1995

The Constitutional Responsibility of Congress for Military Engagements

Lori Fisler Damrosch
Columbia Law School, damrosch@law.columbia.edu

AGORA: THE 1994 U.S. ACTION IN HAITI

THE CONSTITUTIONAL RESPONSIBILITY OF CONGRESS FOR MILITARY ENGAGEMENTS

The U.S.-led military operation in Haiti has unfolded with minimal violence and few casualties so far. That factual proposition—which is necessarily subject to revision—has important ramifications under both U.S. constitutional law and international law. On the constitutional level, the avoidance of hostilities defused what was poised to become a serious confrontation between the President and the Congress. On the international level, doubts in some quarters about the legitimacy of a forcible intervention, although not entirely allayed, were somewhat quieted with the achievement of a negotiated solution, which enabled U.S. troops to bring about the return to power of President Aristide without having to shoot their way into Haiti.

Things might have happened otherwise. Over the late summer of 1994, from the time of the Security Council's adoption of Resolution 940 authorizing a multinational force in Haiti[1] until the announcement of the agreement of September 18, 1994, negotiated by President Clinton's emissaries to the Haitian junta,[2] a military clash seemed increasingly likely. In an unusual series of disclosures aimed at convincing the Haitian military leaders that their days were numbered, the Pentagon outlined an invasion plan that was summarized in the media in mid-September 1994 along the following lines:

> [The Pentagon announced] that Deputy Defense Secretary John M. Deutch had ordered the dispatch of 12 large transport ships for "potential operations in Haiti." The ships are to carry weapons and supplies, including armored Bradley Fighting Vehicles, for the Army's 10th Mountain Division and the 82d Airborne from Fort Bragg, N.C.
>
> Under the invasion plan, which is dominated by the Army and involves about 20,000 troops, soldiers of the 82d Airborne, marines on ships off Haiti and commandos will conduct the initial assault. The plan also calls for AC–130 gunships, A–10 attack planes and fighters. . . .
>
> The troops are to seize airports, ports and communications centers, and, the State Department has announced, try to capture Haiti's military leaders . . . .[3]

The fact that some fifteen thousand U.S. troops did enter Haiti in the first days of a supposedly consensual operation suggests that the preinvasion disclosures could even have underestimated the amount of force that might have been necessary if the Haitian military had mounted any resistance at all.

Nor would the projected costs have been negligible. Shortly before the military operation was to begin, the Pentagon released an estimate that an invasion and

[1] SC Res. 940 (July 31, 1994).

[2] The emissaries were former President Carter, Senator Sam Nunn, and General Colin Powell. For the text, see *Text of Haiti Agreement*, N.Y. TIMES, Sept. 19, 1994, at A1, A9 [hereinafter Carter-Cédras Agreement].

[3] *See U.S. Hopes Talk of War Forces Out Haiti Army*, N.Y. TIMES, Sept. 10, 1994, at A4; *see also Top U.S. Officials Outline Strategy for Haiti Invasion*, N.Y. TIMES, Sept. 14, 1994, at A1.

occupation would cost some $427 million in the first eight months alone;[4] when the consensual operation in fact got under way, the President reported to Congress a cost estimate of $500–$600 million through February 1996.[5] Even if these amounts are not yet on the level of Everett Dirksen's famous quip—"A billion here and a billion there, and pretty soon you're talking about real money"—the unpredictability of the mission's intensity and duration, and the possibility of cost overruns (not wholly unknown to Pentagon planners), could produce billion-dollar costs before long. And history shows that complex objectives of the sort involved in Haiti are not easy to achieve in months or even years: when U.S. marines went to Haiti in 1915, they stayed until 1934.

The administration's spokespeople exuded confidence that an invasion could be carried out with minimal risk to U.S. forces;[6] but no one could rule out the possibility that a military invasion might indeed produce significant (albeit disproportionate) casualties on both sides. At the very least, the thugs who had orchestrated the demonstration at the dock as a U.S. troop carrier approached Haiti in October 1993, and who had recurrently and recently proven themselves capable of assassinating Father Aristide's supporters in cold blood,[7] might well have proven themselves capable of inflicting significant damage on U.S. troops through terror tactics.

Opinion pools showed that as many as 66–73 percent of the electorate opposed military action in Haiti; a whopping 78 percent reportedly thought that the President should ask permission from Congress before invading Haiti.[8] Columnists and editorial writers urged the President to respect constitutional principle and go to Congress in advance.[9]

In the weeks leading up to the Haitian operation, President Clinton and his administration affirmed a strong view of the commander in chief's powers, similar to those claimed by other recent Presidents. At a press conference in early August 1994, President Clinton said: "Like my predecessors of both parties, I have not agreed that I was constitutionally mandated to get" congressional approval before undertaking military action.[10] High-ranking officials reiterated this view during September, as the administration and its congressional supporters maneuvered to avoid a vote in Congress on the question.[11] Interestingly, therefore, when the administration ultimately did issue a detailed legal opinion on military action in

[4] *See Pentagon Estimates It Will Cost $427 Million To Invade Haiti,* N.Y. TIMES, Sept. 2, 1994, at A9.

[5] Report of President Clinton to Congress under section 8147 of the Defense Appropriations Act of 1994 (Sept. 18, 1994), 30 WEEKLY COMP. PRES. DOC. 1801 (Sept. 18, 1994). The Act is discussed in the text at note 22 *infra.*

[6] It was noted that Haiti's army consisted of only about seven thousand ill-disciplined men, and that many months of international sanctions had taken their toll on its fighting capabilities. *See Haiti's Forces: Poorly Armed and Seasoned Only in Terror,* N.Y. TIMES, Sept. 14, 1994, at A1.

[7] *See generally* Lori Fisler Damrosch, *Epilogue* to ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 376 (Lori Fisler Damrosch ed., 1993). The most recent acts of terror in Haiti took place days before the U.S. intervention.

[8] *See Preaching to Skeptics: Clinton Gives His Rationale for Invasion But the Message Faces a Tough Audience,* N.Y. TIMES, Sept. 16, 1994, at A1; *Invasion of Haiti Would Be Limited, Clinton Aides Say,* N.Y TIMES, Sept. 13, 1994, at A13.

[9] *See, e.g., Congress Must Vote on Haiti,* N.Y. TIMES, Sept. 13, 1994, at A22 (Editorial); Anthony Lewis, *'Not in a Single Man,'* N.Y. TIMES, Sept. 12, 1994, at A15.

[10] *Presidential News Conference,* N.Y. TIMES, Aug. 4, 1994, at A16.

[11] *See Clinton Has Authority He Needs to Invade Haiti, Top Aides Say,* N.Y. TIMES, Sept. 12, 1994, at A1; *Some Lawmakers Say Clinton Can Order Haiti Invasion,* N.Y. TIMES, Sept. 9, 1994, at A8.

Haiti, that opinion turned out to be carefully nuanced, differing both in tone and in important substantive respects from the assertions of previous administrations.

The Clinton administration's legal position is most fully articulated in a letter sent by Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel, to key congressional leaders in the week following the arrival of U.S. troops in Haiti.[12] He replied in similar terms to the position taken by a group (in which I participate) of ten professors who work in the fields of constitutional law and foreign relations law.[13] In December of 1990, our group had filed an amicus brief in *Dellums v. Bush,* decided the month before the commencement of the air and ground war against Iraq, in which we affirmed that the Constitution requires that Congress be meaningfully consulted and give its genuine approval prior to the introduction of U.S. armed forces into significant hostilities.[14] In August 1994, following the UN Security Council's adoption of the resolution authorizing multinational military action in Haiti,[15] our group affirmed that the same constitutional principles would apply to that situation, at least in circumstances where, in the words of Judge Harold Greene in *Dellums,* "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."[16]

As a clear and comprehensive statement of the Clinton administration's views on the constitutional aspects of military operations, the Dellinger letter merits close attention. In certain aspects, it marks a notable and welcome departure from the attitudes of prior administrations. In particular, it seems to accept that, for as long as the War Powers Resolution remains on the books, that resolution is indeed part of the operative corpus of law and is to be taken seriously.[17] Moreover, the Dellinger letter also appears to proceed from the assumption that, in cases of initiation of major conflict, Congress would be constitutionally required to participate. President Bush never acknowledged that point as a matter of constitutional principle, although he yielded in January 1991 to the political imperatives of obtaining congressional approval in the Authorization for Use of Military Force Against Iraq Resolution.[18]

Despite the constructive aspects of the Dellinger letter, however, its argumentation is problematic and not wholly convincing, especially in the respects going

[12] Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Senators Robert Dole, Alan K. Simpson, Strom Thurmond & William S. Cohen (Sept. 27, 1994), *reprinted infra* at p. 122 [hereinafter Dellinger letter].

[13] Letter from Bruce Ackerman (Yale), Abram Chayes (Harvard), Lori Damrosch* (Columbia), John Hart Ely (Stanford), Gerald Gunther (Stanford), Louis Henkin* (Columbia), Harold Hongju Koh* (Yale), Philip B. Kurland (Chicago), Laurence H. Tribe (Harvard) & William Van Alstyne (Duke) [asterisk indicates a member of the *AJIL* Board of Editors], to President William J. Clinton (Aug. 31, 1994), *reprinted infra* at p. 127 [hereinafter August letter].

[14] Brief of Amici Curiae Ackerman et al., Dellums v. Bush, 752 F.Supp. 1141 (D.D.C. 1990) (No. 90-2866), *reprinted in* 27 STAN. J. INT'L L. 257 (1991).

[15] *Supra* note 1.

[16] 752 F.Supp. at 1145. Our letter, after referring to the *Dellums* amicus brief and the passage from Judge Greene's opinion quoted in the text, went on to say that the Security Council resolution "expressly leaves each member nation, according to its own constitutional processes, to decide whether warmaking is 'a necessary means' to carry out its international obligations," and we urged the President to seek congressional approval before engaging in war making. August letter, *supra* note 13, at p. 127 *infra.*

[17] The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (50 U.S.C. §§1541–1548) (1988) [hereinafter WPR], is discussed in the text at notes 28–36 *infra.*

[18] Pub. L. No. 102-1, 105 Stat. 3 (1991).

beyond events as they have actually unfolded (without combat) and addressing the legality of the military operation that was terminated in the wake of the Carter-Cédras Agreement of September 18, 1994. My amicus colleagues and I, whatever our private opinions on the legitimacy or wisdom of the activities in progress in Haiti, unanimously believed that, if an invasion of Haiti had gone forward, *with attendant hostilities,* congressional approval of such a military operation *would have been constitutionally required and had not been given.* Thus, we responded to Dellinger with a letter to that effect.[19] The ten of us represent a range of attitudes toward various questions of constitutional law, constitutional interpretation and constitutional theory, and have different opinions on current questions of foreign relations law and foreign policy; our call for fidelity to the Constitution's requirement of genuine congressional participation in decisions to commit U.S. troops into hostilities transcends our differences in other areas.

Our group did not take a position on the legality *vel non* of the administration's actions in the specifics of the Haitian case;[20] in particular, we did not address whether the President acted properly in preparing for, and indeed initiating, the invasion plan,[21] knowing that large majorities of Congress and the public were evidently opposed. My own position is that the avoidance of hostilities is a fact of constitutional significance; and on that basis I consider that the Haitian operation has been executed to date in a manner consistent with the constitutional allocation of responsibilities between Congress and the President, and also consistent with the War Powers Resolution. But the same cannot be said of the situation that would have transpired if the military invasion had proceeded and resulted in actual combat. The fact that combat was averted by a last-minute negotiation carried out in the shadow of a threat of force makes it more, rather than less, important to probe the constitutional implications of this form of diplomacy.

After examining the arguments advanced by the Clinton administration concerning the President's authority to conduct military operations in Haiti, I turn to some of the broader issues raised by the Haitian case. I conclude that in the present critical phase of transition to new post–Cold War foreign policies, it is more important than ever that Congress affirmatively act to authorize military engagements when the President determines to initiate combat.

Analysis of the Clinton Administration's Legal Position

The Claim of Statutory Authorization

The Dellinger letter puts forward a three-part argument in support of the lawfulness of the contemplated invasion. First, and perhaps most surprising, is the claim that Congress had already authorized a military operation in Haiti by virtue of an inconspicuous piece of legislation, section 8147 of the Department of Defense Appropriations Act of 1994.[22] This statutory argument is implausible almost to the vanishing point. In October 1993, when the measure in question was introduced and acted upon, Congress was reacting to the tragic loss of life in

[19] Letter (Oct. 14, 1994) signed by the 10 professors referred to in note 13 *supra,* responding to Dellinger letter, *supra* note 12, *reprinted infra* at p. 128 [hereinafter Amicus response].

[20] *See* Amicus response, *supra* note 19, at p. 128 n.1 *infra.*

[21] President Clinton ordered 61 planes to take off from the United States for Haiti while the Carter mission was still in Haiti. *See Haiti's Military Leaders Agree to Resign: Clinton Halts Assault, Recalls 61 Planes,* N.Y. Times, Sept. 19, 1994, at A1.

[22] Pub. L. No. 103-139, 107 Stat. 1418 (1993).

Somalia that very month, in an operation that President Bush had initiated and Congress had done precious little to authorize or control. Mindful of those events, subsection 8147(b) expressed the "sense of the Congress" that appropriated funds "should *not* be obligated or expended for United States military operations in Haiti" unless Congress gave its advance authorization or certain urgent circumstances applied, such as imminent danger to U.S. citizens.

At the same time, Congress knew that plans had been under way for what was supposed to be a noncombatant use of U.S. troops in Haiti, pursuant to the Governors Island Agreement of summer 1993.[23] The expectation was that the United States would supply about half of a mission of some thirteen hundred observers, whose functions would be to assist in the agreed transition back to democratic rule and in the training and monitoring of a civilian police force in Haiti. Deployment of the first contingent of these monitors had been interrupted by a dockside demonstration in October 1993, which threw the Governors Island scenario into substantial doubt.[24] Not wishing to prevent the United States from doing its part to implement the Governors Island Agreement, yet also anxious to ensure a peaceful, rather than violent, transition in Haiti and the safety of U.S. participants in that process, Congress went on in subsection 8147(c) to express its further sense that the limitation of subsection 8147(b) should *not* apply if the President made a certain six-part report to the Congress in advance. The report was to cover such points as the steps intended to ensure that the U.S. Armed Forces "will not become targets due to their rules of engagement." From its text and context, it is clear that the most that section 8147 can be taken to authorize is the kind of limited peacekeeping that was actually contemplated in the fall of 1993, not the major change in concept that moved to the policy agenda only in the summer of 1994.[25]

The contention that Congress had already authorized a large-scale military action in Haiti, with rules of engagement of the sort implied by the Pentagon's press briefings on the September 1994 invasion plan, is particularly incongruous in view of the tenor of congressional deliberations in the summer of 1994. None of the occasional mentions of the fall 1993 congressional action in any way suggests that Congress believed it had already granted an authorization that it would now have to take back. Rather, the debate was framed in terms of the constitutional responsibilities of the two branches, as well as the wisdom or foolishness of an

[23] For the Governors Island Agreement, see The Situation of Democracy and Human Rights in Haiti: Report of the Secretary-General, UN Doc. A/47/975–S/26063 (1993).

[24] *See generally Epilogue, supra* note 7, at 376, 387 n.32.

[25] With respect to section 8147, the Amicus response, *supra* note 19, at p. 128 *infra*, notes:

> [O]n its face, that statute provides no affirmative legislative authorization for the planned military invasion of Haiti. . . .
>
> At best, the President's transmittal of a report under §8147(c) negates the inference of congressional disapproval that would otherwise arise *from this statute* if the President obligated or expended funds for military operations in Haiti before September 30, 1994. The provision was introduced ten days before the original October 30, 1993 deadline for President Jean-Bertrand Aristide's return to Haiti pursuant to the Governors Island Accord and was enacted shortly thereafter. Nothing in that law affirmatively authorized the President to invade Haiti nearly one year later under quite different factual circumstances, or altered the President's constitutional obligation to seek congressional approval before launching such an invasion.

See further infra pp. 128–29.

invasion on its merits. The various floor votes treated the prospect of an invasion as a new question, not prejudged by any previous enactment.[26]

On September 18, 1994, the very day of the introduction of U.S. troops in Haiti, President Clinton provided Congress with the report contemplated by section 8147(c), addressed to the deployment pursuant to the Carter-Cédras Agreement. As relevant to the issue of safety and security of U.S. troops, the report provides as follows:

> Our intention is to deploy a force of sufficient size to serve as a deterrent to armed resistance. The force will have a highly visible and robust presence with firepower ample to overwhelm any localized threat. This will minimize casualties and maximize our capability to ensure that essential civil order is maintained and the agreement arrived at is implemented. The force's rules of engagement allow for the use of necessary and proportionate force to protect friendly personnel and units and to provide for individual self-defense, thereby ensuring that our forces can respond effectively to threats and are not made targets by reason of their rules of engagement.[27]

While this report apparently satisfies the expectations of subsection 8147(c), the same would not have been true of plans for overcoming concerted resistance to an invasion.

The War Powers Resolution

The Dellinger letter next turns to the War Powers Resolution and argues not only that the administration *is* in compliance with it, but more sweepingly that the *planned deployment* into Haiti (that is, an invasion of Haiti, undertaken with the consent of the legitimate government but against the holders of effective power) would have satisfied the WPR. The gist of the argument is that the WPR *assumes* that the President does possess constitutional authority going beyond the instances enumerated in the WPR's "Purposes and Policy" section,[28] and that compliance with the WPR's procedural requisites would discharge the President's legal obligations.

The contention that the WPR's time periods presuppose some independent presidential authority to act within them has been widely debated in the literature.[29] For present purposes, all that needs to be said is that the circumstances of the Haitian situation did not pose that contention in a favorable light. No U.S. nationals needed to be extricated from peril; nor was there any urgency to resolve a crisis that was about to enter its fourth year. Because of the arms embargo and other sanctions, and the relative weakness of the Haitian military in general, it is not plausible to argue that the adversary would have been able to gain a military advantage if the President had adhered to the principle of congressional involvement in the decision to initiate combat. Congress was available to act on the matter, indeed had already been actively debating it for some weeks, and was poised to vote on the very question. Thus, the argument for finding authority in the WPR for independent presidential initiation of combat in Haiti would boil down to the claim that the resolution leaves the President free to do *anything* he

[26] The previous measure was referred to, inter alia, in 140 CONG. REC. S10,675 (daily ed. Aug. 5, 1994) as having expressed the sense of the Senate *against* invasion; *see also id.* at S10,663.

[27] Point (2) of the Report, *supra* note 5. [28] WPR, *supra* note 17, §2(c).

[29] *See, e.g.*, JOHN HART ELY, WAR AND RESPONSIBILITY 65, 127–28 (1993).

wants on his own, as long as he can accomplish his objectives in sixty or ninety days of hostilities. That notion is hardly compatible with the terms and conception of the resolution.[30]

Among the ten of us who signed the response to Assistant Attorney General Dellinger, there may well be a range of opinions concerning whether the WPR enumeration is exclusive and where to draw constitutionally significant lines with respect to such matters as protecting endangered U.S. nationals or responding to real emergencies. We are all in agreement, however, that nothing in the WPR or the Constitution "assumes" a presidential prerogative to commit armed forces *into hostilities* in a nonurgent situation, where the President could have gone to Congress but declined to do so. Compliance with the resolution's procedural requirements can in no way substitute for the constitutional duty to obtain congressional approval of an initiation of combat by the U.S. Armed Forces, at least where nothing stands in the way of a timely congressional decision.[31]

The relationship between the WPR's substantive conception and its procedural scheme is perfectly coherent under the following construction: the WPR does not create or assume authority in the President to introduce troops into hostilities without congressional approval, but it does provide a procedural framework for responding to hostilities initiated *by others,* as in the case of attacks on U.S. forces deployed outside the United States. In other words, the WPR's time periods become relevant where hostilities have erupted not because the President took a premeditated and unauthorized decision to initiate them, but because another party has attacked U.S. troops deployed overseas in a noncombatant or defensive posture: the President then would have sixty (extendable to ninety) days in which he must withdraw the troops unless he obtains congressional authorization for the conduct of hostilities beyond that time.

The Somalian experience can illustrate the point. President Bush dispatched U.S. troops to Somalia in December 1992, explaining that their mission was humanitarian and that, although they would be "equipped and ready . . . to defend themselves," they were not expected to engage in combat.[32] Although this may have been an overly rosy characterization in light of the way things later turned out, it was more or less accurate through the first half of 1993, until General Aidid's faction began deliberately targeting U.S. troops. Thereafter (at some point in mid-1993 and in any event no later than the October 1993 incident in which

[30] Section 8(d)(2) of the WPR, *supra* note 17, states that nothing in the resolution "shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities . . . which authority he would not have had in the absence of this joint resolution."

[31] The Amicus response denies Dellinger's assertion that the War Powers Resolution *"assumes"* that the President has independent authority to introduce troops into hostilities:

> But the Constitution itself makes no such assumption. As we noted in our *Dellums* memorandum, "the structure and history of the Constitution . . . require that the President meaningfully consult with Congress and receive its affirmative authorization—not merely present it with *faits accomplis*—before engaging in war." Nothing in the War Powers Resolution authorizes the President to commit armed forces overseas into actual or imminent hostilities in a situation where he could have gotten advance authorization, but failed to do so.

Amicus response, *supra* note 19, at p. 129 *infra* (citation omitted).

[32] *See, e.g.,* President Bush's War Powers Report on Somalia, 28 WEEKLY COMP. PRES. DOC. 2338 (Dec. 10, 1992).

eighteen marines died), it would be fair to say that the legal situation under the WPR could have switched from an "equipped for combat" category[33] to the "hostilities" category.[34] The onset of hostilities, attributable to Aidid's attacks, was what would have triggered the WPR's time periods, subject to any intervening congressional decision concerning the matter.[35]

President Clinton's war powers report with respect to Haiti is not a "hostilities" report under section 4(a)(1) of the WPR; rather, the situation constitutes introduction of U.S. troops into Haiti "equipped for combat."[36] Because the absence of armed resistance means that we do not have "hostilities" (or "imminent hostilities") within the meaning of the WPR, the time limitations of the WPR have not come into play.

"War" in the Constitutional Sense

Finally, the Dellinger letter argues that congressional authorization for the introduction of troops into Haiti was not constitutionally required because the deployment was not "war" in a constitutional sense. To the extent that this argument speaks to the present situation, I agree with it, because the absence of hostilities is, in my view, constitutionally dispositive.[37] To the extent, however, that Dellinger makes a broader claim reaching what could have meant introducing troops *into combat*, his interpretation of the Constitution is perplexing. Dellinger's contention is that " 'war' does not exist where United States troops are deployed at the invitation of a fully legitimate government in circumstances in which the nature, scope, and duration of the deployment are such that the use of force involved does not rise to the level of 'war.' "[38] This contention has at least three parts, which I will address separately: an "invitation" claim, and "nature-scope" and "duration" claims.

As to the "invitation" point, President Aristide's consent to a military operation cannot resolve the constitutional question. In contrast, what was initially contemplated under the Governors Island Agreement, and what was achieved on a different scale by virtue of the Carter-Cédras Agreement, was "invitation" in the sense of consent of all relevant power wielders to a presence not intended or expected to result in combat. But the constitutional analysis must be different where combat is anticipated: President Aristide's consent to start a shooting war (which may well be relevant to the legitimacy of the action under international

[33] WPR, *supra* note 17, §4(a)(2) or (3). [34] That is, from §4(a)(2) to §4(a)(1) of the WPR.

[35] WPR §5(b). It is not easy to ascertain exactly when "hostilities" within the meaning of the WPR actually began in Somalia (or whether they were intermittent in a way that could have interrupted the running of the periods); congressional activity in the first 10 months of 1993 did not effectively clarify the situation. After the October 1993 attack, Congress enacted a measure restricting the use of appropriated funds for the Somalian military operation after March 31, 1994. *See* Department of Defense Appropriations Act, 1994, note 22 *supra*, §8151(b).

[36] The President's report, like many under the WPR, does not cite or even refer to a particular section of the WPR. *See generally* Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AJIL 571 (1984). Because the troops were introduced into Haiti "equipped for combat" but not actually fighting or expected to fight, the situation properly falls under section 4(a)(2).

[37] My amicus colleagues did not address the point raised in this sentence in the text (*see* the footnote in the Amicus response cited in note 20 *supra*) and thus cannot be assumed to concur with my view.

[38] Dellinger letter, *supra* note 12, at p. 126 *infra*.

law) could not properly substitute for the congressional consent that the Constitution requires.[39]

The "nature-scope" and "duration" claims raise issues of a different sort. The troubling implication of the "duration" claim is that the President can do anything he likes as long as he gets it over quickly. As discussed above, the perception that the WPR allows the President a free pass to commence hostilities as long as he ends them within sixty or ninety days is fatally flawed. At least as regards uses of force involving significant hostilities—those as to which, in the words of Judge Greene's important dictum in *Dellums v. Bush,* the "magnitude and significance" of the contemplated forces "present no serious claim that a war would not ensue if they became engaged in combat"[40]—congressional approval is required even if hostilities are expected to be brief (as the Persian Gulf war was).

The relevant constitutional lines therefore have to be drawn on the basis of the "nature and scope" criteria. The Dellinger letter seems to recognize that congressional approval would be required for combat of an intensity properly considered "war," but it denies that the contemplated Haitian invasion would have risen to that level. On the basis of the facts outlined at the beginning of this essay, it seems highly dubious to characterize the invasion plans as not entailing "war." Equally important is the point that the congressional war powers are not confined to the four corners of the constitutional clause that gives Congress the power "to declare War."[41] Rather, as constitutional text,[42] original intent,[43] judicial decision[44] and historical experience[45] all confirm, the congressional prerogative applies not only to cases of "war" in the traditional sense, but also to cases of initiation of combat short of war.

The War Powers Resolution, for all its defects as a piece of legislative drafting, reclaimed Congress's powers both with respect to "war" and with respect to lesser degrees of "hostilities." Even if the WPR's critics are right that the resolution should not be read to prohibit some presidential uses of force, such as those involving rescue missions or other urgent or minor incursions, Congress has

[39] As the Amicus response put it, "Presumably, at the outset of World War II, General de Gaulle could not have nullified the Constitution's requirement of congressional approval by 'inviting' the United States to invade occupied France." A footnote to this passage states: "We express no view on whether President Aristide in fact 'invited' the invasion that was contemplated, but not executed . . . . We note, however, that [the Dellinger] letter grants legal significance to *President Aristide's* actions, not to the Carter-Cedras agreement of September 18, which in fact averted the invasion." Amicus response, *supra* note 19, at pp. 129–30 & n.3 *infra.*

[40] *See* note 16 *supra.*

[41] The Amicus response, *supra* note 19, at p. 130 *infra,* explains: "Article I, §8, cl. 11 of the Constitution grants Congress power not simply 'to declare War,' but also to address hostilities in situations short of war . . . ." We expressed the view that "the totality of Congress' Article I, §8 powers reserves to Congress alone the prerogative and duty to authorize initiation of hostilities."

[42] Some have found in the Marque and Reprisal Clause explicit articulation of Congress's prerogatives with respect to hostilities short of war. Although that particular text may be helpful in establishing the Framers' expectations, I prefer an approach that takes account of the totality of congressional powers in Article I, §8, cls. 10–16, and the Necessary and Proper Clause (cl. 18), as well as the power of the purse, and the structure of democratic accountability, which remains the best safeguard of the legitimacy of military engagements.

[43] *See generally* W. TAYLOR REVELEY, WAR POWERS OF THE PRESIDENT AND THE CONGRESS 51–115 (1981).

[44] *See, e.g.,* Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804).

[45] *See* ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 145–47, 161–66 (1976).

surely not abandoned—and indeed has expressed its insistence on asserting—its constitutional prerogatives with respect to *introduction of U.S. forces into hostilities*,[46] whether or not those hostilities are denominated "war." While noncombatant uses of U.S. military power, or certain other low-level engagements, might fall below the threshold of "hostilities" that is the trigger point Congress itself established for invocation of its own constitutional prerogatives,[47] the planned invasion of Haiti would not have been one of those cases.

The Nonargument of UN Approval

The Dellinger letter is of interest also for an argument *not* made—one that was pressed on behalf of the Bush administration's Persian Gulf policy and debated in the pages of this *Journal* in 1991[48]—namely, the claim that congressional consent to a military action might not be required in circumstances where the UN Security Council has already given its approval. This question was thoroughly and properly laid to rest when Congress did act in January 1991 to authorize the President to execute the Security Council's resolutions with respect to Iraq and Kuwait.[49] Because Security Council Resolution 940 of July 31, 1994, had authorized a multinational military force to bring about the objectives of restoring the legitimate Haitian Government to power, the issue might once again have been raised as to whether the President's constitutional authorities were in any way altered or augmented by virtue of UN approval of a military action. Of interest in the Haitian case is the fact that, on August 3, 1994, the U.S. Senate on a roll-call vote unanimously approved an amendment to the 1995 defense appropriations bill sponsored by Senators Dole and Gregg, to the following effect: "It is the sense of the Senate that United Nations Security Council Resolution 940 of July 31, 1994 does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution."[50] Significantly, the Dellinger letter discusses the legal aspects of the Haitian deployment without attempting to argue that UN approval might somehow have increased the President's constitutional or statutory powers. We can therefore conclude that this line of argument is dead and buried and is not likely to rise to haunt us during the present administration—nor, we may hope, in the future.

BROADER QUESTIONS RAISED BY THE HAITIAN CASE

It is not necessary here to reargue the case for constitutional control over the war power or for the congressional prerogative to authorize initiation of hostilities in general. Rather, my objective is to suggest that the Haitian case demon-

[46] Thus, I disagree with Professor Trimble in his contribution to this *Agora, The President's Constitutional Authority to Use Limited Military Force, infra* p. 84. Under his interpretation, Congress can only exercise its constitutional function by acting to block the President; and unless it does so, the President is free to act. As many have observed, this interpretation turns the constitutional structure inside out and effectively denies any meaningful predecisional role to Congress.

[47] *E.g.*, in §§2(a), 2(c), 5(b), 8(a), and 8(d) of the WPR, *supra* note 17.

[48] *Compare* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AJIL 63 (1991) *with* Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter, id.* at 74.

[49] *See* note 18 *supra.*

[50] *See* 140 CONG. REC. S10,415, 10,433 (daily ed. Aug. 3, 1994).

strates the need for affirmative congressional authorizations of new military engagements, not just because the Framers set up such a system more than two centuries ago, but because its validity has been reaffirmed in our generation and it remains the best framework for ensuring that the most fateful national decisions are made as wisely as possible.

During the Cold War, the argument was frequently heard that the U.S.-Soviet confrontation and the threat of nuclear warfare had rendered the Framers' conception archaic. Yet it might also have been said of that period—though constitutional purists would not find the proposition dispositive of the legal questions—that Congress and the public generally understood and expected that Presidents would act decisively in the event of attacks, emergencies or comparable dangers created by known Cold War adversaries or their proxies. The relatively high tolerance of presidential war making from Korea through Vietnam can be explained in this light.

The present period, in contrast, cries out for congressional deliberation and decision making with respect to the areas of national interest that are worth the spilling of blood and the spending of treasure. When President Bush identified such interests in Kuwait, his military strategy derived much-needed legitimacy from the fact that he was able to persuade Congress to support him; that congressional articulation of national interest has provided authority and credibility not only for the 1991 war, but also for the subsequent reminders to Saddam Hussein that U.S. military power can be invoked to enforce compliance with international norms. In contrast, when the same President later sent troops to Somalia, while leaving it to his successor to carry through on the policy and to explain the rationales to an increasingly skeptical Congress and public, the effort suffered from a lack of popular support that might have been obtainable if either President had sought to involve Congress in a meaningful way.

The current period is characterized by great uncertainty about the preferable directions for U.S. foreign policy, combined with great doubt as to whether any particular policy objective will be backed up by effective uses of American power. These uncertainties and doubts cannot be resolved by reverting to the Cold War paradigm of an unfettered Executive, whose strong powers were claimed to be justified as the only efficacious parry to Soviet-style thrusts. Now, just as with the Persian Gulf war of January 1991, robust parliamentary debate and genuine deliberation, interacting with the opinions of an informed public, are necessary for the articulation of new foreign policy objectives. Only then will our adversaries (or indeed our allies) understand which American purposes are in fact to be backed with American military power.

In the case of Haiti, some may believe that military intervention needed no new validation, as it could be seen as just another iteration of longstanding U.S. practices in the hemisphere. But the "Monroe Doctrine" did not purport to set up the President as sole authority to decide on uses of force in the hemisphere. President Monroe evidently believed that congressional participation in invocations of his doctrine was constitutionally required,[51] and the misguided adventures of some of his successors in the twentieth century only confirm the soundness of the underlying principle of constitutional control through advance congressional participation.

[51] *See* SOFAER, *supra* note 45, at 256 n.**.

There remains the question whether the recent Haitian events can stand as a "precedent" for a strong version of executive powers. In some of its groundbreaking aspects, the Haitian case warrants "precedential" status, notwithstanding the efforts in some quarters to minimize or deny precedential effects. Thus, when the Security Council first characterized the situation in Haiti as a "threat to peace" and applied mandatory economic sanctions under chapter VII of the UN Charter in June 1993,[52] no amount of hand wringing over the "unique and exceptional circumstances" of the case or assertions that it "should not be regarded as a precedent" could disguise the significance of the action being taken, or could prevent others from invoking the example in the future.[53]

But in the constitutional sense, the Haitian incident cannot stand as "precedent" for something that was aborted even as it began, namely a presidential invasion of a foreign country. At most, it could only be precedent for what actually happened: the decision to prepare for and take preliminary steps toward military action, while combining such coercion with skillful diplomacy so that major hostilities were in fact averted. These events raise the important question whether the President can legitimately "threaten" force when he is not yet in a proper constitutional posture to carry out the threat in full.

Relatively little attention has been directed to problems of threats of force, as distinct from consummated uses of force, in either constitutional or international law.[54] Threats as well as uses of force are proscribed by Article 2(4) of the UN Charter and presumably also by the customary law that exists in parallel to the Charter;[55] and treaties procured by threats of unlawful force are considered void under the law of treaties,[56] a textbook example being Hitler's threats against Czechoslovakia and Czechoslovakian representatives to coerce their agreement to a German protectorate.[57] Nonetheless, there may well be a differential tolerance of "threats" of force, notwithstanding their contemporary treatment in the same breath with "uses" of force.[58] But, on the plane of international law, President Clinton's policy of deploying a multinational force to Haiti had been approved by the UN Security Council; and if (as I believe) the fact of that approval rendered a military operation legitimate in the eyes of international law, then a fortiori the threat to carry out such an operation was likewise legitimate.

In constitutional terms, President Clinton raised the stakes with his address to the nation on September 15, 1994, when he announced his determination to

[52] SC Res. 841 (June 16, 1993), *reprinted in* 32 ILM 1206 (1993).

[53] The quoted language was reiterated at the meeting at which the Council adopted Resolution 841 applying compulsory economic sanctions to Haiti. *See, e.g.*, UN Doc. S/PV.3238, at 9 (1993) (President of Council stating after vote: "Members of the Council have asked me to say that the adoption of this resolution is warranted by the unique and exceptional situation in Haiti and should not be regarded as constituting a precedent."). Similar language was used by some delegates at the time of Resolution 940 authorizing a multinational force in Haiti. *See* S/PV.3413, at 11, 19–20 (July 31, 1994).

[54] In the international law literature, an important contribution is Romana Sadurska, *Threats of Force*, 82 AJIL 239 (1988).

[55] Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14 (June 27).

[56] Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, Art. 52, 1155 UNTS 331.

[57] *See* LOUIS HENKIN, RICHARD C. PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW 492–96 (3d ed. 1993).

[58] Sadurska examines this argument in her article cited in note 54 *supra*.

remove the Haitian military leaders yet did not ask Congress to approve that decision. The wager achieved the desired international result—by facilitating the negotiated departure of the junta—short of full-scale implementation of the threat. In future cases, where the objectives may not be attainable without actual application of substantial amounts of force and resultant casualties, compliance with the constitutional principle of congressional authorization would ensure that our commitments are credible, and that they can be sustained.

LORI FISLER DAMROSCH*

SOVEREIGNTY AND COMMUNITY AFTER HAITI: RETHINKING THE COLLECTIVE USE OF FORCE

The history of diplomacy has been a history of two competing structural conceptions: sovereignty, the barrier that limits state power, and community values, the collective power that overcomes that barrier. In ages past, when the fault line shifted between sovereignty and community, and cracks began to appear in the old legal edifice governing use of force by sovereign against sovereign or community against sovereign, the leading nations of the world gathered at Westphalia, or Vienna, or Versailles, or San Francisco to clarify the contours of the new order and to formulate, however loosely, a set of rules that would govern the use of force for generations to come—rules that recognized states as equals, rules that prohibited aggression, rules that permitted only defensive force. But not this time.

The Cold War ended with a whimper that failed to produce multipolar centers of power, and the world community of the 1990s did not join together to rethink the relationship between sovereignty and community. But, just as surely as in the past, the old rules seemed increasingly outmoded, antiquated by new erosions of sovereignty, new bonds of community, and new ways of making decisions to use force.

In a few states, sovereignty actually faded as an issue as a new phenomenon emerged: states without governments. Authorities in Rwanda and Somalia were unable to exercise the traditional incidents of governmental power. Hence, it made little sense to analyze use of force in purely traditional terms. Military intervention could hardly be seen as having been undertaken against a sitting government because there was no government. Consent could hardly be given to intervene because no authority existed to give consent.

Community, more and more, was strengthened. The Security Council became a more active promoter of humanitarian values as democracy and protection of human rights became widespread, challenging longstanding principles of sovereignty. A consensus emerged that a breach of the peace or threat to the peace existed in Rwanda, Somalia and Haiti, which justified the Council's authorization of the use of force.

And use of force became less easily attributable to governments, not only because its use was collectively authorized, on the one side, but also because there

* Of the Board of Editors. I have benefited in particular from conversations with Harold Hongju Koh and Louis Henkin on these issues.