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

MARGARET E. MCGUINNESS*

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

* Associate Professor, University of Missouri Law School. I want to thank the Johns Hopkins SAIS Program in International Law, at which I served as a visiting scholar while this piece was in gestation. In particular, thanks go to Ruth Wedgwood for her support and many stimulating conversations and Isabelle Talpain-Long for logistical help and good company. Special thanks to Michael Carney, Michael Sinclair and Joel Houkom for their outstanding research assistance and to Norman Williams for putting together this terrific symposium on presidential power in the 21st Century. I also thank the students of the Willamette Law Review, especially Lee Ann Donaldson and Dorothy Ryan for their editorial support.

and majority rule[1]—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 bas1d9soe nrical6 idthat4(s an)6.2(ideal,) b2 TD-6s0005 Tc0s10038a set of idealeOt of idof i0

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

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]

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.

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 measures[35] 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 1373[38] 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

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

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, wv c1.130ansm.20( )-5.2L

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

related counterterrorism resolutions establish "smart sanctions" that are seemingly limitless is 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

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

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

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.

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 Charter[87] 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. [illegible] *supra* note 81, at 1593–94.

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 e]2(.)-pten asserted that e]2(.)-pten asserted that e]2(.)-p[illegible]U U.S.inclas

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 om-0.7(i0.5)4.232 remu0au03846.54437.45.7(t)-0

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

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 Congressionaly Counco5en to

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]

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.

WLR45-3_M