervention. Indeed, international law scholars have shied away from clearly declaring that nations may use force to stop human rights abuses that wholly occur within other sovereign nations. Rather than articulate a doctrine that contradicts the basic principles of the UN Charter and much of Western history since the Peace of Westphalia, international legal scholars in Kosovo chose the course of silence. If international law is so contingent on our normative agreement with the results of international politics, however, it should impose little constraint on US actions to maintain world order.

Basing international law on justice or fairness rather than the UN Charter system or the practice of states provides no basis for concluding that Western concepts of justice should govern in international law and Russian or Asian or Islamic understandings should not. Instead, overriding territorial sovereignty and non-intervention principles only opens up international law to multiple, conflicting interpretation, rooted in fundamental differences in culture and even religion. By failing to be consistent on Kosovo, international lawyers undermine their own goal, the rule of law in world affairs. If this is the modern state of international law today, it certainly ought not constrain the decisions of US leaders in their decision to use force abroad.

