

THE PRESIDENT, CONGRESS AND THE SECURITY COUNCIL: COUNTERTERRORISM AND THE USE OF FORCE THROUGH THE INTERNATIONALIST LENS

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INTRODUCTION

This symposium is focused on the powers of the U.S. presidency, a topic that typically implies questions of constitutional law. More narrowly, the topic of presidential powers in the area of counterterrorism typically raises questions of how the Constitution addresses the shared war powers of the President and Congress. U.S. legal scholars have generally not framed the question of presidential power to use force against transnational terrorist groups as one of international law or international institutions. Rather, the separation of powers question has focused on historical and functional views of the President's war powers and whether and to what degree presidential exercise of war powers should be subject to congressional constraints. Thus, we can view the question of presidential power to carry out counterterrorism policies as raising the question of how much congressional participation in use of force decisions is either constitutionally required or politically desirable.

A different set of issues emerges when the allocation of the war powers between the President and Congress is viewed from the perspective of international law and institutions. Traditionally, international law was unconcerned with the central elements of democratic governance—which, stated broadly, are the rule of law

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and majority rule¹—either within the institutions of international law, which are based on the non-democratic doctrine of sovereign equality, or within sovereign states.² Moreover, “decisions that emerge from democratic processes are not acceptable reasons for failure to comply with international obligations.”³ In recent years, however, international legal scholarship has grappled with the question of this “democracy deficit” in international law and institutions.⁴ The “democracy deficit” within international institutions occurs on two levels.⁵ On the first level, problems of legitimacy occur when nation states delegate central governmental functions (law-making, enforcement and adjudication) to international organizations (IOs) without subjecting the IOs to democratic constraints in carrying out those functions.⁶ On the second level is the anti-democratic structure of the international institutions themselves. In the case of the United Nations Security Council, this second-level critique centers on the size of the Council, presence of the Permanent Five members who each wield veto power, and the lack of transparency in decision making.⁷ But the question of two-level democratic accountability is

1. See DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW 6 (Charlotte Ku & Harold K. Jacobson eds., 2003)(describing democracy as “a term used to describe both a set of ideals and historical and contemporary political systems, and noting that “as an ideal, democracy involves two basic principles, the rule of law and majority rule.”).

2. *Id.* at 9.

3. *Id.* at 9.

4. See Robert O. Keohane, *International Institutions: Can Interdependence Work?*, 110 FOR. POL. 82 (1998); Eric Stein, *International Integration and Democracy: No Love at First Sight*, 95 AM. J. INT'L L. 489 (2001). The term “democracy deficit” has also been adopted to describe anti-democratic structural defects in the Constitution. See Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (2007).

5. See THE ‘DOUBLE DEMOCRATIC DEFICIT’: PARLIAMENTARY ACCOUNTABILITY AND THE USE OF FORCE UNDER INTERNATIONAL AUSPICES 3, 4–5 (Hans Born & Heiner Hanggi eds., 2004).

6. For an overview of the types of functions and powers states confer on international institutions, see generally DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* (2005).

7. See Anne-Marie Slaughter, *A New U.N. for a New Century*, 74 FORDHAM L. REV. 2964–66 (noting that “[i]f the U.N. Security Council looks like it does today, the U.N. will not be relevant to the majority of the world’s nations.”); U.N. Charter art. 23, para. 1 (stating that “[t]he Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be *permanent members*” (emphasis added)); U.N. Charter art. 27, para. 3 (bestowing a “veto” to the permanent five on all non-procedural Security Council matters. A single veto is sufficient to prevent Security Council action). See also JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 189 (2005).

present wherever the use of force takes place under multilateral auspices.⁸

This article looks at the question of presidential powers to carry counterterrorism policies—in particular the use of force against terrorist groups—through an internationalist lens. Viewed through that lens, domestic constitutional understandings of appropriate democratic constraints on presidential counterterrorism powers can be seen as interacting with international institutional understandings of democratic accountability for the use of force.⁹ This intersystemic dialectic can be engaged to address democracy deficits at both the international and domestic level and to promote reform at IOs.

Part I of the article explains that U.S. counterterrorism policy post-September 11, 2001 (hereinafter 9/11) has been more multilateral in its orientation than is generally assumed, and that counterterrorism policy going forward is likely to rely more, rather than less, on multilateral institutions. Part II examines the question of U.S. constitutional practice where the war powers have been exercised through international institutions. Part III argues that international institutional legitimacy should be more explicitly invoked as a rationale for closer consultation with and participation by Congress in counterterrorism use of force decisions. A more explicit acknowledgment of the dynamic, dialectical interaction between domestic democratic accountability for a state's participation in U.N. counterterrorism programs and the international and domestic accountability for the action taken by the U.N. offers several advantages. Open embrace of more robust congressional participation in U.S./U.N. counterterrorism practice can contribute to overcoming the democracy gaps at home and within the U.N. by: (1) strengthening democratic accountability domestically; (2) modeling “best practices” for nascent democracies and regimes in transition; (3) promoting procedural legitimacy within the Council; (4) promoting legitimacy of emerging international legal norms concerning the use

8. The Ku & Jacobson study of accountability and the use of force, *supra* note 1, examines whether the “criteria [of democratic governance] are met when military forces are used under the auspices of international institutions and if so, how well.” DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 1, at 10.

9. For a discussion of the interaction between national and international legal systems on the use of force, see Lori Fisler Damrosch, *The Interface of National Constitutional Systems with International Law and Institutions on Using Military Forces: Changing Trends in Executive and Legislative Powers*, in DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 1, at 39–60.

of force against terrorists and terrorist groups; (5) harmonizing U.N. counterterrorism programs with international human rights protections; and (6) clarifying the role of judicial review (at the domestic and international level) of U.N. actions.

As a normative matter, the international collective security mechanism of the Security Council serves to transfer the monopoly over the use of force from the nation state to the U.N.¹⁰ The use of collective security mechanisms against non-state terrorist groups is an emerging and contested area of the law governing the use of force. Ensuring the legitimacy of enforcement measures carried out by the U.N. in the counterterrorism context is thus essential to the effectiveness of those measures. Indeed, democratic legitimacy at the domestic and international levels is as important—or perhaps more important—than the operational efficiency of these counterterrorism efforts. Moreover, the institutional legitimacy of the organization developing the new norms in the area of counterterrorism and the use of force is essential to solidifying those norms as international law.

I. THE POST-9/11, POST-BUSH COUNTERTERRORISM ERA

The Bush presidency is frequently portrayed as marked by aggressive unilateralism in foreign affairs in general and counterterrorism policy in particular.¹¹ Unilateralism has been used

10. U.N. Charter art. 39 (noting that when operating pursuant to Chapter VII, “[t]he Security Council *shall* determine the existence of any threat to the peace, breach of the peace, or act of aggression and *shall* make recommendations, or decide what measures *shall* be taken in accordance with Articles 41 and 42, to *maintain or restore international peace and security*” (emphasis added)); *see also* U.N. Charter art. 42 (noting that the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.”). The Security Council’s decision to use force, when they determine it is necessary pursuant to Chapter VII, is binding on U.N. member states. *See also* U.N. Charter art. 24, para. 1 (stating that the U.N.’s “Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf”); U.N. Charter art. 25 (stating “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”); U.N. Charter art. 48, para. 1 (stating that “[t]he action required to carry out the decisions of the Security Council for the maintenance of international peace and security *shall be* taken by all the Members of the United Nations or by some of them, as the Security Council may determine” (emphasis added)).

11. Unilateralism has been defined as “a tendency to *opt out* of a multilateral framework (whether existing or proposed) or to *act alone* in addressing a particular global or regional challenge rather than choosing to participate in collective action.” David M. MALONE & YUEN FOONG KHONG, UNILATERALISM AND U.S. FOREIGN POLICY 3 (2003). For a discussion

to describe the Bush administration's internal attitude toward working with Congress (i.e., assertions of broad presidential powers to act without legal constraint in the area of counterterrorism) and also its external attitude toward international law and institutions (i.e., rejection of international law as a constraint on presidential war powers).¹² This view of President Bush's unilateralism is somewhat misleading, reflecting more the rhetoric of the Bush Administration and its legal policies in the "Global War on Terror" (GWOT) than on the reality of the broad range of its actions—both domestic and international. Despite this reputation for "going it alone," U.S. military responses to the attacks of 9/11—if not all the legal implications of those responses claimed by the administration—have been authorized by Congress and have relied heavily on multilateral action and support from partners and allies.¹³ The U.S. participated actively in United Nations' counterterrorism policy and lawmaking prior to 9/11, and only amplified its support and encouragement of increased United Nations counterterrorism activities post-9/11.¹⁴ (This article does not address the legality of the 2003 invasion of Iraq or whether it could be classified as a unilateral, multilateral or mixed action. The Iraq war is not, however, included as an element of U.S. or U.N. counterterrorism policies, notwithstanding the terrorist attacks against U.S. and U.N. interests in Iraq following the invasion.)¹⁵ This support for U.N. policies continued even as President Bush pursued

emphasizing the unilateralism of the Bush presidency, see IVO H. DAADLER & JAMES M. LINDSAY, *AMERICA UNBOUND* (2003).

12. See generally CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007).

13. See Kimberley A. Strassel, *Bush Was No Unilateralist*, WALL ST. J., Dec. 13, 2008 (quoting an Administration official defending the "vibrant, multilateral component" to many of the global affairs policies of the Bush administration).

14. The Security Council adopted resolution 1267 (1999) and Resolutions 1333 requiring all members to freeze the funds and other financial resources controlled by the Taliban regime. S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). Resolution 1267 established the Al-Qaida and Taliban Sanctions Committee to monitor state implementation of these obligations. See U.N., Security Council Committee Established Pursuant to Resolution 1267 (1999) Concerning Al-Qaida and the Taliban and Associated Individuals and Entities, <http://www.un.org/sc/committees/1267/index.shtml> (last visited Mar. 18, 2009). See also U.S. DEP'T OF STATE, REPORT TO THE COUNTERTERRORISM COMMITTEE PURSUANT TO PARAGRAPH 6 OF SECURITY COUNCIL RESOLUTION 1373 OF 28 SEPTEMBER 2001 IMPLEMENTATION OF UNSCR 1373, http://hongkong.usconsulate.gov/ci_ct_2001121901.html (last visited Feb. 8, 2009).

15. For a discussion of the legality and legitimacy of the Iraq invasion, see Margaret E. McGuinness, *Multilateralism and War: A Taxonomy of Institutional Functions*, 51 VILL. L. REV. 149, 158–66 (2006).

responses to the attacks that relied on unilateral action and *ad hoc* cooperation with allies and friendly governments around the world.

This multilateralism should not be surprising from an instrumental perspective. Effective responses to terrorism have required, and will continue to require, both congressional participation domestically and multilateral coordination internationally. Foreign policy unilateralism and avoidance of the central international mechanisms for cooperation is costly to the United States—in terms of both reputation and ability to defeat terrorism. An effective counterterrorism policy requires an adoption of the full range of tools available to the United States and other governments, individually and collectively. Such tools include promoting civil society, supporting development programs (economic, political and educational) aimed to alleviate conditions that breed recruiting grounds for terrorists, coordinating law enforcement across borders (including monitoring of persons, capital and materiel used in support of terrorism), and applying the use of force and all other available tools of warfare to find, seize and, in some cases, target and kill terrorists.¹⁶

In the absence of a separate global counterterrorism organization,¹⁷ these measures taken at the Security Council represent the central multilateral response to global terrorism, and the United States is likely to continue to support strengthening the U.N. capacity in counterterrorism. First, the U.N. Security Council offers a unique mechanism for regulating those behaviors that facilitate and support the growth of transnational terrorism. The Security Council possesses powerful tools for responding to terrorism—the ability to create binding law on member states and to enforce that law, including, imposing economic and political sanctions and authorizing the use of force under the auspices of Chapter VII of the U.N. Charter.¹⁸ The

16. See generally PHILIP H. GORDON, WINNING THE RIGHT WAR (2007); See G.A. Res. 60/288, Annex, U.N. Doc. A/RES/60/288 (Sept. 20, 2006) (describing methods indicative of a multifaceted approach to combating terrorism).

17. Some critics see the U.N. as inherently ill-equipped to handle counterterrorism on its own and have called for such a new institution. See, e.g., Eric Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism: Is a Global Counterterrorism Body Needed?*, 11 J. OF CONFLICT & SEC. LAW 399, 401 (2006) (calling for “a new international body dedicated to counterterrorism outside of, but perhaps related in some way to the UN” because the U.N. is inherently incapable of the coordinated effort needed to serve as an effective counter-terror organization).

18. See U.N. Charter art. 42.

U.S. wields considerable influence—political and structural, through the power of the veto—over these law-making and enforcement tools.

Second, the United Nations (as well as other regional and international organizations) has the ability to overcome the coordination and cooperation problems that arise from free rider and collective action in the counterterrorism context. Particular issues include the problem of defection in the area of sanctions, coordination and cooperation in the monitoring of peoples (including standardization of approaches to immigration and asylum issues), and coordinated legal and policy approaches to human rights safeguards in the face of terrorism.¹⁹ The complexity of the transnational terrorism problem means that unilateralism cannot be part of the broad *strategic* answer, though it has been and will continue to be a *tactical* answer in particular places.²⁰

Third, acting with and through the U.N. provides the United States broader international “buy-in” for its own counterterrorism programs. The imprimatur of the U.N. brings with it the legitimacy effects of acting under international law, while at the same time permitting the U.S. to pursue multilaterally those actions (e.g., creating financial watch lists) that it also pursues unilaterally and on an ad hoc cooperative basis with friendly states. Acting through the Council permits the U.S. to more broadly influence the normative development of counterterrorism law, explicitly linking the threat from non-state terrorist actors to the threat to international peace and security, and developing a set of international legal norms about what actions states may take against terrorism.

Fourth, multilateral institutions offer a meaningful way to make progress that does not involve the unique U.S. imprimatur, which, in some places, has caused more long-term damage than it has gained security. The United Nations is not always popular around the world either, but in places where it is relatively more popular than, for example the United States of the United Kingdom, it is likely to be

19. There is a wide support for the general proposition that transnational terrorism requires multilateral approaches to overcome both cooperation and coordination problems, including the free rider problem. *See generally* Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism*, *supra* note 17. *See also* Anti-Defamation League, *Multilateral Responses to Terrorism: The United Nations* (Oct. 2004), *available at* http://www.adl.org/Terror/tu/tu_38_04_09.asp.

20. For a discussion of the distinction between the strategic goals of counterterrorism and tactical responses to particular terrorist threats, see GORDON, *supra* note 16.

relatively more effective across a range of peacekeeping, national building and civil society programs.²¹

Finally, the broadly predicted general dilution and diminishment of the relative political power of the United States will force the U.S. back toward greater engagement at the U.N. and other multilateral spaces in order to leverage options and resources.²² For purely instrumentalist reasons, therefore, the U.N. may be the best tool for counterterrorism responses in particular places.²³

A. *U.S.-Led United Nations Counterterrorism Policies*

The Bush Administration went to the Security Council the day after the 9/11 attacks, and the Security Council acted before the U.S. Congress, passing Resolution 1368 by a unanimous vote. Resolution 1368 condemned the attacks and regarded them “like any act of international terrorism” as “a threat to international peace and security.”²⁴ A few days later, Congress passed the Authorization for the Use of Military Force (AUMF),²⁵ which explicitly empowers the President to:

[use] all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.²⁶

A reasonable reading of the phrase “all necessary appropriate force” would include any use of force actions taken through the Security Council.

The United Nations’ counterterrorism policy before 9/11 consisted mainly of efforts to define and outlaw certain acts of terrorism. For years, the United Nations had foundered on the

21. See generally JAMES DOBBINS ET AL., *THE UN’S ROLE IN NATION-BUILDING: FROM THE CONGO TO IRAQ* (2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG304.pdf.

22. See generally FAHREED ZAKARIA, *THE POST-AMERICAN WORLD* (2008) (arguing that the age of American unilateralism is over and that this trend is in America’s best interests).

23. See generally GORDON, *supra* note 16.

24. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

25. See Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

26. *Id.* at § 2(a).

problem of defining “terrorism,” and failed to reach any accord on elements of terrorism for the purpose of regulating and creating international legal liability for terrorist acts.²⁷ In the immediate aftermath of 9/11, however, under the assertion of strong U.S. leadership taken at a moment of maximum U.S. leverage and maximum international goodwill toward the U.S., the Security Council passed a series of resolutions that: (1) condemned the 9/11 attacks on the United States and characterized those attacks as a threat to international peace and security;²⁸ (2) reaffirmed the need to act against terrorists, criminalized the act of aiding terrorists, froze the assets of those persons found to aid terrorists, and prevented states from assisting terrorists in any way;²⁹ and (3) called for global unity to fight terrorism.³⁰

In October 2001, the U.S. launched a military campaign in Afghanistan to root out al Qaeda and remove the Taliban regime. While the U.S. did not formally invoke self-defense under Article 51 of the Charter, and the Council did not separately authorize the U.S. attacks, the Council took *ex post* actions that served to endorse the U.S.-led military action. For example, in December 2001, the Security Council authorized the establishment of the International Security Assistance Force to secure the transition to a post-Taliban

27. Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism*, *supra* note 17, at 407 (noting that despite thirty-five years of debate, the U.N. General Assembly has been unable to reach a consensus on the appropriate definition of terrorism); Eric Rosand, *Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight Against Terrorism*, 97 AM. J. INT'L L. 333, 339 (2003) (noting the positive attributes of Res. 1373 but listing the absence of an agreed-upon international definition of terrorism as a challenge). For an example of a discussion of the international criminalization of terrorism, see Barbara J. Falk, *The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III*, 3 J. INT'L L. & INT'L REL. 31, 51 (2007) (noting “[a]t present, there is no comprehensive UN terrorism convention, which speaks to the potential difficulty of obtaining an international consensus on the highly contestable concept of terrorism. Moreover, the new ICC does not have jurisdiction over terrorist offences”); *but see* Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1030–36 (2004) (identifying the historic difficulties associated with defining terrorism but arguing that terrorism could theoretically be tried as an international crime against humanity without any modification to the ICC’s existing jurisdictional mandate).

28. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001).

29. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

30. S.C. Res. 1377, U.N. Doc. S/RES/1377 (Nov. 12, 2001). The Council later called for states and the international community to pass legislation and administrative acts against Al-Qaida and called for the continued arrest of its members. S.C. Res. 1455, U.N. Doc. S/RES/1455 (Jan. 17, 2003).

government in Afghanistan.³¹ The Council explicitly linked its support for the change of government in Afghanistan brought about by the U.S. military actions to the Council's earlier condemnations of terrorism as a threat to international peace and security and of "[t]he Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the al-Qaida group and other terrorist groups. . . ."³² In the two years following 9/11, the Security Council passed a total of ten resolutions addressing terrorism as a threat to international peace and security.³³

At the center of these efforts is Security Council Resolution 1373, which was passed explicitly pursuant to the Council's Chapter VII power.³⁴ Resolution 1373 also established the United Nations Counter Terrorism Committee (UNCTC), comprising all 15 members of the United Nations Security Council and given the task of monitoring the implementation of Resolution 1373. The resolution required that nations implement measures³⁵ to enhance their legal and administrative ability to fight counterterrorism at home by calling for states to: (i) criminalize the financing of terrorism, (ii) freeze funds related to terrorism, (iii) deny all forms of financial support for terrorist groups, (iv) remove safe haven sustenance or support for terrorism, (v) share information with other nations on any groups practicing or planning terrorist attacks, (vi) cooperate with other nations in investigating, detecting, arresting, extraditing and prosecuting terrorists, and (vii) criminalize active and passive assistance to terrorists in domestic law.³⁶

31. S.C. Res. 1386, UN Doc. S/RES/1386 (Dec. 20, 2001). This force was replaced by a NATO operation in August 2003.

32. S.C. Res. 1378, U.N. Doc. S/RES/1378 (Nov. 14, 2001).

33. Those are resolutions 1368, 1377, 1438, 1440, 1450, 1452, 1455, 1456, 1465, and 1516. All but one of these resolutions passed unanimously with no vetoes asserted by the Permanent Five members of the Council. Resolution 1450, which reaffirmed the commitments of resolution 1373 and condemned the November 2002 terrorist attacks in Kenya, passed with one no vote by Syria. See Press Release, Security Council, Council Votes to Condemn Terrorist Attack in Kenya as It Adopts Resolution 1450 (2002) by Vote of 14-1, U.N. Doc. SC/7602 (Dec. 13, 2002), available at <http://www.un.org/News/Press/docs/2002/sc7602.doc.htm>.

34. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

35. The resolution "decides" that States "shall" undertake the measures described in the resolution. This is mandatory language, taken under Chapter VII powers, and thus creates a binding legal obligation on the member states of the U.N. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

36. *Id.*

The work of the UNCTC does not involve authorizations to use force and thus does not appear to implicate war powers in the same way as authorization of force resolutions. The UNCTC does, however, carry out quasi-legislative and executive functions. It makes law that binds member states and monitors and enforces compliance with that law. The breadth of the “smart sanctions” regime (“smart” because they are targeted against individuals, groups and institutions, rather than states)³⁷ created by Resolution 1373³⁸ and carried out by the UNCTC carries with it the risk that it will provide the factual predicates upon which future recourse to force under Chapter VII will be taken. Further, even absent Security Council Chapter VII enforcement action, the breach of the 1373 measures—framed, as they are, as necessary to securing international peace and security—by member states may be used as a legal predicate for states to resort to force through other multilateral institutions, ad hoc coalitions of willing states, or even unilaterally. Thus, the 1373 process itself raises important questions about the legitimacy of the delegations of law-making and law-enforcement authority (including the commitment of troops to enforce the law) made by member state governments to the Council.

B. The Council as Counterterrorism Law-Maker

The actions by the Security Council since 9/11 have already contributed to the normative development of international law in the area of terrorism. Without recourse to a specific definition—the quest for which has bedeviled the U.N. for years—the Council has established counterterrorism policies, such as sanctions regimes and authorizations to use force, as appropriate subjects for Chapter VII enforcement actions. By working with the United Nations, the United States has directly influenced the development of an international legal norm recognizing terrorism as a threat to international peace and security, a recognition that was a predicate to the adoption of Resolution 1373. Resolution 1373 incorporated parts of the Convention for the Suppression of the Financing of Terrorism (which had only been adopted by four states and had come into force by

37. See Andrea Bianchi, *Assessing the Effectiveness of the UN Security Council's Anti-Terrorism Measures: The Quest for Legitimacy and Cohesion*, 17 EUR. J. INT'L L. 881, 882 n. 3 (2007).

38. Resolution 1373 expanded on the sanctions regimes created under Resolutions 1267 and 1333, and the committee work was amended by Resolution 1390. See *id.* at 883 n. 11.

2001),³⁹ but also added to the provisions of that treaty and omitted others.⁴⁰ In short, the U.S. was able to leverage the Council to adopt as binding law provisions that states had not adopted through treaty, and it was able to do so without some of the significant protections that treaty provided to states and individuals.⁴¹

By labeling terrorism as a universal concern and a central threat to international peace and security, U.N. policies effectively delegitimize the acts of terrorism and the terrorists themselves in a way that mere unilateral action cannot.⁴² But as Professor José Alvarez notes, the normative value of the Security Council's actions to brand terrorism as a threat to international peace and security has also "done more than open the door to the Council's own possibilities for action."⁴³ Alvarez points out that "[b]y branding such actions as cognizable threats to world order, the Council has put them on the agenda in other organizations that address related issues; has channeled resources, NGO and media attention; and helped to alter the views and priorities of governments and legislators."⁴⁴ These "normative ripples" are felt by "those with the capability themselves to affect national or international law, in other IOs, other transnational networks, and governments."⁴⁵

The normative impact of this expansive Council-led counterterrorism policy may be similar to the development of humanitarian intervention principles and the "responsibility to protect" doctrine that arose from the U.N. Chapter VII interventions

39. Only four states—which did not include the U.S.—had ratified the 1999 convention by the time Resolution 1373 was passed in 2001. It came into force in 2002. ALVAREZ, *supra* note 7.

40. See ALVAREZ, *supra* note 7, at 196 (noting that the resolution omitted, for example, "the explicit deference to requirements of international law, including the rights due to persons charged with terrorism-related offenses, the rights of extradited persons, the requisites of international humanitarian law, and the provisions on international disputes settlement.").

41. See Ilias Bantekas, *The International Law of Terrorist Financing*, 97 AM. J. INT'L L. 315, 326 (2003).

42. See Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism*, *supra* note 17, at 403 (stating a comprehensive counter-terrorism policy is "needed to develop and implement strategies for addressing . . . underlying condition and, in doing so, create a positive narrative to counter the hatred and violence that [terrorists] are so eager to spread" (internal quotations omitted)).

43. ALVAREZ, *supra* note 7, at 192.

44. *Id.* (internal footnote omitted).

45. *Id.* (noting that these ripples may be difficult to "delineate with precision").

of the 1990s.⁴⁶ The first step toward the creation of a new humanitarian intervention norm during that time was the recognition in many of the Security Council resolutions of the 1990s that human rights atrocities constituted a threat to international peace and security.⁴⁷ The norm was then transmitted through member states, other IOs, NGOs and other norm entrepreneurs, who invoked it to justify particular interventions as legally required.⁴⁸ Similarly, the work of the UNCTC informs the development of counterterrorism legal norms. But whereas the responsibility to protect doctrine has been largely unsuccessful in altering state behavior, counterterrorism norms can be invoked by states addressing terrorism within their own borders and against non-state terrorist groups outside their borders. They are therefore more likely to find traction as states act opportunistically in their own defense.

C. *The Limits of Security Council Counterterrorism Policies*

Notwithstanding the foregoing advantages the Council brings to counterterrorism, the U.N. is far from a perfect institution and it is clear that its current counterterrorism efforts are not alone sufficient to significantly reduce the threat of global terrorism. As Eric Rosand has noted, the counterterrorism work of the United Nations has, to date, been “less than the sum of its parts” for a variety of reasons.⁴⁹ The General Assembly adopted a counterterrorism strategy in

46. See Thomas G. Weiss, *The Humanitarian Impulse*, in *THE U.N. SECURITY COUNCIL FROM THE COLD WAR TO THE 21ST CENTURY* (David M. Malone ed., 2004), at 37, 44 (noting that the responsibility to protect is triggered where “a state is unwilling or unable to protect the rights of its own citizens . . . temporarily forfeit[ing] a moral claim to be treated as legitimate. [As a result] [i]ts sovereignty, as well as its right to nonintervention, are suspended, and a residual responsibility necessitates vigorous action by outsiders to protect populations at risk.” (emphasis added)).

47. See Mats Berdal, *Bosnia*, in *THE U.N. SECURITY COUNCIL*, *supra* note 46, at 451, 459–60. Berdal argues that the increased resort to Chapter VII in the 1990s is suggestive of a greater willingness on the part of the international community to treat intrastate and internal conflict as matters of legitimate international concern and, in extreme cases, to take enforcement action in response to massive violations of human rights. *Id.* (internal quotations omitted).

48. See Weiss, *supra* note 46.

49. See Rosand, *The UN-Led Multilateral Institutional Response to Jihadist Terrorism*, *supra* note 17, at 420 (claiming that “the proliferation of Security Council counterterrorism programmes [sic] and initiatives has produced overlapping mandates, turf battles, duplication of work, multiple and sometimes confusing reporting requirements for states and continuing tension between the Security Council and the UN Secretariat”). See *id.* at 415 (noting “[t]here is a growing concern among UN members about the effectiveness of the UN’s counterterrorism initiatives and the lack of co-ordination among its different components”).

September 2006 that signaled some improvement in coordination across the institution, but those efforts have not been entirely successful.⁵⁰ Moreover, the UNCTC and the work of the General Assembly are fraught with the sorts of functional and structural problems typical of the U.N., particularly bureaucratic redundancies.

U.N. counterterrorism policies are also not immune from the power of the veto, which is to say they are not immune from power politics. The U.S. is blocked by the interests of veto-wielding members in particular geographic regions, as, for example, in the case of Russia's actions in the Caucasus.⁵¹ Where politics gets in the way of Council action on significant terrorism problems, however, the United States is likely to continue to work through other multilateral institutions (as it did with NATO in Kosovo in 1999),⁵² through ad hoc alliances (as with the 2003 Iraq invasion),⁵³ or unilaterally (as it appears to be doing through the use of drones against terrorist cells in Pakistan).⁵⁴

U.N. counterterrorism enforcement actions not only raise these questions about effectiveness, but also legitimacy.⁵⁵ As the functions and capacities of the Security Council expanded in the post-Cold War era, so too did criticisms of the substantive and procedural norms of its Chapter VII decisions.⁵⁶ Further, unlike Chapter VII enforcement actions addressing more limited objectives, Resolution 1373 and

50. *See id.*

51. For a discussion of the Russian 2008 action in Georgia, see S.C. Res. 1839, ¶¶ 1, 2, U.N. Doc. S/RES/1839 (Oct. 9, 2008); The Secretary-General, *Report on the Situation in Abkhazia, Georgia*, ¶ 6, delivered to the Security Council, U.N. Doc. S/2008/631 (Oct. 3, 2008); The Secretary-General, *Report on the Situation in Abkhazia, Georgia*, ¶¶ 3, 9, delivered to the Security Council, U.N. Doc. S/2008/480 (July 23, 2008); *see also* Anne Barnard, *Russia Broadens Military Campaign as All-Out War Threatens Georgia*, N.Y. TIMES, Aug. 10, 2008, at A1 (detailing the conflict between Russia and Georgia).

52. For a discussion of the 1999 NATO action over Kosovo, see Paul Heinbecker, *Kosovo*, in THE U.N. SECURITY COUNCIL, *supra* note 46, at 537 (noting that “[t]he most striking and significant feature of Security Council decisionmaking on Kosovo was its absence The North Atlantic Treaty Organization (NATO), under U.S. leadership prosecuted the war, and the Group of Eight (G8), under German chairmanship, negotiated the peace”).

53. *See* McGuinness, *supra* note 15, at 158–66.

54. *See* Jane Perlez, *Pakistan Tells U.S. to Stop Airstrikes in Tribal Zone*, N.Y. TIMES, Oct. 29, 2008, <http://www.nytimes.com/2008/10/30/world/asia/30pstan.html?fta=y>.

55. For a broad critique of the legitimacy of the UNCTC, see Bianchi, *supra* note 37.

56. *See, e.g.*, Susan C. Hulton, *Working Methods and Procedure*, in THE U.N. SECURITY COUNCIL, *supra* note 46, at 237, 249; *see also* Kishore Mahbubani, *Permanent and Elected Council Members*, in THE U.N. SECURITY COUNCIL, *supra* note 46, at 257–61 (detailing the inherent procedural and substantive difficulties brought to light post-Cold War, due to the existing structure of the Security Council).

related counterterrorism resolutions establish “smart sanctions” that are seemingly limitless in scope and duration. The legislating and enforcement being performed by the Council is thus ongoing and open-ended. The delegation of law-making and enforcement power by the member states therefore carries broad consequences that go far beyond the initial commitment to address the threats from al Qaeda and the Taliban.⁵⁷ Because the threat from terrorism is viewed as global, and not temporally or geographically limited, the Council’s enforcement actions have the potential of “developing general law beyond the instances with which the Council is concerned.”⁵⁸

These broad enforcement actions have done more than transform counterterrorism norms in international law; they have transformed the mechanism of enforcement measures to general law-making powers.⁵⁹ Thus, José Alvarez contends that,

on the basis of the Council’s increasingly abundant enforcement measures to counter terrorism, [] even states that have not entered into any specific treaty on the point may still owe a duty to cooperate with respect to investigating, prosecuting, and, even perhaps transferring upon request their own national abroad in cases of alleged terrorism.⁶⁰

And in the future, states may demand conformance with these obligations—even absent a Council resolution directed at a particular situation.⁶¹ The expansive nature of the Council’s law-making power in the area of counterterrorism therefore raises deep legitimacy concerns that relate to the democracy deficit and also to the lack of effective human rights safeguards.⁶²

The Council suffers from what Hans Born and Heiner Hangii refer to as a “double democracy deficit”: (1) an internal democracy deficit based on the deficit in domestic legislative participation in the Council’s lawmaking; and (2) an external democracy deficit because, at the international level, not all states are equally represented or able to participate in the passing of laws to which they will be bound.⁶³

57. ALVAREZ, *supra* note 7, at 195–96.

58. *Id.* at 193.

59. *Id.* at 196.

60. *Id.* at 195.

61. *Id.*

62. For a broad critique of the legitimacy of the UNCTC, see Bianchi, *supra* note 37.

63. Heiner Hangii, *The Use of Force Under International Auspices: Parliamentary Accountability and ‘Democratic Deficits,’* in THE ‘DOUBLE DEMOCRATIC DEFICIT’: PARLIAMENTARY ACCOUNTABILITY AND THE USE OF FORCE UNDER INTERNATIONAL

The first level gap addresses itself to domestic law and politics, which are addressed in Part II. The second-level gap raises the counter-majoritarian problem that exists in most international organizations but is especially true of the Council. The Council was designed as a legal and political compromise that would enable the Allies to extend their WWII alliance, keep Germany and Japan out of any collective decision-making on the use of force, and to assert the independent political preferences of the victorious allies through the veto of the Permanent Five members.⁶⁴ Membership has expanded over the years from 10 to 15, and the Council has evolved rules to include rotation of regional preferences, but all the other efforts to reform the U.N. Security Council in order to include larger states and to represent more geo-political and economic diversity have failed.⁶⁵

Because the normative development of counterterrorism regulations at the Council is less constrained by the kinds of narrow factual predicates that existed in earlier sanctions and enforcement regimes, counterterrorism enforcement actions also raise significant human rights concerns. In the 1990s, human rights critiques were applied to large, general embargoes imposed by the Council, and to the detrimental effects of such broad sanctions on individuals not connected with the particular threat to peace and security. The “smart sanctions” of the counterterrorism regime sought to avoid the potential human rights effects of over-inclusive sanctions, but instead may have left individuals and groups named on watch lists with little recourse to challenge their inclusion and the subsequent economic effects of inclusion (frozen bank accounts, revoked visas, etc.).⁶⁶

One significant blow to the legitimacy of these “smart sanctions” is the European Court of Justice’s (EJC) September 2008 decision in *Kadi & Al Barakaat International Foundation*⁶⁷ finding the European Commission’s implementation of Security Council counterterrorism sanctions in breach of European human rights protections: the right to

AUSPICES 3, 4–5, 7 (Hans Born & Heiner Hanggi eds., 2004); *see also* DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 1.

64. *See* McGuinness, *supra* note 15, at 119–29; Richard Edis, *A Job Well Done: The Founding of the United Nations Revisited*, 6 CAMBRIDGE REV. OF INT’L AFF. 29 (1992).

65. HANS KOCHLER, *THE U.N. AND INTERNATIONAL DEMOCRACY: THE QUEST FOR U.N. REFORM* 9–10 (1997).

66. *See* Bianchi, *supra* note 37, at 886.

67. Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int’l Found. v. Council & Comm’n*, 2008 E.C.R. [hereinafter *Kadi*].

a hearing, the right to judicial protection, and the right to property.⁶⁸ The combined case was brought by two individuals (one a Saudi national, the other a Swedish national) whose names appeared on lists drawn by the U.N. Sanctions Committee and on subsequent lists created by the regulation implementing the sanctions under European Community law. The claimants sought to annul the European Commission's regulations on the grounds that they had no ability to challenge the inclusion of their names on lists that served to deprive them of their property, either through a hearing or other judicial protection. The ECJ held, *inter alia*, that, notwithstanding the fact that the sanctions regime adopted through binding Security Council resolutions was binding law on the E.U. member states, the sanctions process was subject to the broader constitutional European framework and to *jus cogens* international law.⁶⁹

The *Kadi* case raises two issues. First, to what extent is Security Council law-making subject to fundamental human rights obligations of the member states that implement the Council's enforcement actions? Second, to what degree should a domestic constitutional order (or regional constitutional order, in the case of the E.U.) affect the means and methods of implementation of Council sanctions? On each of these issues, the *Kadi* case seems to suggest that constitutional courts (considering the ECJ a constitutional court based on its jurisdiction to adjudicate state implementation of Commission regulations) have a role in adjudicating these questions. The next section of this article will examine U.S. constitutional understandings of the power of the President to engage in enforcement actions through the Security Council.

II. PRESIDENTIAL WAR POWERS AND THE U.N. SECURITY COUNCIL: THE CONSTITUTIONAL LENS

The existence of the Security Council and its collective security mechanism "assumes that states that have committed themselves to use military forces will do so automatically in specific situations without further domestic debate."⁷⁰ It further assumes that "[t]he

68. *Id.* See also Takis Tridimas & Jose A. Gutierrez-Fons, *E.U. Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 FORDHAM INT'L L. J. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1271302.

69. *Kadi*, *supra* note 67, at paras. 301–04.

70. DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE, *supra* note 1, at 13.

executive of the state will participate in the international collective decision-making process, but the basic decision will be the determination by an international institution that the state's action constituted aggression or a threat to the peace warranting a collective response."⁷¹ For the United States, determining the legal authority of this exercise of executive power, and any subsequent delegations of the use of force decision from the national government to the United Nations, requires an examination of constitutional understandings of the allocation of the war power between the President and Congress.

Notwithstanding the broad authority the 2001 AUMF confers for counterterrorism operations connected to 9/11,⁷² it is useful to address the question of presidential power to work through the U.N. because the problem of transnational terrorism is not going away. There are and will continue to be terrorist threats that may not be directly connected to the attacks of 9/11 or connected to the states that harbored or supported al Qaeda or others connected to 9/11. Further, as 9/11 recedes in memory, the AUMF itself may lose legal valence—even when dealing with terrorist groups that might have some links to al Qaeda or others that perpetrated 9/11.

The beginnings of this decoupling of the immediate military actions taken in response to the attacks of 9/11 from the longer-term struggle against terrorist organizations can be seen in Justice Kennedy's majority opinion in the 2008 case of *Boumediene*, in which the Supreme Court held that the writ of habeas corpus extended to detainees held in military detention at Guantanamo Bay.⁷³ Although his majority opinion cites directly to a line from the AUMF regarding the President's authority to carry out reprisals and engage in other incidental acts relating to those reprisals,⁷⁴ nowhere does Kennedy refer to the Bush Administration's actions under the rhetorical umbrella of the "Global War on Terror" as a "war" on terror or terrorism.⁷⁵ Indeed, Kennedy does not refer to it as a war at

71. *Id.* at 13–14.

72. *See* discussion *supra* at Part I.

73. *See* *Boumediene v. Bush*, 128 S. Ct. 2229, 2277 (2008). The Court reasoned that, [b]ecause our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however.

Id.

74. *Id.* at 2240.

75. *Id.*

all. Justice Scalia, by contrast, in his dissent remains emphatic that the United States is at “war with radical Islamists.”⁷⁶ In addition to this attenuation of new terrorist threats from the perpetrators of 9/11, there is the possibility—remote but not entirely impossible—that the United States Congress might act to withdraw the authority of the AUMF. Such an action would require a new look at the presidential authority to carry out counterterrorism deployments through the U.N. or other collective security institutions.

Originalist accounts support the view that the Founders wanted to make it harder to commence war by forcing legislative deliberation before the burdens and democratic limitations that accompany war could be imposed on the people.⁷⁷ A robust role for Congress in “declaring war” or “authorizing” aggressive uses of force that, at the time of the founding, were entirely lawful under international law, ensured democratic accountability for broad commitments of American blood and treasure, while retaining the right of the President to repel attacks.⁷⁸ The United Nations Charter redefined what uses of force were lawful, limiting states to actions taken in self-defense or under the authority of the Security Council, thus transferring the legal monopoly over force from the nation state to the collective security institution.⁷⁹ What is the role for Congress in these collective security decisions?

This question was widely debated in the 1990s.⁸⁰ At that time, an activist U.N. Security Council emerged from the Cold War—

76. *Id.* at 2294.

77. Philip Bobbitt, Book Review, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364, 1380–83 (1994).

78. *Id.* at 1376 (noting that the Framers intentionally changed the language of the Constitution, granting Congress the power to “declare war,” from “make war” in order to “reserve to the president the power, without advance congressional authorization, to ‘repel sudden attacks.’” (quoting JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 5 (1993)).

79. See McGuinness, *supra* note 15, at 121–30.

80. See Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. Off. Legal Counsel 182 (1996); see also Louis Fisher, *Sidestepping Congress: Presidents Acting under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1279 (1997) (noting that during the 1990s Presidents G.H.W. Bush and W. Clinton were more concerned with deploying U.S. forces in accordance with their perception of doing the “right” thing than with constitutional formality); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597, 644–55 (1993) (describing the constitutional arguments regarding President G.H.W. Bush’s use of troops in Operation Desert Shield/Storm).

liberated from the superpower struggle that had relegated collective security action to a theoretical possibility that existed only on the paper of the Charter.⁸¹ The Council played a central role in authorizing force and deploying civilian administrators in nearly all the significant conflicts (international and internal) of the early post-Cold War era.⁸² Beginning with President George H.W. Bush in the first Gulf War, U.S. administrations took the position that no authorization was needed from Congress in order for the President to seek U.N. Security Council support for, or for the U.S. to participate in, Chapter VII authorized military interventions.⁸³

As a result of this revitalized Security Council, legal commentary began to take notice of the constitutional question that appeared to lay dormant for decades.⁸⁴ Scholars revisited the founding debates over war powers and took a fresh look at the United States' adoption of the United Nations Charter and the United Nations Participation Act.⁸⁵ Commentators also dusted off the War Powers

81. See 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, 1574 (1994).

82. See, e.g., S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990) (authorizing, under Chapter VII, member-states to use "all necessary means" to expel Iraq from Kuwait in Gulf War I); S.C. Res. 770, ¶ 2, U.N. Doc. S/RES/770 (Aug. 13, 1992) (calling upon member-states to take "all measures necessary" pursuant to Chapter VII, to facilitate the coordination of humanitarian assistance in the Bosnian conflict); S.C. Res. 814, ¶¶ 1, 2, U.N. Doc. S/RES/814 (Mar. 26, 1993) (authorizing Somalia humanitarian assistance under Chapter VII); S.C. Res. 981, ¶ 2, U.N. Doc. S/RES/981 (Mar. 31, 1995) (establishing, pursuant to Chapter VII, United Nations Confidence Restoration Operations (Peacekeepers) in Croatia to preserve the existing cease-fire).

83. See Ian Johnston, *US-UN Relations After Iraq: The End of the world (Order) as We Know It?*, 15 EUR. J. INT'L L. 813 (2004).

84. The expansion of U.N. enforcement activities raises concerns in some quarters about U.N. conspiracy to take over everything. See, e.g., Anne Marie Slaughter, *A New U.N. for a New Century*, 74 FORDHAM L. REV. 2961, 2968 (2006) (noting that some Americans fear that the U.N. is plotting to become a world government); Michael L. Rowady, Comment, *Wolverine Fear: An Inside Look at the Citizen Militia Movement in Michigan and the United States*, 74 U. DET. MERCY L. REV. 771, 774, 785 n.88 (1997) (describing a 1990s era American right-wing theory that the U.S. government was conspiring with the U.N. to allow the latter to take control of the former); Jill Smolowe et al., *Enemies of the State*, TIME, May 8, 1995, at 60, available at <http://www.time.com/time/magazine/article/0,9171,982895,00.html>.

85. See David Golove, *From Versailles to San Francisco: The Revolutionary Transformation of War Powers*, 70. U. COLO. L. REV. 1491 (1999), at 1499-1506; Charles Ernest Edgar, *United States Use of Armed Force Under the United Nations . . . Who's in Charge?*, 10 J.L. & POL. 299, 299-302 (1994).

Resolution (WPR) in an effort to determine the appropriate role for Congress in U.S. government decisions at the Council.⁸⁶

A. How the Creation of the United Nations Altered Constitutional Understandings of the War Powers

On one side of the debate is the argument that U.S. ratification of the United Nations Charter⁸⁷ and congressional adoption of the U.N. Participation Act (UNPA)⁸⁸ did very little to alter original or textual understandings of the constitutional allocation of war powers. The legislative history of senatorial debates over the Charter adoption in 1945, and the congressional debates over the UNPA that same year are cited as evidence that Congress intended to retain pre-existing understandings of its prerogatives to commit troops to war, and was concerned about U.S. commitments of the Charter's Article 43 Military Committee.⁸⁹ The Article 43 Military Committee never came about, but it would have required the U.S. to put troops at the disposal of the Committee for deployment when Council enforcement actions were taken; Congress had insisted that such agreements be approved by it.⁹⁰ On this view, when the President exercises his war powers, he cannot usurp congressional prerogatives—even if he does so through a treaty commitment.⁹¹ Where a Council action requires the President to commit the United States to a significant deployment or long commitments, it runs afoul of the constitutional limitation.

86. President Clinton invoked the WPR in support of short-term U.N.-based deployments. See Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173 (1994) (arguing that “the structure of the War Powers Resolution (WPR) recognizes and presupposes the existence of unilateral Presidential authority to deploy armed forces ‘into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.’” (quoting War Powers Resolution, 50 U.S.C. § 1543(a)(1) (1973))); Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 15–20 (1998) (advocating for repealing the War Powers Resolution).

87. The U.N. Charter was signed June 26, 1945, and came into force on October 24, 1945. U.N. Charter Introductory Note.

88. U.N. Participation Act ch. 583, Dec. 20, 1945, 59 Stat. 619.

89. See U.N. Charter art. 43, para. 1; see also Glennon & Hayward, *supra* note 81, at 1580 (noting that “[s]everal Senators . . . expressed concern over the power vested in the President’s appointed delegate to the Security Council to mobilize troops dedicated to the Security Council under an Article 43 force agreement”).

90. *E.g.*, Golove, *supra* note 85, at 1499–1501 (tracing the demise of Article 43 from proverbial cradle to grave).

91. See Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 391 (2008) (arguing that if a President justifies support of a U.N. Security Council resolution using the “take care” theory, he “impinges on Congress’s war powers”).

One strand of this argument addresses the constitutional and practical limits on the President's ability to assign troops under an Article 43-type agreement on the ground that military command is specifically designated in the United States Constitution as a presidential power.⁹² On this view, any agreement that provides the Security Council command over American troops may be unconstitutional. This view sees initial commitments for a narrowly-defined, single military operation under Article 43 as less problematic because the President has the power to veto an initial Article 43 use of force or the ability to maintain control over U.S. troops.⁹³ Further, any attempt by the Security Council to use troops beyond that initial deployment would be subject to a subsequent veto by the President.⁹⁴ Of course, concerns about the potential for dilution of war powers through the Article 43 Military Committee became moot as the Military Committee never came to be.⁹⁵

The better account of the legislative and political history posits the adoption of the Charter and the creation of the United Nations system as a transformative moment for the United States. Professor David Golove has described the adoption of the Charter and the passage of the United Nations Participation Act as an "act of popular sovereignty" that transformed pre-existing constitutional understandings.⁹⁶ By signing on to the collective security mechanisms of the Charter, the U.S. had agreed, in essence, to view its own national security interests through the lens of international peace and security, which inevitably required altering prior understandings about shared presidential and congressional institutional war powers.⁹⁷

The U.N. Charter clearly authorizes the Council to make binding decisions regarding the use of force.⁹⁸ The legislative history surrounding the Senate's adoption of the U.N. Charter, as well as the later debates over adoption of the U.N. Participation Act, demonstrate

92. See U.S. CONST. art. 2, § 2 (Commander in Chief Clause); Glennon & Hayward, *supra* note 81, at 1593–94.

93. See Glennon & Hayward, *supra* note 81, at 1594.

94. See *id.*

95. See McGuinness, *supra* note 15, at 126 n. 119.

96. See Golove, *supra* note 85, at 1492.

97. See Golove, *supra* note 85, at 1492, 1521 (arguing that in adopting the UN Charter, Congress "transformed the constitutional understanding of the war powers").

98. See DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW, *supra* note 1.

that those voting in favor understood that the U.N. represented a significant change in international law governing the use of force.⁹⁹ Indeed, a central underlying purpose of the Charter was shifting the monopoly of force from the nation state to a collective security system that delegates to the Council the power to determine collective threats. Congress understood that voting in favor of the Charter committed the United States to respond to threats to international peace and security, rather than limiting the definition of national security as only threats to the United States.¹⁰⁰ That Congress engaged in robust debate during both the adoption of the Charter (in the Senate) and during the adoption of the U.N. Participation Act (in both houses) is strong evidence that this shift away from domestic prerogatives toward U.N. authority to determine when to use force was central to the Charter.¹⁰¹

Thus, following the adoption of the Charter and the UNPA, the President appeared to enjoy broader constitutional authority to use armed force where the Security Council has authorized an enforcement action—even without congressional approval—than he would for deployments not sanctioned by the U.N.¹⁰² Indeed, since the adoption of the Charter and the UNPA, every administration has taken the view that the President has broad legal authority to take such actions.¹⁰³

B. Historical Practice Since the Adoption of the U.N. Charter and the U.N. Participation Act

With the notable exception of the Korean conflict, those new understandings were left untested during the Cold War when the

99. See Golove, *supra* note 85, at 1492.

100. *Id.* at 1517.

101. *Id.* at 1518–20. There is some debate over the degree to which Congress was aware of the possibility that it and the President might be giving up some command control over the military when the U.S. acted through U.N. enforcement actions. When asked during the Senate hearings about the Charter and whether Congress would have control over the special assignments to use the armed forces, Leo Pasvolosky, a special assistant to the Secretary of State responded, “[t]hat is a domestic question which I am afraid I cannot answer.” See Fisher, *Sidestepping Congress*, *supra* note 80, at 1247.

102. *Id.*

103. See, e.g., Authorization for Continuing Hostilities in Kosovo: Memorandum from Assistant Att’y Gen. Randolph Moss for the Att’y Gen. (Dec. 19, 2000), <http://www.usdoj.gov/olc/final.htm>.

Security Council was moribund.¹⁰⁴ President Harry Truman did not seek approval of Congress before taking military action in Korea, invoking the U.N. Security Council as he sent troops into combat.¹⁰⁵ Truman announced, “[t]he Security Council called upon all members of the United Nations to render every assistance to the United Nations in the execution of this resolution. In these circumstances I have ordered United States air and sea forces to give the [South] Korean Government troops cover and support.”¹⁰⁶ Some scholars have noted that, regardless of this claim, the Truman Administration did not act pursuant to U.N. authority.¹⁰⁷ Truman committed U.S. forces to Korea and gave General MacArthur authorization to send ammunition to South Korean defense forces prior to the passage of the U.N. resolutions.¹⁰⁸ Thus, the South Korean example is one that demonstrates congressional acquiescence in the face of presidential assertions of the power to act under Council authority, but one where the presidential action appeared to be, in its first hours, purely unilateral.

When the original collective security purposes of the Council were revived in the 1990s, Presidents George H.W. Bush and Bill Clinton exercised executive prerogatives to commit the United States to a number of U.N. Chapter VII actions.¹⁰⁹ For example, when Iraqi President Saddam Hussein invaded Kuwait on August 2, 1990, President Bush deployed U.S. troops to the region to defend Saudi

104. See Jane E. Stromseth, *Collective Force and Constitutional Responsibility: War Powers in the Post-Cold War Era*, 50 U. MIAMI L. REV. 145, 152 (1995). See also Glennon & Hayward, *supra* note 81 (noting a Cold War “superpower deadlock” on the U.N. Security Council).

105. See Louis Fisher, *The Korean War: On What Legal Basis did Truman Act?*, 89 AM. J. INT’L L. 21, 32 (1995).

106. *Id.* (quoting 1950 Pub. Papers 491, 492); see also Statement by the President on the Violation of the 38th Parallel in Korea, 1950 Pub. Papers 491 (June 26, 1950) (stating that “[i]n accordance with the resolution of the Security Council, the United States will vigorously support the effort of the Council to terminate th[e] serious breach of the peace” associated with North Korea’s encroachment past the 38th Parallel into South Korea).

107. See Fisher & Adler, *supra* note 86, at 33.

108. See Special Message to the Congress Reporting on the Situation in Korea, 1950 Pub. Papers 527, 529 (July 19, 1950). These commitments were made on June 26, 1950, the day before the U.N. Security Council resolution was passed. See *id.*; S.C. Res. 1511, U.N. Doc. S/RES/1511 (June 27, 1950); Fisher, *The Korean War*, *supra* note 105, at 32–33.

109. See Adam Roberts, *The Use of Force*, in THE U.N. SECURITY COUNCIL, *supra* note 46, at 133, 136–37 (David M. Malone ed., 2004). See also Stromseth, *supra* note 104, at 147–48 (detailing Presidents G.H.W. Bush and W. Clinton’s deployment of U.S. armed forces in support of the U.N. Security Council).

Arabia and deter further Iraqi aggression.¹¹⁰ However, as the number of troops grew to 500,000, it became apparent that the troops would be deployed to roll back the Iraqi invasion and occupation of Kuwait and further be used for more offensive operations.¹¹¹ Rather than seek authority from Congress, Bush sought authorization from the U.N. Security Council for use of military force, which it provided with the passage of Resolution 678 on November 29, 1990.¹¹² The President believed he needed no further authorization from Congress in order to use military force against Iraq. Professor Thomas Franck argued at the time that a congressional declaration of war is inapplicable to U.N. police actions.¹¹³ But some observers viewed as questionable the use of the term “police action” to describe the military action in Kuwait and Iraq, which appeared to shift from a defensive to an offensive deployment.¹¹⁴

While President Bush did not believe he needed permission from “some old goat in the United States Congress to kick Saddam Hussein out of Kuwait,” he did nonetheless give into congressional pressure to obtain approval for the military action in Kuwait and Iraq.¹¹⁵ Congress passed the Authorization to Use Military Force Against Iraq Resolution in January 1991, before combat operations began.¹¹⁶

President Bush also sought authorization from Congress “consistent with” the War Powers Resolution (WPR) before taking action in Panama in 1989, and before the 1992 deployment to Somalia.¹¹⁷ No U.S. President has explicitly defended the constitutionality of the War Powers Resolution of 1974, which was

110. See Fisher, *Sidestepping Congress*, *supra* note 80, at 1264; see also Eugene Rostow, *Until What? Enforcement Action or Collective Self Defense*, 85 AM. J. INT'L L. 506, 506 (1991) (detailing the deployment from the U.N. perspective).

111. Fisher, *Sidestepping Congress*, *supra* note 80, at 1264.

112. *Id.* at 1265.

113. See *id.*; Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: “The Old Order Changeth,”* 85 AM. J. INT'L L. 63, 74 (1991).

114. See Fisher, *Sidestepping Congress*, *supra* note 80, at 1265.

115. Remarks of President George Bush to the Texas State Republican Convention in Dallas, Texas (June 20, 1992), in 28 WKLY COMP. OF PRESIDENTIAL DOC. 1119, 1120–21. See Lori Fislser Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 130 (2000) (quoting President G.H.W. Bush); see also Stromseth, *Rethinking War Powers*, *supra* note 80, at 597.

116. To Authorize the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678, Pub. L. No. 102-1, 105 Stat. 3 (1991) (codified as amended at 50 U.S.C. § 1541 (1994)) (noting that congressional authorization to use force against Iraq in the first U.S./Iraq Gulf war occurred “on the eve of the outbreak of combat in January 1991”).

117. See Damrosch, *supra* note 115, at 130–31.

adopted in the wake of U.S. involvement in Southeast Asia and passed over President Nixon's veto (based on his objection to the durational limit of presidentially authorized deployments under Section 5(b) of that statute).¹¹⁸

Some observers have argued that the WPR created the danger of a "delegation of the war power in perpetuity," from the President to the United Nations.¹¹⁹ President Bush's 1991 actions to expel Iraq from Kuwait have been used as an example of how Security Council resolutions might lead to this type of perpetual delegation.¹²⁰ The congressional statute in that case created congressional authority for the President to drive Iraq out of Kuwait.¹²¹ But because the congressional statute included the phrase "all subsequent [United Nations] resolutions," some have argued that any resolutions the Security Council promulgated on the subject following the date of the statute would be automatically sanctioned by the statute authorizing force.¹²²

Similar to his predecessors, President Bill Clinton also maintained his constitutional prerogative to deploy military force under U.N. authority without congressional approval. Shortly before the September 1994 U.N. operation in Haiti, Clinton asserted, "'I have not agreed that I was constitutionally mandated to get' congressional approval for a military action of the sort contemplated in Haiti."¹²³ Professor Lori Damrosch has argued that the Clinton Administration was more forthcoming than most predecessors in issuing formal legal opinions suggestive of some constitutionally-based role for Congress, at least where war is involved.¹²⁴

118. Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (2000)). For a discussion of the War Powers Resolution, see David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 944, 1069-70 (2008) [hereinafter Barron & Lederman, *Commander-in-Chief II*]. Barron and Lederman argue that, while "[i]t is often asserted that every President since Nixon has agreed that section 5(b) of the WPR is unconstitutional," the "historical picture is much more complicated and equivocal." *Id.* at 1070 n. 529. The administration of George W. Bush is the only post-Nixon White House to declare section 5(b) unconstitutional. *Id.*

119. See Fisher & Adler, *supra* note 86, at 1, 18.

120. *Id.* at 19.

121. On January 14, 1991, in Public Law 102-1, Congress authorized the use of U.S. armed force against Iraq. President G.H.W. Bush was authorized to use armed force pursuant to U.N. Security Council resolution 678 (1990) "in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677." *Id.*

122. *Id.*

123. See Damrosch, *supra* note 115, at 131.

124. *Id.* at 131-32.

Nevertheless, the practice of the Clinton Administration was clearly one of seizing the presidential prerogative to use force whenever a U.N. resolution under Chapter VII was invoked.

Congress, however, did not always remain silent in the face of these assertions of authority. Indeed, as Professors David Barron and Martin Lederman have discussed in their comprehensive examination of congressional regulation of the President's Commander in Chief power, Congress has generally been less reticent to interfere with presidential use of force decisions than many observers have assumed:

It is commonly thought that the de facto expansion since the Korean War of unilateral executive authority to use military force confirms Congress's timidity. But if a war goes badly, or if concerns about its wisdom become significant, the modern Congress has been willing—more than in previous eras—to temper or constrain the President's preferred prosecution of the war, and sometimes even to contract or end the conflict contrary to the President's wishes. For this reason, the Commander in Chief increasingly confronts disabling statutory restrictions even in conducting conventional military operations abroad.¹²⁵

The more active Security Council of the 1990s, authorizing the deployment of peacekeeping and peace enforcement troops to dozens of conflicts around the world, raised concerns among members of Congress that the Council would bind the U.S. to troop commitments that neither Congress nor, in some cases, the President could constrain. Congress adopted legal restrictions on how U.S. troops could serve within United Nations operations.¹²⁶ And one member of Congress filed suit to challenge President Clinton's deployment of troops under NATO authority in Kosovo.¹²⁷

125. David J. Barron & Martin S. Lederman, *The Commander-in-Chief at the Lowest Ebb: Framing the Problem, Doctrine, & Original Understanding*, 121 HARV. L. REV. 689, 692 (2008) [hereinafter Barron & Lederman, *Commander-in-Chief I*].

126. See, e.g., Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151(b)(2)(B), 107 Stat. 1418, 1476-77 (1993) (providing that U.S. 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.") See Barron & Lederman, *Commander-in-Chief II*, *supra* note 118, at 1090-92 (discussing the U.N. Command Legislation).

127. See, e.g., *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (Congressman Tom Campbell's attempt to get a declaration that President Clinton violated the War Powers Clause of the Constitution and War Powers Resolution by directing air strikes during the Kosovo conflict was dismissed for lack of standing).

In the context of the war on terrorism, the Administration of George W. Bush “embraced the aggressive preclusive claims of its predecessors [to presidential war powers], and even pushed them to their logical extremes while evincing none of the tempering impulses one detects in the statements of the Nixon, Ford, Carter, and Clinton Administrations.”¹²⁸ But it also pursued policies through the United Nations that enjoyed legal authority—beyond the AUMF—under existing statutes. Such statutory delegations include the International Emergency Economic Powers Act, the Immigration and Nationality Act, and the Antiterrorism and Effective Death Penalty Act of 1996, which empower the President to participate in the kinds of “smart sanctions” created by the UNCTC.¹²⁹

The approach of the President and Congress to the constitutional allocation of their war powers when acting through the United Nations thus tells a mixed story. Congress has delegated broad authority to the President through approval of the Charter and the UNPA, while from time to time attempting to place limits on the scope of the delegated authority. The President has jealously guarded the legal prerogative to bind the U.S. to enforcement actions through the Security Council, while from time to time seeking per-authorization or ex post approval from Congress for actions that commit the U.S. to substantial military deployments. The final section of this article proposes an approach to congressional participation in U.S. action at the Security Council that retains fidelity to this constitutional history while at the same time addresses legitimacy challenges at the U.N. and pays down the “democracy deficit.”

128. Barron & Lederman, *Commander-in-Chief II*, *supra* note 118, at 1094.

129. See Immigration and Nationality Act, 8 U.S.C. §§ 1103–1104 (2006) (granting broad immigration powers to the Executive via the Attorney General and the Secretary of State); see also 8 U.S.C. § 1182(a)(3)(B) (2006) (stating that those involved in “terrorist activities” are ineligible for a visa or admission into the United States); International Emergency Economic Powers Act, 50 U.S.C. § 1702 (2006) (outlining the President’s broad economic powers during a national emergency); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat. 1214, 1255 (1996) (granting the President broad authority to use “all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens”).

III. CONGRESSIONAL PARTICIPATION IN U.N. COUNTERTERRORISM
POLICY AND THE DEMOCRACY DEFICIT:
THE INTERNATIONALIST LENS

Given the legitimacy concerns with Security Council enforcement actions, I am reframing the question of congressional participation in use of force decisions by examining it through the internationalist lens. The mixed history of congressional involvement in presidential decisions to act through the U.N., and the current critiques—judicial and otherwise—of the U.N. counterterrorism programs, suggests additional imperatives for expanding and making more explicit a congressional role in U.S. participation at the Security Council. The rationales for such explicit involvement are both political and legal and can serve to address the democracy deficit at the domestic and international level.

If U.S. adoption of the Charter and participation at the U.N. delegated broad power to the executive as a matter of U.S. constitutional law, international law increasingly has something to say about that particular delegation of powers.¹³⁰ As such, U.S. participation in the U.N. may require better democratic accountability both because of the democracy deficit in the U.N.'s own participatory structure, and also because perceptions of legitimacy and fairness are central underpinnings of international normative constraints on the use of force.¹³¹ A focus on the norms at stake—defining terrorism, establishing rules governing the use of force against terrorists and terrorist organizations, and delineating the scope of human rights protections that constrain collective or unilateral counterterrorism policies—reveals that patterns of institutional behavior at the domestic and international levels of the international security system operate dialectically, influencing and affecting the operations of one another. Thus to continue dominant procedural modes and methods of the U.N. Security Council—secret, closed, non-transparent, counter-majoritarian—has the tendency to reinforce those norms among its member states. At the same time, failure to get *ex ante* legislative authority at home widens the democracy gap at the U.N. Security Council. Together, these patterns breed discontent and

130. See SAROOSHI, *supra* note 6, at 121–22.

131. See generally THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS* (2002); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995).

distrust of states in resorting to U.N. enforcement measures to address terrorism.

Some have argued that, while President Bush may have been on constitutionally firm ground in many of the unilateral domestic actions he undertook under the auspices of the GWOT, he would have gained considerable domestic political legitimacy, served to protect executive prerogatives, and strengthened the presidency as an institution had he more frequently sought explicit congressional approval for his policies (approval which would have been readily provided).¹³² This policy argument can be applied to presidential participation at the Security Council. Even where it is not constitutionally required, seeking out ongoing congressional approval for participation in Council counterterrorism programs serves both to strengthen legitimacy of the executive at home and the legitimacy of the Council process itself.

This is not a functionalist argument. It does not presuppose that Congress is any better suited to making decisions about whether to engage through the U.N. Security Council or not. Indeed, the President may be functionally better suited to working through the U.N.. Because the President is constrained at the Council by external legal and political controls and institutional norms, for example, he may be less likely to miscalculate the costs of a particular use of force than when he acts unilaterally.¹³³ A range of opinions, including institutional opinions of the Secretariat staff and the Secretary General's special representatives, can serve as the same kind of deliberative mechanism as congressional deliberation, without the kind of electoral risks that create disincentives for members of Congress to second guess risk assessments from the President.

Nor am I arguing that congressional participation is mandated by international law. Indeed, the accountability debate—particularly the question of parliamentary or other legislative participation and support for Security Council Chapter VII measures—focuses on the value of political, not legal, accountability. Domestic legislatures tend to bear the brunt of political fall-out where a state's participation in a U.N. operation goes wrong, by way of inquiries, reviews of

132. *See generally* JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007); LOUIS FISHER, *PRESIDENTIAL WAR POWER* 205–18 (2d ed. 2004).

133. The 2003 invasion of Iraq offers an excellent case study for the value of multilateral deliberation and the cost of proceeding unilaterally when multilateral authorization is not available.

military behavior, and perhaps even action under domestic laws governing misconduct by troops participating in U.N. operations.

A. The Value of More Explicit Ex Ante Congressional Involvement in U.S./U.N. Counterterrorism Measures

A shift in thinking toward involving the United States Congress in a more formal method of *ex ante* internal consultation on U.S. activities at the U.N. Security Council would have several salutary effects. First, it would reinforce and solidify the acceptance of U.N. Security Council substantive norms within the U.S. legal and political system. Second, it would create opportunities for capacity building within the U.N. Security Council on the question of parliamentary and legislative participation (which itself is an important dimension of the comprehensive counterterrorism policy, as well as important to addressing the democracy gap). This, in turn, has the potential to influence efforts to increase democratic accountability of other member states. Third, increased involvement of the U.S. Congress can also influence accountability and coordination of other transnational actors (in particular NGOs) who can “game” the accountability gap at the international and domestic level. Fourth, it may increase “buy-in” by the U.S. through Congress’s power of the purse. The United States provides 25% of the United Nations’ peacekeeping budget and already provides important outside accountability for management problems at the U.N.¹³⁴ Increased consultation can serve to sharpen those processes by providing early congressional input into the form and financing of particular U.N. measures.

Moreover, democratically grounded participation in U.N. counterterrorism policies will enable the United States to demonstrate its commitment to protection of human rights as consistent with counterterrorism policy. The U.N. Charter balances the mandate of maintaining peace and security with the mandate to uphold human rights and human dignity.¹³⁵ By recognizing that counterterrorism policy implicates the dual pillars of the U.N. Charter, the United States will go a long way in addressing the concerns of the human rights community regarding particular past national policies (e.g.,

134. See Marjorie Ann Browne, Foreign Affairs, Defense, and Trade Div., Congressional Research Service, United Nations Peacekeeping: Issues for Congress, at CRS-2 (May 7, 2003), available at <http://fpc.state.gov/documents/organization/20712.pdf>.

135. See U.N. Charter art. 1, para. 1, 3; U.N. Charter art. 2.

communications monitoring, creation of watch lists, and administrative or preventative detention).¹³⁶ Terrorist groups are allied against the universality of human rights espoused by the U.N. Charter and the central human rights instruments of the human rights system.¹³⁷ By working within that system to correct its problems and support its infrastructure, the United States will create a more effective bulwark against the nihilist ideologies of those terrorist and jihadist groups.

Finally, the strongest argument for more robust and ongoing congressional participation in Council military activities is that failure to secure and sustain strong domestic support for American involvement in U.N. operations would leave U.S. counterterrorism policy especially vulnerable to sudden reversal by Congress—and potentially also by the courts.¹³⁸ While building a consensus in support of particular policies is not easy, Congress can serve as an early warning for programs that raise particular domestic constitutional or human rights concerns. Congressional backlash that can occur when consultation does not take place can be costly.¹³⁹ Judicial reversal, as with the *Kadi* case in Europe, is also costly to the effectiveness of Council measures. Adding more voices to the process before detailed enforcement measures are put in place may be one way to avoid these reversals.

136. See Rosemary Foot, *The United Nations, Counter Terrorism, and Human Rights: Institutional Adaptation and Embedded Ideas*, 29 HUM. RTS. Q. 489, 490 (2007) (writing “[n]ot only do terrorists violate the lives of innocents, but state authorities, too, stand accused of acting indiscriminately, opportunistically, and illegally in their moves to counter terrorism”); see generally LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* (1995) (stating essentially that states should account for peace and security first, but protection of individual rights have a role in state decision-making across the full spectrum of national and international actions. (from Henkin’s general course and lectures on human rights and justice at the Hague Academy of International Law, 1989)).

137. See, e.g., PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 69 (2008) (noting the accuracy of “Shoe Bomber” Richard Reid’s portrayal of the al Qaeda vision of “a war between [Islam] and democracy” based on the terror group’s “reaction to the globalization of human rights—democracy, the rule of secular law, [and the] protection of women’s rights” (quoting a letter from Reid to his mother providing an explanation for his actions)).

138. See Stromseth, *Collective Force and Constitutional Responsibility*, *supra* note 104, at 180.

139. See *id.* at 149; see also Jordan J. Paust, *U.N. Peace and Security Powers and Related Presidential Powers*, 16 GA. J. INT’L & COMP. L. 15, 19–22 (1996) (describing Congress’s capabilities as stymie of unilateral presidential pursuit of U.N. Security Council directives); Fisher, *The Korean War*, *supra* note 105, at 34–38 (1995) (describing Congressional “blowback” associated with President Truman’s use of U.S. Forces in Korea).

There is of course, one significant cost to congressional participation in U.S. counterterrorism policies at the U.N.: the risk that Congress may block the President's preferred policy. The cost of obstruction of policies that are central to the security of the American people was cited by the Bush administration as a rationale for working around Congress, applying signing statements that restricted the effect of legislation in the area of national security, and invoking radical theories of presidential power in order to ignore statutory prohibitions against certain measures (including the use of torture).¹⁴⁰ That internally unilateralist approach created significant international ripples which were costly to the U.S.. While it is difficult to measure whether those costs outweigh any claimed security benefits gained through the policies (that judgment may belong only to history), it is clear that the United States' reputation for compliance with international human rights and humanitarian legal norms has been significantly harmed. Moreover, congressional objection to a particular U.N. policy that is made prior to U.S. support or votes at the Council can lead to ongoing negotiation over the form and content of the policy. After-the-fact objections, by contrast, may lead to congressionally imposed reversals that may prove more costly to the President.

B. The Form of Congressional Involvement

The National War Powers Commission, chaired by former Secretaries of State James Baker and Warren Christopher, proposed a War Powers Consultative Act (WPCA).¹⁴¹ Though its project was not aimed explicitly at the question of U.N. operations, the Commission set aside the question of constitutional war powers of the President and Congress that has bedeviled the War Powers Resolution, and replaced it with a structured consultative mechanism (the WPCA) designed to address domestic political concerns.¹⁴² The framework of the WPCA may be a useful starting point for thinking about incorporating congressional consultation and participation into the President's actions at the Council, not only for domestic legitimacy

140. See generally, Barron & Lederman, *Commander-in-Chief I*, *supra* note 125, at 706–12.

141. See James A. Baker III & Warren Christopher, *National War Powers Commission Report*, UNIV. OF VA. MILLER CENTER OF PUB. AFF. 8–9, 27–48 (2008). available at <http://millercenter.org/policy/commissions/warpowers/report> [hereinafter *WPCA Report*].

142. *Id.*

purposes, but also for purposes of international institutional legitimacy.

By setting aside the contentious constitutional law questions, the Commission usefully positions its own proposal as a political arrangement aimed at broader political participation and accountability. It is useful to think about congressional participation in use of force decisions as politically desirable, rather than legally mandated, as the Commission recommends.¹⁴³ The proposal, however, falls short in that it specifically exempts short-term and limited operations—which would include many of the types of counterterrorism operations we are likely to see more of.¹⁴⁴ The proposed WPCA includes a requirement for congressional consultation for large-scale military commitments, and notes that “[i]n cases of lesser conflicts—*e.g.*, limited actions to defend U.S. embassies abroad, *reprisals against terrorist groups*, and covert operations—such advance consultation is not required, but is strongly encouraged.”¹⁴⁵ Adding to this proposal specific language in support of multilateralism and requiring prior consultation in the case of all U.N. operations—including smaller scale operations—would create the kind of formal statutory mechanism which could achieve the goals of more effective domestic accountability.

Expanding, deepening, and formalizing the executive branch practice of prior consultation with Congress is only one way to achieve congressional participation. Other, less formal (even creative) approaches could be adopted as means of supplementing formal consultation requirements. For example, the executive branch could adopt a practice of hosting more direct congressional presence at the U.N. Security Council. This could be accomplished in a variety of ways that would not infringe on the President’s diplomatic and foreign affairs prerogatives. As U.S. Ambassador to the U.N., Richard Holbrooke hosted a Senate Foreign Relations Committee hearing at the Council as a way to build that Committee’s support for paying

143. Indeed, treating the WPCA draft as a framework for political cooperation, rather than as a statute, would be one means of getting around constitutional objections to the proposal. Professor Michael Glennon, for example, has branded the proposal “flatly unconstitutional.” Michael J. Glennon, *The War Powers Resolution, Once Again*, 103 AM. J. INT’L L. 75 (2009).

144. *WPCA Report*, *supra* note 141, at 45. For a broader critique of this exemption for short-duration uses of force, *see* Glennon, *supra* note 143.

145. *Id.* at 45 (emphasis added).

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U.S. arrears to the U.N. general budget.¹⁴⁶ The effort was largely successful. Even considering appointing former legislators, who retain significant political and personal ties to their former colleagues, to key U.S. diplomatic positions at the U.N. (as President Bush did with his appointment of Senator John Danforth to be U.S. Permanent Representative to the U.N.) can have a real effect. These are not meant to exhaust all the possible means and avenues of executive consultation with Congress, but are merely intended as initial thoughts about improving congressional participation. The point is to create processes through which U.S. participation in U.N. counterterrorism measures at the U.N. can be seen to enjoy broad-based popular support.

CONCLUSION

In the struggle against global terrorism, legitimacy of the norms—both substantive and procedural—that are invoked by states working to protect their own and international security are as important as the effectiveness of the military and other weapons deployed against terrorists. If it is the case that the U.S. will increasingly act through the U.N. and other collective security mechanisms to address terrorism, then the U.S. should do so in a way that reinforces democratic participation and individual rights protections both at home and internationally. An expanded and more explicitly acknowledged role for the Congress in U.S. counterterrorism policies at the U.N. represents one useful means through which to ensure greater legitimacy of counterterrorism measures, a legitimacy which is essential to reducing the threat terrorism poses to democratic governance and the international rule of law.

146. See James Traub, *Holbrook's Campaign*, N.Y. TIMES MAG., Mar. 26, 2000, at 41.

