War Decisions in the Late 1990s by Partial Congressional Declaration

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I. INTRODUCTION

The great surprise in actual war powers decision making of the late 1990s has been the emergence of a practically decisive, yet constitutionally unexplored paradigm: "partial" congressional declaration of war.[1] Presently, the Senate and the House seem to have the function of deciding on warlike action through unmatched, "partial" declarations; just how constitutional can this be?

In 1998, President Clinton led the nation close to a violent conflict with Iraq, and the declination to fight, while conveniently linked to United Nations mediation, also followed the stalling-out in the Senate of a resolution supporting combat.[2] Since 1997, the United States has

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1. For general treatments of the subject, see STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW (2d ed. 1997); LOUIS FISHER, PRESIDENTIAL WAR POWER (1995); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS (2d ed. 1993); JOHN NORTON MOORE ET AL., NATIONAL SECURITY LAW (1990).

2. Subsequently, in December 1998, President Clinton did launch a major air strike on Iraq, criticized by Congressional Republicans for its timing on the eve of the House vote on impeachment. The December 1998 airstrike was more limited, and thus less dependent on Congress, than what had been considered in early 1998. Miles A.

extended its military commitment to the war zone in Bosnia through the implementation of the Dayton Accords, following the 1998 House action which backed away from challenging the President on the commitment.[3] This pattern was set by the sending of 20,000 troops to a potentially hot war zone in Bosnia, authorized when a skeptical Congress in late 1995 agreed to vote for approval.

As far as the lay world sees it—the public, the press, the military, and foreign nations—the American war decisions of recent years have matched closely the extent to which Congress will give even a partial nod to intervention. Under a constitutional analysis, however, a "partial nod" raises problems. As a result of public and congressional ambivalence about putting the United States military in an Eurasian war or a Middle East conflict, no declaration of war could be, or was, enacted in the Bosnia and Iraq situations. Yet, the partial actions of Congress did decide several issues, most notably the muting of war powers disputes concerning the commitment of troops in Bosnia.

How can separate and substantively different actions by the Senate and the House be constitutionally effective? The Supreme Court in *INS v. Chadha*[4] adopted a formalistic analysis that separate action by the House and the Senate short of enactment cannot have legal effect. In the absence of a viable set of concepts, *Chadha* might reduce what the Congress did regarding Bosnia to some kind of signal about public opinion, a Gallup Poll in fancy dress, not an integral part of constitutional war powers. Yet, the Bosnia war decisions followed full-scale congressional debates which were not just about polls or public

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Pomper, et al., *GOP Leaders Refuse to Close Ranks With Clinton on Bombing of Iraq*, 56 CONG. Q. WKLY REP. 5639 (Dec. 22, 1998). For the early 1998 events, see Donna Cassata, *Congress Finds Its Resolve As Iraq Crisis Cools Off*, 56 CONG. Q. WKLY. REP. 577 (Mar. 7, 1998) [hereinafter Cassata, *Congressional Resolve*]; Donna Cassata & Chuck McCutcheon, *Public's Worries About Iraq Policy Echo Concerns in Congress*, 56 CONG. Q. WKLY. REP. 448 (Feb. 21, 1998) [hereinafter Cassata & McCutcheon, *Public's Worries*]; Donna Cassata, *'Big Stick' Approach to Iraq Masks Uncertainty on Hill*, 56 CONG. Q. WKLY. REP. 326 (Feb. 7, 1998) [hereinafter Cassata, *Big Stick*].

3. For the 1998 House action and its 1997 background, see Miles A. Pomper, *House Shies Away From Conflict With Clinton Over War Powers*, 56 CONG. Q. WKLY. REP. 760 (Mar. 21, 1998); Pat Towell, *Hill Unlikely To Block Extension Of Bosnia Deployment*, 55 CONG. Q. WKLY. REP. 3134 (Dec. 20, 1997); *Issue: Bosnia*, 55 CONG. Q. WKLY. REP. 3020 (Dec. 6, 1997) (describing House and Senate votes in 1997); Bradley Graham, *House Backs June 1998 Funding Cutoff for U.S. Peacekeeping Troops in Bosnia*, WASH. POST, June 25, 1997, at A6; Helen Dewar & John Warrick, *Senate Acts on Road-Building, Immigrant Issues in Supplemental Funding Bill*, WASH. POST, May 8, 1997, at A7. For the leading constitutional criticism of President Clinton's steps, see Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1272-76 (1997); Louis Fisher, *The Bosnia Commitment: Binding the United States by Unilateral Executive Action*, LEGAL TIMES, Mar. 11, 1996, at 22 [hereinafter Fisher, *The Bosnia Commitment*].

4. 462 U.S. 919 (1983).

opinion, but about the constitutional necessity of congressional authorization before the exercise of war powers. As the second decade of the post-Cold War era approaches, war powers theory must advance beyond its past analytical apparatus, beyond the concepts, polarities, and disputes of the Cold War. It must catch up with how the Gulf War of 1991, the Somalia intervention in 1992-93,[5] and the Haiti intervention of 1994[6] marked both the emergence of new issues in foreign affairs and bases for military intervention.

The end of the presidentially-directed confrontation with the Soviet Union changed the presidential-congressional interaction over war powers, which had been focused upon weighing vigorous presidential claims of unilateral power in the face of affirmative congressional resistance. A public that had largely trusted presidents to confront the Soviet Union without close congressional checking, notwithstanding the exceptions of the Vietnam War, the Iran-contra affair[7] and the War Powers Resolution,[8] now wanted presidents to avoid global interventions

5. For discussions of the justifications for the Somalia interventions, see Christopher A. Ford, *War Powers as We Live Them: Congressional-Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609, 678-700 (1995); David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 399, 441-43 (1995); Gary M. Stern & Morton H. Halperin, *Common Ground*, *in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR 167, 172-73 (Gary M. Stern & Morton H. Halperin eds., 1994).

6. For discussions of the justifications for the Haiti interventions, see Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58 (1995); Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 824-27 (1995); August 24, 1994, correspondence with Assistant Attorney General regarding the legality of United States military action in Haiti, *reprinted in* Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 127 (1995). Regarding the background to the intervention, see Harold Hongju Koh, *The "Haiti Paradigm" in United States Human Rights Policy*, 103 YALE L.J. 2391 (1994).

7. *See, e.g.*, Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255 (1988); G. Hr. Wolohojian, Note, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534 (1988); Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456 (1987).

8. For discussions regarding the War Powers Resolution, see JOHN HART ELY, WAR AND RESPONSIBILITY (1993); Peter M. Shane, *Learning McNamara's Lessons: How the War Powers Resolution Advances the Rule of Law*, 47 CASE W. RES. L. REV. 1281 (1997); Ronald D. Rotunda, *The War Powers Act in Perspective*, 2 MICH. L. & POL'Y REV. 1 (1997); Philip Bobbitt, *War Powers: An Essay On John Hart Ely's War and Responsibility*, 92 MICH. L. REV. 1364 (1994); Note, *Realism, Liberalism, and the War*

unless Congress also took responsibility. In the Clinton years, Congress has indeed exercised great power over defense and intelligence decision making through oversight of the executive branch.[9] In addition, the considerable legal thought about justifying intervention pursuant to United Nations approval[10] further marks the challenge concerning congressional authorization.

Both President Bush in the Gulf War[11] and President Clinton in Bosnia and Iraq have moved toward a new paradigm for presidential-congressional interaction about war decisions, aligning themselves with, rather than against, the powerful argument that Congress should take responsibility. Each President submitted his defining military action to Congress along with a request for congressional approval in advance. Thus, this post-Cold War paradigm for momentous, highly publicized congressional debates characterizes the present arena for resolving the questions about putting the military in harm's way.

In a constitutionally neat world, these congressional debates would often end with Congress authorizing such action by a declaration of war or its equivalent: a measure passed by both Houses of Congress (i.e., satisfying bicameralism) and presented to the President for his signature (i.e., satisfying presentment), as Congress must do to make law on

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Powers Resolution, 102 HARV. L. REV. 637 (1989); John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); Martin Wald, Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407 (1983-84); Bennett C. Rushkoff, Note, *A Defense of the War Powers Resolution*, 93 YALE L.J. 1330 (1984); Cyrus R. Vance, *Striking the Balance: Congress and the President Under the War Powers Resolution*, 133 U. PA. L. REV. 79 (1984-85).

9. *See* Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 208-210 (1998).

10. *See* John J. Kavanagh, Note, *U.S. War Powers and the United Nations Security Council*, 20 B.C. INT'L & COMP. L. REV. 159 (1997); Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J.L. & PUB. POL'Y 533 (1996); Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995); George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435 (1994); Charles E. Edgar, *United States Use of Armed Force Under the United Nations... Who's In Charge?*, 10 J.L. & POL., 299 (1993); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993); Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573 (1994).

11. *See generally* THE PRESIDENCY AND THE PERSIAN GULF WAR (Marcia Lynn Whicker et al. eds., 1993); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845 (1996) (book review); Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79 (1995); Glennon & Hayward, *supra* note 10; W. Michael Reisman, *Some Lessons from Iraq: International Law and Democratic Politics*, 16 YALE J. INT'L L. 203 (1991); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991).

domestic issues.[12] However, an ambivalent public has not pushed Congress into full enactments. Rather, the Senate and House have adopted only "partial" actions, which are characterized as actions either short of enactment or actions resulting in non-binding expressions of the sense of Congress.

Why should "partial" congressional actions have any legal effect regarding the constitutional power of a President to make war powers decisions? This Article seeks to bridge the gap between the strong formalist reasons to deem "partial" congressional action completely without effect and the strong functional reasons to accord significance to "partial" congressional actions within a context of a shared presidential-congressional war power.[13]

Part II of this Article provides a concrete description of the sequence of events in Washington by which the Bosnia and Iraq actions came to highly visible legislative debates. In 1998, President Clinton threatened conflict with Iraq over its resistance to weapons inspections, but the Senate failed to adopt a resolution of support. In late 1995, President Clinton agreed to request congressional action before sending troops to Bosnia for NATO implementation of the Dayton Accords. While both chambers rejected measures to cut off appropriated funds, the Senate adopted a conditional measure approving the mission, and the House adopted a resolution that merely supported sending United States forces being sent. Part II also draws on the House's extensive 1997 report of its "Bosniagate" Committee, on which my role as counsel[14] permitted

12. For the early Supreme Court cases, see *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801). A list prepared for Congress in 1973 found more than thirty instances of statutory authorization for war activity. *See* Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR, *supra* note 5, at 29, 33.

13. For a fine recent treatment of the validity of Congressional-Presidential interaction, see John O. McGinnis, *The Spontaneous Order of War Powers*, 47 CASE W. RES. L. REV. 1317 (1997). For discussions of formalism and functionalism in separation of powers, see Michael L. Yoder, Note, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173 (1990); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987).

14. Regarding the Bosniagate investigation, see COMM. ON INT'L REL., 104TH CONG., 2D SESS., FINAL REPORT OF THE SELECT SUBCOMMITTEE TO INVESTIGATE THE UNITED STATES ROLE IN IRANIAN ARMS TRANSFERS TO CROATIA AND BOSNIA (Comm. Print 1997) (hereinafter House Bosniagate Report). I served as deputy minority counsel. The investigation, conducted in 1996, focused on allegations as to United States

scrutiny of the change in presidential-congressional national security interactions since my previous Congressional service.[15]

Part III distinguishes three different conceptual theories for the constitutional war powers significance of the Senate and House measures on Bosnia that fell short of enactment. For all three theories, the starting point is Justice Jackson's "zone of twilight" analysis in *Youngstown Co. v. Sawyer*,[16] a functionalist explication of a shared war power. Of the three theories, perhaps the conceptual approach most rooted in traditional judicial opinions looks at the background of annual military appropriations.[17] Today's war actions receive funding from appropriations in which an ambivalent Congress neither expressly authorizes, nor expressly cuts off, funding for particular interventions. Actions by Congress short of enactment may elucidate the intent of

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diplomatic interactions relating to Bosnia obtaining arms from Iran. It did not primarily concern the Congressional action on sending troops to Bosnia after the Dayton Accords, but it did chronicle the whole pertinent history. Because of the time required for declassification, the report, completed in October 1996, has only been released in 1997.

15. As Solicitor of the House of Representatives, the author personally represented the House of Representatives in a number of constitutional cases on national security. *See, e.g.*, American Foreign Serv. Ass'n v. Garfinkel, 490 U.S. 153 (1989) (vacating ruling striking down as unconstitutional a classified information provision in an appropriation bill), *on remand* 732 F. Supp. 13 (D.D.C. 1990). As Special Deputy Chief Counsel on the House Iran-contra Committee, I co-authored the chapter in the committee report on the Boland Amendments. *See* HOUSE COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN & SENATE COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION, 100TH CONG., 1ST SESS., REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR (Comm. Print 1987)[hereinafter IRAN-CONTRA REPORT]. For previous writings drawing on such service, see CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY 119-136 (1994); George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of "Use" Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43 (1990); Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto?*, *in* FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES? (Peter Raven-Hansen ed., 1987).

16. 343 U.S. 579 (1952). Justice Jackson's "zone of twilight" analysis has been recognized in other current contexts, such as the 1995 Mexican peso bail-out, as befitting the post-Cold War situation of presidents who propose national security actions that elicit neither clear authorization nor clear prohibition from a Congress, and a public, ambivalent about foreign involvements. *See, e.g.*, Russell Dean Covey, Note, *Adventures in the Zone of Twilight: Separation of Powers and National Economic Security in the Mexican Bailout*, 105 YALE L.J., 1311 (1996); James D. Humphrey II, Note, *Foreign Affairs Powers and "The First Crisis of the 21st Century": Congressional vs. Executive Authority and the Stabilization Plan for Mexico*, 17 MICH. J. INT'L L. 181 (1995).

17. Judicial opinions on the Indochina War exemplify this conceptual approach, which is developed further in articles explaining the appropriations power. *See, e.g.*, DaCosta v. Laird, 471 F.2d 1146, 1157 (2d Cir. 1973); DaCosta v. Laird, 448 F.2d 1368, 1369 (2d Cir. 1971); Orlando v. Laird, 443 F.2d 1039, 1042 (2d Cir. 1971); Mitchell v. Laird, 488 F.2d 611, 615 (D.C. Cir. 1973); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343 (1988).

congressional appropriations, particularly because of the established, albeit obscure, significance of "partial" congressional actions in approving between-enactment spending.[18] A second and distinct conceptual line focuses on the interactive system of presidential requests for congressional approval. Formal and express presidential requests for congressional approval, like President Bush's in 1991 and President Clinton's in 1995, may bestow or confirm the legal significance of the corresponding congressional "partial" approval actions. Finally, Congress may take legally significant positions, even apart from a presidential request. Understanding the tradition of such congressional position-taking represents in some respects the ultimate challenge in this area of constitutional analysis.

With these three theories elaborated, Part IV seeks to integrate key additional elements into a general post-Cold War paradigm. It turns to the puzzling relation of the United Nations, as well as other treaty organizations like NATO, to the American constitutional processes, again seeking to bridge the gap between formalist rigidity and functionalist reality. In addition to the background of appropriations, the background of international agreements can provide a context by which functional congressional approval, though not formally an enactment, can have constitutional significance. The discussion appropriately turns to the criteria of bicameral congressional "responsibility," that is, whether both chambers of Congress have taken responsibility for war decisions, even when they have not produced a formal enactment. Part V concludes by setting forth how these new theories of presidential-congressional interaction may apply to new cases at the start of the next century. Although the 1999 NATO air campaign against Serbia post-dates the writing of this article, the analysis in this article may appropriately be applied to that action. To do this, the analysis would be applied to two series of Congressional actions: the Senate and House votes on the air campaign; and, the Congressional enactment of the

18. Regarding ratification in the war powers context, see the *Prize Cases*, 67 U.S. (2 Black) 635, 671 (1862) (congressional ratification, after the fact, of President Lincoln's initial war powers actions at the start of the Civil War); *Youngstown*, 343 U.S. at 611 (Frankfurter, J., concurring). Regarding interpreting congressional silence and the significance of actions short of enactment in other national security contexts, see *Haig v. Agee*, 453 U.S. 280, 300 (1981) (citing Zemel v. Rusk, 381 U.S. 1, 11 (1965)). *See also* William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988); John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into "Speculative Unrealities,"* 64 B.U. L. REV. 737 (1985).

emergency supplemental appropriation relating to, but well after the beginning of the air campaign.

II. CONGRESSIONAL ACTION IN THE LATE 1990S

A. Iraq and Bosnia in 1997-98

The Iraq crisis came to a sudden peak in 1998, and muted congressional signals played a significant role in the outcome of military action. In late 1997, Saddam Hussein defied the world community by refusing to allow international inspectors to examine Iraq's nuclear, chemical, and biological weapons programs. President Clinton moved toward a full-scale war action against Iraq, with a likelihood of significant United States military casualties. Initially, Congress seemed likely to enact a resolution in support of military action, but Senate dissenters made debate over the resolution a vehicle for congressional involvement in the decision.[19] Senate resistance to the resolution, drawing on fears that Saddam Hussein would survive in power and that few allies were giving the United States support, expressed itself in disputes over the resolution's wording.[20] Amidst increasing congressional criticism of the proposed action, the Senate refused to pass the resolution before a lengthy recess.[21] This reluctance served as a point of articulation for public concern, pressuring the Clinton Administration into being receptive to a face-saving peaceful mediation by Secretary General Kofi Annan.[22] In the end, Congress had neither approved nor disapproved military action, but its manifest ambivalence had likely discouraged,[23] if not prevented, war.

Congressional debates over Bosnia, which were much more protracted than the Iraq debates, served as a way for the President to gauge whether a military commitment could continue. In 1997, President Clinton's proposal to extend the United States military commitment to Bosnia past its June 30, 1998, exit date drew extensive congressional criticism in hearings and elsewhere.[24] The House had written funding cutoffs of June

19. *See* Donna Cassata, *Cleland Warns Against Repeating Tonkin Gulf Mistake*, 56 CONG. Q. WKLY. REP. 247 (Jan. 31, 1998).

20. *See generally* Cassata, *Big Stick*, *supra* note 2.

21. *See* Donna Cassata & Pat Towell, *Doubts About Clinton's Strategy Stall Iraq Resolution*, 56 CONG. Q. WKLY. REP. 397 (Feb. 14, 1998).

22. *See* Cassata & McCutcheon, *Public's Worries*, *supra* note 2.

23. *See* Cassata, *Congressional Resolve*, *supra* note 2.

24. *See The U.S. Role in Bosnia: Hearings Before the House Committee on International Relations*, 105th Cong., 1st Sess. (Nov. 7, 1997) *available at* 1997 WL 697759 (F.D.C.H.); Kay Bailey Hutchison, *The Bosnia Puzzle Needs a New Solution*, N.Y. TIMES, Sept. 11, 1997, at A31 (opinion editorial by Senator); Bradley Graham,

30, 1998 for the Bosnia mission after June 30, 1998, into the defense authorization and appropriation bills, but the final version of these bills allowed the President to waive that prohibition.[25] In March of 1998, House members seeking a War Powers Resolution test of the Bosnia commitment forced a vote on the House floor, but their proposal was defeated.[26]

B. Bosnia in 1995

Because the congressional debates in 1995 produced an actual military commitment based on differing Senate and House actions, these debates warrant a more detailed exploration.

1. The Route to Action, Up to the Dayton Accords

Following the collapse of Yugoslavia in 1991, fighting broke out in Bosnia between the weak Bosnian government forces and a powerful, Serbian supported, Bosnian army, which is now charged with war crimes against the Bosnian Muslim population.[27] While President Bush kept the United States out of the war, Presidential candidate Clinton campaigned in 1992 on a promise of greater American military involvement in Bosnia.[28] Early in 1993, the new Clinton Administration expressed the possibility of a commitment of U.S. troops to enforce an eventual agreement under the auspices of the United Nations.[29]

House Backs June 1998 Funding Cutoff for U.S. Peacekeeping Troops in Bosnia, WASH. POST, June 25, 1997, at A6; Helen Dewar & Joby Warrick, *Senate Acts on Road-Building, Immigrant Issues in Supplemental Funding Bill*, WASH. POST, May 8, 1997, at A7.

25. *See* Pat Towell, *Hill Unlikely to Block Extension of Bosnia Deployment*, 55 CONG. Q. WKLY. REP. 3134 (Dec. 20, 1997); *Issue: Bosnia*, 55 CONG. Q. WKLY. REP. 3020 (Dec. 6, 1997) (describing House and Senate votes in 1997); Bradley Graham, *Hill Negotiators' Bosnia Exit Date May Leave Clinton an Option for Extension*, WASH. POST, Sept. 20, 1997, at A8.

Of course, there has been some powerfully articulated criticism. For the leading legal criticism of President Clinton's steps, see Fisher, *The Bosnia Commitment*, *supra* note 3; *President Clinton Extends U.S. Bosnia Commitment*, 54 CONG. Q. WKLY. REP. 3284 (Nov. 16, 1996).

26. *See* Pomper, *supra* note 3; *House Rejects Bosnia Resolution*, WASH. POST, Mar. 19, 1998, at A4 (item in brief without author).

27. *See* House Bosniagate Report, *supra* note 14, at 263-64, 267-68.

28. *Id.* at 275.

29. *See* Barton Gellman & Ann Devroy, *U.S. May Offer Troops for Bosnia*, WASH. POST, Feb. 10, 1993, at A1; Peter Rodman, *Before We Land Troops in Bosnia*, WASH. POST, Oct. 6, 1995, at A25; David C. Gompert, *The United States and Yugoslavia's*

As a practical matter, the intervention in Somalia dealt a heavy blow to the theory of a "United Nations" route to a Bosnia commitment.[30] Reflecting the changed climate, the Clinton Administration approached the military intervention in Haiti by turning away from a claim of unilateral presidential power to implement United Nations resolutions and, instead, using justifications in terms of congressional will.[31] The 1994 election of a Republican majority in Congress cemented the opposition to unilateral presidential commitment decisions, especially those justified by inclusion in United Nations peacemaking forces.[32]

Yet, in the face of new Bosnia Serb assaults on designated safe areas for Bosnian Muslims, the United States participated in a series of NATO air strikes against Bosnian Serb forces, with a particularly effective series starting on August 29, 1995.[33] Shortly thereafter, a United States troop commitment in support of an anticipated peace agreement[34] had to

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Wars, in THE WORLD AND YUGOSLAVIA'S WARS 122, 137 (Richard H. Ullman ed., 1996); Andrew K. Schiff, Note, *The War Powers Resolution: From the Halls of Congress to the Hills of Bosnia, Inertia Should Give Way to Post-Cold War Reality*, 11 AM. U. J. INT'L L. & POL'Y 877, 903 (1996). At that time, President Clinton was promoting, with a directive on the concept of "peace operations," the justification of American military commitments, not by individual congressionally enacted authorizations, but pursuant to the imprimatur of United Nations resolutions. On May 3, 1994, President Clinton signed Presidential Decision Directive 25 (PDD-25) regarding U.S. policy on multilateral peace operations. *See Clinton Signs New Peacekeeping Policy*, Inter Press Serv., May 5, 1994, *available in* LEXIS, News Library, Archives File.

30. *See generally* Sean D. Murphy, *Nation-Building: A Look at Somalia*, 3 TUL. J. INT'L & COMP. L. 19 (1994); Rajendra Ramlogan, *Towards a New Vision of World Security: The United Nations Security Council and the Lessons of Somalia*, 16 HOUS. J. INT'L L. 213 (1993). That commitment, launched by President Bush in 1992 and continued by President Clinton, floundered and never recovered from a change in mission, a bloody ambush of United States troops, and the televised image of a dead American soldier dragged by a jeering crowd before television cameras in Mogadishu. Polls showed limited American public support for committing troops to Bosnia, even lower if they went under the command of the United Nations. *See* Richard Sobel, *U.S. and European Attitudes toward Intervention in the Former Yugoslavia: Mourir pour la Bosnie?, in* THE WORLD AND YUGOSLAVIA'S WARS 145, 147-50 (Richard H. Ullman ed., 1996).

31. *See* Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 110 (1995); Damrosch, *supra* note 6, at 61-67; Uyeda, *supra* note 6, at 824-27; *Word for Word: A President's Ability to Declare War*, N.Y. TIMES, Sept. 30, 1994, at A29; FISHER, *supra* note 1, at 154-57.

32. A set of House committees issued reports in opposition to American troops serving under United Nations command in particular. *See* H.R. REP. NO. 104-18, pt. 1, at 24-26 (1996) (National Defense Authorization Act for Fiscal Year 1996); H.R. REP. NO. 104-18, pt. 2, at 19-20 (1996) (Cuban Liberty and Democratic Solidarity Act of 1996); H.R. REP. NO. 104-18, pt. 3, at 4-6 (1996) (Intelligence Authorization Act for Fiscal Year 1997).

33. *See* House Bosniagate Report, *supra* note 14, at 290.

34. The air strikes led to diplomatic progress. There was a tentative outline of a Bosnian peace agreement by September 7, and a suspension of the bombing in mid-September. *See* ELIZABETH DREW, SHOWDOWN 254 (1996).

be decided upon. Practically, this meant deciding whether or not to send 20,000 American troops to the Bosnian war zone as part of an overall NATO led Implementation Force.[35]

Not surprisingly, the season of significant congressional actions on Bosnia opened in September of 1995 when the House passed an appropriations limitation, the Neumann Amendment, that prohibited funds for any new Bosnia operations.[36] On September 29, the Senate passed by a 94 to 2 vote an amendment against funds for Bosnia combat deployments unless Congress gave advance approval.[37] Additional House opposition followed this amendment.[38] On October 19, President

35. Considering the fierce fighting and the intense hostility, in particular, of Bosnian Serbs towards outside military forces, American military casualties were a distinct possibility. Moreover, the deployment amounted to the first sending of American land forces into a European combat zone since World War II, falling quite outside the pattern of authorizations.

36. The House adopted the amendment by voice vote, to the FY 1996 Department of Defense Appropriations Bill (H.R. 2126), when it was offered by Representative Mark Neumann. *See* Dana Priest, *Republicans Voice Objections to U.S. Ground Troops in Bosnia*, WASH POST, Sept. 22, 1995, at A14. In conference the amendment was softened to a sense-of-the-Congress provision for the President to consult with Congress. 141 Cong. Rec. H9465 (daily ed Sept. 25, 1995) (test of section 8124: "It is the sense of Congress that none of the funds ... shall be obligated ... for the deployment ... of United States Armed Forces in any peacekeeping operation in Bosnia-Herzegovina, unless such deployment or participation is specifically authorized by a law enacted after the date of enactment of this Act ...."). The House rejected the conference report on September 29 and the substitute conference report did not include language on Bosnia. 141 Cong. Rec. S17169 (daily ed. Nov. 16, 1995) (discussing that "policy statements on Bosnia ... have been eliminated.").

37. *See* Carroll J. Doherty, *Lawmakers Wary of Balkan Role*, 53 CONG. Q. WKLY. REP. 3018 (Sept. 30, 1995). In mid-October, congressional hearings gave a hostile reception to Clinton Administration spokespersons planning a land deployment in support of an anticipated peace agreement. *See* Pat Towell, *Hearings Fail to Win Support for Peacekeeping Mission*, 53 CONG. Q. WKLY. REP. 3217 (Oct. 21, 1995). Secretary Christopher testified before the Senate Foreign Relations Committee, drawing intense bipartisan opposition, that the President not only would not be "bound" by a congressional ban on deployment, but even that he would not seek Congress's prior approval, only "welcome" it. *See* Dana Priest, *President Not 'Bound' by Hill on Deploying Troops, Christopher Says*, WASH. POST, Oct. 18, 1995, at A27. *See generally* Warren Christopher, *U.S. Forces in Bosnia: Hearings Before the House Comm. on National Security*, 104th Cong., 1st Sess. (Oct. 18, 1995), *available at* 1995 WL 610504 (F.D.C.H.) (Secretary Christopher's prepared statement); Warren Christopher, *U.S. Forces in Bosnia: Hearings Before the Senate Foreign Relations Committee*, 104th Cong., 1st Sess. (Oct. 17, 1995), *available at* 1995 WL 610422 (F.D.C.H.) (Secretary Christopher's prepared statement).

38. On October 30, the House passed H. Res. 247 by 315-103, expressing the sense of the House against deployment unless Congress gave advance approval, with even tougher blocking actions planned. *See* Pat Towell, *House Opposes Peacekeeping*

Clinton stated in a letter to the Senate that he "would welcome, encourage and, at the appropriate time, request an expression of support by Congress" for a troop commitment.[39] When President Clinton received the Balkan leaders at the convening of the Dayton talks, he reiterated that he would seek a resolution of support from Congress.[40]

2. *Request and Partial Authorization*

By mid-November of 1995, the press recognized that "President Clinton hope[d] to copy the success with legislators that George Bush had in the run-up to the Persian Gulf War five years ago"[41] by using the same type of approach to Congress.[42] President Clinton began implementing by formal and concrete steps, his quest for congressional action.[43] He made his formal request with a nine-page letter to Speaker Gingrich that promised he would ask for a "congressional expression of support" upon a Dayton agreement.[44] Equally as important, the President took a crucial step regarding the defense appropriation bill for fiscal year 1996, which was then in conference.[45] In high-level

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Role, Delays Vote on Cutoff of Funds, 53 CONG. Q. WKLY. REP. 3390 (Nov. 4, 1995); Rowan Scarborough & Paul Bedard, *Clinton Not Backing Off on Bosnia: House Democrats' Message Fails to Dampen His Resolve*, WASH. TIMES, Nov. 1, 1995, at A1. On November 8, the House Republican Conference overwhelmingly approved a resolution calling for "prompt" House action to block deployment. *See* Pat Towell, *White House Tries To Head Off Hill Curbs on Peacekeeping*, 53 CONG. Q. WKLY. REP. 3467 (Nov. 11, 1995).

39. Dana Priest, *President to Ask for Bosnia Vote*, WASH. POST, Oct. 21, 1995, at A1 (citations omitted). The letter had been sent to former Senate Majority Leader Robert C. Byrd, who responded encouragingly to the letter, indicating on October 20 that the President had earned a delay in any premature Senate expression against troop deployment. *See* Pat Towell, *U.S. Readies for Peace Talks; Lawmakers Remain Wary*, 53 CONG. Q. WKLY. REP. 3319 (Oct. 28, 1995).

40. *See* John F. Harris, *Clinton Asserts Role for U.S. Troops*, WASH. POST, Nov. 1, 1995, at A23.

41. Helen Dewar, *In Bid for Hill Backing on Troops, Clinton Faces Tougher Task than Bush*, WASH. POST, Nov. 14, 1995, at A9; *see also* Michael Dobbs & Thomas W. Lippman, *Cost of U.S. Bosnia Force Put at $1.5 Billion*, WASH. POST, Nov. 15, 1995, at A21.

42. TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, *supra* note 15, at 130.

43. On October 6, he gave a major policy address that he would "want and welcome" Congressional support. Carroll J. Doherty, *Clinton Vow to Provide Troops Revives War Powers Conflict*, 53 CONG. Q. WKLY. REP. 3158 (Oct. 14, 1995).

44. *See* Dobbs & Lippman, *supra* note 41. The President assured Congress a "timely opportunity" to review the issue, which the White House clarified as meaning no military action would occur without Congress having a two week period to deliberate and to vote. *Id.*

45. Following the congressional budget plan, which differed sharply from the President's proposal, Congress had developed a defense spending bill $7 billion above the President's request, which the President had threatened to veto. Congressional Republicans had vowed such a veto would draw a bill back from Congress precluding a Bosnian deployment by a binding cut-off of funding. *See* Rowan Scarborough, *Congress*

appropriations maneuvers, the President avoided clashing with Congress by offering to back away from his veto threat if some of the funds would pay for the Bosnia deployment.[46] On December 1, President Clinton let the bill become law, with an extra $7 billion over and above his budget request, and without his signature.[47]

The President's position sent the Senate and the House in different directions. Often in war decisions, one chamber has been markedly less eager than the other. This congressional division can be traced from the Spanish-American War in 1898, to World War I,[48] and to the Persian Gulf War in 1991.[49] In an impressive demonstration of leadership, Senate Majority Leader Dole developed his own approach to bring his chamber toward authorizing the Bosnian commitment. His strategy of conditional approval,[50] drawing on a historic congressional conditioning power,[51] served many purposes. It established that the Senate exercises a share of decision-shaping power, which is registered by congressionally drafted measures, not by mere presidential assurances.[52] From such

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Unlikely to Block Troops, WASH. TIMES, Nov. 28, 1995, at A1.

46. *See* John F. Harris & Helen Dewar, *Clinton Bargains Defense Funds for Support on Bosnia*, WASH. POST, Nov. 29, 1995, at A30.

47. *See* Pat Towell, *Congress Reluctantly Acquiesces In Peacekeeping Mission*, 53 CONG. Q. WKLY. REP. 3668, 3669 (Dec. 2, 1995). In that period of especially fierce budget veto-bargaining between the President and Congress, this was the most striking point upon which the President yielded. For an analysis of this veto-bargaining period of the budget battle, see Charles Tiefer, *"Budgetized" Health Entitlements and the Fiscal Constitution in Congress's 1995-1996 Budget Battle*, 33 HARV. J. ON LEGIS. 411, 438-40 (1996).

48. In one historic incident, the inexorable American movement toward entry into World War I, forwarded when the House voted 403 to 13 to enact authority sought by President Wilson for arming American ships against German submarines, was stopped cold, at least temporarily, when Senate opponents filibustered the bill until the session's adjournment. *See* FISHER, *supra* note 1, at 56-57; FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 80 (1986).

49. In 1898, the House approved the declaration of war by huge margins (325-19 and 311-6) while the Senate approved the declaration by a mere 42 to 35 vote. *See* FISHER, *supra* note 1, at 43. In 1991, the House approved the Persian Gulf War Resolution by a comfortable margin, while it barely passed in the Senate by 53 to 47. *See* TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, *supra* note 15, at 133.

50. *See* Towell, *supra* note 47, at 3669-71.

51. While some authorizations, from the War of 1812 to the declarations in World War II, have been unconditional, observers count at least four conditional congressional authorizations in the 19th century, including the commencement of the Spanish-American War by an 1898 resolution authorizing hostilities against Spain if it did not withdraw from Cuba. *See* WORMUTH & FIRMAGE, *supra* note 48, at 56-57.

52. *See* Pat Towell, *Congress Torn Over Response as Deployment Begins*, 53 CONG. Q. WKLY. REP. 3750, 3750-52 (Dec. 9, 1995).

congressional conditions came the major 1996-98 equip-and-train program.[53]

In the House, the issue of congressional support caused a striking fissure to open. On one side, Speaker Gingrich announced in late November that he had an "open mind"[54] concerning House approval of the Bosnia deployment, intimating he might let the President win a vote. At the same time, Senate Majority Leader Dole also made a subtle pitch to support the President.[55] On the other side, House majority party antagonism to the military commitment remained intense, particularly among junior members.[56]

On November 27, President Clinton made a televised address in support of the deployment, which itself was an implicit concession to the congressional role, particularly because the address was coordinated with the heavy lobbying of Congress.[57] Significantly,[58] the President emphasized that NATO, under an American general,[59] provided the

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53. In brief, Senator Dole's drafting of the resolution moved toward the United States troop role sticking to pure military work, not the "nation-building" part of the Dayton Accords, and, required that the Bosnian Muslims be armed and trained. Regarding the "equip and train" program and its origin in a Senate condition, see Tracy Wilkinson, *U.S. to Provide Bosnia 116 Heavy Cannons*, WASH. POST, May 10, 1997, at A22.

54. Carla Anne Robbins & Hilary Stout, *Clinton Outlines Case for Sending Troops to Bosnia*, WALL. ST. J., Nov. 28, 1995, at A16.

55. By Majority Leader Dole having the Senate take up first, on November 17, a measure to cut off funds for the Bosnia deployment—with the correct anticipation that the Senate would defeat the measure—Dole made a subtle multi-level pitch for approving the deployment. The Majority Leader's approach was quoted and analyzed as follows:

> [B]y demonstrating that more radical efforts [to cut off funds for deployment] face a dead end in the Senate, Dole hopes to encourage more House Republicans to line up behind a resolution that conditionally backs the troops.
>
> "It may help us in our final efforts on the House side if we vote on what they sent us," he said Dec. 7. "I think some of them think they're being stiffed."

Pat Towell, *Congress Torn Over Response As Deployment Begins*, 53 CONG. Q. WKLY. REP. 3750, 3750 (Dec. 9, 1995) (citations omitted).

56. On December 7, 201 Members signed a ten-word letter to President Clinton: "We urge you not to send ground troops to Bosnia." *Id.* On December 13, the House Republican Conference voted 108-64 to bring up a new bill to cut off funds for deployment. *See* Pat Towell & Donna Cassata, *Congress Takes Symbolic Stand On Troop Deployment*, 53 CONG. Q. WKLY. REP. 3817, 3818 (Dec. 16, 1995).

57. *See* Robbins & Stout, *supra* note 54.

58. For the discussion of the significance of the choice of international arrangements, *see infra* the text accompanying note 140.

59. President Clinton twice noted the command structure for American forces: that they were "under the command of an American general" and "will take their orders from the American general." President Clinton, *'If We're Not There, NATO Will Not Be . . . Peace Will Collapse,'* WASH. POST, Nov. 28, 1995, at A8 (text of the President's address).

background for the deployment, not the United Nations.[60] The Senate, guided by Majority Leader Dole,[61] then overwhelmingly rejected by a vote of 22 to 77 the "Inhofe" Bill, which was identical to a measure passed by the House on November 13 to cut off funds for the deployment.[62] Eventually, Senator Dole won adoption of his resolution by a 69 to 30 vote.[63]

Deferring to its conference,[64] the House majority leadership brought up the Dornan Bill, another measure to cut off funds for the deployment.[65] While the House had voted in favor of such cutoffs before, now it defeated the cutoff by the close vote of 210 to 218.[66] The House did adopt the bipartisan Buyer-Skelton resolution to express support for the troops. The resolution reiterated "serious concerns and opposition to the President's policy" but announced "support"[67] for the

60. The word "NATO" appeared ten times in the address (not counting the additional multiple mentions of "European allies"), in contrast, the words "United Nations" appeared only once. The only mention of the UN was that "American troops will take their orders from the American general who commands NATO .... unlike the U.N. forces, they will have the authority to respond immediately." *Id.*

61. Senator Dole was still drafting, on December 12, the eve of action, the precise text of the central Senate resolution. *See* Nancy E. Roman, *Senate, House Refuse to Block Funding for Bosnia Mission*, WASH. TIMES, Dec. 14, 1995, at A1. This demonstrated how independent was the formal Senate exercise of authority.

It contrasts with the Gulf of Tonkin Resolution, drafted by the Johnson Administration long in advance of the actual incident that triggered it, and phrased in terms most desired by the President and least attuned to diverse congressional views. What became the Tonkin Gulf Resolution had been conceived in February 1964 and put in draft form in May 1964, though the Tonkin Gulf incident did not occur until August. *See* FISHER, *supra* note 1, at 116-17. Such drafting allowed a Senate report later to contend that the Congress had not meant what the words of the resolution said. *See id.* at 122. For a scholarly response to the Senate report's argument, see ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 15-23.

62. The Senate also voted 52-47 to reject the "Hutchinson Resolution" to support the troops but not the mission. *See* Helen Dewar & Guy Gugliotta, *Senate Backs Troops to Bosnia; House Retreats on Fund Cutoff*, WASH. POST, Dec. 14, 1995, at A1.

63. *See* 141 CONG. REC. S18552 (daily ed. Dec. 13, 1995).

64. *See* Carla Anne Robbins, *Senate Votes To Give Support To Bosnia Plan*, WALL. ST. J., Dec. 14, 1995, at A3.

65. *See* 141 CONG. REC. H14838 (daily ed. Dec. 13, 1995) (statement of Rep. Dornan).

66. *See* Pat Towell & Donna Cassata, *supra* note 56, at 3817; Dewar & Gugliotta, *supra* note 62, at A1.

67. As Representative Henry Hyde explained the resolution, "It does not cut any funds, as the Dornan resolution did. In fact, it supports giving our troops all of the resources necessary to carry out their mission safely .... [It] perfectly states my views in opposition but in support of the troops." 141 CONG. REC. H14858 (daily ed. Dec. 13, 1995).

United States forces conducting the mission.[68]

III. ELEMENTS OF FUNCTIONALIST ANALYSIS: THE APPROPRIATIONS BACKGROUND, PRESIDENTIAL REQUEST-AND-APPROVAL INTERACTION, AND THE PATTERN OF CONGRESSIONAL POSITIONS

Part III analyzes various concepts regarding how congressional action, though falling short of enactment, can fill the constitutional role of legislative authorization. It first establishes the tension between formalism and functionalism. Then, it discusses in sequence three different approaches to a constitutionally effective "partial" congressional authorization, respectively focusing on the appropriations background, presidential requests, and congressional position-taking.

A. Functionalism and Formalism

Supreme Court decisions in the 1980s regarding separation of powers produced considerable analysis of the two distinct conceptual approaches, functionalism and formalism.[69] Nowhere did the Supreme Court more firmly set forth a formalist position than in *INS v. Chadha*.[70] *Chadha* invalidated a legislative veto concerning immigration, a statutory provision by which the House or Senate, by resolution, could cancel administrative stays of deportation for certain aliens. The Court wrote the decision to apply broadly to all legislative actions of the House or the Senate that did not go through the full enactment process of bicameralism and presentment. Therefore, *Chadha* would seem to deny legal effect to the separate adoption by the Senate and the House of different measures regarding Bosnia in 1995, as well as the Senate and House actions on Iraq and Bosnia in 1997-98.

However, *Chadha* by its language deals only with attempts by the House or Senate to take part in statutorily delegated powers. The decision speaks repeatedly about delegated powers and how their exercise is restrained by judicial review and by the non-delegation doctrine.[71] It does not purport to address constitutionally shared powers.

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68. The House passed the resolution by a 287-141 vote. *See* 141 CONG. REC. H14859 (daily ed. Dec. 13, 1995). The House also debated H. Res. 306, a resolution offered by Representative Lee H. Hamilton which was somewhat more supportive of the deployment. *See* 141 CONG. REC. H14860 (daily ed. Dec. 13, 1995).

69. In brief, the decisions with functionalist analysis regarded the three branches of government as a flexible system, which Congress could adjust to meet changing conditions. The decisions with formalist analysis regarded the separation of powers as strict, to keep Congress from absorbing or interfering with the powers of the other branches. For sources on formalism and functionalism, *see supra* note 13.

70. 462 U.S. 919 (1983).

71. *See Chadha*, 462 U.S. at 953 n.16, 954-55. The non-delegation doctrine does

A description of the constitutionally shared war powers notes the various ways the United States has to take war actions and how these options call into play several constitutional capabilities.[72] The meaning of the shared war powers was most eloquently expounded upon in the greatest functionalist opinion on war powers: Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[73] His concurring opinion, joined by Justice Frankfurter, subsequently received authoritative acceptance from the Supreme Court majority in *Dames & Moore v. Regan*.[74]

Justice Jackson's opinion in *Youngstown* separated war actions that the President might propose into three categories: those clearly authorized by a law enacted by Congress, those clearly against such a Congressional enactment, and a middle category, called the "zone of twilight."[75] Justice Jackson captures several functionalist themes about the nature of war powers in his "zone of twilight" analysis. His opinion

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not apply in foreign relations the way it applies domestically. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315-24 (1936). The Supreme Court strongly reconfirmed this principle in 1998. *See* Clinton v. City of New York, 118 S. Ct. 2091, 2106 (1998). *See also* Charles Tiefer, *Congress in a Straitjacket?*, LEGAL TIMES OF WASH., June 29, 1998 at 23, 24-25.

72. These include Congress's power to declare war, to take other steps regarding war such as providing funding, and to make or to share with the President other national security decisions like treaty ratification; and, the President's power to negotiate with other nations, to command the military, and to make or to share with Congress other national security decisions like treaty ratification. The powers involved in taking war actions are not strictly separated and exercised pursuant to close judicial control, like domestic lawmaking powers, but shared powers. For discussions of war powers, *see* the sources cited *supra* note 1.

73. 343 U.S. 579 (1952). Justice Jackson found that President Truman did not have authority, during the Korean War, to seize the nation's steel mills in order to end a labor conflict. *See id.* at 634-55.

74. 453 U.S. 654, 669 (1981).

75. *Youngstown*, 343 U.S. at 637. A "zone of twilight" occurs

> [w]hen the President acts in absence of either a congressional grant or denial of authority . . . there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

Id.

Dames & Moore restated the same concept by saying that executive actions fall "along a spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore*, 453 U.S. at 669.

identifies the war powers as an issue "in which [the President] and Congress may have concurrent authority."[76] Concurrent authority could just mean that the President and Congress each have their own distinct authority, but it could also mean than they share authority so that their interaction governs whether the proposed action has been sufficiently and validly authorized.

Moreover, Justice Jackson comments that legal conclusions about war powers exercised in this "zone" turn on "the imperatives of events and contemporary imponderables."[77] Such factors have been cited to justify the expansive presidential power experienced in the Korean and Vietnam Wars, and in recent actions such as Grenada in 1983,[78] Libya in 1986,[79] the Persian Gulf reflagging in 1988, and Panama in 1989.[80] Yet, Justice Jackson wrote his opinion about unilateral war powers not to explain that President Truman had expansive powers, but that he did not. The President lost in *Youngstown*. This Jacksonian approach did not use "contemporary factors" to dispense with paying close attention to what Congress had approved and what it had not;[81] instead, its "three zone" analysis turned precisely upon Congressional action and inaction.[82]

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76. *Youngstown*, 343 U.S. at 637. The image of a "zone of twilight" itself betokens transition between day and night, shading between light and dark, or, in other words, an area of in-betweenness rather than a sharp division.

77. *Id.*

78. *See generally* John Quigley, *The United States Invasion of Grenada: Stranger Than Fiction*, 18 U. MIAMI INTER-AM. L. REV. 271 (Winter 1986-87) (describing the Grenada invasion); Samuel R. Maizel, *Intervention in Grenada*, 35 NAVAL L. REV. 47 (1986) (describing the Grenada invasion).

79. *See generally* Robert G. Torricelli, *The War Powers Resolution After the Libya Crisis*, 7 PACE L. REV. 661 (1987) (describing the Libya action).

80. *See generally* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293 (1991) (describing the Panama action); Margaret G. Wachenfeld, Note, *Reflagging Kuwaiti Tankers: A U.S. Response in the Persian Gulf*, 1988 DUKE L.J. 174 (1988); Joseph R. Biden Jr. & John B. Ritch III, *The War Power at a Constitutional Impasse: A "Joint Decision" Solution*, 77 GEO. L.J. 367 (1988). With this record, Harold Koh understandably titled a classic study, "Why the President (Almost) Always Wins in Foreign Affairs . . . ." Koh, *supra* note 7.

81. Moreover, Justice Jackson drew on his own extensive experience as Solicitor General for President Roosevelt in the lead-up to American involvement in World War II, when the President had limited the exercise of powers in light of the interactions with a more isolationist Congress. Solicitor General Jackson had helped President Roosevelt to find what authority Congress' actions did grant the 1940s President. For all of President Roosevelt's very considerable activism in the period 1940-41, ranging from the destroyer deal and the occupations of Greenland and Iceland to an undeclared naval war with Germany and a provocative embargo against Japan, President Roosevelt stayed out of World War II until Pearl Harbor. American ground forces were not committed to a Eurasian war zone without congressional approval in 1940-41, as was the issue in Korea, Kuwait, and Bosnia. *See* 39 Op. Att'y Gen. 484 (1940) (Jackson's opinion); FISHER, *supra* note 1, at 63-67 (President Rosevelt's steps in 1940-41).

82. Justice Jackson's description of "congressional inertia, indifference or

B. The Background of Appropriations

Annual military appropriations create a background for all war powers actions. This background has received extensive discussion recently from Professors Raven-Hansen and Banks in *National Security Law and the Power of the Purse.*[83] Two chapters in the book deal with the opposite ways in which congressional intent regarding uses of military appropriations can regulate war powers. First, Congress can enact "restrictive appropriations," which stop or limit war action.[84] Alternatively, Congress can enact "legitimating appropriations," which approve or ratify war action.[85]

For analysis of the Bosnia commitment, what matters is that congressional actions short of enactment occurred against this background of general military appropriations. Of course, Congress did not put expressly authorizing or prohibitory language concerning Bosnia on its 1996 fiscal year appropriation laws. Hence, the December 1995 actions by Congress effectively expressed intent with legal significance in two different aspects. First, the appropriations committees considered denying funding for the Bosnia commitment before deciding not to do so.[86] Second, President Clinton felt it necessary to concede a $7 billion budgetary issue to avoid a threatened express cutoff.

The tremendous floor debate by the Senate and the House concerning proposals to cut off appropriations occurred after the defense appropriations had been enacted into law.[87] According significance to these debates, however, requires going beyond the simple argument that they constitute a legislative history for the enactment of the pertinent military appropriations.[88] An appropriations-background concept that

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quiescence" reflects that when Congress has neither expressly authorized, nor expressly prohibited, a proposed action, there is still much to be learned from the exact record of congressional action, as Justices Jackson and Frankfurter examined concretely in that case. *Youngstown*, 343 U.S. at 637.

83. WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994).

84. *Id.* at 137. Marked recent examples of this include the Boland Amendments that ended (for their duration) legitimate American government spending in support of the contra war in Nicaragua, and the funding cut-off provisions that ended American involvement in the Indochina War. *See id.* at 137-57.

85. *Id.* at 119.

86. *See supra* notes 45-47.

87. *See* ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 82-93.

88. Moreover, the WPR's thrust against implied authority through appropriations undermines the appropriations-background theory for finding legal effect in the 1995

somewhat fills the gap is the "ratification" theory of war powers.[89] Under this theory, Congress can react to presidential action by taking disapproving steps. These disapproving actions convey a message to the President that no good-faith expectation of ratification can exist in later supplemental and regular appropriations.[90]

Pursuant to "ratification" theory, the steps taken by Congress in December of 1995 arguably had legal significance in determining whether President Clinton had a good-faith expectation about provisions in the next supplemental appropriations law. If the Congress had voted against the Bosnia commitment, even though they did not enact a prohibition, he could not have gone ahead with a good-faith expectation of approval. Because both the Senate and the House voted favorably to him, he could, and did, proceed with the Bosnia commitment. In contrast to domestic action,[91] the machinery of military appropriations

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congressional actions. That is, since section 8(a)(1) of the WPR, 50 U.S.C. § 1547(a)(1), says not to take appropriations as authority for war actions, including appropriations for which cut-off amendments were defeated, it takes away the appropriation-background significance of the Senate and House votes in 1995 against cut-off provisions. *See* 50 U.S.C. § 1547(a)(1).

89. This theory explains that under some circumstances presidents can legitimately take military actions not previously authorized by Congress, in the good-faith expectation that Congress will soon legislatively approve the action retroactively. In fact, there are powerful examples of the ratification theory in operation. Ratification by legislation, after the fact of war powers exercise, is well established in Supreme Court case law, and Congress's enactment of appropriations for the Vietnam War in the late 1960s and early 1970s, it has been argued, constituted ratification for the expansion of that war. *See* ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 27-30; *see also* cases cited *supra* note 17 (ratification case law).

90. For example, the appropriations for 1984 limited aid to the contras to a low rate, which "would require the Administration to soon ask Congress for more, thus keeping the Administration's policy on a very short leash." Andrew W. Hayes, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534, 1567 (1988). From Congress's condemnatory reaction after public disclosure of the mining of the Nicaraguan harbors, it was obvious that the Administration could not have any good-faith belief thereafter that Congress would ratify its drawing upon funds when the 1984 limit was reached. *See id.* at 1568. That funding shortage led to the search for alternative funding sources that became the Iran-contra affair. *See* articles cited *supra* note 15 (Iran-contra inquiry).

91. If Congress appropriated, as it legislates, at what can be highly irregular intervals, such a theory of the legal significance of congressional actions short of enactment would be strained. Take, as a contrast, the federal labor laws. Intervals of twenty years or more can go by between occasions when Congress enacts major substantive revisions of the labor laws; some might say none has occurred from the Landrum-Griffin act of 1959 to the present. Moreover, Congress rarely puts major statutory expressions about the labor laws on appropriations. It would be idle to argue that a freestanding resolution by the Senate expressing a particular view about a ruling of the National Labor Relations Board has much legal significance by ratification theory. Whatever the NLRB has to sustain its ruling, it does not have the expectation of imminent Congressional enactments to ratify or to overrule. *See generally* Robert Douglas Brownstone, Note, *The National Labor Relations Board at 50: Politicization Creates Crisis*, 52 BROOK. L. REV. 229 (1986) (discussing major political swings that

proceeds very much on the expectation of imminent congressional enactments of funding laws that could ratify major military steps.

C. Presidential Requests for Congressional Approval

One of the most open and challenging constitutional issues of war powers in the post-Cold War era consists of how legally to regard a presidential request for congressional approval. Certainly, a presidential request has evident political significance. As with President Bush's request in 1991, President Clinton's request regarding Bosnia in 1995 took away some of the opposition's arguments against presidential unilateral action. Moreover, such requests not only affect public opinion, but they also affect congressional opinion directly.[92] Ironically, in 1995 Majority Leader Dole took the lead in shaping the Senate floor debate to encourage granting approval to President Clinton, notwithstanding the fact that Dole was fated to run against President Clinton in the 1996 presidential election.[93]

Constitutional analysis of the significance of presidential requests starts with the theory that war powers are a shared authority of Congress

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occurred in NLRB rulings during the 1980s, without Congressional action).

92. Neither in 1991, nor in 1995, did congressional leadership treat the President badly once he made his request. Each time, the congressional leadership allowed the President to have his test of approval basically on favorable terms. The leadership saw to it that a very few simple propositions went to the floor, not shaped to defeat the President and not filibustered, delayed, or subject to slow amendment. In 1991, the Democratic leadership of the Senate and House gave President Bush this favorable treatment even though, on the merits, the Democratic leadership opposed authorizing the war. There was no serious contention, after the Congress voted in 1991 on the Persian Gulf War Resolution, that Speaker Foley or Majority Leader Mitchell had given the President anything less than a full and fair opportunity to win that Congressional approval. In 1995, the Republican leadership of the Senate and House gave President Clinton this favorable treatment even though, as to politics, it was locked with him in bitter struggle on other issues. *See* TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, *supra* note 15, at 132-33 (discussing circumstances of 1991 floor votes), *see also* sources cited *supra* notes 61-68 (discussing circumstances of 1995 floor votes).

93. This interaction of presidential request, and favorable reception in return, is by no means an inevitable course of action in war powers. On the contrary, this interaction contrasts favorably with the Cold War pattern. President Nixon in the expansion of the Indochina War, and President Reagan as to support for the contra war in Nicaragua, were not, in hindsight, consistently requesting congressional approvals, and, to some extent, they were denied favorable congressional floor arrangements for votes on issues of disapproval, i.e., votes on fund cutoffs. *See* THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 13-33 (1979) (discussing circumstances of Congressional action at time of expansion of Indochina War); Iran-Contra Report, *supra* note 15 (discussing circumstances of Congressional action at time of votes on contra support).

and the President. A generalized feature of Cold War era analysis, reflecting to some extent the actual clashes at the time between the President and Congress regarding authority, was the polarization of war powers authorization theory. Neither of the two positions looked at war powers authority as being very much shared.[94] Although *Youngstown* speaks of concurrent war powers, opponents and proponents of presidential unilateral power alike tended to disregard the shared interaction of the president and Congress. Rather, both sides focused on different ways to read congressional inaction, either as a withholding of the affirmative authorization necessary for war, or as inviting presidents to proceed on their own.

By contrast, to illustrate the shared theory of war powers, it helps to look at another power that has come to be shared constitutionally: the spending power. From a formalist view, the spending power consists of two separated powers, the power of Congress to enact spending, and the power of the President to implement spending legislation.[95] Yet, in practice the spending process works with the two branches giving formal significance to presidential requests, which in turn, give significance to congressional appropriation committee actions that are only "partial" and not full enactments. Together, these actions determine what the lump sums[96] for defense programs are to be used for, particularly after

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94. One position relied primarily on the Declaration of War Clause and related aspects of the original intent of the Framers to bar war unless authorized by congressional declaration of war or an equivalent enactment. The opposing position relied primarily on the asserted presidential practices in the past two centuries, particularly since World War II, to authorize war by unilateral presidential decision.

A formalist argument can be made that only a declaration of war, not any other kind of enactment, suffices as a congressional authorization, but the better authority is to the contrary. *Compare* Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122, 126-32 (1991) *and* BANKS & RAVEN-HANSEN, *supra* note 83, at 122-27, *with* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991). For examples regarding the original understanding of the framers, see William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997); John C. Yoo, *The Continuation of Politics By Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672 (1972); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623 (1972); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1973).

95. A formalist finds no legal significance in requests by the president for spending, and no legal significance in "partial" actions by the appropriations committees after appropriation enactment, for only Congress by full enactment can adopt laws, and only the President can implement them. The formalist analysis would tell the whole story in a situation of presidential-congressional antagonism or aloofness; Congress would treat presidential requests as 'dead on arrival," in the budget vernacular, and presidents would treat appropriation committee positions after enactment as mere expressions of political views.

96. *See* Lincoln v. Vigil, 508 U.S. 182, 192 (1993).

the transfer of monies from one account-item to another.[97] Congress accepts presidential requests as significant;[98] then, after enactment by an elaborate formal system, the executive departments submit anticipated transfers or reprogrammings[99] to the appropriation committees for their approval or disapproval.[100]

In such a context, congressional objection in response to presidential requests has significance on a continuum. As Professor Glennon commented, this "objection is manifested most clearly by the enactment of a statute expressly prohibiting the action in question. Objection can exist, however, short of express prohibition, as when Congress rejects a bill or an amendment to a bill authorizing the disputed act."[101] Profesor Glennon further commented that:

> [There is] a vertical as well as a horizontal spectrum of objection or consent. The objection might be made on the committee level or on the floor of the House in question. Moreover, identical action might have been taken in the other House as well, or in the conference committee, or in connection with action on the conference report in either House.[102]

Other well-known examples of formal systems of requests and approvals for shared powers illustrate this difference.[103]

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97. For an overall discussion of defense appropriations, see BANKS & RAVEN-HANSEN, *supra* note 83, at 62-64.

98. "The budget estimates submitted by the [President's] defense agencies set forth in detail the purposes for the proposed spending .... [T]he detail ... is retained and employed in the ongoing relationship between Congress and the defense agencies." *Id.* at 63.

99. *See* Blackhawk Heating & Plumbing Co. v. United States, 622 F.2d 539, 542 (Ct. Cl. 1980); BANKS & RAVEN-HANSEN, *supra* note 83, at 76-79.

100. *See generally* United States v. Board of Educ., 621 F. Supp. 1296, 1374 (N.D. Ill. 1985) (providing a condensed description and background on reprogramming); 1 OFFICE OF THE GEN. COUNSEL, GENERAL ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW, at 2-25 to 2-33 (2d ed. 1991) (describing reprogramming and when general appropriations provisions are construed as permanent legislation).

101. Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 139 (1984).

102. *Id.* at 140.

103. One is the famous "Good Friday" agreement between President Bush and Congress, in which the President requested contra aid and agreed, before releasing the aid, to accept the decisions on approval of four congressional committees. *See* Michael J. Glennon, *The Good Friday Accords: Legislative Veto by Another Name?*, 83 AM. J. INT'L L. 544 (1989); *see also* John O. McGinnis, *Constitutional Review by the Executive in Foreign Affairs and War Powers: A Consequence of Rational Choice in the Separation of Powers*, 56 LAW & CONTEMP. PROBS. 293 , 323-24 (1993) (describing the bargaining process that took place under this agreement); BANKS & RAVEN-HANSEN, *supra* note 83, at 64-65 (providing a brief description of the agreement). President

In the first 150 years of our country, numerous instances of presidential requests to Congress for war power authorization had occurred.[104] During the Cold War, the well-known "area resolutions" of the 1950s were requested.[105] These resolution's provided the model for the Tonkin Gulf Resolution of 1964[106] which preceded the massive American intervention in Vietnam.

There has been some tendency for war powers theory to brush aside such presidential requests as insignificant camouflage for the unilateral exercise of presidential power.[107] Along with this presidential posturing, there exists a corresponding myth that the eventuality of war never actually depends on what Congress does with these requests.[108] Yet,

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Bush's own White House Counsel, C. Boyden Gray, publicly attacked the Secretary of State for making a deal that violated *Chadha*, and had to be "taken to the woodshed" by the President, as the Washington expression goes. Both sides made and adhered to the agreement, which "shows the executive branch bargaining away the right not to be checked by Congress other than through a bill passed by both Houses and presented to the president." McGinnis, *supra*, at 323.

104. The very first foreign war of the new United States consisted of the naval war with Revolutionary France in 1798. President John Adams did not go to war on his own, nor did Congress authorize war on its own. President Adams wrote Congress a request for it to take the steps supportive of a war, and Congress did so. *See* FISHER, *supra* note 1, at 17-19 (citing the famous Supreme Court cases regarding Congress's steps and that war). Numerous subsequent presidential requests could be cited, some granted by Congress, some rejected.

105. The modern system of presidential requests, and congressional actions in response, began following the Korean War and the *Youngstown* decision, when President Eisenhower took office. He followed a pattern of requesting congressional actions of support for his military interventions, and receiving congressional resolutions of support in response. These were the Formosa Resolution of 1955, and the Middle East Resolution of 1957. *See id.* at 104-07; *see also* JAMES A. ROBINSON, CONGRESS AND FOREIGN POLICY-MAKING 54-55 (1962) (discussing the 1955 Formosa Resolution).

106. Pub. L. No. 88-408, 78 Stat. 384 (1964).

107. Presidents themselves deny in many ways that their requests have significance. In this regard, President Clinton adhered to presidential tradition by maintaining that for legal purposes he had sufficient unilateral power for his Bosnia action, and that what presidents ask is mere "support" with only political, not constitutional, significance. Presidential signing statements for the Gulf War Resolution and the Multilateral Force in Lebanon Resolution exemplify this tradition. Both President Clinton and President Bush made public statements in advance of the congressional votes that they had constitutional power to act on their own. *See supra* note 37 (Secretary of State Christopher announcing the Administration position that President Clinton would not be bound); ROGER HILSMAN, GEORGE BUSH VS. SADDAM HUSSEIN: MILITARY SUCCESS! POLITICAL FAILURE? 91 (1992) (President Bush announcing he could go ahead with war regardless of Congress).

There is less to this presidential unilateralism than meets the eye. Presidents make similar claims even for matters, like the request for the declaration of World War I, that indisputably required congressional approval. Moreover, Congress and the public can tell the difference between occasions when Presidents truly act without care for congressional approval, and occasions, like 1983, 1991, and 1995, when the President's request signifies that congressional action matters.

108. Presidents maintain the fictions that they decide on war, and that their requests for congressional approval signify at most that such approval is a foregone conclusion.

there is a major difference between presidential posturing and such requests having no meaning. The presidential request-for-approval interaction with Congress cranks up an elaborate machinery for the democratic inclusion of the nation in the military commitment decision. Hearings, news coverage, briefings, disputes over conditions or demands for assurances, and floor debate ventilate and test the propositions as to the soundness of the commitment, which was previously done only within the relatively closed circle of the executive branch. Moreover, congressional action has its effects on the course of military action.[109]

There was something of a hiatus in the interactive system from the late 1960s to the 1980s, owing to mutual suspicion between presidents and Congresses following the Vietnam War, where presidents tended to act without requesting congressional approval.[110] This period represents a

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Conversely, bitter congressional opponents contend that the President manipulated the Congress into approval. This was expressed when President Clinton extended the Bosnia commitment from 1996 to 1997-98; it was also expressed in 1991, when congressional critics charged that President Bush had boxed Congress in by deploying the large forces in Saudi Arabia for offense in November-December 1990 while Congress was in recess. *See* TIEFER, THE SEMI-SOVEREIGN PRESIDENCY, *supra* note 15, at 125-27 (1994) (late 1990 deployment said to have boxed in Congress); *see also* sources cited *supra* note 3 (reporting regarding 1997-98 Bosnia commitment extensions).

109. The hearings on the Lebanon resolution of 1983 probably helped prepare President Reagan to pull out when the commitment proved nonviable, so did the Senate discussion on Somalia in 1993.

There is even the classic 1954 example that negative congressional reaction to one historic presidential request, all the more effective for the discussion having occurred quietly and non-publicly, flatly stopped proposed American combat involvement in, of all places, Vietnam. In 1954, as the French position in Indochina rapidly deteriorated, President Eisenhower sent Secretary of State Dulles to seek congressional approval for use of American air and naval power in the conflict. The approval would have been in the form of a joint resolution, of which Secretary Dulles brought a draft to a meeting with the congressional leadership. The bipartisan congressional leadership opposed the proposal, and not only killed the prospect of the resolution, but the whole idea of American military intervention in Indochina at that time. *See* ROBINSON, *supra* note 105, at 53-54.

110. Of course they asked for appropriations, extensions of the draft, and other Congressional acts that may be considered congressional ratification of the war. *See* ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 27-30. It could be argued there is a continuum along which different kinds of presidential requests constitute greater or lesser deference to congressional decision making. At least Congress knew it was voting to continue the Vietnam War when it voted those appropriations. In contrast, when President Nixon requested the defense appropriations that funded a secret air war in Laos, he made an effort to ensure that the public, and to some extent most of Congress, not know what those appropriations were for. *See id.* at 68-97.

Even during this hiatus, some semblance of the request-for-approval system continued. Probably the most dramatic example concerned the Lebanon intervention of 1983, and

Cold War era interruption in the working system of presidential requests and congressional actions.[111] There is always some congressional suspicion of presidents seeking a war action, even when they do not unilaterally make war; for instance, the Bosniagate committee investigation was part of this tradition.[112] Presidential failure to request congressional approval aggravates this suspicion to the point of reducing the capabilities of the interactive system.[113]

Conversely, the return of the interactive system in the 1990s offered incentives for both branches. Just as an express presidential request for congressional approval increases Congress' willingness to provide it, the offering on the congressional floor of carefully shaped propositions increases Congress' willingness to provide approval in some form. Members of Congress find ways in such carefully shaped voting opportunities to implement the public's ambivalent sentiments regarding a particular deployment.[114]

Congress's enactment in 1983 of the Multinational Force in Lebanon Resolution. *See* Pub. L. No. 98-119, 97 Stat. 805 (1983). That President Reagan agreed to such a resolution resolved the most significant war powers interaction of the period between the Vietnam War and the Gulf War. Tragically, the terrorist bombing of American headquarters facilities in Lebanon, which claimed 241 lives, fulfilled the worst fears as to the cost of that commitment. What mattered as a precedent was that President Reagan recognized the need for a congressional enactment explicitly in accord with the War Powers Resolution. Congress, in turn, gave the President such an authorization, as it did in 1991 and 1995.

111. Out-and-out Presidential-Congressional combat over war powers during that era ranged from President Nixon's (overridden) veto of the War Power Resolution itself, to President Bush's vetoes or denials of the efficacy of numerous limitations in defense and foreign aid appropriations. President Bush's disputes of the efficacy of appropriation limitations are discussed in TIEFER, THE SEMI-FOREIGN PRESIDENCY, *supra* note 15, at 36-49. For completeness, it should be noted that many in Congress saw President Clinton's intervention in Haiti as a wrongfully unilateral exercise of power. The Cold War peaks of "divorce" between Congress and the President may be past, but the marriage still has serious episodes of domestic disturbance.

112. This is an important tradition. The first congressional investigation ever, in 1792, concerned a military catastrophe that befell a military expedition against the Indians. A great congressional investigation in 1946 of Pearl Harbor partly dealt with conspiracy theories that President Franklin Roosevelt had wanted war enough to deserve blame in the intelligence coordination failures that let Japan attain complete surprise in the attack. The Iraqgate inquiries of 1991-92 concerned President Bush's courtship of Saddam Hussein up to the eve of the Kuwait invasion. *See* FISHER, *supra* note 1, at 14 (1792 investigation); *see also supra* note 15 (Iran-contra inquiry).

113. The Johnson Administration deception that underlay the Tonkin Gulf Resolution, and the Iran-contra deception of the late 1980s, marked eras of particularly distrustful partial incapacitation of the interactive system. *See* FISHER, *supra* note 1, at 117 (Tonkin Gulf deception); *see also supra* note 15 (Iran-contra inquiry).

114. They can say both that they insisted on a congressional vote, and even opposed some overly positive form of support—a bow to the sentiment in the nation antipathetic to the deployment—and, on the other hand, that ultimately they backed the deployment in some more conditioned or limited form—a bow to the sentiment on the other side. *See supra* notes 61-68 (conditioned and limited support for Bosnia commitment).

D. Institutional Positions of the Senate and the House

Putting presidential requests aside, do the positions taken by Congress themselves have an independent legal significance concerning shared war powers? The third conceptualization focuses on past congressional actions, short of enactments, regarding national security.[115]

For powers that the executive and legislative branches exercise separately, actions fit the simple bipolar model of binding action versus nullity. Within their separate domestic powers, Congress enacts laws and appropriations, and Presidents issue executive orders within their constitutional or delegated powers and make other decisions. What one branch says, short of binding action, does not constitute the exercise of power, but is rather just a nullity.

Analysis of shared war powers requires a model, drawn from the world of the contract or the lawsuit,[116] of the role of the position taken by one party in an interactive context. The position taken by each party as to the shared power is not a nullity. It confines, shapes, and thereby directs the future joint actions of both parties. Each party's position can be part of a sequence in which, periodically, some joint actions take place that are influenced by a prior party's position and thereafter are implemented by a party. Congress and the President are like partners in a game of bridge, which can be played alternatively by unilateral or interactive systems. The rules of the game give partners the "concurrent" authority to bid for and to win a contract.[117] However, partners do better if they adopt a bidding system, which they agree to adhere to with each other, and which they formally announce to the other team. Under an interactive system, their bids have significance in addition to the rock-bottom unilateral significance under the rules of the

115. As described, in October and November 1995, both the Senate and House adopted non-binding propositions against deployment without advance approval. Then, in November, the Senate and House adopted propositions regarding the sending of the troops. None of these were binding enactments. *See supra* notes 36-38.

116. Contracting parties acting together can exercise shared powers: they can modify, discharge, fill in missing terms or details of performance, renew, and so forth. Litigating parties acting together can exercise shared powers: they can settle, dismiss, stipulate, arrange details of discovery or relief, and so forth. As to the shared powers, a position taken by one of those contracting or litigating parties alone does not amount, by itself, to a binding action: one party's position does not modify or renew a contract, or arrange the steps in a lawsuit.

117. Those rules do not force a system of interactive bidding upon them. Partners who do not care what each other does can bid unilaterally, without a system, like presidents and Congresses antagonistic to each other.

game.[118]

For a shared national security power, historical practice reflects and confirms the constitutional significance attributable to position-taking by the chambers of Congress.[119] For example, the President and the Senate share the treaty power under the text of Article II, which prescribes that the President makes treaties with the advice and consent of the Senate.[120] The legal effect of actions by the Senate alone, apart from the bare act of ratification, is not answered by the text of Article II. Constitutional issues arise concerning the effectiveness of various other actions the Senate might take on a one-chamber basis.[121]

Regarding the congressional share of war powers, the adoption of measures short of enactment establishes the official position of an institution that the Constitution charges with a share of war powers. Senate or House adoption of measures differs from mere public nonofficial sentiment about war, such as a public opinion poll or a survey of newspaper editorial boards.[122] The development of congressional positions on war powers issues occurs through the same parliamentary procedures of committee hearings, committee reports, and floor debates on amending and passing resolutions as Congress uses for binding enactments. Once each chamber develops an institutional position in this manner, the chamber's future actions are influenced. Other institutions, from the Presidency to the military, often adapt to that position. Therefore, the formal process of congressional position-taking and the subsequent reaction of other institutions give the process its legal effect.[123]

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118. Each partner agrees by this bidding system to give, and to hear, bids under a rule-guided, legitimate, formal arrangement, contemplated within the workings of the game, by which each partner's bids then influence how the other partner will exercise her (otherwise unilateral) bidding power. *See generally* ALFRED SHEINBOLD, FIRST BOOK OF BRIDGE 35-108 (1952) (how bridge bidding works in general).

119. *See generally* Glennon, *supra* note 101.

120. U.S. CONST., ART. II, sec. 2.

121. Has the Senate some role in treaty termination? Can the Senate make amendments or "reservations" to a treaty? Practice indicates a vital Senate power here, even though the text of the Constitution is silent. *See id.* at 124-34. Can the Senate's record establish an interpretation of a treaty that cannot subsequently be changed by the President? For twenty-five years this issue, in the context of the ABM treaty, has been the subject of excited debate, considerably focused upon practice, the Constitution's text again being silent. *See id.* at 134-45.

122. The Constitution establishes in Article I the institutional character of the Senate and House, their nature, membership, and procedures, by which the institutions develop positions in that progress toward complementary or joint actions. Through the chamber's deliberative procedures, the sides in the debate about a war proposal build their case.

123. By gradually developing a continuing formal position for the institution, the proponents of that position solidify that position by proper procedures, testing in debate, and adequate opportunity for the Executive to respond. In terms of the established tool

Similarly, historical practice may shed light on what each chamber does concerning the shared war powers. Each chamber has a historic pattern of adopting institutional positions regarding the government's shared war powers.[124] The key examples regarding today's issues of global intervention, like the key examples cited in the debates on unilateral presidential power, arise in the modern era after World War II.[125] The first pattern concerned the United States' emergence from isolation into a system of international arrangements with the United Nations, prior to[126] and after its establishment.[127] As the Cold War progressed and the United States made a series of mutual security treaties, another pattern of adopting institutional positions arose. This pattern consisted of the Senate adopting three resolutions: a 1948 resolution to prepare for the establishment of the NATO alliance,[128] a 1951 resolution to commit American ground forces to Europe for use

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of legal analysis termed "positive political theory," such formal incidents and underpinnings of durability of position are a key component of what makes legislative action significant for legal purposes. Not only does the particular legislative institution adhere, in future actions, to its enduring positions, but other institutions, seeing the formality, legitimacy, and solidity of the institutional legislative position, adapt to that position. The adaptation of one institution to a formal, legitimate, official institutional position of another signifies it has a kind of legal effect in their interactions.

124. A classic nineteenth century example was the House's famous censure of President Polk in 1848 for acting unconstitutionally in provoking the start of the Mexican war. *See* FISHER, *supra* note 1, at 34. That censure gave the young Representative Abraham Lincoln the occasion to expound narrow views of presidential power, somewhat ironic in view of his own later actions. *See id.*

125. Only this era has seen the necessity for extensive American commitments and military deployments outside the Western Hemisphere. It was after World War II that constitutional doctrine, reacting against the inadequacies of the processes that had overly checked American foreign policy during the isolationist period between the wars, boosted alternatives to supplement it. *See generally* Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I*, 54 YALE L.J. 181 (1945).

126. For pertinent purposes, this pattern begins with Representative (later Senator) Fulbright's House resolution of 1943. *See* ROBINSON, *supra* note 105, at 33-35.

127. Significantly, the Fulbright Resolution conveyed that the President would not exercise war powers alone in connection with the anticipated international organization. Rather, the Fulbright Resolution continued, in this new context, the position of the House that it, and the Senate, would share in those powers. *See* FISHER, *supra* note 1, at 73-74. The Fulbright Resolution prefigured the terms on which the Senate ratified the United Nations Charter and the Congress enacted the United Nations Participation Act.

128. Senator Vandenberg moved this resolution through the Senate, and the House as well. *See* ROBINSON, *supra* note 105, at 44-46.

with NATO,[129] and the 1969 "National Commitments Resolution."[130] These Senate resolutions prefigured the treaty ratifications and legislation, all the way to the enactment of the War Powers Resolution.

Another pattern of adopting institutional positions consists of provisions for the withdrawal of troops by congressional adoption of a two-chamber concurrent resolution – i.e., the withdrawal of troops by congressional action short of enactment.[131] Section 5[c] of the War Powers Resolution provides that a concurrent resolution by both the House and the Senate can end a military commitment.[132] A surprising number of commentators have defended the provision's constitutionality before,[133] in the immediate aftermath,[134] and now looking back at

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129. The Senate debated President Truman's plan for three months. Ultimately, the Senate adopted a resolution, S. Res. 99, that supported the President's action only on the condition that future commitments would be approved by Congress. *See* FISHER, *supra* note 1, at 99.

130. Senator Fulbright followed up his historic inquiries regarding the Vietnam War by reporting, and moving to adoption this resolution, which provided that further national commitments to fight overseas, like the commitments that had led the country step-by-step into Vietnam, should occur only by treaty, statute, or concurrent resolution. *See id.* at 120-23.

131. The 1957 Middle East Resolution had included explicit authority, which President Eisenhower did not oppose, for the Senate and House to terminate the involvement by concurrent resolution. So did the Tonkin Gulf Resolution of 1964. In 1964, when Senator Richard Russell found that the draft of the Tonkin Gulf Resolution had not included such a provision, "'it was agreed that the resolution of August, 1964 would contain on its face a provision that the Congress, acting alone by concurrent resolution, could rescind it.'" Doyle W. Buckwalter, *The Congressional Concurrent Resolution: A Search for Foreign Policy Influence*, 14 MIDWEST J. POL. SCI. 434, 450-51 (quoting hearings).

132. 50 U.S.C. 1544(c) (199). Debate over what *Chadha* means for war powers has overwhelmingly centered upon this provision, since the concurrent resolution in section 5[c] of the War Powers Resolution would not be presented to the President, and would not become an enactment. Justice White's dissent in *Chadha* discussed how section 5[c] had apparently been struck down by the sweeping majority opinion. *INS v. Chadha*, 462 U.S. 919, 971 (White, J., dissenting).

133. Professor Paul A. Freund expressly distinguished this sphere from others, arguing persuasively that "on the substantive premises of the bill, the provision respecting a concurrent resolution is a valid and appropriate measure, and does not raise constitutional issues of the kind mooted in connection with other categories of legislation." 119 Cong. Rec. 21, 224-25 (1973) (reprinting letter of June 12, 1973 from Paul A. Freund to Rep. Pierre S. Du Pont).

134. For examples of the commentary supporting the constitutionality of the War Powers Resolution's concurrent resolution mechanism notwithstanding *Chadha*, *see The Supreme Court Decision in INS v. Chadha: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Comm. On the Judiciary*, 98th Cong., 1st Sess. 175, 186-87 (1983) (testimony of former Rep. Robert C. Eckhardt); *The U.S. Supreme Court Decision Concerning the Legislative Veto: Hearings Before the House Comm. On Foreign Affairs*, 98th Cong,. 1st Sess. 155 (1983) (Prof. Eugene Gressman); Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 671, 680 (1984); Carter, *The Constitutionality of the War Powers*

Chadha.[135]

Congress can take positions by considering measures, not likely to be enacted, yet part of a legislative process meant to develop a congressional position regarding a particular conflict.[136] Somewhat complicating all the patterns just discussed, congressional actions conforming with bicameralism and presentment can be drafted as "non-binding."[137] Congressional actions regarding Grenada[138] and Somalia[139] resemble the 1997-98 actions regarding Iraq and Bosnia, insofar as these relatively inconclusive "partial" congressional actions actually shaped what the Clinton Administration could, and eventually did, do. The 1995 Neumann and Gregg Amendments, both opposing unapproved deployments in Bosnia, exemplified such an approach.[140]

From Congress's viewpoint, whether the adoption of a measure ends up as part of an effective joint or complementary action, or as a resistance to such action, may not be foretold until the final sequence of

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Resolution, 70 VA. L. REV. 101, 129-32 (1984); Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1432-36 (1984).

135. *See* DYCUS ET AL., *supra* note 1, at 134; Glennon, *supra* note 11, at 99-100; ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 119.

136. For example, in 1983, the House passed a measure reported by its Intelligence Committee, H.R. 2760, that would have completely cut off aid to the contras in Nicaragua after a date certain. The position established by the House bore fruit in later enacted Boland Amendments that drew the metes and bounds for the Iran-contra affair. *See* IRAN-CONTRA REPORT, *supra* note 15, at 386.

137. Members of Congress routinely draft provisions of bills, or whole resolutions, to start with the phrase, "It is the sense of the Senate that . . . ." or "It is the sense of the Congress that . . . ." Such wording equates with non-binding effect, the offerors aiming deliberately not to have legal effect of that kind. *See, e.g.*, *supra* notes 36 & 38 (examples of such "sense-of" provisions).

138. In 1983, the House passed a measure applying the War Powers Resolution to the Grenada intervention, which the Senate acted upon in parallel though without enactment. The House passed a joint resolution, H.J. Res. 402, by the lopsided vote of 403-23, significantly declaring that the Grenada invasion had triggered the War Powers Resolution. *See* Ford, *supra* note 5, at 665-66. The Senate added similar language to an unrelated bill pending on its floor, though, for unconnected reasons, that bill failed and efforts to move the language to enactment were abandoned. *See id.* at 666.

139. Intervention started by the Bush Administration in 1992 but continued with the Clinton Administration in 1993. At the start of 1993, the House and Senate each passed differing versions of a joint resolution to authorize the Somalia operation. The Administration took note of the House and Senate actions in subsequent correspondence with Congress, deeming Congress to have provided, by those actions, a form of authority. *See id.* at 680-85, 690. In October 1993, after the ambush of American forces, the Senate adopted a provision to cut off funds for Somalia operations. *See id.* at 691-92. In the face of this, and long before it could become law, President Clinton announced that he would withdraw American troops. *See id.* at 692-93.

140. *See supra* notes 36-37.

action regarding a particular conflict is complete.[141] For example, after the Vietnam War, the military developed an understandable desire not to repeat one of the war's biggest mistakes, which was to go to war without the kind of firm and legitimate national commitment that can only occur through congressional action. Congressional actions such as those on Iraq and Bosnia might satisfy the military's needs for such a legitimate national commitment, without regard to the fact that such actions fell short of enactment.

IV. THE INTERNATIONAL BACKGROUND, CONGRESSIONAL RESPONSIBILITY, AND THE SCALE OF MILITARY ACTION

The elements of the new paradigm discussed in Part III—the appropriations background, presidential requests, and congressional position-taking—provide the basis for tackling some of the more advanced and often controversial war powers issues. To measure the constitutional authorizing effect of a "partial" congressional action, it is useful to look in Part IV at some more particularized factors.

A. The Background of International Peacemaking Arrangements

Few issues of international and constitutional law have as much interest in the transition from Cold War to post-Cold War modes of analysis as the relevance of the international arrangements with the United Nations and NATO. The separate legal aspects of this issue warrant a brief review. When joining the United Nations and NATO at the start of the Cold War,[142] Congress took care to ensure that war powers decisions of the United States would continue to occur under our constitutional process. This still left unanswered the question of how, in practice, such international arrangements would factor into the American constitutional process.[143] Following the lead established by President

141. Moreover, adoption of a resolution by the Senate or House also contrasts with official, but still non-institutional, expressions of legislative sentiment. The Senate and House measures regarding Bosnia differed from such official, but non-institutional, expressions as the Members' floor speeches about Bosnia or their letter to the President opposing a troop commitment. By those expressions, the involved legislators made a political point, but not a constitutional one.

142. Prior to World War II, the refusal by the Senate to ratify the Treaty of Versailles after World War I, and the following isolationist era, had established a national policy of disconnection from international arrangements for peacemaking and mutual security.

143. *See* John J. Kavanagh, *supra* note 10; Brian M. Spaid, Comment, *Collective Security v. Constitutional Sovereignty: Can the President Commit U.S. Troops Under the Sanction of the United Nations Security Council Without Congressional Approval?*, 17 U. DAYTON L. REV. 1055 (1991); *see also* sources cited *supra* note 10.

Truman in the Korean War,[144] later administrations, as a means to justify the Vietnam War, cited United States obligations arising due to membership in the Southeast Asia Treaty Organization. Critics dispute that these type of collective security agreements, or the resolutions of the United Nations for that matter, can justify unilateral presidential war decisions.[145] With the end of the Cold War, the debate regarding the role of the United Nations in American constitutional war authorizing has intensified in both public and scholarly forums.[146] United Nations peacemaking and peacekeeping operations around the world and its associated bipolar security and stabilization patterns have expanded with the end of the Cold War.[147]

Yet, after the Cold War, a subtler approach may have begun regarding

144. In the first and key instance, President Truman committed United States forces against the North Korean invasion of South Korea in 1950, without advance congressional authorization or explicit Congressional ratification. For descriptions of the Korean War approval background, see Stromseth, *supra* note 10, at 621-35. To provide a legal justification, his administration relied in part upon the United Nations Security Council Resolution calling for action against the North Korean invasion. *See Authority of the President To Repel the Attack in Korea*, DEP'T ST. BULL., July 31, 1950, at 173.

145. *See* Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509 (1986). Since the Constitution itself required congressional action such as a declaration of war, no international agreement could validly remove that requirement. Under some circumstances, a treaty can be self-executing in other respects, but it is a much further reach to argue that treaties could put the nation at war without Congress so deciding. *See* ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 14.

The agreements themselves, as Congress approved them, left unaltered the constitutional processes of war powers. Reviews of the terms of the mutual security treaties, and of the legislative history of their ratification and the ratification of the United Nations Charter and the United Nations Participation Act, do not support the assertion that they were intended to authorize war actions in that way. To the extent the United States makes mutual defense or similar international commitments that bind the nation as a matter of international law, those commitments can be fulfilled only through regular constitutional processes like congressionally-enacted war authorization, much as financial commitments by treaty can only be fulfilled through the regular constitutional processes of congressionally-enacted appropriations.

146. President Bush gave reasons initially to think he might have tried to justify the Gulf War without congressional authorization, on the strength of UN resolutions. *See* Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: The Old Order Changeth*, 85 AM. J. INT'L L. 63 (1991).

147. When the Clinton Administration took office, the subject was much discussed of whether Presidents would make military deployments on United Nations peacemaking operations without formal congressional authorization. *See generally* sources cited *supra* note 10. While the legal arguments continued on the issue, public and political opinion turned somewhat against this approach, particularly Somalia and the 1994 congressional election. *See generally* sources cited *supra* note 32.

the question of the role of international agreements in United States war powers decisions. In marked contrast with President Truman's approach regarding the Korean War, Presidents Bush and Clinton sought congressional approval for their actions in Iraq and Bosnia. So as not to alienate Congress or the part of the public aligned with congressional responsibility, both President Bush and President Clinton acted consistently with the desires of the contemporary Congresses on international matters such as funding and command.[148] President Clinton did not use the United Nations Charter or the NATO treaty as an alternative to seeking congressional approval regarding Bosnia. Instead, he designed the Bosnia troop deployment to occur under the aegis of NATO, not to avoid seeking congressional approval, but to act consistently with congressional position-taking that had opposed putting American troops under U.N. command.[149]

This Article explores and seeks to determine the constitutional significance of the new paradigm of using international arrangements that complement rather than circumvent congressional intent. In this regard, the new paradigm finds a parallel between the background of the system of appropriations and the background of the system of international agreements.[150] In the post-Cold War era, presidents have moved away, and may continue to move away, from using such unilateralist gambits to usurp congressional approval. Today, those approaches alienate politically vital public and congressional support.

Current war powers analysis might permit a different way to factor international arrangements into the issue of authorization of military action.[151] There is no *Chadha* problem with the original acts by

148. To win congressional support for the Gulf War, President Bush did not use international contacts to circumvent congressional funding controls. He agreed to put on the congressional-controlled books the foreign contributions to Operation Desert Shield, such as the large Saudi Arabian and Japanese contributions. President Bush agreed to statutory provisions bringing the foreign contributions within the system of congressional control. *See* 66 CONG. Q. ALMANAC 733-34 (1990).

149. *See generally* Dean N. Reinhardt, *The United States Military and United Nations Peacekeeping Operations*, 19 HOUS. J. INT'L L. 245, 270-73 (1996) (describing Congressional resolutions on Bosnia); Kaye, *supra* note 5, at 404. "No U.S. troops under U.N. command" had been part of the Republican "Contract with America" in the 1994 campaign, and had been part of a bill adopted by the House in the 104th Congress. *Id.* For more information regarding this bill, see H.R. 7, 104th Cong. (1995) ("The National Security Revitalization Act").

150. During the Cold War, each was used by presidents as part of arguments for unilateral power. Presidents claimed that lump-sum appropriations without any express cut-offs, and international agreements ratified in the past by Congress, both justified unilateral presidential decision-making military commitments without any fresh congressional approval.

151. Also, it is suggested here, for constitutional purposes those approaches clash with the background assumptions by which Congress actually enacted the lump-sum appropriations funding the military in these operations, and ratified the international

Congress, such as the ratification of the United Nations Charter, the treaty establishing NATO, and the United Nations Participation Act, which establishes the United States connection with those international arrangements. In a system of presidential request-for-approval and congressional position-taking, these original acts can be seen as creating a sort of evolving (or "common law") standard of constitutional authorization.[152] Today's complementary presidential and congressional interactions can validly exercise, consistent with an original treaty or other early charter, a shared war authority even when the current congressional actions by themselves may fall short of enactment.[153]

B. Congressional Responsibility and Leadership Agenda Control

The Declaration of War Clause[154] and the modern consensus expressed in the War Powers Resolution do not consider an exercise of war powers to have congressional authorization if one chamber of Congress approves action, but the other chamber opposed it. This leaves the question of how to analyze the 1995 congressional action on Bosnia. At a key moment, the House acted in between the clarity of the two ends of the scale. It did not join in a declaration of war, a similar enactment, or a concurrent resolution of approval. Yet, it did not act in resistance to the commitment by voting "no"; instead, it voted against a measure to

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agreements and treaties for deploying the military in these operations.

152. That is, the original acts of ratification and statutory implementation decades ago invite the president and Congress, as time passes, to take complementary actions in particular war situations. The nature of the shared presidential-congressional complementary implementing actions flexibly evolves over time, the way the Supreme Court has indicated that the nondelegation doctrine applies differently, and more flexibly, in foreign affairs. *See* Loving v. United States, 517 U.S. 748 (1996) (nondelegation doctrine applies differently to military affairs). *See also supra* note 71.

153. Viewing the international arrangements as a background, like the background of lump-sum appropriations, allows these "backgrounds" to satisfy some of the formalist concerns. Meanwhile, the functionalist requirements of an authorization are met in part when Presidents employ, in proposals for war powers action, international command and financial arrangements consonant with Congress's current intent.

154. As James Wilson defended the Declaration of War Clause in the Pennsylvania ratifying convention:

> This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives . . . .

2 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 2d ed. 1859, 1861).

cut off funds for the deployment, much to the surprise of observers. Although the House's actions did not constitute a "yes," such actions do avoid two types of presidential complaint: that Congress has abdicated its responsibility[155] or that it has engaged in micromanagement.[156] Therefore, when presidents ask for congressional approval, Congress has an opportunity, which it took in both 1991 and 1995, to find the middle path between abdication of responsibility and micromanagement.

Each chamber of Congress has an elaborate system for deciding when it will vote on an issue. This is the agenda-management system.[157] In particular, the leaders of Congress manage the agenda on war powers approval votes by controlling some of each chamber's "negative legislative checkpoints,"[158] also called "veto gates."[159] Such agenda management, rather than abstract constitutional doctrines, harmonizes the two elected branches in their operation of the constitutional system of shared war powers,[160] unless a President takes a unilateralist

155. Presidential unilateral undertaking of war actions without even asking for congressional approval might lead Congress not to voluntarily undertake any responsibility. Observers might view this as congressional abdication. Professor Ely not only termed his whole book on war powers WAR AND RESPONSIBILITY, but also entitled a chapter the problem of "Inducing Congress to Face Up to Its Constitutional Responsibilities." This is the title of chapter 3 in ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 47. *See generally* Peter D. Coffman, *Power and Duty: The Language of the War Power*, 80 CORNELL L. REV. 1236 (1995) (Book Review of Ely's WAR AND RESPONSIBILITY).

156. On the one hand, presidential persistence in war actions which Congress did not consider itself as having approved could produce a long sequence of congressional actions to set limits. To Presidents, this seemed like overinterfering micromanagement. The series of provisos against extensions of the Vietnam War, and the Boland Amendments in the 1980s against American support for the contra war in Nicaragua, exemplified such a sequence. *See* ELY, WAR AND RESPONSIBILITY, *supra* note 8, at 37-43 (Indochina War provisos); Hayes, *supra* note 90, 566-69 (Boland Amendments).

157. Then Judge, now Justice Breyer, himself a former Senate committee chief counsel, explored some of the legal role of such systems. Breyer argued that "knowledge of the institutional workings, internal understandings, and societal role of Congress helps to determine Congress's purpose in enacting [statutes]." Stephen Breyer, *The 1991 Justice Lester W. Roth Lecture on the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 866 (1991).

158. Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 398, 408 (1992).

159. McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720-21 (1992).

160. The congressional leadership screened out potential frequent interference during the Vietnam War, the Lebanon intervention of 1983, the Desert Shield build-up of 1990, and the Somalia intervention of 1993. Congressional leadership resorted to those "veto gates," rather than some constitutional stance on the President's part of acting against legislative direction, reduced the potential for congressional interference with war powers. *See* Ford, *supra* note 5, at 643, 688 (Lebanon and Somalia); *see also* HOUSE COMMITTEE ON RULES, 97TH CONG., 2d Sess., A HISTORY OF THE COMMITTEE ON RULES 288 (Comm. Print 1983) (Vietnam); 66 CONG. Q. ALMANAC 736 (1990) (Iraq).

approach.[161]

Under the post-Cold War paradigm, the return of a shared war powers relationship allows a favorable reading of the congressional votes on war authorizing issues. In both Bosnia in 1995 and Iraq in 1998, the leadership of the Senate and the House held off decisive votes until the President asked. In 1995, Congress then organized a period of debate leading up to a single occasion of voting on focused choices.[162] The fact is that after all the preliminary arguments and maneuvers had occurred every Representative and every Senator took an ultimate vote on the Bosnia deployment proposal, which is certainly enough taking of responsibility to satisfy the functional interest, if not the formalist interest, in fulfillment of the enactment steps. The Mexican peso bailout of 1995 provides another example of congressional support as a situation where the President acts in harmony with Congress, or at least without its disapproval, and thereby acts with legal authorization.[163]

V. CONCLUSION

As Chief Justice Marshall once said, "it is a constitution we are expounding."[164] The actions required to authorize constitutionally an exercise of war powers have roots in the text and original intent of the Constitution, yet such actions evolve in each era.[165] So, providing an

161. During the Cold War era, the controversial presidential unilateral exercise of power offered a reason to insist that congressional actions be clear statements in order to be effective as authorization. The breakdown at times of the shared relationship between President and Congress was exemplified by Presidential misinforming of Congress, and presidential exceeding of intended bounds of actions, during the Vietnam War and during the Iran-contra affair. Amidst that pattern, no more authorization from Congress could be found in what it adopted, than a cold reading of the words would compel. *See* BANKS & RAVEN-HANSEN, *supra* note 83, at 112-14.

162. Even though on both occasions a President of one party faced a congressional leadership of the other, on both occasions, the congressional leaderships gave the President a fair enough opportunity to win, that he succeeded in obtaining votes he could characterize as approval. House votes in December 1995 satisfied the central constitutional value that it not be the President alone, but the elected congressional representatives of both chambers, who take responsibility for war decisions.

163. *See generally* Humphrey, *supra* note 16, at 194-95, 200-01 (the Mexican Debt Disclosure Act of 1995); Covey, *supra* note 16, at 1313 & nn.10-11 (bills and resolutions).

164. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

165. From the way the United States went to naval war with France in 1798, an exposition of the war power under the new Constitution would have told a great deal. The Mexican War, the Civil War, World War I, and the Korean War would also have supported expositions of the evolving congressional-presidential interplay over war

analysis of the congressional-presidential interaction occurring this decade has told a great deal about the direction of constitutional war powers after the Cold War. Still, it requires a great analytical effort to see beyond the late 1990s to the shape of war authorization in the evolving post-Cold War paradigm. Some familiar elements continue with changed, yet possibly enhanced, importance: the Declaration of War Clause, the background of military appropriations, international agreements, and command arrangements. Some familiar processes remain, arguably with greater importance than ever, such as congressional debates and votes either on enactments or on measures short of enactment.

How will new law on this subject be made? There have been times when the congressional desire to put its stamp on the affairs of state was so deep that some profound congressional step structured the war powers interactions for the following decades.[166] The first decade after the Cold War has not occasioned any similarly profound pre-structuring of war powers in years to come. No treaty, statute, or particular intervention has established an enduring system.[167] Instead, as this Article argues, the interactions concerning the Gulf War in 1991 and the Bosnia commitment in 1995 have marked an evolutionary path. The issues of the future will still include the analysis of conflict between Congress and the President. But, in addition, constitutional analysis will face the novel challenge of the interpretation of the ambiguous actions of the elected branches of government, which essentially reflects an ambivalent public attitude toward overseas involvement.

As a way of visualizing the future of war powers, a hypothetical new commitment decision may be examined. Suppose a civil war starts in Cambodia, and the President considers it advisable to make a military commitment to one side, but, wisely, he does not seek to authorize this commitment by a unilateral claim of power. Relevant congressional position-taking has occurred in which, even before the crisis comes to a head, the House and the Senate have each expressed themselves as seeing an American interest in the situation. When the President

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powers.

166. Rejection of the Treaty of Versailles commenced an isolationist era that preserved the peace for the following two decades, though at the price of United States non-involvement with the trends to World War II. The interaction of President Truman and Congress in 1945-50 shaped a Cold War era in which Presidents came to see the war power as their own. Enactment of the War Powers Resolution put a stamp on the following two decades as an era of presidential-congressional disputation over the legality of interventions.

167. Efforts to rewrite the WPR have come to naught. No President has seized power, as President Truman did in Korea, in a way that displaces the other branch's role for an era to come.

requests congressional approval, Congress arranges for the matter to come up in floor votes in each chamber as a provision on a supplemental appropriations bill; and while each chamber votes without disapproving the presidential proposal, it may or may not produce an enactment akin to a declaration of war. How should Congress's actions be evaluated under this hypothetical?

By hypothesis, the presidential-congressional interaction already includes two major elements favored in the paradigm discussed in this article: presidential request for approval and congressional position-taking supporting the commitment. Further evaluation under this paradigm would start by considering the following factors:

(1) What do the congressional votes say when measured against the appropriations background? That is, is the President merely usurping the power of previously voted appropriations, or does he have a good-faith reason to think that in future appropriation bills Congress would approvingly ratify the commitment?

(2) What do the congressional votes say when measured against the international agreements background? That is, if the President acts in conjunction with the U.N., or with the Association of Southeast Asian Nations (ASEAN), is he end-running Congress, or is he acting consistently with the current intent of Congress about that particular international arrangement?

(3) Was the matter put before the two chambers of Congress in such a way that both the Senate and the House have taken responsibility by having to go on record and thereby creating a basis of public involvement and of accountability to the public?

Assuming these factors all speak favorably of authorization of the shared power, the question comes down to the scale of the commitment. If the level of military commitment is high, such as the dispatch of a ground force with a certainty of major casualties, then there still is not sufficient congressional authorization, unless the full enactment process occurs. On the other hand, if the level of military commitment is distinctly less, the congressional votes of approval, even though not an enactment, might then suffice to be considered, together with the President's position, as a constitutional authorization. And that is what this article proposes: looking beyond the late 1990s, for a post-Cold War era approach to the classic issue of constitutional war authorization.


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