CONGRESSIONAL CONTROL OF THE MILITARY IN A MULTILATERAL CONTEXT:

A CONSTITUTIONAL ANALYSIS OF CONGRESS'S POWER TO RESTRICT THE PRESIDENT'S AUTHORITY TO PLACE UNITED STATES ARMED FORCES UNDER FOREIGN COMMANDERS IN UNITED NATIONS PEACE OPERATIONS

THE COMMITTEE ON MILITARY AFFAIRS AND JUSTICE
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During the 1990s a number of legislative proposals were advanced to restrict the President's discretion to involve U.S. forces in United Nations (UN) peace operations. A key element of those proposals restricted the authority of the President to place U.S. forces under the tactical or operational control of UN commanders who were not officers in the U.S. armed forces. In the one instance in which such a proposal was passed by Congress, President Clinton exercised his veto on the ground that the restriction unconstitutionally encroached upon the President's power as commander in chief. This article examines the constitutional questions raised by those legislative proposals and concludes that they did not impermissibly encroach upon presidential power.

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1. This article was written as a report for the Committee on Military Affairs and Justice of The Association of the Bar of the City of New York, and was adopted as the position of the Association in August 1999. Members of the Committee on Military Affairs and Justice at the time were: William C. Fredericks, Chair; Ralph A. Dengler; Michelle Phillips; Miles P. Fischer; William M. Schrier; Patricia J. Murphy; Stephen J. Shapiro; and Richard M. Hartzman as an adjunct member. The article differs from the official report in matters of style but not in content. The official report is available from the Association.

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In the absence of legislative restriction the President has discretion, within the limits of his responsibilities as commander in chief, to determine the qualifications for selection of a commander charged with the tactical or operational control of U.S. armed forces serving in UN peace operations. However, this power is not exclusive. Congress may choose to enact its own selection criteria under its power to make rules for the government and regulation of the armed forces; and if it does so, that enactment takes precedence over and limits presidential discretion. Congress's rule-making power in matters of military administration is plenary. The kind of restriction contained in the legislative proposals is neither beyond Congress's power to legislate, nor does it constitute an unconstitutional encroachment upon the President's authority to direct military operations.

Moreover, such a restriction does not unconstitutionally infringe upon the President's power to conduct diplomacy and negotiate agreements. The President has exclusive power to conduct and control foreign diplomacy, negotiations, and communications. But the President is not the sole determiner of the content of that diplomacy. Congress has a role in determining foreign policy, particularly when that policy involves the disposition of military forces. The restriction in the legislative proposals, being a constitutionally valid exercise of Congress's power to make rules for the government and regulation of the armed forces, is also a constitutionally proper constraint on the President's power to conduct diplomacy and negotiate military agreements with the UN for the disposition of American forces in peace operations.

However, though constitutional, adopting such a legislative restriction would not reflect a wise policy choice. It would go counter to the fundamental need for flexibility in the conduct of foreign affairs. It would set up a double-standard in relation to other countries that would damage diplomatic efforts to obtain cooperation in establishing peace missions. Finally, passage of this type of blanket legislative restriction would likely have an undesirable effect on the relationship between the President and the Congress, undermining the comity and mutual respect between these co-equal branches of government in a field in which it is of paramount importance that the President and the Congress work together.

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I. Introduction

There has been considerable national debate in recent years concerning the extent to which United States foreign policy objectives in the post-Cold War era should be pursued through multilateral organizations, and in particular through the UN. In the course of this debate, legislation was repeatedly proposed in Congress that would have significantly limited the President's authority to involve U.S. military forces in UN peace operations by prohibiting, as a general rule, U.S. military personnel from serving under non-U.S. commanders in UN operations. President Clinton opposed these legislative proposals as unconstitutional and vetoed the one version that was passed by Congress. Proposals to prevent U.S. troops from serving under foreign commanders in peace operations have continued to surface, most recently in the context of a March 1999 House resolution concerning North Atlantic Treaty Organization (NATO) peacekeeping operations in Kosovo.[3] This confirms that the subject is one of continuing significance. Because these are important constitutional issues not yet addressed by scholars and commentators, the author, on behalf of the Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, undertook this comprehensive review.[4]

The questions considered in this article involve classic separation of powers issues: the dividing lines between the President's commander in chief and foreign affairs powers, on the one hand, and Congress's authority

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3. Subsection 3(b)(1)(B) of H.R. Con. Res. 42, 106th Cong. 1st Sess. (1999), provides for certification by the President to Congress that "all United States Armed Forces personnel so deployed pursuant to subsection (a) [i.e., any NATO peacekeeping operation in Kosovo] will be under the operational control only of United States Armed Forces military officers." The Resolution was approved by the House on 11 March 1999 by a vote of 219 to 191.

4. The Committee is unaware of any scholarly articles that consider the pertinent constitutional issue in any detail. Two memoranda prepared during the legislative proceedings address aspects of the constitutional issue. One was prepared by the American Law Division of the Congressional Research Service, dated 30 April 1996 (on file with the Committee on Military Affairs & Justice), which asserts that the legislation is constitutional. Its analysis, however, is largely conclusory. The second was prepared by Assistant Attorney General Walter Dellinger, which concludes that the legislative proposals are unconstitutional. Memorandum for Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, subject: House Bill 3308 (May 8, 1996), *reprinted in* 142 CONG. REC. H10062 (daily ed. Sept. 5, 1996) [hereinafter Dellinger Memorandum]. However, the Committee considers this analysis to be incomplete and, in addition, disagrees with its premises. The arguments in the memorandum are addressed in this article.

to "make rules" for the government and regulation of the armed forces, on the other hand. The constitutional issues can be characterized by a number of questions: Would a restriction on the President's authority to place U.S. forces under foreign commanders in UN peace operations impermissibly encroach upon the sphere of exclusive presidential powers to control the military or to conduct diplomacy and negotiate international agreements? Are decisions regarding whom should command U.S. troops in UN peace operations exclusively within the discretion of the President, or does Congress have power under the Constitution to enact rules to govern such decisions? If the restriction falls within an area of concurrent congressional and presidential power, does Congress or the President have primacy?[5]

The question is not one of war powers–which concern, strictly speaking, the decision to go to war and to conduct a war–but rather the broader field of military powers.[6] The failure to make this distinction may have been one source of confusion during congressional debates on the various legislative proposals. In the early stages of the debate, there was considerable confusion about the scope of the proposal. Many members of Congress believed that the proposed restrictions related to the authority of the President to commit American forces to UN peace operations. This view reflected the goal of the proponents of the legislation, which was effectively to end the involvement of the United States in UN peace operations, notwithstanding the inclusion of a waiver provision. Only later did it

5. Potentially there are two additional constitutional issues. The first concerns the power of the purse. The proposed law would restrict the obligation or expenditure of funds for U.S. forces serving under foreign commanders in UN peace operations. A constitutional question concerning the use of the appropriations power by Congress arises if the substantive legislative restriction encroaches upon exclusive Presidential power: Can Congress control indirectly through the power of the purse what it cannot control directly? The second issue concerns the waiver provision in the legislation. Does the authorization for the President to waive the restriction under specified circumstances eliminate any constitutional infirmity that may have existed without it?

6. The large body of constitutional literature and case law concerning the military typically refers to "war powers," a phrase that came into general usage during the Civil War era. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1789-1984, at 264 (5th rev. ed. 1984). However, when discussing military matters falling outside the domain of "war," it is analytically more accurate to speak in terms of "military powers," that is, the power to establish and maintain, govern and regulate, and use military forces, of which the "war power" is only one aspect. The Constitution authorizes maintaining a standing army during peacetime. Moreover, many military operations, such as peacekeeping, drug interdiction, humanitarian assistance, and arguably peace enforcement operations under the UN Charter, do not constitute war. It is conceptually confusing to analyze constitutional issues regarding non-wartime military matters, and even many issues regarding wartime governance of the military, in terms of "war powers."

become clear that the restrictions, as a matter of constitutional law, did not concern the question of *whether* to participate in a peace operation, but rather, once a commitment to engage has been made, the authority of the President to determine the control of U.S. military personnel detailed to the operation.

Were war powers the issue in the legislation, any number of additional constitutional questions would have come into play: Does the President have independent power to commit the nation to a military operation, even if that operation is "short of war"? Does the Constitution give the President independent authority to commit U.S. forces to UN peace operations without prior congressional approval? Does the War Powers Resolution bear on presidential decisions to involve U.S. forces in UN peace operations? These are all important questions, but they are not germane to a constitutional analysis of the legislation at issue in this article.[7]

The analysis in the article focuses on the allocation of powers between the executive and legislative branches with regard to the administration and command of the armed forces, and with regard to the conduct of military and foreign affairs through diplomacy and the negotiation of agreements. On the one hand, Congress has the power to raise and support an army, and to make rules for regulating and governing the armed forces. Congress can set foreign policy through legislative enactments. Further, it has power to make laws necessary and proper to carry out its own powers as well as all other powers vested by the Constitution. On the other hand, the President is the commander in chief of those forces, and has the power

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7. *See, e.g.*, Matthew D. Berger, *Implementing a United Nations Security Council Resolution: The President's Power to Use Force Without the Authorization of Congress*, 15 HASTINGS INT'L. & COMP. L. REV. 83 (1991); Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58 (1995); Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 61 (1991); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991); 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); Jordan J. Paust, *Peace-Making and Security Council Powers: Bosnia-Herzegovina Raises International and Constitutional Questions*, 19 S. ILL. L.J. 131 (1994); Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145 (1995); Letter from Bruce Ackerman et al., to President William J. Clinton (Aug. 31, 1993), *reprinted in* 89 AM. J. INT'L L. 127 (1995); Letter from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to Senators Robert Dole, Alan K. Simpson, Strom Thurmond & William S. Cohen (Sept. 27, 1994), *reprinted in* 89 AM. J. INT'L L. 122 (1995).

to represent the nation in the conduct of diplomacy and the negotiation of agreements and treaties. After reviewing the background and provisions of one version of the proposed legislation in Part II, Part III of this article explores these constitutional powers in relation to the legislation, offering a number of ways of characterizing the proposed restriction as a means of answering the constitutional question.

The postscript discusses some of the policy concerns, which are important in judging the wisdom of this type of legislative proposal. A number of questions are addressed: Is a blanket restriction such as that proposed in the legislation, even with a waiver provision, wise governance? Would it be more beneficial to leave such decisions to the President, acting on the advice of his senior military advisors, based on developing military doctrines of joint and coalition operations, and upon the tradition of "lessons learned"? Is such legislation an appropriate method for handling the institutional relations between the legislative and executive branches of the government?

II. Genesis, History, and Content of the Legislation

A. Genesis and History

The recent efforts by Congress to restrict the U.S. role in UN peace operations represents only one episode in the often problematic relationship between the United States and the UN. The main impulse leading to the creation of the UN was the concern for international security–"to save succeeding generations from the scourge of war."[8] Two devastating world wars and the failure of the League of Nations spurred world leaders to renew their efforts to form an effective international security organization.

In this new organization, the central organ for security matters was the Security Council, patterned as a modified concert of powers, with five great powers (United States, Soviet Union, Great Britain, France, and China) having permanent seats on the Council and a veto power on substantive matters, and with other countries[9] serving on the Council on a rotating basis.[10] Chapters VI ("Pacific Settlement of Disputes") and VII

8. UN CHARTER pmbl.

9. Initially six, the number was increased to ten in December 1963, effective as of September 1965. *See* UNITED NATIONS, EVERYMAN'S UNITED NATIONS 465 (8th ed. 1968).

10. UN CHARTER arts. 23, 27.

("Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression") of the UN Charter spell out the tools available to the Security Council. Chapter VI measures roughly correspond to what has been termed peace making, and Chapter VII measures roughly correspond to what has been termed peace enforcement.[11]

Article 42, in Chapter VII of the Charter, empowers the Security Council to use such force "as may be necessary to maintain or restore international peace and security."[12] The drafters of the Charter contemplated that forces would be made available to the UN for Article 42 actions by member nations on the call of the Security Council. For this purpose, Article 43 of the Charter provided for the negotiation of special agreements between member states and the Security Council, "subject to ratification by the signatory states in accordance with their respective constitutional processes."[13] The agreements would "govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided."[14]

The United States ratified the UN Charter before the end of World War II,[15] and implemented it through the UN Participation Act (UNPA).[16] Sections 6 and 7 of the UNPA authorize the President to commit personnel to UN missions under specified circumstances. Section 6[17] authorizes the President to commit troops to Chapter VII peace enforcement operations without further congressional approval, but only after the President has negotiated a special agreement with the UN Security Council pursuant to Article 43 of the Charter, only after Congress has approved such agreement, and only to the extent provided for in such special agreement. Section 7 of the UNPA[18] allows the President to commit up to one thousand members of the armed forces to UN operations not undertaken under Chapter VII of the UN Charter, that is, operations that are not Article 42 operations, such as peacekeeping operations. Forces committed by the

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11. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE *passim* 1992. Peacekeeping, characterized as a "Chapter Six and a Half" operation by Dag Hammarskjöld, is discussed *infra* in the text accompanying notes 21-24.

12. UN CHARTER art. 42.

13. UN CHARTER art. 43.

14. *Id.*

15. 59 Stat. 1031, T.S. No. 993 (June 26, 1945).

16. Ch. 583, 59 Stat. 619 (Dec. 20, 1945) (codified as amended at 22 U.S.C. §§ 287-287e).

17. 22 U.S.C.S. § 287d (LEXIS 1999).

18. 22 U.S.C.S. § 287d-1. Relevant portions of the section are quoted *infra* in the text accompanying note 146.

President pursuant to Section 7 are limited to serving as observers, guards, or in other noncombatant capacities.[19]

With this new international security mechanism in place, and the United States a central participant, hopes were raised for a less violent world. However, those hopes were soon dashed by the growing rivalry between the Soviet Union and the Western powers. The emerging Cold War prevented the UN security mechanisms from performing as intended. A concert of powers cannot work when the actors find little ground for cooperation. Efforts to negotiate Article 43 agreements soon collapsed, and the exercise of the veto largely precluded the undertaking of actions by the Security Council.[20] Nevertheless, a limited scope was found for collective action by the UN in situations where the superpowers saw it in their interest to avoid an escalating confrontation.

The Security Council authorized missions that evolved their own principles and patterns through improvisation and came to be known as peacekeeping operations.[21] These were basically "holding actions," typically employed to monitor cease-fires, help with troop withdrawals, and

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19. A later statute that allows the commitment of U.S. personnel to UN operations is Section 628 of the Foreign Assistance Act of 1961, codified as 22 U.S.C. § 2388. That law authorizes the President to permit agency heads to detail or assign to any international organization any officer or employee of the agency "for common defense against internal or external aggression." This authority neither limits the type of operation to which members of the armed forces may be detailed, nor contains the number and use limitations of §§ 6 and 7 of the UNPA. Whether it supersedes those limitations is a question which is not addressed in this article. The functions of the President under this law have been delegated to the Secretary of Defense subject to consultation with the Secretary of State. Exec. Order 12,163, 44 Fed. Reg. 56,673 (Sept. 29, 1979). *See* UN PEACE OPERATIONS 108-9, 435, 437-439 (Walter G. Sharp, Sr. ed., 1995) (discussing this statute further) [hereinafter Sharp]. For statutory language see *infra* text accompanying note 148.

20. One notable exception where the Security Council was able to act during the Cold War occurred in 1950 when it authorized the use of force in Korea. The authorizing resolution passed only because the Soviet Union was boycotting Security Council proceedings at the time.

21. The legal basis for peacekeeping operations has long been a subject of controversy. While Dag Hammarskjöld said that they could be viewed as deriving from a "Chapter Six and a Half" of the UN Charter (see UNITED NATIONS, THE BLUE HELMETS 5 (2nd ed. 1990) [hereinafter BLUE HELMETS]), and the Soviet Union argued that there was no basis in the Charter for peacekeeping operations, various Articles including 34, 36, 40 and 41 in Chapters VI and VII of the Charter have been held to stand as a legal basis. *See also* D.W. BOWETT, UNITED NATIONS FORCES 274-312 (1964) (providing further discussion of the controversy); STEVEN J. RATNER, THE NEW UN PEACEKEEPING 56-61 (1995) (providing further discussion of the controversy); Sharp, *supra* note 19, at 106 (providing a useful chart relating various Charter provisions to different types of peace operations).

provide a buffer between antagonists.[22] The following principles came to be considered essential to a successful peacekeeping operation: (1) consent of the parties, (2) rigorous impartiality on the part of the UN forces, and (3) the limitation of force by peacekeepers to self-defense, and then only as a last resort.[23] Classic peacekeeping operations fell into two broad if loosely defined categories: "observer missions" consisting largely of officers who were almost invariably unarmed, and peacekeeping forces consisting of "lightly armed infantry units with the necessary logistic support elements."[24] As a general matter, neither the United States nor the Soviet Union contributed personnel to UN peacekeeping operations during the Cold War. This made it possible for the two superpowers to approve missions when it was in their mutual interest while enhancing the conditions for impartiality of peacekeeping forces within the context of the Cold War rivalry.

With the end of the Cold War in 1989 and the collapse of communism in the early 1990s, renewed hopes arose for the UN. Many believed that the organization could finally fulfill the collective security functions for which it was created. During the period of early post-Cold War euphoria, the world community asked the organization to undertake a variety of operations that transcended the classic peacekeeping model. These "second generation" peacekeeping operations involved new types of missions and were more complex than traditional peacekeeping. For example, missions were established to support implementing comprehensive settlements between conflicting parties in Cambodia, El Salvador, Angola, and Mozambique. They were set up to support humanitarian relief operations, as in the first phase of the Somalia operation. They were deployed to assist in rebuilding institutions in collapsed states, such as in the second phase of the Somalia operation. Further, they were deployed to prevent conflict before it occurred, as in Macedonia.[25]

Not only were there new models for peacekeeping; but also, the number of operations dramatically increased. In January 1988, there were five UN peace operations with 9570 military personnel deployed.[26] By December 1994, at the peak of activity, the number of UN peace operations had increased to seventeen with more than 73,000 military personnel

22. BLUE HELMETS, *supra* note 21, at 4-5.

23. *Id.* at 5-6.

24. *Id.* at 8.

25. Many works provide typologies of peacekeeping. *See* BOUTROS-GHALI, *supra* note 11; RATNER, *supra* note 21, at 16-24; Marrack Goulding, *The Evolution of United Nations Peacekeeping*, 69 INT'L. AFF. 451, 456-460 (1993).

deployed.[27] In the first four decades of the UN, from 1945 to 1989, only fifteen peacekeeping missions were deployed.[28] In contrast, during the five-year period of 1989 to 1994, some eighteen missions were deployed.[29]

In the United States, the Bush Administration, after its success in using the UN system to forge a coalition against Iraq and winning the Persian Gulf War, expressed a heightened interest in pursuing American interests within the multilateral framework of the UN. During the Administration's last days in 1992, in response to the mass starvation resulting from Somalia's internal strife, a United States military force undertook a humanitarian mission in coordination with the UN.[30]

The high water mark of renewed interest in multilateral security cooperation came in 1993, during the first months of the Clinton Administration. With officials advocating policies of democratic enlargement and aggressive multilateralism, the Administration circulated a draft document in the summer of 1993 that was provisionally entitled "Presidential Decision Directive 13." The proposed Directive contemplated more intensive American involvement in UN peace operations, including the prospect of U.S. forces regularly serving under foreign commanders.[31] However, the draft Directive drew congressional criticism because of the drift in the Administration's Somalia policy and fear of an open-ended commitment to similar operations without clear goals.[32] Legislative criticism crystallized into legislative initiative in October 1993, after the death of eighteen

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26. SUPPLEMENT TO AN AGENDA FOR PEACE, REPORT OF THE SECRETARY-GENERAL, at table accompanying ¶ 8, U.N. Doc. A/50/60-S1995/1 (3 Jan. 1995), *reprinted in* Sharp, *supra* note 19, at 49.

27. *Id.* As of 30 November 1998, the number of military personnel deployed in the sixteen peacekeeping missions had declined to 11,629 (10,708 troops and 921 observers). In addition, there were 2718 police assigned. The contribution of the United States as of that date was 345 military personnel in Macedonia, 30 military observers in four other missions, and 208 police officers in two additional missions.

28. Jarat Chopra, *Peace Maintenance: A Concept for Collective Political Authority*, *in* PROCEEDINGS OF THE EIGHTY NINTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 280 (1995).

29. *Id.*

30. JOHN R. BOLTON, *Wrong Turn in Somalia*, 73 FOR. AFF. 56, 58 (Jan./Feb. 1994).

31. *Wider UN Police Role Supported, Foreigners Could Lead U.S. Troops*, WASH. POST, Aug. 5, 1993, *reprinted in* 139 CONG. REC. S13567 (1993).

32. Irvin Molotsky, *Administration Is Divided on Role for U.S. in Peacekeeping Efforts*, N.Y. TIMES, Sept. 22, 1993, sec. A at 8.

American Rangers in Somalia and the aborted landing of American soldiers in Haiti.[33]

The new UN peacekeeping became a victim, not of its successes, of which there were several, but of its failures in Somalia and Bosnia. These failures were widely perceived to have been caused in part by the lack of a UN infrastructure capable of handling the growth in number and complexity of peace operations, and by the willingness of the UN and Security Council members to diverge from two of the basic peacekeeping principles–impartiality and consent–while holding rigidly to the third–non-use of force.[34] In response to these problems and the debacle in Somalia, which had highlighted those problems, Senator Don Nickles offered an amendment to the 1994 Defense Appropriations Act that would have prohibited, with certain exceptions, the expenditure of funds to support U.S. military personnel when under "command, operational control, or tactical control by foreign officers" during UN operations.[35]

Although the Nickles Amendment was not adopted, it was the progenitor of a series of bills introduced from the 1994 through 1996 congressional sessions that sought to restrict the President's authority to place United States forces under foreign commanders in UN peace operations.[36] For example, imposing such a restriction was a prime objective of the proposed Peace Powers Act introduced by Senator Robert Dole in 1994.[37] This bill contained a host of provisions directed at the relationship between the United States and the UN. Among other things, it would have required the President to consult with and report to Congress with regard to UN actions, including those in which the United States was not directly

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33. ANDREW KOHUT & ROBERT TOTH, *Arms & the People*, 73 FOR. AFF. 47, 52 (Nov./Dec. 1994).

34. Many commentators have provided views of the problems and failures associated with the new peacekeeping. *See* Richard K. Betts, *The Delusion of Impartial Intervention*, 73 FOR. AFF. 20 (Nov./Dec. 1994); Conference Panel of Rosalyn Higgins, Jarat Chopra, Lamin Sise, David Scheffer, & Michael Doyle, *UN Peacekeeping: An Early Reckoning of the Second Generation*, *in* PROCEEDINGS OF THE EIGHTY NINTH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 275-89 (1995); Ruth Wedgwood, *The Evolution of United Nations Peacekeeping*, 28 CORNELL INT'L L.J. 631 (1995).

35. H.R. 3116, 103rd Cong., 1st Sess., 139 CONG. REC. S13565 (daily ed. Oct. 18, 1993) (Amendment No. 1051 to the excepted committee amendment).

36. *See* George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 435 (1994) (providing additional information on the earlier of these bills beyond that contained in this article).

37. S. 1803, 103rd Cong., 2d Sess., 140 CONG. REC. S180-84 (daily ed. Jan. 26, 1994).

involved. Further, it would have placed limitations on the sharing of intelligence with the UN.

Meanwhile the Clinton Administration backtracked on its broad multilateral approach and redrafted the proposed Presidential Decision Directive 13. The process resulted in a substantially more cautious document issued in May 1994, dubbed Presidential Decision Directive 25 (P.D.D. 25), which defined stringent conditions for setting up peace operations and envisioned a much more limited U.S. role in such endeavors.[38]

However, the more stringent policy enunciated in P.D.D. 25 did not satisfy congressional critics. Later in 1994, the proposal to place restrictions on U.S. armed forces serving under foreign commanders in UN peace operations was incorporated into the Republican Party's "Contract With America" legislative package, which was widely publicized both during and after the mid-term congressional elections of that year.

In January 1995, riding the crest of the Republican electoral sweep of the Congress, Senator Dole reintroduced a modified version of the Peace Powers Act, now numbered Senate Bill 5.[39] In addition to the restrictions on serving under foreign commanders and many of the other provisions contained in the 1994 version of the bill, the legislation would have repealed the War Powers Resolution. It also would have imposed criminal penalties on government officers or employees, including military personnel, for knowingly and willingly obligating or expending funds for UN operations where U.S. military personnel were serving under a foreign commander, unless the President had provided Congress with a notice of waiver as specified in the legislation.

At the same time that Senate Bill 5 was introduced in the Senate, the National Security Revitalization Act (House Bill 7) was introduced in the House.[40] This bill, containing the same core restrictions on U.S. involvement in UN peace operations as were in Senate Bill 5, also covered certain additional foreign policy and military matters, such as NATO enlargement. After two days of contentious debate, House Bill 7 passed the House in

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38. Elaine Sciolino, *New U.S. Peacekeeping Policy De-emphasizes Role of the UN*, N.Y. TIMES, May 6, 1994, sec. A, at 1. An unclassified summary of the Directive was released as *The Clinton Administrations Policy on Reforming Multilateral Peace Operations*, Bur. of Int'l. Org. Aff., U.S. Dept. of State, Pub. L. 10161 (1994), *reprinted in* Sharp, *supra* note 19, at 454 [hereinafter Presidential Decision Directive 25].

39. S. 5, 104th Cong., 1st Sess., 141 CONG. REC. S101-06 (daily ed. Jan. 4, 1995).

40. H.R. 7, 104th Cong., 1st Sess. (1995).

February 1995,[41] and was referred to the Senate where hearings were held before the Foreign Relations Committee on both Senate Bill 5 and House Bill 7.[42]

The part of the legislative proposals that would restrict the placing of U.S. forces under foreign commanders was incorporated into the 1996 National Defense Authorization Act[43] and passed by both houses of Congress in December 1995.[44] President Clinton, however, vetoed the bill. One of the reasons he gave for the veto was the bill's provision concerning foreign commanders in UN peace operations: "Moreover, by requiring a Presidential certification to assign U.S. Armed Forces under UN operational or tactical control, the bill infringes on the President's constitutional authority as commander in chief."[45]

Undeterred by the President's veto, in 1996 members of the House of Representatives introduced another version of the legislation: House Bill 3308.[46] Although it passed the House in September 1996,[47] the Senate did not take action on the bill before the end of the 104th Congress. Nor were the proposed restrictions on the placing of U.S. forces under foreign commanders reintroduced in the new Congress after the 1996 presidential and congressional elections. The focus of congressional critics of the UN had by then shifted to demands that the organization eliminate bureaucratic waste and inefficiency before agreeing to authorize payment of U.S. dues to the UN. Issues concerning the U.S. involvement in UN peace operations had lost their political potency and the effort to legislatively restrict that involvement came to an end, though similar efforts have arisen in related contexts.

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41. 141 CONG. REC. H1764-1890 (daily ed. Feb. 15 and 16, 1995).

42. *The Peace Powers Act (S. 5) and the National Security Revitalization Act (H.R. 7): Hearing before the Committee on Foreign Relations, United States Senate*, 104th Congress 144 (Mar. 21, 1995).

43. H.R. 1530, 104th Cong. 1st Sess. (1995).

44. *See* Thomas: Legislative Information on the Internet, *Bill Summary and Status for the 104th Congress* (visited Nov. 4, 1999) <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR01530:@@@X>; 141 CONG. REC. H15573 (Dec. 21, 1995).

45. 142 CONG. REC. H12 (daily ed. Jan. 3, 1996). The House of Representatives failed to override the veto on a vote of 240 in favor of an override, 156 against, and 38 not voting. 142 CONG. REC. H22 (daily ed. Jan. 3, 1996).

46. H.R. 3308, 104th Cong., 2d Sess. (1996).

47. 142 CONG. REC. H10048-74 (daily ed. Sept. 5, 1996).

B. Proposed Restrictions in House Bill 3308[48]

This article focuses on the provisions contained in House Bill 3308, as it was the last version of the proposed legislation and the provisions relevant to the constitutional and policy analysis were basically the same in all of the bills. House Bill 3308 was a narrowly framed bill that was designed solely to impose restrictions on placing U.S. forces under foreign commanders in UN peace operations,[49] and to prohibit members of the armed forces from being required to wear UN insignia.[50]

The proposed restriction against U.S. armed forces serving under foreign commanders in UN peace operations is in Section 3 of House Bill 3308. It would have added a new Section 405 to Chapter 20 of Title 10, United States Code, limiting the placement of U.S. forces under the operational and tactical control of UN commanders. It was framed to fall within Congress's appropriation power:

> Sec. 405. Placement of United States forces under United Nations operational or tactical control: limitation

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48. A full copy of House Bill 3308 is reproduced in the Appendix.

49. The restriction also applied to the placing of U.S. forces under the command of U.S. citizens who were not U.S. military officers serving on active duty. This second restriction is ignored in the analysis because the constitutional issues involved with it are the same as those with foreign commanders, because the public debate focused on the foreign commander restriction, and because its inclusion would unnecessarily complicate the discussion.

50. This measure grew out of a controversy involving Michael New, a medic assigned to the UN mission in Macedonia who was court-martialed for refusing to wear a blue beret and UN insignia. *See* United States v. New, 50 M.J. 729 (1999); Alan Cowell, *G.I. Gets Support for Shunning UN Insignia*, N.Y. TIMES, Nov. 24, 1995, sec. A, at 14. The proposed prohibition is in Section 5 of House Bill 3308. It would have added a new Section 777 to chapter 45 of Title 10, United States Code, to read as follows:

> § 777. Insignia of United Nations: prohibition on requirement for wearing
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> No member of the armed forces may be required to wear as part of the uniform any badge, symbol, helmet, headgear, or other visible indicia or insignia which indicates (or tends to indicate) any allegiance or affiliation to or with the United Nations except in a case in which the wearing of such badge, symbol, helmet, headgear, indicia, or insignia is specifically authorized by law with respect to a particular United Nations operation.

> (a) LIMITATION–Except as provided in subsection (b) and (c), funds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control, as defined in subsection (f).[51]

Subsection 405(f) defines "United Nations operational or tactical control":

> For purposes of this section, an element of the Armed Forces shall be considered to be placed under United Nations operational or tactical control if–
>
> (1) that element is under the operational or tactical control of an individual acting on behalf of the United Nations for the purpose of international peacekeeping, peacemaking, peace-enforcement, or similar activity that is authorized by the Security Council under chapter VI or VII of the Charter of the United Nations; and
>
> (2) the senior military commander of the United Nations force or operation is a foreign national or is a citizen of the United States who is not a United States military officer serving on active duty.[52]

Thus, Section 405 would have prohibited the President from placing U.S. armed forces participating in either Chapter VI or VII UN peace operations under UN operational or tactical control if the senior military commander was a foreign national or a U.S. citizen who is not a U.S. military officer on active duty.

Two subsections set out exceptions to the prohibition. Subsection 405(c) provides that the limitation does not apply if Congress specifically authorizes a particular placement of U.S. forces under UN operational or tactical control, or if the U.S. forces involved in a placement are participating in operations conducted by NATO.[53]

Subsections 405(b) and (d) permit a waiver of the limitation if the President certifies to Congress fifteen days in advance of the placement that it is "in the national security interests of the United States to place any

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51. H.R. 3308, § 3, 104th Cong., 2d Sess. (1996).
52. *Id.*
53. There is also an exception for ongoing operations in Macedonia and Croatia.

element of the armed forces under UN operational or tactical control," and provides a detailed report setting forth information under eleven specified categories.[54] If the President certifies that an "emergency" precluded compliance with the fifteen day limitation, he must make the required certification and report in a timely manner, but no later than forty-eight hours after a covered operational or tactical control is initiated.

These provisions do not concern the authorization of U.S. involvement in UN peace operations, but rather, once there is such an authorization, what restrictions are to be placed on the commitment. It does not repeal those provisions of the UNPA or the Foreign Assistance Act of 1961, which authorize the President to commit U.S. forces to UN peace operations without further congressional consent. Rather it restricts the way in which U.S. forces can serve in those operations.

III. Constitutional Analysis of the Legislation

The question addressed in this article is whether the restriction proposed in House Bill 3308 and its predecessor bills unconstitutionally encroaches upon presidential power. The proposal can be characterized as a spending restriction that would establish a rule that limits who is authorized to command U.S. armed forces in a certain type of military operation, that is, UN peace operations. The restriction, which is based on the spend-

54. The report must address the following eleven items: (1) a description of the national security interests that would be served by the troop placement; (2) the mission of the U.S. forces involved; (3) the expected size and composition of the U.S. forces involved; (4) the precise command and control relationship between the U.S. forces involved and the UN command structure; (5) the precise command and control relationship between the U.S. forces involved and the commander of the U.S. unified command for the region in which those U.S. forces are to operate; (6) the extent to which the U.S. forces involved will rely on other nations' forces for security and defense, and an assessment of the capability of those foreign forces to provide adequate security to the U.S. forces involved; (7) the exit strategy for complete withdrawal of the U.S. forces involved; (8) the extent to which the commander of any unit proposed for the placement would at all times retain the rights to report independently to superior U.S. military authorities and to decline to comply with orders judged by that commander to be illegal or beyond the mission's mandate until such time as that commander has received direction from superior U.S. military authorities; (9) the extent to which the U.S. retains the authority to withdraw any element of the armed forces from the proposed operation at any time and to take any action it considers necessary to protect those forces if they are engaged; (10) the extent to which the U.S. forces involved will be required to wear as part of their uniform a device indicating UN affiliation; and (11) the anticipated monthly incremental cost to the U.S. of participation in the UN operation by U.S. forces proposed to be placed under UN operational or tactical control.

ing power, would constitute an indirect rather than direct means of regulating executive action.

As thus framed through the power of the purse, the legislation could raise two constitutional issues. First, would such a restriction, if directly imposed, impermissibly encroach upon exclusive or concurrent presidential powers? If the answer is "no," the inquiry is at an end. If the direct adoption of this type of restriction poses no constitutional infirmity, its indirect adoption by means of the spending power raises no constitutional problem. However, if the restriction as directly imposed is constitutionally impermissible, a second issue would have to be addressed: Is it constitutionally permissible for Congress to impose this restriction on the President indirectly by means of the spending power?[55] As this issue need not be addressed if the restriction can be directly imposed, the analysis first

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55. Limitations on the exercise of congressional powers have been said to be guided by "the great principle that what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result. . . . The form in which the burden is imposed cannot vary the substance." Fairbank v. United States, 181 U.S. 283, 294-95 (1900). Senator Borah expressed similar sentiments concerning the President's authority as commander in chief:

> Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.

69 CONG. REC. 6760 (1928). The eminent scholar Louis Henkin has written: "Even when Congress is free not to appropriate, it ought not to be able to regulate a [p]residential action by imposing conditions on the appropriation of funds to carry it out, if it could not regulate that Presidential action directly." LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 119 (2nd ed. 1996). But in practice, the principle that Congress cannot do indirectly through the exercise of the spending or appropriation power what it cannot do directly is not a rigid principle. It has not been mechanically applied. *See* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 144-48 (1994); William C. Banks & Peter Raven-Hansen, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 882-98 (1994); John D. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234 (1961); Albert J. Rosenthal, *Conditional Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). Banks and Raven-Hansen argue that the constitutionality of a "restrictive national security appropriation," where it does not turn on an explicit constitutional prohibition, should be determined by a balancing test: "we must ordinarily weigh the extent to which the restriction prevents the president from accomplishing constitutionally assigned functions against the need for the same restriction to promote objectives within the authority of Congress." BANKS & RAVEN-HANSEN, *supra*, at 146.

considers whether the direct imposition of the restriction would unconstitutionally encroach upon presidential power.

As noted, the proposed restriction can be characterized as a rule that limits the persons authorized to command U.S. armed forces in a specified type of military operation, such as, UN peace operations. So characterized, the President's constitutionally assigned role as commander in chief is plainly implicated, that is, the power to direct military operations, including determining who shall serve as commanders. Arguably, the restriction also involves the President's diplomatic powers.[56]

As for Congress, Section 8 of Article I of the Constitution grants it the power "[t]o raise and support armies,"[57] "[t]o provide and maintain a navy,"[58] and "[t]o make rules for the government and regulation of the land and naval forces."[59] In addition, these powers are supplemented by the necessary and proper clause: Congress "shall have the power . . . [t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."[60] At the least, House Bill 3308 implicates Congress's power to make rules for the government and regulation of the armed forces.[61] This power may be further amplified by the necessary and proper clause.

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56. This argument is considered *infra* at Part III.D. *See* Dellinger Memorandum, *supra* note 4.

57. U.S. CONST. art. I, § 8, cl. 12.

58. *Id.* art. I, § 8, cl. 13.

59. *Id.* art. I, § 8, cl. 14. Clause 14 is hereinafter referred to as the "make rules" clause.

60. *Id.* art. I, § 8, cl. 18.

61. It has been suggested that the "raise and support" clause, in conjunction with the "necessary and proper" clause, is another possible source of congressional power for the proposed restriction of House Bill 3308. While this could prove to be the case, this article does not pursue the argument for a number of reasons. The natural meaning of the term "raise" in the context of the "raise and support" clause is "to create," "to establish," to "build up." The debates among both the framers and ratifiers, which focused on the dangers of establishing a standing army, indicate that no more was meant by the term than this natural meaning. *See* Bernard Donohue & Marshall Smelser, *The Congressional Power to Raise Armies: The Constitutional and Ratifying Conventions, 1787-1788*, 33 REV. POL. 202-11 (1971). Congress solely (but subject to the President's approval or veto) has the power to create an army, establish the number of units in that army, and staff it with a specified number of personnel of specified rank, to be paid certain salaries and to have certain retirement and family benefits as incentives to join and remain in the force. Congress may find it necessary to establish a draft to fulfill the nation's military needs. All these powers are

If the decision regarding the selection of tactical and operational commanders of U.S. forces in UN peace operations[62] falls within at least one of the President's powers, and restrictions on the President's decision are not encompassed by any of Congress's powers, logic dictates that the President's power is exclusive and legislation such as House Bill 3308 impermissibly encroaches upon that power. However, if the decision on selection involves the powers of both the President and Congress, which branch of the government has primacy in controlling the criteria for the decision must be determined. Only if the President's power takes precedence would the conclusion follow that the restriction in House Bill 3308 unconstitutionally encroaches upon that power.

A. The President's Power as Commander in Chief

The question at hand involves the commander in chief clause in its most traditional military sense–the authority to control and direct military operations. There has been considerable controversy over what has been viewed as the enlarging and aggrandizing of presidential power through the commander in chief clause.[63] But as the proposed restriction in House Bill 3308 does not involve those spheres of asserted enlargements of

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61. (continued) vested in the Congress by the "raise and support" clause. Also flowing from this clause is the power to establish rules for such matters as the qualifications of officers in the force and criteria for promotions to higher rank. But, as will be shown later in this article, this power derives also from the "make rules" clause. This is because rules for qualifications and promotions concern not only the creation and maintenance of an armed force, but also the structure and regulation of the force, and by that fact involve "government and regulation."

One might conclude that House Bill 3308 involves the "raise and support" clause because it appears to prescribe a personnel qualification. But House Bill 3308 would not have created qualifications for personnel in the U.S. armed forces. It did not speak to the "raising" or "supporting," that is, to the creation or establishment and supply of an army. Rather, it would have established a criterion restricting who would be allowed to exercise operational or tactical control of U.S. forces. Questions of control, insofar as they fall within the constitutional domain of congressional power, are questions of governance and regulation, not raising and supporting.

62. The discussion assumes that the President has prior authorization to commit U.S. forces to the UN operation, either by virtue of the UNPA, the Foreign Assistance Act of 1961, or other legal basis. A crucial distinction between the setting of general criteria or qualifications for the selection of a commander, and the selection of a particular individual to fill a command position is addressed later in this inquiry.

63. *See* CORWIN, *supra* note 6, at 262-302 ("[S]udden emergence of the "Commander in Chief" clause as one of the most highly charged provisions of the Constitution occurred almost overnight . . . ."); HENKIN, *supra* note 55, at 45-50 ("Some of the 'military' powers

power, they are not considered here. Instead, this discussion of presidential power focuses on what students of the commander in chief clause would likely consider to be an obvious and undisputed element of power vested by the clause.

It cannot be seriously doubted that the President's authority as commander in chief encompasses the power to decide matters of operational and tactical control, including determining who among eligible candidates should be authorized to maintain tactical and operational control.[64] "Command," as defined in its modern military sense by a leading military dictionary, covers the full range of responsibilities for the planning and carrying out of missions, and for the control of forces:

> The authority that a commander in the Military Service lawfully exercises over subordinates by virtue of rank or assignment. Command includes the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions. It also includes responsibility for the health, welfare, morale, and discipline of assigned personnel.[65]

"Operational control" is defined as a subset of command functions:

> [T]ransferable command authority that may be exercised by commanders at any echelon at or below the level of combatant command. Operational control is inherent in combatant command (command authority) and is the authority to perform those functions involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission . . .[66]

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63. (continued) that Presidents have asserted, deriving from or relating to the 'Commander in Chief' clause, supported the growth of Presidential 'war powers.'). *Cf.* FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, TO CHAIN THE DOG OF WAR 107-23 (1989) ("The Supreme Court has never held that the clause conferred any other powers than those of a military commander.").

64. That is not to say that the President will directly exercise that authority rather than largely delegating it to subordinate military officers.

65. U.S. DEPARTMENT OF DEFENSE, DICTIONARY OF MILITARY TERMS (1984).

66. *Id.*

"Tactical control" is again a subset of the functions contained within operational control, and thus also an element of the command function: "The detailed and usually local direction and control of movements or maneuvers necessary to accomplish missions or tasks assigned."[67]

Although these modern and somewhat technical dictionary definitions cannot be ascribed to the Framers of the Constitution, there is no reason to believe that they did not intend the President's authority as commander in chief to include those command functions that have later come to be formally defined as "operational" and "tactical" control. Moreover, as will be seen, the core functions that the Framers assigned to the President as commander in chief were assigned exclusively to the President.[68] This conclusion follows from the application by the Framers of the fundamental constitutional principle of the separation of powers, which in this instance was based on a concern for effective and efficient government. As a consequence, it involved applying a corollary principle, the principle of unity of executive functions; and the principle of unity, applied to the command function, implies the principle of exclusive military command.[69] These principles were stressed by the Framers and have been acknowledged by the Supreme Court.

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67. *Id.*

68. *But see* HENKIN, *supra* note 55, at 103-04:

> Less confidently, I believe also that in war the President's powers as Commander in Chief are subject to ultimate Congressional authority to "make" the war, and that Congress can control the conduct of the war it has authorized. (One might suggest, even, that the President's powers during war are not 'concurrent' but delegated by Congress, by implication in the declaration or authorization of war.) It would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the President's authority is effectively supreme. But, in my view, he would be bound to follow Congressional directives not only as to whether to continue the war, but whether to extend it to other countries and other belligerents, whether to fight a limited or unlimited war, perhaps, even whether to fight a "conventional" or a nuclear war.

69. A function may be exclusive as between different branches of government and to that extent unitary. However, it may not be unitary as to a particular branch even if assigned exclusively to that branch, if that branch is multi-headed. (The Framers considered this as an option for the executive branch.) Again, if a function is not exclusively assigned to one branch, it cannot be unitary. But even with shared powers, separate elements of that shared power can be exclusive and to that extent unitary. For example, under

1. Original Understanding

The Framers of the Constitution split the powers over the military between Congress and the President to "chain the dog of war," vesting Congress with the power to declare war, to raise and finance a military establishment, and to make rules for its regulation and governance. But the Framers were also convinced that once a commitment to a military venture had been made, the ultimate responsibility for directing operations should be vested in a single person rather than divided. That person was to be the President. This scheme for allocating military powers is reflected in the way the military provisions in the Articles of Confederation were taken over and modified in the Constitution.

The loose and limited structure of governance created under the Articles of Confederation provided for no executive department or officer. All executive functions, including all military functions, were vested in the Continental Congress, the sole organ of the Confederation.[70] With respect to the military, the Articles granted the Continental Congress the power to determine war and peace, to direct military operations, to appoint officers in the armed forces, including a commander in chief, and to make rules for military governance.[71]

This Confederation structure was abandoned by the Framers at the outset of the 1787 Constitutional Convention in Philadelphia. In its place,

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69. (continued) the appointment power, the President has independent discretion to nominate any individual for a particular office who satisfies the qualifications for that office. Congress may enact a law setting eligibility requirements for the office, but it cannot direct the President to nominate a particular individual. Similarly, the congeries of military powers may be assigned to more than one branch of the government and thus not be exclusive or unitary as a whole. But a specific element of those military powers may be assigned exclusively to one branch.

70. A handful of rudimentary departments were established during the era of the Articles (1781-1789)–Finance, War, Foreign Affairs, and the Post Office–but they were completely subject to the control of the Continental Congress. They were not based on any independent executive power. *See* JENNINGS B. SANDERS, EVOLUTION OF EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-1789 (1935).

71. This authority is in Article IX of the Articles of Confederation;

> The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war except in the cases mentioned in the sixth article . . .
>
> . . . .

a number of plans for a federal government were proposed that suggested allocating some of the national military power to an executive. The New Jersey Plan, offered by William Paterson, provided for an executive branch composed of an unspecified number of persons who were "to direct all military operations" but were to be precluded from taking "command of any troops, so as personally to conduct any enterprise as General, or in other capacity."[72] Charles Pinckney submitted a proposal that was referred to the Committee of the Whole[73] and, though not discussed, was the source of a number of provisions found in the final document.[74] He proposed that there be a single executive with the title of President who was to be "commander in chief of the Land Forces of United States and Admiral of their Navy" with the power "to commission all Officers."[75] Alexander Hamilton also proposed that there be a single executive, to be called "Governeur." This executive was "to have the direction of war when authorized or begun."[76] The fourth plan, the Virginia plan, was chosen to be the basis of discussion at the Convention. It provided for an undefined executive who, "besides a general authority to execute the National laws," "ought to enjoy the Executive rights vested in Congress by the Confederation."[77] Those "vested rights" were not further specified but presumably included

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71. (continued)

> The United States, in Congress assembled, shall also have the sole and exclusive power of . . . appointing all officers of the land forces in the service of the United States . . . appointing all officers of the naval forces . . . making rules for the government and regulation of said land and naval forces, and directing their operation.
>
> . . . .
>
> The United States in Congress assembled shall never . . . appoint a commander in chief of the army or navy, unless nine states assent to the same . . . .

ART. OF CONFED. art. IX, *reprinted in* MERRILL JENSEN, THE ARTICLES OF CONFEDERATION 266, 268, 269 (1970).

72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 244 (Max Farrand ed., 1966) [hereinafter Farrand].

73. *Id.* at 23.

74. ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS, AND CONSTITUTIONAL POWER 26 (1976).

75. 3 Farrand, *supra* note 72, at 606.

76. 1 Farrand, *supra* note 72, at 292.

77. *Id.* at 21.

the "right" to command, to direct military operations, and to appoint military officers.

As finally drafted by the Framers, the new Constitution created the executive office of the President and transferred to that office certain military powers that had previously been assigned to the Congress under the Articles of Confederation. Instead of the commander in chief being an agent of the Congress serving at the order and direction of the Congress, the commander in chief function was incorporated independently into the office of the President,[78] merging the military function of the supreme commander with the political function of the executive. Furthermore, the power to direct military operations was removed as one of Congress's named powers and not otherwise expressly mentioned in the new Constitution.

From these changes two inferences can be drawn. First, the Framer's believed that, inasmuch as the President was now to be commander in chief–the officer commonly understood to be the one responsible for the direction of military operations–there was no need to expressly refer to that power in the Constitution. Second, it is fair to infer that the power to direct operations was meant to be vested exclusively in the President as commander in chief. This is demonstrated in the contrast between the Framer's decision to completely transfer the commander in chief function to the President, and their decision to retain for Congress certain elements of the power to appoint military officers. Although the President was given the power to make appointments, the exercise of that power was made subject to eligibility criteria as enacted by Congress, and to the advice and consent of the Senate. In contrast to the explicit power-sharing scheme with

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78. The records of the Convention do not reveal any debate on the commander in chief clause, which was reported out by the Committee of Detail without comment. 2 Farrand, *supra* note 72, at 185. But Luther Martin, in an address to the Maryland Legislature, noted objections at the Convention based on the proposal in the New Jersey Plan:

> Objections were made to that part of this article, by which the President is appointed commander-in-chief of the army and navy of the United States, and of the militia of the several States, and it was wished to be so far restrained, that he should not command in person; but this could not be obtained.

3 Farrand, *supra* note 72, at 217-18. Similarly, during the ratification debates in Virginia and North Carolina in 1788, there were arguments that the President should not be allowed to take *personal* command of the army or navy. *See* CHARLES WARREN, THE MAKING OF THE CONSTITUTION 530 n.1 (1928).

respect to appointments, it is apparent that by deleting the reference to the "direction of military operations" as contained in the Articles of Confederation and the New Jersey Plan, and by making the President "commander in chief," the Framers did not intend power to be shared with regard to the direction of operations.

A number of observations made in the *Federalist Papers* corroborate this understanding. Hamilton noted the conceptual connection between the power to direct operations and the commander in chief clause in three passages, all of which have played an important role in interpreting the commander in chief clause.

The military powers, which were to be vested in the new national government, were enumerated by Hamilton in *Federalist No. 23*: "The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to prescribe rules for the government of both; to direct their operations; to provide for their support."[79] This enumeration exactly parallels specific clauses in the Constitution itself: Congress has the power to "raise and support armies,"[80] to "provide and maintain a navy,"[81] to "make rules for the government and regulation of the land and naval forces,"[82] and to provide for their support.[83] As for the direction of operations, Hamilton surely meant by that phrase to signify the President's authority as commander in chief.

Hamilton expressly links the direction of military operations to the commander in chief function in *Federalist No. 69*,[84] where he contrasts the

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79. THE FEDERALIST No. 74, at 153 (Alexander Hamilton) (Clinton Rossier ed., 1961) (emphasis in original) [hereinafter THE FEDERALIST].

80. U.S. CONST. art. I, § 8, cl. 12.

81. *Id.* art. I, § 8, cl. 13.

82. *Id.* art. I, § 8, cl. 14.

83. *Id.* art. I, § 8, cls. 1, 2, and 12.

84.

> *First*. The President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Second*. The President is to be commander in chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the

powers of the President with that of the king in England, and in *Federalist No. 74*,[85] where he defends the propriety of making the President commander in chief. For Hamilton, the President "as first general and admiral of the Confederacy" would properly and exclusively exercise the "supreme command and direction" of the armed forces.[86]

The Framers, as exemplified in Hamilton's explication, made the obvious conceptual connection between the commander in chief clause and the notion of the direction of military operations. By placing the executive power in a single person and designating him as commander in chief, the Framers also resolved on a unitary structure that vested exclusive direction of military operations in the President. They rejected ideas such as that of an executive council or a sharing of power with the legislature, other than as expressly allowed. This was based on the belief that there was a need for a vigorous and energetic executive. As observed again by Hamilton: "A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice a bad government."[87]

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84. (continued)

> supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies–all which, by the Constitution under consideration, would appertain to the legislature.

THE FEDERALIST, *supra* note 79, No. 69, at 417-18 (emphasis in original).

85.

> The propriety of this provision [the commander in chief clause] is so evident in itself and it is at the same time so consonant to the precedents of the State constitutions in general, that little need be said to explain or enforce it. Even those of them which have in other respects coupled the Chief Magistrate with a council have for the most part concentrated the military authority in him alone. Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength forms a usual and essential part in the definition of the executive authority.

Id. No. 74, at 447.

86. *Id.* No. 69, at 418.

87. *Id.* No. 70, at 423.

Energy was considered the most important quality in the executive; deliberation and wisdom in the legislative branch. Hamilton opined that it was undisputed that "unity is conducive to energy": "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[88] That unity could be destroyed "either by vesting the power in two or more magistrates of equal dignity and authority, or by vesting it ostensibly in one man, subject in whole or in part to the control and co-operation of others . . . ."[89] Other Framers during the Constitutional Convention expressed similar concern for unity of command authority in military operations.[90]

From the perspective of the original understanding, it is reasonable to conclude that responsibility for operational and tactical control of American military forces was vested exclusively in the President–the officer of the government charged with the power to direct military operations as commander in chief.

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88. *Id.* No. 70, at 424.
89. *Id*.
90.

> Mr. Butler contended strongly for a single magistrate as most likely to answer the purpose of the remote parts. If one man should be appointed, he would be responsible to the whole, and would be impartial to its interests. If three or more should be taken from as many districts, there would be a constant struggle for local advantages. In [m]ilitary matters this would be particularly mischievous. He said his opinion on this point had been formed under the opportunity he had of seeing the manner in which a plurality of military heads distracted Holland when threatened with invasion by the imperial troops. One man was for directing the force to the defense of this part, another to that part of the Country, just as he happened to be swayed by prejudice or interest.

1 Farrand, *supra* note 72, at 88-89 (Madison's Notes).

> Mr. Gerry was at a loss to discover the policy of three members of the Executive. It [would] be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy. It would be a general with three heads.

Id. at 97 (Madison's Notes).

2. The Supreme Court's Understanding of the Commander in Chief

The Supreme Court's understanding of the commander in chief clause is in accord with the original understanding. Moreover, the Court has elaborated to a limited extent its perception of what is implied by the term "direction of operations" as it applies to the President's power as commander in chief. For example, in *Fleming v. Page*,[91] a case involving the Mexican War, the Court acknowledged the President's power to direct movements and to employ the armed forces in a manner which he deems most effectual: "As commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy."[92]

Similarly, in *United States v. Sweeney*,[93] the Court noted that the commander in chief clause gives the President "supreme and undivided command" over the armed forces. As the Court stated, "the object of the provision is evidently to vest in the President the supreme command over all the military forces, such supreme and undivided command as would be necessary to the prosecution of a successful war."[94]

Justice Jackson, in his famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[95] recognized the exclusive power of the President to command the nation's military forces, notwithstanding the Court's holding that the President cannot seize steel plants as commander in chief in the absence of authorizing legislation:

> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as commander-in-chief. I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.[96]

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91. 50 U.S. (9 How.) 603 (1850).

92. *Id.* at 615.

93. 157 U.S. 281 (1895).

94. *Id.* at 284.

95. 343 U.S. 579, 634 (1951).

96. *Id.* at 645. When he was Attorney General, Jackson showed a similar appreciation for the President's role as commander in chief:

The Supreme Court also noted the exclusivity of the President's command authority in *Ex Parte Milligan*.[97] The Court found the convening of a military commission to try a criminal case in a civilian district during the Civil War to be in excess of the President's power as commander in chief and hence unconstitutional. Nevertheless, Judge Chase, in his concurring opinion, expressed the view that Congress does not have the power to interfere with "the command of forces and the conduct of campaigns." In doing so, he characterized the relationship between Congress and the President with regard to military powers in these terms:

> Congress has the power not only to raise and [to] support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. *This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief.* Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without sanc-

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96. (continued)

> [T]he President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States . . . . [T]his authority includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.

Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61-62 (1941).

97. 71 U.S. (4 Wall.) 2 (1866).

> tion of Congress, institute tribunals for the trial and punishment of offences . . . .[98]

3. Limitations on the President's Power as Commander in Chief

The decisions reached in *Youngstown* and *Milligan* manifest the view that the President's power as commander in chief is not without limits, although his authority to control and direct military operations may be exclusive.[99] This was made explicit by Justice Jackson in *Youngstown*, when he recognized that "to some unknown extent" limitations even on the President's command functions flowed from Congress's power to make rules for the government and regulation of the armed forces.[100] Chief Justice Harlan Stone put the matter differently, noting that the President as commander in chief is subject to a wide variety of laws which can be enacted by Congress:

> The Constitution thus invests the President, as commander in chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.[101]

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98. *Id.* at 139-40 (emphasis added).

99. *But cf.* HENKIN, as quoted *supra* in note 68 (challenging the exclusive nature of presidential power as commander in chief); WORMUTH & FIRMAGE, *supra* note 63, chs. 6 and 7 (discussing the limitations on the President's power as commander in chief).

100. *Youngstown*, 343 U.S. at 644.

> [The President] has no monopoly of "war powers," whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the "Government and Regulation of land and naval Forces," by which it may, to some unknown extent, impinge upon even command functions.

Id.

101. *Ex parte* Quirin, 317 U.S. 1, 26 (1942).

Put this way, the limitations on the President's power as commander in chief can be seen as deriving from his constitutional duty to "take care that the laws be faithfully executed . . . ."[102]

Raoul Berger, a noted constitutional scholar whose writings stress the limitations on presidential power, has also noted the limitations Congress can impose on the commander in chief power:

> In the entire armory of war powers only one has been exclusively conferred upon the President, the power as "first General" to direct the conduct of war once it has been commenced. Even in this area, the military and naval command was not immune from parliamentary inquiry into the conduct of the war.[103]
>
> . . . .
>
> Thus, the Framers separated the presidential direction of "military operations' in time of war from the congressional power to make rules "for the government and regulations of the armed forces," a plenary power enjoyed by the Continental Congress and conferred in identical terms upon the federal Congress. The word "government" connotes a power "to control," "to administer the government" of the armed forces; the word "regulate" means "to dispose, order, or govern." Such powers manifestly embrace congressional restraint upon deployment of the armed forces. Since the Constitution places no limits on the congressional power to support and to govern the armed forces and to make or withhold appropriations therefore, arguments addressed to the impracticability of regulating all deployments go to the wisdom of the exercise, not the existence, of the congressional power . . . .[104]

Accordingly, not only are limits to the President's military power as commander in chief widely recognized, the preceding authorities show that it is widely accepted that those limits can be based on Congress's power to make rules for the government and regulation of the armed forces. What then is the scope of the congressional power to make rules

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102. U.S. CONST. art. 2, § 3.

103. RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 108-09 (1974) (citation omitted).

104. *Id.* at 114-15.

for the government and regulation of the armed forces? Can Congress, by virtue of that power, enact a restriction such as that contained in House Bill 3308?

B. Congress's Power to Make Rules for the Government and Regulation of the Armed Forces

At first glance, the language of the "make rules" clause gives no reason to suggest that Congress's power to make rules for the armed forces does not include the type of restriction proposed in House Bill 3308. The Supreme Court has consistently recognized Congress's "broad constitutional power" to raise and regulate armies and navies.[105] As the Court noted in considering a challenge to the selective service laws: "The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[106] This broad congressional power covers the entire gamut of military law.

Nevertheless, it might be thought that military law is narrowly limited by definition to the rules of conduct for military personnel and to the procedures for military justice through courts-martial,[107] and that Congress's power to make rules for the government and regulation of the armed forces is limited to military law in this narrow sense. If Congress's power to "make rules" were so limited, it could not provide the necessary constitutional basis for House Bill 3308.

There is some secondary authority that arguably supports such a narrow view of the "make rules" clause. For example, one turn-of-the-century military law treatise limits the definition of military law to rules of conduct in relation to military discipline:

> The term Military Law applies to and includes such rules of action and conduct as are imposed by a State upon persons in its military service, with a view to the establishment and maintenance of military discipline. It is largely, but not exclusively, statutory in character, and prescribes the rights of, and imposes duties and obligations upon, the several classes of persons com-

105. Lichter v. United States, 334 U.S. 742, 755 (1948); Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); Rostker v. Goldberg, 453 U.S. 57, 65 (1981).

106. United States v. O'Brien, 391 U.S. 367, 377 (1968).

107. These rules were once denominated Articles of War and today are codified under the Uniform Code of Military Justice. 10 U.S.C.S. §§ 801-946 (LEXIS 1999).

> posing its military establishment; it creates military tribunals, endows them with appropriate jurisdiction and regulates their procedures; it also defines military offenses and, by the imposition of adequate penalties, endeavors to prevent their occurrence.[108]

Similarly, in his treatise on the Constitution, Joseph Story termed the "make rules" clause "a natural incident to the . . . powers to make war, to raise armies, and to provide and maintain navies," and identified the domain of that clause with military crimes and punishments, though he was silent about what else might belong to that domain.[109]

However, these two older sources are in sharp contrast with the much broader contemporary definition of military law:

> Military law may be defined as the *law regulating the military establishment.* The legislative enactments of the U.S. Congress form the primary source of military law. Congressional authority to enact military law is derived from various provisions of the U.S. Constitution. These include the power to: raise and support armies; provide and maintain a navy; makes rules for the government of land and naval forces; call forth the militia to execute the law of the country; suppress insurrections and repel invasions; organize, arm, and discipline the militia; govern such parts of the militia as may be employed in the service of the United States; and make all laws necessary and proper for carrying into execution the foregoing powers. . . . The military justice system is only one part of military law.[110]

This broad definition of military law, which is not narrowly confined to military justice and discipline, also accords with the Supreme Court's view. In *Chappell v. Wallace*,[111] the Court refers to Congress's plenary power over the framework of the "Military Establishment," including but not limited to the field of military discipline.[112] In *Gilligan v. Morgan*,[113]

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108. GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 1 (2nd rev. ed. 1899) (citation omitted).

109. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1196-1197 (5th ed. 1891).

110. EDWARD M. BYRNE, MILITARY LAW 1 (3rd ed. 1981) (emphasis added).

111. 462 U.S. 301 (Burger, C.J.) (1983).

112.

> It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the frame-

the Court also recognized the role that Congress has, in addition to that of the President, in decisions concerning control of the military establishment:[114] "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches."[115]

Most recently, in *Loving v. United States*,[116] the Court reiterated its view of the broad power held by Congress by virtue of the "make rules" clause: "Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs."[117] The Supreme Court's view of the matter does not conflict with what can be gleaned of the original understanding of the "make rules" clause.

1. The Original Understanding

The historical record unfortunately sheds little light on the original meaning ascribed to the "make rules" clause; but what there is tends to suggest a broad, not narrow understanding of its scope. The clause was included in the final draft of the Constitution apparently without either discussion or debate. Madison's notes from the Constitutional Convention contain the following brief entry: "Mr. Gerry. 'To make rules for the Government and regulation of the land & naval forces,'–added from the existing Articles of Confederation."[118]

Neither the original proposals for the Constitution presented to the Philadelphia Convention (the Virginia and New Jersey plans, and Hamil-

112. (continued)
work of the Military Establishment, including regulations, procedures, and remedies related to military discipline; and Congress and the courts have acted in conformity with that view.

Id. at 301.

113. 413 U.S. 1 (1973).

114. The President's broad power in the management and administration of the military is not denied in this article. Here the issue is the extent of Congress's power. A later section will address whether Congress or the President has primacy in the making of rules for the military.

115. *Gilligan*, 413 U.S. at 4.

116. 517 U.S. 748 (1996).

117. *Id.* at 768 (citing Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981)).

118. 2 Farrand, *supra* note 72, at 330.

ton's and Pinckney's proposals) nor the draft submitted by the "Committee of Detail" contained the clause. It was incorporated at a later stage in the Convention, taken over from Article IX of the Articles of Confederation. That Article provided:

> The United States in Congress assembled shall also have the sole and exclusive right and power of . . . appointing all officers of the land forces in service of the United States; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of said land and naval forces, and directing their operations.[119]

Because the Articles of Confederation did not provide for an executive branch, the Continental Congress had all power over the armed forces of the United States. As noted previously, the Framers of the Constitution reallocated the military powers by transferring the authority to direct operations to the President as commander in chief, and by partially transferring the power to appoint officers to the President. The President thus had the power to select candidates for positions, subject to eligibility requirements established by Congress, and the advice and consent of the Senate. However, the Framers left with the legislative branch the power to raise and support armed forces and to "make rules" for their governance and regulation, as well as the power to declare war.

Clues to the meaning of the "make rules" clause as contained in the Articles of Confederation must be based on meager evidence. The text of the Articles of Confederation was agreed to in November 1777, although it did not come into force until 1 March 1781. The Continental Congress created a committee to draft the Articles on 12 June 1776. John Dickinson, who was the dominant member of the committee, prepared the first draft in early summer, 1776.[120] His draft, which was presented to the Continental Congress on 12 July 1776, contains language concerning military powers almost identical to that found in the final version approved in 1777:

> ART. XVIII. The United States assembled shall have the sole and exclusive Right and Power of . . . Appointing General Officers of the Land Forces in Service of the United States–Commissioning such other Officers of the said Forces as shall by

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119. ART. OF CONFED. art. IX, *reprinted in* JENSEN, *supra* note 71, at 266, 268.
120. *See* JENSEN, *supra* note 71, at 126.

> appointed by Virtue of the tenth Article–Appointing all the Officers of the Naval Forces in the Service of the United States–Making Rules for the Government and Regulation of the Said Land and Naval Forces, and directing the operations . . . .[121]

Dickinson's adoption of the phrase "making rules for the government and regulation" of the armed forces was presumably based at least in part on its prior use by the Continental Congress in relation to the drafting of Articles of War, that is, the code of conduct for the military. On 14 June 1775, a year before establishing the committee to draft the Articles of Confederation, the Continental Congress passed a resolution creating a "committee to bring in a draft of [r]ules and regulations for the government of the army."[122] The document produced by that committee and approved by the Congress on 30 June 1775, was termed "Articles of War" and "Rules and Regulations."[123]

Later that year, in December 1775, "Rules for the Regulation of the Navy of the United Colonies" were adopted by the Congress.[124] Like the Articles of War, the navy rules concerned the conduct of naval personnel and their discipline. The Articles were revised by another committee of the Continental Congress created on 14 June 1776. This was two days after creation of the committee to draft Articles of Confederation. The revisions were approved on 20 September 1776.[125]

Given the way the language was used by the Continental Congress in the drafting of the Articles of War and navy regulations, it is possible that what Dickinson and his committee contemplated in the clause "making rules for the government and regulation of the said land and naval forces" was solely the promulgation of Articles of War. It is also possible that the inclusion of separate clauses in the Articles of Confederation for the appointment of officers and for the direction of operations expresses an intention to exclude from the scope of the "make rules" clause such matters as creating command and control structures and the setting of officer qualifications.[126] These possibilities do not seem likely, however. Would such fine distinctions have occurred to men who had almost no previous expe-

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121. Dickinson Draft of the Confederation, art. XVII, *reprinted in* JENSEN, *supra* note 71, at 258-59.

122. 2 JOURNALS OF THE CONTINENTAL CONGRESS 90 (W.C. Ford ed., 1905).

123. *Id.* at 111-22.

124. BYRNE, *supra* note 110, at 4.

125. *Id.* at 8.

126. Jeremy Bentham, in a treatise completed in 1782, refers to "articles of war for the government of the army . . . ." JEREMY BENTHAM, OF LAWS IN GENERAL 7 (H.L.A. Hart

rience in raising, maintaining, and supporting a military establishment, and who had to learn on the job as the army and navy were first being created?

Moreover, with no executive branch to run a military establishment and the Continental Congress responsible for every aspect and detail of its governance and regulation, it is difficult to believe that the "make rules" clause in the Articles of Confederation was meant to have a narrow scope, even if the phrase was used in the context of the drafting of articles of war.[127] Having experienced the Revolutionary War, when the Continental Congress was responsible for the full panoply of military governance, it is unlikely that a narrow meaning of the clause would have been in the Framers' minds when they convened in Philadelphia in 1787. Though a department of war was created during the era of the War and the Confederation, it was fully answerable to the Continental Congress and not in any way an independent executive department.[128] Evidence is not available that suggests that the Framers understood the "make rules" clause to apply only to the narrow authority to enact articles of war; or that they meant to bar the newly created legislature from playing a role in making rules for the administration *and control* of the armed forces.

The idea of a national executive with independent powers was a novel idea for the thirteen states–an idea opposed by many. Among the Framers themselves, considerable tension existed between the forces pushing for a strong executive and those wanting only a weak executive.[129] If the Framers were set on vesting Congress, not the President, with the power to declare war, and expressly vested in Congress the other vital powers over the military except that of commander in chief, it seems most unlikely that they intended to limit Congress's power to make rules concerning the structure and administration of the military establishment.

It should be noted that there is some evidence for a narrow interpretation of the "make rules" clause in the history of the state conventions held

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126. (continued) ed., 1970). Although published during his lifetime, it nevertheless it gives a contemporaneous view of what the language in question generally meant–at least in part–in the English speaking countries at the time.

127. A cursory review of the debates leading to approval of the Articles in the Continental Congress reveals no discussion of the clause in question. Because the clause was not changed from the Dickinson draft, and since the debates focussed on far more significant issues, it is unlikely that an exhaustive review of those debates would shed any further light on its meaning.

128. SANDERS, *supra* note 70, at *passim*.

129. *See* CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY *passim* (1923).

to consider ratifying the Constitution. In Massachusetts, New Hampshire,[130] New York,[131] and Rhode Island,[132] proposals to amend the proposed Constitution used language that referred to the "government and regulation" of the armed forces in a manner suggesting that this phrase (echoing the language of the "make rules" clause) was understood to refer only to matters of military law and justice. But from these proposals, which do not vest the power to "make rules" but only refer to it in the specific context of military justice, it can only be concluded that the "make rules" clause was meant to *include* military law in the narrow sense of military justice. The proposals, in the absence of other language setting limits to the scope of the clause in the context of the grant of power, do not demonstrate that the ratifiers understood it to *exclude* everything else regarding military administration.

On balance, a common sense interpretation of the sparse historical record regarding the original understanding of the "make rules" clause

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130. The proposed amendments in Massachusetts and New Hampshire were:

> That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he first be indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

1 ELLIOT'S DEBATES 323, 326 (2d ed.).

131. The proposed amendment in New York was:

> That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; . . . .

Id. at 328.

132. The proposed amendment in Rhode Island was:

> That, in all capital and criminal prosecutions, a man hath the right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial jury in his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces), nor can he be compelled to give evidence against himself.

Id. at 334.

favors a broad interpretation of the clause. The narrow interpretation must be rejected–whether based on the ordinary meaning of the words in the clause, on the understanding of the founders, or on its reading by the Supreme Court. Nevertheless, it must still be determined if the type of restriction proposed in House Bill 3308 falls within that broad scope of the "make rules" clause. Further classification of the restriction in House Bill 3308 and a look at similar kinds of military legislation will determine the issue.

2. Analogues to House Bill 3308

As previously noted, the rule in House Bill 3308 and its predecessor bills can be characterized as a rule limiting the persons authorized to command U.S. armed forces in a certain type of military operation, in this instance UN peace operations. More generically, the rule can be characterized in any of the following three ways: (1) a rule delimiting command and control structures and relations, and the chain of command,[133] (2) a rule establishing conditions for the detailing of U.S. military personnel, and (3) a rule establishing qualifications or eligibility requirements for the selection of commanders of U.S. forces.[134]

Based on the ordinary meaning of the language of the "make rules" clause, it is reasonable to view any of these three ways of characterizing House Bill 3308 as the making of a rule for the "government and regulation" of the armed forces. As a matter of common sense, rules for governance and regulation involve all matters of management and administration. This would, by its very nature, include the setting of general qualifications for selecting personnel such as commanding officers, establishing conditions for using forces (for example, in authorizing and setting limitations on the detailing of forces), and creating governing structures and relations for personnel. There is no interpretative reason to ignore the natural meaning of the phrase "government and regulation of the land and naval forces." Moreover, ample evidence exists supporting the conclusion that the "make rules" clause has long been viewed as

133. House Bill 3308 was characterized by Rep. Ronald Dellums as affecting command and control relations. *See* Additional Views of Ronald V. Dellums, H.R. REP. NO. 104-642, pt. 1, at 13 (June 27, 1996). For more on his views, see *infra* text accompanying notes 156-159. Similarly, Walter Dellinger characterizes House Bill 3308 as being concerned with "command structures." Dellinger Memorandum, *supra* note 4, at H10062.

134. Walter Dellinger also uses this characterization in his discussion of House Bill 3308. *See* Dellinger Memorandum, *supra* note 4.

encompassing the three classes of rules listed above, so that, however characterized, the restriction in House Bill 3308 is encompassed by the clause. Each class shall be examined in turn.

a. Does Congress have Authority to Establish Qualifications for Command Positions?

The third type of rule–personnel qualifications–should begin the discussion, not only because of the compelling case for Congress's power to so legislate and because it most closely characterizes House Bill 3308, but also because it is discussed in the Clinton Administration's legal memorandum that concluded that House Bill 3308 unconstitutionally encroaches on presidential power.[135]

The memorandum, prepared by Assistant Attorney General Walter Dellinger, concedes that Congress has the power to determine "the general class of individuals from which an appointment may be made," but then appears to blur this power with the presidential power to select a particular individual from the general class.[136] In addition, he mistakenly relies on

135. *Id.* at H10061-62.

136. Dellinger's argument is as follows:

> It is for the President alone, as commander in chief, to make the choice of the particular personnel who are to exercise operational and tactical command functions over the U.S. Armed Forces. True, Congress has the power to lay down general rules creating and regulating "the framework of the Military Establishment," Chappell v. Wallace, 462 U.S. 296, 301 (1983); but such framework rules may not unduly constrain or inhibit the President's authority to make and to implement the decisions that he deems necessary or advisable for the successful conduct of military missions in the field, including the choice of particular persons to perform specific command functions in those missions. Thus, for example, the President's constitutional power to appoint a particular officer to the temporary grade of Marine Corps brigadier general could not be undercut by the failure of a selection board, operating under a general statute prescribing procedures for promotion in the armed services, to recommend the officer for that promotion. "Promotion of Marine Officer," 41 Op. Att'y Gen. 291 (1956). As Attorney General Rankin advised President Eisenhower on that occasion, "[w]hile Congress may point out the general class of individuals from which an appointment may be made . . . and may impose other reasonable restrictions . . . it is my opinion that the instant statute goes beyond the type of restriction which may validly

the opinion of the Attorney General in *Promotion of Marine Officer.*[137] The opinion involved advice concerning the interim appointment of a Marine colonel to the rank of brigadier general to be followed by nomination to the Senate when it reconvened. The statute specifying the procedure for such appointments provided that they be made "only upon the recommendation of a board of officers convened for that purpose."[138]

In the situation before the Attorney General, the particular officer being recommended for promotion to brigadier general had not been picked by the selection board. The Attorney General, while recognizing that Congress has "a right to prescribe qualifications for" government offices, concluded that the procedural requirement of the statute "goes beyond the type of restriction which may validly be imposed" insofar as it subordinated the President's discretion in making appointments to the views of an inferior selection board.[139]

The restriction contained in House Bill 3308 is strictly concerned with qualifications of a type found acceptable in the Attorney General's opinion in *Promotion of Marine Officer.* It is not procedural; it does not subject the President's power of decision to a subordinate body. Indeed the opinion in *Promotion of Marine Officer*, as well as the additional authority discussed in it, fully support both the applicability of the "make rules" clause to the type of rule under discussion and the inclusion of House Bill 3308 within the scope of that type of rule. For example, in addition to con-

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136. (continued)

> be imposed. . . . It is recognized that exceptional cases may arise in which it is essential to depart from the statutory procedures and to rely on constitutional authority to appoint key military personnel to positions of high responsibility." *Id.* at 293, 294 (citations omitted in original). In the present context, the President may determine that the purposes of a particular UN operation in which U.S. Armed Forces participate would be best served if those forces were placed under the operational or tactical control of an agent of the UN, as well as under a UN senior military commander who was a foreign national (or U.S. national who is not an active duty military officer). Congress may not prevent the President from acting on such a military judgment concerning the choice of the commanders under whom the U.S. forces engaged in the mission are to serve.

Id. at H10062.

137. 41 Op. Att'y. Gen. 291 (1956).

138. *Id.*

139. *Id.* at 292, 293.

firming Congress's general right to "prescribe qualifications" that limit the President's discretion in the selection of military officers, the opinion approvingly quotes from an earlier Attorney General's Opinion which held that Congress can require officers to be American citizens–a requirement that is almost identical to that in House Bill 3308.[140] If Congress can require that an individual be an American citizen when appointed an officer in the United States military, as conceded in this Attorney General's Opinion, why should Congress not be able to require that the commander of U.S. forces detailed to the UN be a U.S. military officer on active duty and not a foreign commander?

Of two additional Attorney General's Opinions cited in *Promotion of Marine Officer*, one notes that Congress may establish a general class of individual from which an appointment may be made,[141] and the second addresses the central issue in this section—the scope of the "make rules"

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140. That earlier opinion stated:

> The argument has been made that the unquestioned right of Congress to create offices implies a right to prescribe qualifications for them. This is admitted. But this right to prescribe qualifications is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment.
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> . . . .
>
> *Congress could require that officers shall be of American citizenship* or of a certain age, that judges should be of the legal profession and of a certain standing in the profession, and still leave room to the appointing power for the exercise of its own judgment and will; and I am not prepared that to go further, and require that the selection shall be made from persons found by an examining board to be qualified in such particulars as diligence, scholarship, integrity, good manners, and attachment to the [g]overnment, would impose an unconstitutional limitation on the appointing power. It would still have a reasonable scope for its own judgment and will.

Id. at 292-93 (quoting from 13 Op. Att'y. Gen. 516) (emphasis added).

141. Issuance of Commission in Name of Deceased Army Officer, 29 Op. Att'y. Gen. 254, 256 (1911).

> [N]ow appointment in the Army as in any other department of the Government is an executive, not legislative act (Story on Const. Vol. II, sec. 1526; Federalist No. 76; Wyman on Administrative Law, sec. 48), and the provisions of the Constitution are satisfied by giving Congress the power to make the general rules prescribing the organization and govern

clause.[142] It concludes that congressional power to establish qualifications for military personnel derives from the "make rules" clause:

> From this review of the action of the Executive and of the Legislature in regard to the promotion and appointment of officers to fill vacancies, whether original or accidental, in the Army, it will be seen that both these departments of the Government have not only deemed the subject to be a proper one for regulation, but have considered such regulation as appropriately belonging to a system of regulations designed for the government of the military service. It may, therefore, be regarded as definitely settled by the practice of the Government, that the regulation and government of the Army include, as being properly within their scope, the regulation of the appointment and promotion of officers therein. And as the Constitution expressly confers upon Congress authority "to make rules for the government and regulation of" the Army, it follows that that body may, by virtue of this authority, impose such restrictions and limitations upon the appointing power as it deems proper in regard to making promotions or appointments to fill any and all vacancies of whatever kind occurring in the Army, provided, of course, that the restrictions and limitations be not inconsistent or incompatible with the exercise of the appointing power by the department of the Government to which that power constitutionally belongs.[143]

These Attorney General Opinions involve the power of appointment, a power not directly applicable to House Bill 3308, because the selection of a person to serve as a commander of U.S. forces detailed to the UN does

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141. (continued)
ment of the Army, leaving to the President, with the advice and consent of the Senate, the designation of the particular individuals who are to fill the office created by the Congress therein.

Congress may point out the general class of individuals from which an appointment must be made, if made at all, but it can not control the President's discretion to the extent of compelling him to commission a designated individual. (President Harrison's veto, Feb. 26, 1891, Messages of the Presidents, vol. 9, p. 138; Attorney General Brewster's opinion in *Fitz John Porter*'s case, 18 Op. 18.).

Id.

142. Appointment and Promotion in the Army, 14 Op. Att'y. Gen. 164 (1873).
143. *Id.* at 172.

not constitute an appointment to a position in the U.S. government–military or otherwise. Nevertheless, the setting of qualifications with regard to the exercise of the power of appointment is parallel to the setting of qualifications for those individuals authorized to command U.S. armed forces detailed to non-United States entities, whether it be the UN or a foreign government. The setting of qualifications in such a situation does not materially differ from that of an appointment.[144] The power to establish qualifications applies equally to both situations. House Bill 3308, constituting a general eligibility requirement for military personnel, thus falls within the scope of congressional power under the "make rules" clause.

b. Does Congress have Power to Authorize and Set Rules for the Detailing of U.S. Armed Forces?

There are several historical instances in which Congress has passed legislation that establishes rules for the detailing of U.S. military forces. It appears that these exercises of congressional power have neither been subjected to judicial review, nor provoked criticism on constitutional grounds. This state of affairs thus indicates that the proposed restrictions contained in House Bill 3308 are within the historically recognized ambit of congressional powers.

One of the most notable and longstanding statutes that expressly deals with the detailing of U.S. military personnel to multilateral operations is

144. Mr. Dellinger agrees with this point. He says:

> The President's appointment power is not at issue here, because the foreign or other nationals performing command functions at the President's request would be discharging specific military functions, but would not be serving in federal offices. *See* Memorandum to Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, subject: Defense Authorization Act at 2n.1 (Sept. 15, 1995). Nonetheless, we believe that the reasoning under the Commander in Chief Clause closely parallels that under the Appointments Clause.

Dellinger Memorandum, *supra* note 4, at H10062.

the UNPA of 1945.[145] Section 7 of the Act provides in pertinent part as follows:

> Noncombatant assistance to the United Nations
>
> (a) Armed forces details, supplies and equipment, obligation of funds, procurement and replacement of requested items.
>
> Notwithstanding the provisions of any other law, the President, upon the request by the United Nations for cooperative action, and to the extent that he finds that it is consistent with the national interest to comply with such requests, may authorize, in support of such activities of the United Nations as are specifically directed to the peaceful settlement of disputes and not involving the employment of armed forces contemplated by chapter VII of the United Nations Charter—
>
> (1) the detail to the United Nations, under such terms and conditions as the President shall determine, of personnel of the armed forces of the United States *to serve as observers, guards, or in any noncombatant capacity, but in no event shall more than a total of one thousand of such personnel be so detailed at any one time*: Provided, that while so detailed, such personnel shall be considered for all purposes as acting in the line of duty, including the receipt of pay and allowances as personnel of the armed forces of the United States, credit for longevity and retirement, and all other perquisites appertaining to such duty. . . .[146]

This language shows Congress's understanding of its power to set such terms and conditions as it deems necessary and proper for the detailing of forces to the UN. In this instance, it concluded in its wisdom that the President should have broad discretion. However, notwithstanding the discretion accorded to the President, the statute (in the italicized language) clearly sets limits on the detailing of U.S. forces. No more than one thousand men or women can be detailed at any one time, and then only for operations that are not Article 42 peace enforcement operations. In addition, the capacity in which detailed forces can serve is limited to guarding, observing, and other non-combatant roles. These are limitations that,

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145. Ch. 583, 59 Stat. 619 (Dec. 20, 1945) (codified as amended at 22 U.S.C. §§ 287-287e).

146. 22 U.S.C.S. § 287d-1 (LEXIS 1999) (emphasis added).

although affecting the President's power as commander in chief, have not been viewed as unconstitutional. Restrictions of the type proposed in House Bill 3308 would simply establish an additional limit on the President's authority to detail personnel to UN peace operations. From this perspective, no fundamental difference exists between the proposed restriction in House Bill 3308 and the restrictions already imposed by the UNPA.

Paralleling the UNPA is Section 628 of the Foreign Assistance Act of 1961.[147] It authorizes the head of any federal agency

> [w]henever the President determines it to be consistent with and in furtherance of the purposes of this chapter . . . to detail, assign or otherwise make available to any international organization any officer or employee of his agency to serve with, or as a member of, the international staff of such organization, or to render any technical, scientific, or professional advice or service to such organizations . . . .[148]

Section 627 of the Foreign Assistance Act of 1961[149] contains a similar authorization allowing the detailing of federal officers and employees to foreign governments "where acceptance of such office or position does not involve the taking of an oath of allegiance to another government . . . ."[150] Section 503 of the Act also provided for the detailing of U.S. military forces, but only for noncombatant duty.[151]

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147. Pub. L. 87-195, pt. III, § 628, 75 Stat. 452 (Sept. 4, 1961), codified as 22 U.S.C. § 2388. There is additional discussion of this provision in note 19 *supra*.

148. *Id.*

149. Pub. L. 87-195, pt. III, § 627, 75 Stat. 452 (Sept. 4, 1961), codified as 22 U.S.C. § 2287.

150. *Id.*

151. Pub. L. 87-195, pt. II, § 503, 75 Stat. 435 (Sept. 4, 1961).

> General Authority.–The President is authorized to furnish military assistance on such terms and conditions as he may determine, to any friendly country or international organization, the assisting of which the President finds will strengthen the security of the United States and promote world peace and which is otherwise eligible to receive such assistance, by–
>
> . . . .

Another law authorizing the detail of military personnel, used to justify sending U.S. military advisers to Southeast Asia, and codified as 10 U.S.C. § 712,[152] "Detail to Assist Foreign Governments," provides:

> (a) Upon application of the country concerned, the President, whenever he considers it in the public interest, may detail members of the Army, Navy, Air Force, and Marine Corps to assist in military matters
>
> (1) any republic in North America, Central America, or South America,
>
> (2) Cuba, Haiti, or Santo Domingo,
>
> (3) during a war or a declared national emergency, any other country he considers it advisable to assist in the interest of national defense.
>
> (b) Subject to prior approval of the Secretary of the military department concerned, a member detailed under this section may accept any office from the country to which he is detailed.[153]

A further statutory example shows the level of detail that Congress sees itself as proper to engage in from time to time. The statute, 10 U.S.C. § 168, authorizes "military-to-military contacts" with foreign governments "that are designed to encourage a democratic orientation of defense establishments and military forces of other countries." The section lists eight kinds of "authorized activities" for which funds may be used. These include, among others: the activities of "traveling contact teams," "military liaison teams," military and civilian personnel exchanges between the Department of Defense and foreign defense ministries, and between units of U.S. and foreign armed forces, "seminars and conferences held primarily in a theater of operations," and the distribution of publications in a theater of operations.

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151. (continued)

> (d) assigning or detailing members of the [a]rmed [f]orces of the United States and other personnel of the Department of Defense to perform duties of a noncombatant nature, including those related to training or advice.

Id.

152. Ch. 1041, 70A Stat. 32 (Aug. 10, 1956), *amended by* Pub. L. 85-477, ch. V, § 502(k), 72 Stat. 275 (June 30, 1958).

153. *Id.*

In a final example, military legislation was found by the Attorney General to limit executive power to detail military personnel.[154] A Navy regulation that permitted the adjutant, quartermaster, and paymaster of the Marine Corps to be detailed permanently away from headquarters, and to be assigned duties inconsistent with their staff functions, was determined to be invalid because it contravened existing statutes. The Attorney General, in finding the regulation invalid, stated:

> This [regulation] then, purports to give the power to the commandant–whether ever exercised or not is immaterial–permanently to impose duties upon these staff officers inconsistent with those of an adjutant, quartermaster, and paymaster of the Marine Corps, and to detach them permanently from the headquarters of the command–the only place where, in the nature of things, those duties can be regularly performed.[155]

From these examples, it can be concluded that Congress has full power to authorize and to set limits on the detailing of military personnel. The proposed restriction in House Bill 3308 likewise sets a limit on the detailing of military personnel, in this case in the form of an eligibility requirement for commanders of U.S. forces in UN peace operations. Such a restriction is within the scope of congressional power under the "make rules" clause.

c. Does Congress have Power to Enact Rules Delimiting Command and Control Structures and Relations, Including the Chain of Command?

In the House debate on House Bill 3308, a ranking minority member of the House National Security Committee argued that the restrictions in House Bill 3308 reflected an impermissible attempt by Congress to define "what command and control relations should be," and that Congress simply does not have the power to regulate those relations under the "make rules" clause or any other clause in the Constitution.[156] He asserts that the "make rules" clause "does not connote that the Congress may take away the most basic and important moral responsibility of the commander in

154. Detail of Staff Officers of Marine Corps to Duty Outside Washington, 30 Op. Att'y. Gen. 234 (1913).

155. *Id.* at 236-37.

156. H.R. REP. No. 104-642, pt. 1, at 12-16 (1996) (remarks of Ron Dellums).

chief."[157] With regard to "raise and support land forces" clause,[158] he asserts that "this section does not speak to command and control, and proponents of House Bill 3308 can find no support for the proposition that Congress has a role in dictating command and control relations."[159]

However, the historical evidence does not bear out this view. Throughout the history of the republic, many congressional enactments have expressly delimited command and control relations, determined command structures, and established or modified the chain of command. Some of those laws may have caused difficulties in the effective management and administration of the military. But such difficulties have not rendered those laws unconstitutional. The Constitution does not mandate wise legislation, it only allocates power in such a manner as to maximize the opportunity for wise political, military, and administrative leadership.

For example, during the Civil War, President Lincoln had enormous difficulties finding acceptable commanding generals–so much so that he and his Secretary of War, Edwin Stanton, personally involved themselves in the conduct of the war to an extent unthinkable today. In part, these difficulties stemmed from legislated seniority rules that prevented certain generals from serving under other generals, thereby restricting the President's discretion to appoint theater commanders.[160] Although these seniority rules (like the restrictions contained in House Bill 3308) may have been unwise, they are an example of a President being limited by rules imposed by Congress with respect to the command and control of U.S. armed forces.[161]

The history of legislation related to establishing a general staff, and, more recently, creating and modifying the structure of the Joint Chiefs of Staff and the Joint Staff, is perhaps the best example of the extent to which Congress has been involved in establishing command structures. Significantly, the office of Army chief of staff did not even exist until 1903, when Congress created the office in response to appeals from the War Depart-

157. *Id.* at 14.

158. U.S. CONST. art. I. § 8, cl. 12.

159. H.R. REP. No. 104-642, at 14.

160. *See* WORMUTH & FIRMAGE, *supra* note 63, at 91 (providing further details).

161. Less than twenty years earlier, during the Mexican War, President James Polk was similarly limited in his ability to select the commanding general of his choice. *See id.* at 91 (discussing Polk's failure to obtain Senate approval of legislation that would have allowed him to appoint someone other than General Winfield Scott to command the U.S. armed forces involved in the southern campaign).

ment for a general staff corps.[162] Statements made by Secretary of War Elihu Root supporting the Administration's request clearly acknowledged Congress's authority and responsibility with respect to military organization and structure.[163] Root appealed to Congress for statutory changes in the organization and structure of the army because of systemic defects, including the lack of "an adequate provision for a *directing and coordinat-*

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162. Ch. 553, Laws of 1903, 32 Stat. 830 (Feb. 14, 1903). The office of Chief of Naval Operations was created in 1915. Ch. 83, Laws of 1915, 38 Stat. 928 (Mar. 3, 1915). The office of chief of staff of the air force was created in 1947. Ch. 343, Laws of 1947, 61 Stat. 503 (July 26, 1947).

163. ELIHU ROOT, THE MILITARY AND COLONIAL POLICY OF THE UNITED STATES: ADDRESSES AND REPORTS 411 (1916). For example, in a statement before the Senate Committee on Military Affairs in March 1902, Root stated:

> Mr. Chairman, this bill contains two series of provisions of primary importance, together with a number of minor provisions on separate subjects. The provisions of primary importance are, first, a series of provisions for the consolidation of the supply departments. The second series of provisions is for the creation of a general staff. Both of these provisions seem to be of very great importance–to be necessary to an effective organization of the army. . . . They are simply a rearrangement of the present official force in such a way as to make that force more effective; and they are merely putting on paper the lessons which I believe have been generally deduced from observation of the working of the present system in the war with Spain.

Id. Later in 1902, Root again addressed the need for a general staff corps in a statement before the House Committee on Military Affairs:

> Let me call your attention for a moment to the reason for asking you to authorize the formation of such a body of officers. We have an army excellent in its personnel . . . .
>
> I can go through the different branches of administration and make the same statements regarding each particular corps, department, and bureau organization . . . Nevertheless, no one can fail to see that there has been in the past, in the administration of the army, something which was out of joint. It is not necessary for me to go into the specification of details . . . The confusion comes from the fact that our organization is weak at the top. It does not make adequate provision for a directing and coordinating control. It does not make provision for an adequate force to see that these branches of the administrative staff and the different branches of the line pull together, so that the work of each one will fit in with the work of every other one . . .
>
> While I say that the organization is weak at the top, I am not criticizing any one at the top. It is weak at the top because the system is defective;

ing control"[164]–defects which the Administration clearly believed could not be remedied solely by executive action. Although Root surely recognized that the President and his military subordinates have exclusive power to direct and control the military, he also recognized that the exercise of this power is subject to the structural and organizational limitations imposed by Congress.

Root's remarks demonstrate that he understood Congress may provide the President with an effective military organization and it may not. The restriction on the selection of senior commanders in House Bill 3308 may be effective and it may not. But it's effectiveness or lack thereof is not a criteria for measuring its constitutionality. From the constitutional standpoint, the only question in terms of the issue at hand is whether the restriction in House Bill 3308 is a rule affecting the structure or relations of command, and whether Congress has the power to make such a rule.

The rules in the legislation creating the General Staff Corps, enacted in response to Root's requests, are quite detailed. Under the legislation, the chief of staff was charged with the supervision of all troops of the line and all staff departments, under the direction of the President or Secretary of War. He was "to be detailed by the President from officers of the Army at large not below the grade of brigadier general."[165] In addition to creating the position of chief of staff, the statute set forth rules in Section 3 that controlled the detailing of officers to the General Staff Corps.[166] With regard

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163. (continued)
because there is a distribution of powers and no coordination of the exercise of powers provided for in the system.

Id. at 419-20.

164. *Id.* at 419.

165. Ch. 553, Laws of 1903, 32 Stat. 830 (Feb. 14, 1903).

166. The statute provided:

> All officers detailed in the General Staff Corps shall be detailed therein for periods of four years, unless sooner relieved. While serving in the General Staff Corps, officers may be temporarily assigned to duty with any branch of the Army. Upon being relieved from duty in the General Staff Corps, officers shall return to the branch of the Army in which they held permanent commission, and no officer shall be eligible to a further detail in the General Staff Corps until he shall have served two years with

to the selection of officers for the Corps, Section 3 established minimum grade requirements but delegated to the President the discretion to prescribe further rules for selection. Thus, this one law contains all three classes of rules under discussion in this section.

More recently, the Goldwater-Nichols Department of Defense Reorganization Act of 1986[167] shows the detail with which Congress has specified command structures and relations, and chains of command in the contemporary military context. The purposes of Goldwater-Nichols set forth in the policy section of the law include:

> (1) to reorganize the Department of Defense and strengthen civilian authority in the Department;
> (2) to improve the military advice provided to the President, the National Security Council, and the Secretary of Defense;
> (3) to place clear responsibility on the commanders of the unified and specified combatant commands for the accomplishment of missions assigned to those commands;
> (4) to ensure that the authority of the commanders of the unified and specified combatant commands is fully commensurate with the responsibility of those commanders for the accomplishment of missions assigned to their commands;
>
> . . . .
>
> (7) to improve joint officer management policies; and
> (8) otherwise to enhance the effectiveness of military operations and improve the management and administration of the Department of Defense.[168]

In furtherance of these legislative purposes, Goldwater-Nichols implemented numerous reforms that affect the core of the military's chain of command and structure. For example, Section 201, codified in part as 10 U.S.C. § 155, concerns the appointment and operation of the Joint Staff under the Chairman of the Joint Chiefs of Staff, and provides, *inter alia*,

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166. (continued)
the branch of the Army in which commissioned, except in case of emergency or in time of war.

Id.

167. Pub. L. 99-433, 100 Stat. 992 (Oct. 1, 1986).

168. *Id.* § 3, 100 Stat. 993.

that: "The Joint Staff shall not operate or be organized as an overall Armed Forces General Staff and shall have no executive authority. The Joint Staff may be organized and may operate along conventional staff lines."[169] Another provision of the Act, codified as 10 U.S.C. § 162 and entitled "Combatant commands: assigned forces; *chain of command*,"[170] provides in subsection (b) that: "Unless otherwise directed by the President, the chain of command to a unified or specified combatant command runs–(1) from the President to the Secretary of Defense; and (2) from the Secretary of Defense to the commander of the combatant command."[171]

Similarly, 10 U.S.C. § 163 specifies the role of the Chairman of the Joint Chiefs of Staff with regard to (1) lines of communication between the President, Secretary of War, and commanders of unified and specified combatant commands, and (2) oversight responsibility for combatant commands.[172] And 10 U.S.C. § 164 both establishes qualifications for combatant commanders[173] and defines their powers and duties.

The type of provisions discussed above frequently allow for waivers by the President, as does House Bill 3308. It might be argued that this is done to avoid constitutional encroachment upon the President's authority as commander in chief. However, evidence in support of such a conclusion

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169. 10 U.S.C.S. § 155(e) (LEXIS 1999).

170. *Id.* § 162 (emphasis added).

171. *Id.*

172. A precursor to Goldwater-Nichols is the Department of Defense Reorganization Act of 1958, Pub. L. 85-599, 72 Stat. 514 (Aug. 6, 1958). Among other things this law clarified and shortened the military chain of command. "To facilitate this change the concept of unified and specified combatant commands was established by law, combining forces from the Army, Navy, Air Force, and Marine Corps as the Secretary of Defense saw fit." Peter Murphy & William Koenig, *Whither Goldwater-Nichols?*, 43 NAVAL L. REV. 183, 186 (1996).

173. Subsection (a) establishes commander qualifications as follows:

> Assignment as combatant commander.
> (1) The President may assign an officer to serve as the commander of a unified or specified combatant command only if the officer–
> (A) has the joint specialty under section 661 of this title; and
> (B) has completed a full tour of duty in a joint duty assignment (as defined in section 664(f) of this title) as a general or flag officer.
> (2) The President may waive paragraph (1) in the case of an officer if the President determines that such action is necessary in the national interest.

10 U.S.C.S. § 164(a).

is lacking. Indeed, the testimony of Elihu Root would argue to the contrary, as would the difficulties suffered by Polk and Lincoln. The straightforward view is that Congress is not required to allow for waivers to avoid unconstitutional encroachment, but rather that it uses this device in certain military contexts because it understands the need for flexibility in chains of command and in the setting of qualifications for commanders.

Whether derived from the "make rules" clause or the "raise and support" and "provide and maintain" military clauses of the Constitution, Congress has throughout the history of the Republic played a significant and essential role in regulating command and control structures and relations and in delimiting chains of command. Congress has full power in this domain. It has exercised its power in establishing qualifications for selecting military officers, and it has set conditions for the detailing of military personnel. The restriction proposed in House Bill 3308, characterized in any of the three ways discussed in this section, falls within the scope of congressional power. The opponents of House Bill 3308 have not shown to the contrary. What remains to be determined is whether the President or Congress has precedence in the control of these areas.

C. Congress or the President: Which Branch Has Primacy in Regulating the Military?

It should be apparent at this stage of the inquiry that the proposed restriction in House Bill 3308 does not encroach on the exclusive sphere of presidential authority as commander in chief. The bill does not require the President to select a particular person to exercise operational or tactical control over U.S. forces. It does not dictate the ways in which U.S. forces are conducted in UN peace operations. It does not direct the movement, employment, or disposition of U.S. forces, or their discipline. It does not stipulate that UN operations in which U.S. forces participate are carried out according to a certain plan. In other words, House Bill 3308 does not affect the President's core command functions as they have been characterized in the constitutional literature.

Rather, in terms of the classification offered above, House Bill 3308 establishes a general eligibility requirement for selecting personnel to exercise control over U.S. forces in UN peace operations. It creates a limitation on the detailing of U.S. forces to the UN in addition to those already existing. It delimits command relations and the chain of command in the context of UN peace operations. Enacting any of these types of rules is a

proper exercise of Congress's military power to make rules for the government and regulation of the armed forces.

However, the restriction in House Bill 3308 does fall within an area in which Congress and the President have concurrent authority.[174] Constitutional jurisprudence has long accepted the view that the President, as well as Congress, is empowered to regulate the military. The Supreme Court, in *United States v. Eliason*,[175] affirmed that "[t]he power of the executive to establish rules and regulations for the government of the army, is undoubted."[176] The reason for this power was clear to the Court: The consequence of there not being such power would be, in the absence of congressional enactment, "a complete disorganization of both the army and navy."[177] In the absence of the restriction of House Bill 3308, the President is free to exercise his discretion as commander in chief and allow a foreign commander to exercise operational and tactical control over U.S. forces in UN peace operations.[178]

The existence of concurrent power, however, leaves open the question as to who has primacy–Congress or the President. This question with respect to Congress's power to make rules for the military was answered by the Supreme Court in its recent decision in *Loving v. United States*,[179] in which it recognized Congress's plenary power and primacy over the President.[180]

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174. "Concurrence results in particular from the President's authority as Commander in Chief, which authority overlaps the explicit power of Congress to make rules for the government and regulation of the land and naval forces." HENKIN, *supra* note 55, at 94.

175. 16 PET. 291 (1842).

176. *Id.* at 301.

177. *Id.* at 302.

178. This is not to say that the President's discretion is unfettered in the absence of congressional action. He has a constitutional responsibility as commander in chief to maintain meaningful control and direction of American forces, even when they are placed under the operational or tactical control of foreign commanders. *Cf.* Printz v. United States, 521 U.S. __ (1998), in which the Court held that the Brady gun control law impermissibly transferred the President's responsibility to administer the law to local law enforcement officers without meaningful presidential control. In the context of UN peace operations, the need for meaningful executive control is provided for in Presidential Decision Directive 25, *supra* note 38.

179. 517 U.S. 748 (1996).

180. The Court stated:

> Under Clause 14 [the "make rules" clause], Congress, like Parliament, authority. Cf. *United States v. Eliason*, 16 PET. 291, 301 (1842) ("The

The Supreme Court's opinion, though definitive, offers little explanation. However, a rationale for Congress's primacy is offered in a work by G. Norman Lieber,[181] who was The Judge Advocate General of the Army at the turn of the century. Lieber recognized the President's "constitutional authority" to issue army regulations "as Commander in Chief of the Army and as Executive,"[182] but nevertheless argued that the President cannot encroach upon Congress's plenary power over military administration when it chooses to exercise its authority.[183] Lieber thus concedes Con-

180. (continued)

> power of the executive to establish rules and regulations for the government of the army, is undoubted"). This power is no less plenary than other Article I powers, *Solorio*, *supra*, at 441, and we discern no reasons why Congress should have less capacity to make measured and appropriate delegations of this power than of any other, *see Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-221 (1989) (Congress may delegate authority under the taxing power); cf. *Lichter v. United States*, 334 U.S. 742, 778 (1948) (general rule is that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes") (emphasis deleted). Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981). And it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority.

Id. at 767-68.

181. G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS (1898). As Lieber offers an articulate and useful discussion, but one lost in time, it is here quoted at length.

182. *Id.* at 9. (Footnote references are omitted in all quotations from this work.)

183. Lieber states:

> As to the subject matter of regulations for the government of the Army, no distinct line can be drawn separating the President's constitutional power to make them from the constitutional power of Congress "to make rules for the government and regulation" of the land forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not encroach on it. But when it does not do so, the President's power is of necessity called into action. It is, indeed, of the commonest occurrence for Congress to regulate a subject in part and for the Executive to regulate some remaining part, and this without any pretense of statutory authority, but

gress's power to completely control military administration if it chooses to do so, and supports the proposition of Congress's superior power with an opinion from the War Department.[184]

What is striking is that the issue for Lieber with respect to concurrent power is not whether Congress might encroach on presidential power, but whether the President might encroach on congressional power. He does warn against congressional encroachment, not in the zone of concurrent power over military governance, but only where it would intrude upon the President's exclusive authority to direct military operations as commander in chief.[185] Lieber's view concerning the extent of the President's exclu-

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183. (continued)

> upon the broad basis of constitutional power. We thus have a legislative jurisdiction and, subject to it, an executive jurisdiction extending over the same matter.

Id. at 11-16.

184.

> The War Department has recognized this by its approval of the following views: "The issue of duplicate discharges, or certificates in lieu of lost discharges, is a matter over which both Congress and the President have control, the former by virtue of the power 'to make rules for the government and regulation of the land and naval forces,' and the latter by virtue of his power as Executive and Commander in Chief. The power of Congress is, however, the superior power, and therefore nothing in conflict with any regulation on the subject made by Congress can legally be prescribed by the President, but the fact that the Congress has made a regulation partly covering the subject does not take away from the President his power to make a regulation relating to the part not covered."

Id. at 16 n.2.

185. In making this point, Lieber quotes from Judge Cooley's *Constitutional Limitations*:

> Where complete power to pardon is conferred upon the executive, it may be doubted if the legislature can impose restrictions under the name of rules or regulations; but where the governor is made commander in chief of the military forces of the State, it is obvious that his authority must be exercised under such proper rules as the legislature may prescribe because the military forces are themselves under the control of the legislature, and military law is prescribed by that department. There would be this clear limitation upon the power of the legislature to prescribe rules rules for the executive department; that they must not be such as, under pretense of regulation, divest the executive of, or preclude his exercising, any of his constitutional prerogatives or powers. Those matters which

sive authority as commander in chief connects that exclusive sphere to the core command function of directing military movements.[186]

Addressing the primacy of Congress over the President within the area of concurrent military powers, Lieber offers an explanation of Congress's precedence, which is grounded in the constitutional text: Congress's power is based on an express grant, whereas the President's power is a construction of his position.

> When Congress fails to make regulations with reference to a matter of military administration, but either expressly or silently leaves it to the President to do it, it does not delegate its own legislative power to him, because that would be unconstitutional, but expressly or silently gives him the opportunity to call his executive power into play. It is perhaps not easy to explain why, if regulations may, under the Constitution, be made both by the legislative and executive branches, one should have precedence over the other; but it is to be noticed that the power of Congress is the express one "to make rules for the government and regulation of the land and naval forces," whereas the power of the President is a construction of his position as Executive and commander in chief. The legislative power, by the words quoted, covers the whole field of military administration, but it is not always certain how far the executive power may go. It is not as well defined as the legislative power, but it is undoubtedly

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185. (continued)

> the constitution specifically confides to him the legislature can not directly or indirectly take from his control.

THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS 133 (5th ed. 1883), *reprinted in* LIEBER, *supra* note 181, at 17, n.3.

186. He says:

> In speaking of the power of Congress over the administration of the affairs of the Army, it is of course, not intended to include what would properly come under the head of the direction of military movements. This belongs to command, and neither the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives it command over the Army. Here the constitutional power of the President as commander in chief is exclusive.

LIEBER, *supra* note 181, at 18.

> limited to so much of the subject as is not already controlled by the latter. The jurisdiction of the executive power is not, however, within this limit coextensive with that of the legislative power, because the legislative branch of the Government has a constitutional field of operation peculiar to itself, and yet there are army regulations which seem to be of a legislative character. It is because of this that difficulty sometimes occurs–a difficulty which has in the past quite often taken the form of a difference of views between the War Department and the accounting officers of the Treasury.[187]

For Lieber, as for the Supreme Court, Congress's power not only takes precedence over the President's with respect to military administration; the source of this power, the "make rules" clause, is applicable in the broadest sense. Congress's power is plenary.

In summary, the restriction contained in House Bill 3308 falls within the sphere of concurrent congressional and presidential authority over the military, but not within the sphere of exclusive presidential authority. As Congress has primacy within the sphere of concurrent authority, House Bill 3308 does not invalidly encroach upon the President's power as commander in chief.

D. The President's Power to Conduct Diplomacy and Negotiate Agreements: Does it Trump Congress's Power Under the "Make Rules" Clause With Respect to House Bill 3308?

Walter Dellinger argues that House Bill 3308 would unconstitutionally interfere with the President's authority to conduct diplomacy, impermissibly tying his hands in negotiating agreements with respect to U.S. involvement in UN peace operations.[188] However, Dellinger's depiction of the scope of the President's power, with the exception of his limiting the discussion of the power to conduct diplomacy to the context of negotiating international agreements, is so vague and broad as to leave a large gap

187. *Id.* at 18-20.

188. Dellinger says:

> Congress is impermissibly undermining the President's constitutional authority with respect to the conduct of diplomacy. *See, e.g.*, *Department of Navy v. Egan*, 484 U.S. 518, 529 (1988) (the Supreme Court has

between the principles he asserts and the conclusions he draws. Most importantly, Dellinger does not spell out either the type of agreements involved in these negotiations, the constitutional bases for the presidential power to negotiate such agreements, or Congress's power to limit that presidential power. Definition is necessary in order to place the constitutional issue in its proper context. Only then can Dellinger's claims be adequately addressed.

There are basically three kinds of international agreements: (1) treaties, which are defined for constitutional purposes as international agreements made by the President with the concurrence of a two-thirds vote of the Senate;[189] (2) "congressional-executive agreements," which are made subject to congressional approval, or pursuant to authorizing legislation;[190] and (3) "sole or self-executing executive agreements," which do not depend on congressional approval and are made on the basis of the Presi-

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188. (continued)

> "recognized 'the generally accepted view that foreign policy was the province and responsibility of the Executive"') (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 705-06 n.18 (1976) ("[T]he conduct of [foreign policy] is committed primarily to the Executive Branch."); *United States v. Louisiana*, 363 U.S. 1, 35 (1960) (the President is "the constitutional representative of the United States in its dealings with foreign nations"); "*Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*," 39 Op. Att'y Gen. 484, 486 (1940) (Jackson, Att'y Gen.) (the Constitution "vests in the President as a part of the Executive function" " control of foreign relations"). UN peacekeeping missions involve multilateral arrangements that require delicate and complex accommodation of a variety of interests and concerns, including those of the nations that provide troops or resources, and those of the nation or nations in which the operation takes place. The success of the missions may depend to a considerable extent, on the nationality of the commanding officer, or on the degree to which the operation is perceived as a UN activity (rather than that of single nation or bloc of nations). Given that the United States may lawfully participate in such UN operations, we believe that Congress would be acting unconstitutionally if it were to tie the President's hands in negotiating agreements with respect to command structures for those operations.

Dellinger Memorandum, *supra* note 4, at H10062.

189. U.S. CONST. art. II, § 2.

190. *See* HENKIN, *supra* note 55, at 215-19; John F. Murphy, *Treaties and International Agreements other than Treaties: Constitutional Allocation of Power and Responsibility Among the President, the House of Representatives, and the Senate*, 23 KAN. L. REV. 221, 222-23 (1975).

dent's independent constitutional powers.[191] Commentators have presented forceful challenges to the making of sole executive and congressional-executive agreements.[192] Such agreements are, nevertheless, generally accepted as a constitutionally permissible means of conducting foreign relations,[193] deriving from any one of several of the President's enumerated powers: his constitutional authority as commander in chief, the treaty power, the power to receive foreign representatives and to recognize governments, the obligation to faithfully execute the laws, or his power as chief executive.[194]

In the context of negotiating agreements, House Bill 3308 can be characterized as placing a restriction on the President's authority to make agreements with the UN regarding the disposition and control of U.S. forces in UN peace operations. Such agreements, which concern military matters and do not involve or require further congressional action, would be "sole executive agreements" negotiated on the basis of the President's authority as commander in chief.[195]

The constitutional question then is, what if any limits can Congress place on the President's power to negotiate sole executive agreements in his capacity as commander in chief? An immediate answer suggests itself from the analysis already undertaken in this article: Congress is constitutionally disabled from imposing such limits to the extent that they would

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191. *See* HENKIN, *supra* note 55, 219-24; Murphy, *supra* note 190.

192. One such attack is Raoul Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1 (1972).

193. *See* HENKIN, *supra* note 55, at 215-24. Several important Supreme Court cases impliedly accept executive international agreements of various types. *See, e.g.*, United States v. Belmont, 301 U.S. 324 (1937); United State v. Pink, 315 U.S. 203 (1942); Reid v. Covert, 354 U.S. 1 (1957); Wilson v. Girard, 354 U.S. 254 (1957); Dames & Moore v. Regan, 453 U.S. 654 (1981).

194. *See* Craig Mathews, *The Constitutional Power of the President to Conclude International Agreements*, 64 YALE L.J. 345-89 *passim* (1955); Murphy, *supra* note 190, at 233.

195. It is fair to say that the issue of operational and tactical control of U.S. forces in a multilateral operation is much more in the nature of a military question rather than one of foreign diplomacy. The ink spilled on this subject has been in military manuals, books, and articles, not foreign relations treatises. *See* B. Franklin Cooling, *Interoperability*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN MILITARY 1737-69 (John E. Jessup & Louise B Ketz eds., 1994) [hereinafter Jessup & Ketz]; William J. Coughlin & Theodore C. Mataxis, *Coalition Warfare*, *in* Jessup & Ketz, *supra*, at 1709-36; U.S. JOINT CHIEFS OF STAFF PUBLICATION No. 3-0, DOCTRINE FOR JOINT OPERATIONS; U.S. JOINT CHIEFS OF STAFF PUBLICATION No. 3-07.3, JOINT TACTICS, TECHNIQUES, AND PROCEDURES FOR PEACEKEEPING OPERATIONS (1994); U.S. DEPT. OF THE ARMY, FIELD MANUAL 100-23: PEACE OPERATIONS (1994); U.S. DEP'T OF THE ARMY, FIELD MANUAL 100-8: COMBINED ARMY OPERATIONS (1993).

encroach upon the President's exclusive power as commander in chief; but it is not disabled from doing so within the sphere of concurrent military powers. As the restriction in House Bill 3308 falls within the sphere of concurrent military powers, it is a permissible restriction on the President's authority to negotiate agreements with the UN.

Stepping back from the quick answer, the analysis can be fleshed out by addressing more fully the question of limits on the President's power to negotiate international agreements. A good starting point is the "sole organ" theory of the President's foreign affairs power. This theory has often and erroneously been invoked as an expression of plenary and exclusive presidential power over foreign affairs. It was first enunciated by John Marshall with respect to an extradition controversy when he was serving in the House of Representatives: "The President is sole organ of the nation in its external relations, and its sole representative with foreign nations."[196] However, the theory, as fully set forth by Marshall, does not imply exclusive control of foreign policy by the President:

> The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him . . . .
>
> He is charged to execute the laws. A treaty is declared to be a law. He must then execute a treaty . . . .
>
> Ought not [the President] to perform the object, although, the particular mode of using the means has not been prescribed? Congress, unquestionably, may prescribe the mode, and Congress may devolve on others the whole execution of the contract; but till this be done, it seems the duty of the Executive department, to execute the contract by any means it possesses.[197]

The controversy on which Marshall was commenting concerned an extradition demand by Great Britain under an existing treaty. The issue was whether President John Adams could surrender one Jonathan Robbins to British authorities without a judicial hearing. In his remarks, Marshall was

196. 10 ANNALS OF CONG. 613 (1800).
197. *Id.* at 613-14.

clear that Congress could "prescribe the mode" of executive action with regard to matters of "external relations."

As intended by Marshall and generally understood since, the "sole organ" theory does no more than characterize the President as the sole spokesman or representative "to make or receive communications on behalf of the United States,"[198] and by that to conduct diplomacy and negotiate international agreements. It "does not necessarily imply that the President has the authority to determine the content of what he should communicate, to make national policy."[199] As Charles Lofgren has noted, "John Marshall, at least in 1800, evidently did not believe that because the President was the sole organ of communication and negotiation with other nations, he became the sole foreign policy-maker. Marshall indicated that Congress could modify the President's diplomatic role."[200] Similarly, another eminent constitutional scholar, Edward Corwin, has concluded that "while the President alone may address foreign governments and be addressed by them, yet in fulfilling these functions, he is, or at least may be, the mouthpiece of a power of decision that resides elsewhere."[201] The authorities cited by Dellinger do not suggest more. They do not imply that only the President can determine the content of the diplomacy he conducts or the agreements he negotiates. If constraints could not be imposed on the President's power to negotiate agreements, an important constitutional check would not exist and the President would have virtually dictatorial powers in the sphere of foreign relations.

That Congress can control presidential power to make international agreements by way of legislation has long been understood. Quincy Wright, for example, explained the congressional power to restrict international agreements as follows:

> To discover the subject on which the President may make international agreements, we must examine his constitutional powers. For this purpose we may distinguish his powers as (1) head of the administration, (2) as commander in chief, (3) as the representative organ in international relations. The President is Chief Executive and head of the Federal administration with power to direct and remove officials and the duty to "take care that the laws be faithfully executed." But the exercise of these

198. HENKIN, *supra* note 55, at 41.

199. *Id.*

200. CHARLES A. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 203 (1986).

201. CORWIN, *supra* note 6, at 208.

> powers, and the meeting of this responsibility is dependent upon the laws which Congress may pass, organizing the administration and defining the powers and responsibilities of office. *In this capacity, therefore, the President may only make international agreements, under authority expressly delegated to him by Congress,* or the treaty power*, or agreements of a nature which he can carry out within the scope of existing legislation.* Congress has often delegated power to the President to make agreements within the scope of a policy defined by statute, on such subjects as postal service, patents, trademarks, copyrights and commerce. Such agreements appear to be dependent for their effectiveness upon the authorizing legislation, and are terminable, both nationally and internationally, at the discretion of Congress.[202]

The Supreme Court has also recognized limits on the making of international agreements. In *Reid v. Covert*,[203] the Court stated:

> [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution . . . The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and Senate combined.[204]

Thus, the difficulty for analysis comes not in accepting that limitations may be imposed on the President's power to conduct diplomacy and negotiate agreements, but in determining the constitutionally permissible scope of those limitations.

With respect to negotiations involving military agreements that are based on the President's power as commander in chief, Congress can limit the power of the President to conclude international agreements through its power to make rules for the government and regulation of the armed forces.[205] To the extent that Congress's power under the "make rules" clause overlaps the President's power as commander in chief, the President's power to negotiate military agreements can be controlled by Congress.

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202. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 235-36 (1922) (emphasis added).

203. 354 U.S. 1 (1957).

204. *Id.* at 16-17.

205. Mathews, *supra* note 194, at 382.

As one commentator concludes after a detailed discussion of the scope of that limiting power,[206] "so long as the safety of the United States is not endangered, Congress has power to limit the size and disposition of the armed forces, with a consequent inhibiting effect upon the President's power to take military action."[207] Accordingly, "Congress can limit the effective exercise of the constitutional powers of the President by refusing appropriations or necessary legislation." Under these principles, there is no basis to argue that House Bill 3308 is an unconstitutional encroachment on presidential power.

A few examples will illustrate Congress's power to control presidential action with respect to military and national security matters. Two appropriations riders brought an end to U.S. combat activities in Southeast Asia by prohibiting the expenditure of funds for such activities after 15 August 1973.[208] The Boland Amendments in the 1980s placed severe limitations on the use of funds to aid the *Contras*, who opposed the Sandinista government in Nicaragua during the 1980s.[209] More recent legislation restricted the use of funds for U.S. military involvement in Somalia[210] and Rwanda;[211] a provision in the Arms Export Control Act forced the President to impose sanctions on India and Pakistan after those countries detonated atomic bombs in May 1998.[212]

The first example put severe limits on the President's ability to negotiate agreements for the withdrawal of armed forces from Viet Nam. The second cut off the President's legal power to provide arms to the *Contras*.

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206. *Id.* at 382-85.

207. *Id.* at 388.

208. Pub. L. 93-50, § 307 (July 1, 1973), 87 Stat. 99; Pub. L. 93-52, § 106 (July 1, 1973), 87 Stat. 130. Of course, these measures can also be viewed as affecting the President's military powers.

209. Pub. L. 97-377, § 793 (Dec. 21, 1982), 96 Stat. 1865; Pub. L. 99-169, § 105(a) (Dec. 4, 1985), 99 Stat. 1003.

210. Pub. L. 103-139, § 8151(b) (Nov. 11, 1993), 107 Stat. 1476-77; Pub. L. 103-335, § 8135 (Sept. 30, 1994), 108 Stat. 2653-54. The first of these statutes also provided that "United States combat forces in Somalia shall be under the command and control of United States commanders under the ultimate direction of the President of the United States." Pub. L. 103-139, § 8151(b).

211. Pub. L. 103-335, Title IX (Sept. 30, 1994), 108 Stat. 2659-60.

212. Arms Export Control Act §§ 102(b)(1), (b)(2). The President acted with respect to India in Presidential Determination 98-22 (May 13, 1998) *available at* <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/5/13/8.text.1>, and with respect to Pakistan in Presidential Determination 98-25 (May 30, 1998) *available at* <http://www.pub.whitehouse.gov/uri-res/I2R?urn:pdi://oma.eop.gov.us/1998/6/2/11.text.1>.

The third and fourth significantly restricted presidential discretion with regard to peace operations in those countries. The last example gave the President no discretion to negotiate a resolution of the India-Pakistan nuclear crisis without further congressional action. All of the examples, in Dellinger's words substantially "tied the hands" of the President. But can it be said that the legislation was, therefore, unconstitutional? If not, why should House Bill 3308 be unconstitutional for tying the President's hands with respect to U.S. involvement in UN peace operations?

House Bill 3308 can be viewed as having an effect similar to laws that control other kinds of military agreements negotiated between the United States and foreign nations or international organizations. For example, the negotiations for status of forces agreements–agreements defining the status, rights, and immunities of U.S. forces serving on foreign soil–are constrained by a variety of statutes.[213] As explained by one experienced negotiator of status of forces agreements, "[w]ithout a treaty, the United States could only agree to status provisions supported by federal law and regulations and applicable state law."[214] The subject matter of these agreements involve many concerns that are not of a military nature but nevertheless can be extremely sensitive. They include entry and departure procedures, wearing of uniforms, carrying of arms, criminal and civil jurisdiction, arrest and service of process, customs, duties and taxes, use of transportation, use of currency and banking facilities, work permit requirements, local procurement, and use of local labor.[215] What Dellinger says about the "delicate and complex accommodation of a variety of interests"[216] in negotiations concerning UN peace operations can be said with equal force in the negotiation of status of forces agreements.

In developing a draft text during the negotiation of status of forces agreements, among the several factors that "must be considered" is "United States law."[217] If negotiations on status of forces agreements are subject to the constraints imposed by "United States law," why should that not be the case with negotiations to join in a UN peace operation? The UNPA already imposes constraints on agreements to detail U.S. forces to UN peace operations, constraints as to number and use.[218] To that extent,

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213. *See* Colonel Richard J. Erickson, USAF (Ret.), *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 A.F. L. REV. 140 n.19, 145 n.33, 149 n.36, 151 n.42, 152-53 n.47, 153 n. 49 (1994).

214. *Id.* at 140 n.19.

215. *Id.* at 147-52.

216. Dellinger Memorandum, *supra* note 4, at H10062.

217. Erickson, *supra* note 213, at 146.

218. *See supra* text accompanying notes 145 and 146.

the President's hands are already tied in conducting UN diplomacy. House Bill 3308 simply adds another constraint, one that is within Congress's power to enact as a rule for the government and regulation of the armed forces. The restriction may not be a good idea; but it is not an unconstitutional limitation on the President's power to conduct diplomacy and negotiate agreements.

E. Conclusion

The President has exclusive authority as commander in chief to control and direct military operations. This authority, however, is subject to his duty to take care that the laws be faithfully executed, including those which Congress can enact pursuant to its power to make rules for the government and regulation of the armed forces. Among the classes of rules which are encompassed by this congressional power are: (1) rules delimiting command and control structures and relations, and the chain of command; (2) rules establishing conditions for the detailing of U.S. military personnel; and (3) rules establishing eligibility qualifications for the selection of commanders of U.S. forces. The restriction in House Bill 3308 falls within the scope of all three of those classes of rules and is similar to prior laws of those types.

In the absence of legislative restriction, the President has discretion to determine the qualifications for selecting a commander charged with the operational or tactical control of U.S. armed forces serving in UN peace operations. However, this power is not exclusive. Congress may choose to enact its own selection criteria under the "make rules" clause, and if it does so, that enactment takes precedence over and limits presidential discretion. Congress's rulemaking power in matters of military administration is plenary. The kind of restriction contained in House Bill 3308 is neither beyond Congress's power to legislate nor an unconstitutional encroachment upon the President's authority to direct military operations.

House Bill 3308 does not unconstitutionally infringe upon the President's power to conduct diplomacy and negotiate international agreements. The President has exclusive power to conduct and control foreign diplomacy, negotiations, and communications. But the President is not the sole determiner of the content of that diplomacy. Congress has a role in determining foreign policy, particularly when that policy involves the disposition of military forces. The restriction in House Bill 3308, being a constitutionally proper exercise of Congress's power to make rules for the

government and regulation of the armed forces, is a constitutionally permissible constraint on the President's power to conduct diplomacy and negotiate military agreements with the UN for the disposition of American forces in peace operations.

It was noted at the beginning of this analysis that there was a potential issue involving the scope of Congress's power of the purse–the argument that Congress cannot do indirectly what it is barred from doing directly. However, as Congress has the direct power to enact the restriction contained in House Bill 3308, there is no infirmity in its doing so indirectly through the spending power. Accordingly, the issue of indirect action need not be addressed.

For the foregoing reasons, Congress has the constitutional authority to prohibit members of the United States armed forces from serving under a foreign commander.

IV. Post Script: Congressional Efforts to Restrict the President's Authority to Place U. S. Armed Forces Under Foreign Commanders in Multilateral Operations–An Unwise Policy

That a particular legislative proposal is constitutional does not, of course, mean that it is a good idea. In this instance a comprehensive analysis of the policy considerations implicated by the type of restriction contained in House Bill 3308 is beyond the scope of this article. Nevertheless, it would be remiss not to express the position that the restriction proposed in House Bill 3308 is unwise. In short, although the Clinton Administration was in error in asserting that the restriction unconstitutionally infringes on the President's authority as commander in chief, President Clinton's veto was correct as a matter of policy.

It became apparent during 1993 and 1994 that UN peace operations are not a panacea for solving the world's problems. Even when such operations are desirable, U.S. participation may not be appropriate. This change in perspective from the overly optimistic attitudes of the immediate post-Cold War era was reflected in the Clinton Administration's retreat from the policy reflected in the proposed Presidential Decision Directive 13, which had placed high hopes on the capacity of the UN to make or keep peace in international trouble spots, to the much more cautious policy

guidelines finally enunciated in Presidential Decision Directive 25.[219] But House Bill 3308 and its siblings sought to carry this shift in mood to an extreme by effectively precluding the United States from becoming involved in UN peace operations, regardless of their nature and size, unless they are led by U.S. commanders.

Much of the "popular appeal" of House Bill 3308-type restrictions appear to rest on the faulty assumption that U.S. troops will inevitably be drawn into significant front-line combat roles in UN operations, such as occurred in Somalia. However, the overwhelming majority of UN peace operations in which U.S. forces participate do not involve hostilities, such as in Somalia, where the risk of combat casualties is relatively high. Instead, they involve more traditional operations where U.S. forces (often quite small in number) are supporting UN observer or peacekeeping missions that are operating with the consent of the relevant parties, and where, accordingly, the risk of casualties is minimal.

For example, in the UN Observer Mission in Georgia (UNOMIG) and in the UN Truce Supervision Organization (UNTSO), which monitors cease-fires along Israel's borders, there are just two Americans serving as military observers.[220] Similarly, the UN Iraq-Kuwait Observer Mission (UNIKOM) and the United Nations Mission for the Referendum in Western Sahara (MINURSO) use just eleven and fifteen U.S. observers, respectively.[221] There is no good foreign policy or military rationale for an American presence to be foreclosed in such missions, especially because

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219. As noted *supra* in the text accompanying note 31, the proposed Presidential Decision Directive 13 contemplated a more intensive American involvement in UN peace operations, including the prospect of American forces regularly serving under foreign commanders. In contrast, the policy finally adopted by the Clinton Administration in Presidential Decision Directive 25 defined stringent conditions for establishing peace operations and envisioned a much more limited U.S. role in such operations. It also set forth detailed criteria for determining under what circumstances and to what degree U.S. forces would be permitted to serve under foreign commanders. *See* Presidential Decision Directive 225, *supra* note 38.

220. These figures are current as of November 1998. Deployment figures for UN peace operations broken down by contributing country, as well as much other information about those operations, are posted on the Internet site for the UN Department of Peacekeeping. *See* United Nations, *UN Peacekeeping Operations* (visited Nov. 23, 1999) <http://www.un.org/Depts/dpko/>.

221. These figures are current as of November 1998. *See id.*

even token U.S. participation may have significant symbolic and political significance.[222]

More importantly, imposing broad restrictions on the President's authority to place U.S. forces under foreign command, whether in UN operations or otherwise, ignores the fundamental need for flexibility in the conduct of foreign affairs and diplomacy. Such restrictions have the potential to limit the President's ability, as commander in chief, to establish command and control relations that best meet the exigencies of a particular situation.

Indeed, history shows that throughout the Twentieth Century, the President and his military advisors have occasionally deemed it appropriate to place U.S. forces under foreign commanders, at least temporarily. American troops served under the foreign commanders in both World Wars, in the multinational intervention in the Russian Civil War in 1918, and during the war in Vietnam.[223] In 1991, during the Gulf War, Gen. Norman Schwarzkopf placed U.S. forces under the operational control of a French general.[224] Under existing security arrangements in Korea, a U.S. Army division serving under the UN flag in South Korea is under the operational control of a South Korean general. In many if not all of these operations, forces from other countries have also been placed under U.S. commanders when deemed appropriate.[225] As former Colorado Representative David E. Skaggs has cogently concluded:

> [T]his history demonstrates how from time to time the President's ability to place our forces under an ally's operational control–or to take such control of an ally's forces–has enhanced [the United States'] ability to establish and maintain alliances and to

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222. Similarly, there will undoubtedly be situations in the future in which U.S. personnel are needed to provide only logistic support, such as transportation or communications. Again, in such circumstances, there is no reason to impose a blanket prohibition on such deployments simply because the broader military operation is under a foreign commander.

223. Cooling, *supra* note 195, 1709-69 (discussing these instances); Coughlin & Mataxis, *supra* note 1995, 1709-69 (discussing these instances). *See* George K. Walker, *United States National Security Law and United Nations Peacekeeping or Peacemaking Operations*, 29 WAKE FOREST L. REV. 441 n.53 (1994) (providing additional references).

224. *See* 142 CONG. REC. H10061 (daily ed. Sept. 5, 1996) (statement of Rep. Skaggs).

225. These instances are also reviewed in the sources referenced in note 225, *supra*.

> fashion international coalition efforts when circumstances make that the best way for us to pursue U.S. national interests.[226]

Representative Skaggs's comment points to a further concern: the potential for compromising U.S. diplomatic initiatives with regard to peace operations caused by the perception that the U.S. is uncompromisingly separating itself from the rest of the international community through restrictions of the type contained in House Bill 3308. The passage of any legislation similar to House Bill 3308 would gratuitously weaken the ability of the United States to persuade other nations to engage in multilateral military actions, whether it be under American leadership or without U.S. participation. Passage of such legislation would effectively send a message to other countries that the United States does not trust the foreign officers.

Yet, at the same time the United States has a significant interest in persuading other countries to become more (rather than less) involved in sharing military burdens overseas. Although there may be a certain domestically popular appeal to legislation providing that only American officers can exercise operational control over U.S. troops in UN operations, it is difficult to perceive how such legislation could do anything but weaken the ability of the President to persuade foreign nations to place their troops under the operational control of foreign commanders in future crises, whether they be American commanders or commanders from third countries.[227]

Moreover, the passage of such legislation has the potential, over time, to undermine the comity and mutual respect between co-equal branches of government in an area where it is of paramount importance for the country that the Congress and the President work together. Although such legislation is not unconstitutional, it would effectively constitute a decision by the Congress to deny the President authority that, in a broad, non-legal sense has traditionally been considered to lie within the scope of the President's discretion to conduct operations as commander in chief. This can only add an additional dimension for conflict between the two branches of government in times of crisis and raise the potential for skewing the political and

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226. 142 CONG. REC. H10061.

227. Supporters of House Bill 3308 noted that the legislation contained a waiver provision that would have given the President the authority to place U.S. forces under foreign command if the President: (a) certifies to Congress that it is "in the national security interests of the United States to place any element of the armed forces under UN operational or tactical control," and (b) provides the Congress with a detailed report describing, *inter alia*,

military responses to future crises away from those which may be most effective.

House Bill 3308 identified problems with UN command and control structures as a justification for the blanket restriction contained in the bill.[228] Such a restriction, however, is a very blunt instrument to use to address issues that should be considered case by case, taking account of the particular nature of each operation, the degree of risk involved (for example, there is a vast difference between enforcement operations and observer missions), the specific personnel and command structure proposed for a given operation, and the lessons learned from earlier missions. It also fails to account for the highly developed doctrine and understanding acquired by the U.S. military in its experience with interoperability in joint and coalition operations.[229]

The national interest is best served by continuing to allow the President broad flexibility, as commander in chief, to deploy U.S. forces under such operational and tactical control arrangements as the President and his military advisors believe will best serve the mission at hand. As General David C. Jones (Ret.), a former Chairman of the Joint Chiefs of Staff, and several other high-ranking retired military officers eloquently stated during the debate on House Bill 3308:

> In the post-Cold War world, it will remain essential that the President retain the authority to establish command arrangements

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227. (continued) the national security interests at issue, the proposed mission of the U.S. armed forces to be deployed, the precise command and control relationships to be employed, and the "exit strategy for the complete withdrawal of the United States forces involved." H.R 3308 subsections 405(b) and (d), *reprinted in* the Appendix, *infra*. In response, as one opponent of House Bill 3308 argued, "the waiver and certification requirements in this bill are not workable. As drawn, they would require the President to see the unforeseeable, or to be forced to choose between a dissembling assertion of knowing what cannot be known and an improper abdication of constitutional authority." 142 CONG. REC. H10060 (daily ed. Sept. 5, 1996) (remarks of Rep. David E. Skaggs). However, aside from the question of whether the waiver provision is workable as a practical matter, it is unlikely that such a provision would have overcome the perception in other countries that House Bill 3308 was designed to ensure that U.S. armed forces would not serve under non-U.S. nationals in UN peace operations, even though the U.S. would still expect foreign military personnel to serve under American commanders when the U.S. was willing to participate in such missions.

228. H.R. 3308, sec. 2(a)(5).

229. For examples of the level of sophistication of the military's understanding of joint operations, including peacekeeping missions, see the military manuals and articles referenced *supra* in note 195.

> best suited to the needs of future operations. As commander in chief, he will never relinquish command of U.S. military forces. However, from time to time it will be necessary and appropriate to temporarily subordinate elements of our forces to the operational control of competent commanders from allied or other foreign countries. As retired military officers, we can personally attest that it is essential to the effective operation of future coalitions that the President retain this authority. Just as we will frequently have foreign forces serving under the operational control of American commanders, so must we be able to negotiate reciprocal arrangements freely.[230]

The Committee[231] concurs with the views of General Jones and his fellow former officers.

To conclude, although House Bill 3308 is constitutional, the adoption of the type of restriction contained in that bill would undermine rather than advance U.S. foreign policy and national security interests.

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230. Letter from David C. Jones, General, U.S. Air Force (Ret), David E. Jeremiah, Admiral, U.S. Navy (Ret), Glenn K. Otis, General, U.S. Army (Ret), W.E. Boomer, General, U.S.M.C. (Ret), B.E. Trainor, Lt. Gen, U.S.M.C. (Ret), to Hon. Newt Gingrich (Feb. 15, 1995) *reprinted in* 141 CONG. REC. H1792 (daily ed. Feb. 15, 1995).

231. The Committee on Military Affairs and Justice of the Association of the Bar of the City of New York.

APPENDIX

Text of House Bill 3308

H.R. 3308: 104th CONGRESS, 2d Session

AN ACT

To amend title 10, United States Code, to limit the placement of United States forces under United Nations operational or tactical control, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'United States Armed Forces Protection Act of 1996.'

SEC. 2. FINDINGS AND CONGRESSIONAL POLICY.

(a) FINDINGS-Congress finds as follows:

(1) The President has made United Nations peace operations a major component of the foreign and security policies of the United States.

(2) The President has committed United States military personnel under United Nations operational control to missions in Haiti, Croatia, and Macedonia that could endanger those personnel.

(3) The President has deployed over 22,000 United States military personnel to the former Yugoslavia as peacekeepers under NATO operational control to implement the Dayton Peace Accord of December 1995.

(4) Although the President has insisted that he will retain command of United States forces at all times, in the past this has meant administrative control of United States forces only, while operational control has been ceded to United Nations commanders, some of whom were foreign nationals.

(5) The experience of United States forces participating in combined United States-United Nations operations in Somalia, and in combined United-Nations-NATO operations in the former Yugoslavia, demonstrate that prerequisites for effective military operations such as unity of com-

mand and clarity of mission have not been met by United Nations command and control arrangements.

(6) Despite the many deficiencies in the conduct of United Nations peace operations, there may be unique occasions when it is in the national security interests of the United States to participate in such operations.

(b) POLICY-It is the sense of Congress that--

(1) The President should fully comply with all applicable provisions of law governing the deployment of the Armed Forces of the United States to United Nations peacekeeping operations;

(2) The President should consult closely with Congress regarding any United Nations peace operation that could involve United States combat forces and that such consultations should continue throughout the duration of such activities;

(3) The President should consult with Congress before a vote within the United Nations Security Council on any resolution which would authorize, extend, or revise the mandate for any such activity;

(4) In view of the complexity of United Nations peace operations and the difficulty of achieving unity of command and expeditious decision making, the United States should participate in such operations only when it is clearly in the national security interest to do so;

(5) United States combat forces should be under the operational control of qualified commanders and should have clear and effective command and control arrangements and rules of engagement (which do not restrict their self-defense in any way) and clear and unambiguous mission statements; and

(6) None of the Armed Forces of the United States should be under the operational control of foreign nationals in United Nations peace enforcement operations except in the most extraordinary circumstances.

(c) DEFINITIONS-For purposes of subsections (a) and (b):

(1) The term 'United Nations peace enforcement operations' means any international peace enforcement or similar activity that is authorized by the United Nations Security Council under chapter VII of the Charter of the United Nations.

(2) The term 'United Nations peace operations' means any international peacekeeping, peacemaking, peace enforcement, or similar activity

that is authorized by the United Nations Security Council under chapter VI or VII of the Charter of the United Nations.

SEC. 3. PLACEMENT OF UNITED STATES FORCES UNDER UNITED NATIONS OPERATIONAL OR TACTICAL CONTROL

(a) IN GENERAL-

(1) Chapter 20 of title 10, United States Code, is amended by inserting after section 404 the following new section:

'Sec. 405. Placement of United States forces under United Nations operational or tactical control: limitation

'(a) LIMITATION-Except as provided in subsections (b) and (c), funds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control, as defined in subsection (f).

'(b) EXCEPTION FOR PRESIDENTIAL CERTIFICATION-

'(1) Subsection (a) shall not apply in the case of a proposed placement of an element of the armed forces under United Nations operational or tactical control if the President, not less than [fifteen] days before the date on which such United Nations operational or tactical control is to become effective (or as provided in paragraph (2)), meets the requirements of subsection (d).

'(2) If the President certifies to Congress that an emergency exists that precludes the President from meeting the requirements of subsection (d) [fifteen] days before placing an element of the armed forces under United Nations operational or tactical control, the President may place such forces under such operational or tactical control and meet the requirements of subsection (d) in a timely manner, but in no event later than [forty-eight] hours after such operational or tactical control becomes effective.

'(c) ADDITIONAL EXCEPTIONS-

'(1) Subsection (a) shall not apply in the case of a proposed placement of any element of the armed forces under United Nations operational or tactical control if Congress specifically authorizes by law that particular

placement of United States forces under United Nations operational or tactical control.

‘(2) Subsection (a) shall not apply in the case of a proposed placement of any element of the armed forces in an operation conducted by the North Atlantic Treaty Organization.

‘(d) PRESIDENTIAL CERTIFICATIONS-The requirements referred to in subsection (b)(1) are that the President submit to Congress the following:

‘(1) Certification by the President that it is in the national security interests of the United States to place any element of the armed forces under United Nations operational or tactical control.

‘(2) A report setting forth the following:

‘(A) A description of the national security interests that would be advanced by the placement of United States forces under United Nations operation or tactical control.

‘(B) The mission of the United States forces involved.

‘(C) The expected size and composition of the United States forces involved.

‘(D) The precise command and control relationship between the United States forces involved and the United Nations command structure.

‘(E) The precise command and control relationship between the United States forces involved and the commander of the United States unified command for the region in which those United States forces are to operate.

‘(F) The extent to which the United States forces involved will rely on forces of other countries for security and defense and an assessment

of the capability of those other forces to provide adequate security to the United States forces involved.

'(G) The exit strategy for complete withdrawal of the United States forces involved.

'(H) The extent to which the commander of any unit of the armed forces proposed for placement under United Nations operational or tactical control will at all times retain the right-

> '(i) to report independently to superior United States military authorities; and
>
> '(ii) to decline to comply with orders judged by the commander to be illegal or beyond the mandate of the mission to which the United States agreed with the United Nations, until such time as that commander receives direction from superior United States military authorities with respect to the orders that the commander has declined to comply with.

'(I) The extent to which the United States will retain the authority to withdraw any element of the armed forces from the proposed operation at any time and to take any action it considers necessary to protect those forces if they are engaged.

'(J) The anticipated monthly incremental cost to the United States of participation in the United Nations operation by the United States forces which are proposed to be placed under United Nations operational or tactical control and the percentage that such cost represents of the total anticipated monthly incremental costs of all nations expected to participate in such operation.

'(e) CLASSIFICATION OF REPORT- A report under subsection (d) shall be submitted in unclassified form and, if necessary, in classified form.

'(f) UNITED NATIONS OPERATIONAL OR TACTICAL CONTROL- For purposes of this section, an element of the Armed Forces shall

be considered to be placed under United Nations operational or tactical control if–

'(1) that element is under the operational or tactical control of an individual acting on behalf of the United Nations for the purpose of international peacekeeping, peacemaking, peace-enforcing, or similar activity that is authorized by the Security Council under chapter VI or VII of the Charter of the United Nations; and

'(2) the senior military commander of the United Nations force or operation is a foreign national or is a citizen of the United States who is not a United States military officer serving on active duty.

'(g) INTERPRETATION- Nothing in this section may be construed -

'(1) as authority for the President to use any element of the Armed Forces in any operation;

'(2) as authority for the President to place any element of the Armed Forces under the command or operational control of a foreign national; or

'(3) as superseding, negating, or otherwise affecting the requirements of section 6 of the United Nations Participation Act of 1945 (22 U.S.C. § 287d).

(2) The table of sections at the beginning of subchapter I of such chapter is amended by adding at the end the following new item:

'405. Placement of United States forces under United Nations operational or tactical control: limitation.

(b) EXCEPTION FOR ONGOING OPERATIONS IN MACEDONIA AND CROATIA- Section 405 of title 10, United States Code, as added by subsection (a), does not apply in the case of activities of the Armed Forces that are carried out–

(1) in Macedonia as part of the United Nations force designated as the United Nations Preventive Deployment Force (UNPREDEP) pursuant to United Nations Security Council Resolution 795, adopted December

11, 1992, and Resolution 983, adopted March 31, 1995, and subsequent reauthorization Resolutions; or

(2) in Croatia as part of the United Nations force designated as the United Nations Transitional Administration for Eastern Slavonia, Baranja, and Western Sirmium (UNTAES) pursuant to United Nations Security Council Resolution 1037, adopted January 15, 1996, and subsequent reauthorization Resolutions.

SEC. 4. REQUIREMENT TO ENSURE THAT ALL MEMBERS KNOW MISSION AND CHAIN OF COMMAND.

(a) IN GENERAL- Chapter 37 of title 10, United States Code, is amended by adding at the end the following new section:

'656. Members required to be informed of mission and chain of command

'The commander of any unit of the armed forces assigned to an operation shall ensure that each member of such unit is fully informed of that unit's mission as part of such operation and of that member's chain of command.

(b) CLERICAL AMENDMENT-The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

'656. Members required to be informed of mission and chain of command.

SEC. 5. PROHIBITION ON REQUIREMENT FOR MEMBERS OF THE ARMED FORCES TO WEAR UNIFORM ITEMS OF THE UNITED NATIONS.

(a) IN GENERAL-Chapter 45 of title 10, United States Code, is amended by adding at the end the following new section:

'Sec. 777. Insignia of United Nations: prohibition on requirement for wearing

'No member of the armed forces may be required to wear as part of the uniform any badge, symbol, helmet, headgear, or other visible indicia or insignia which indicates (or tends to indicate) any allegiance or affiliation to or with the United Nations except in a case in which the wearing of

such badge, symbol, helmet, headgear, indicia, or insignia is specifically authorized by law with respect to a particular United Nations operation.

(b) CLERICAL AMENDMENT-The table of sections at the beginning of such chapter is amended by adding at the end the following new item:

‘777. Insignia of United Nations: prohibition on requirement for wearing.

Passed the House of Representatives by a vote of 299 to 109 on 5 September 1996.