



AMERICAN CONSTITUTIONALISM  
VOLUME I: STRUCTURES OF GOVERNMENT  
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

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Walter Dellinger, “**Proposed Deployment of United States Armed Forces into Bosnia**” (1995)<sup>1</sup>

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*In 1992, following the fall of the Berlin Wall, Yugoslavia broke apart. Slovenia and Croatia seceded from Yugoslavia and were followed by the Republic of Bosnia and Herzegovina. The Serbian Republic objected to the departure of Bosnia, and war broke out between ethnic Serbs and Bosnians, with Croats intervening. After a series of civilian massacres, NATO intervened in 1995, which eventually led to a peace agreement.*

*The United States committed both air and ground forces to the intervention in Bosnia. President Bill Clinton did not seek congressional approval before inserting troops into the country, and it is not clear that the White House had the votes it would have needed in Congress to win such a resolution. In November of 1995, the White House counsel requested a legal analysis from the Office of Legal Counsel in the Justice Department on the validity of the president’s actions. Assistant Attorney General Walter Dellinger provided a memorandum endorsing the president’s decision, arguing that the president had the unilateral power to use American forces in hostile situations. The Bosnian episode became a precedent for a variety of future presidential actions, including the Obama administration’s campaign in Libya.*

*When can the president commit troops into a hostile situation, according to Dellinger? Can the president initiate or enter into a “war” without congressional approval? What counts as engaging in war?*

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The United States has a large stake in helping to secure the Bosnian peace agreement. The United States has a firm commitment to the principle that the security and stability of Europe are of fundamental interest to the United States. As the President stated, if the negotiations fail and the war resumes, there is a very real risk that it could spread beyond Bosnia, and involve Europe’s new democracies as well as our NATO allies.

Although the involvement of the United Nations in the Bosnian conflict can be traced back to at least 1991, the United Nations first deployed the United Nations Protection Force (“UNPROFOR”) in the former Yugoslavia in April 1992. Most of the troops in UNPROFOR have been provided by nations allied with the United States under the NATO Treaty. . . . [T]he Security Council authorized Member States and regional organizations to take “all necessary measures” to ensure compliance with the no-fly zone. . . .

Working with NATO allies, the United States has played an important role in the United Nations’ dispute-settlement efforts and in UNPROFOR’s Bosnian operations. . . . The President reported each of these incidents by formal letters to Congress.

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In 1980, we noted that

[t]he power to deploy troops abroad without the initiation of hostilities is the most clearly established exercise of the President’s general power as a matter of historical practice. Examples of such actions in the past include the use of the Navy to “open up” Japan, and President Johnson’s introduction of the armed forces into the Dominican Republic in 1965 to forestall revolution.

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<sup>1</sup> Excerpt taken from 19 *Op. Off. Legal Counsel* 327 (1995).



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... Today, American soldiers are deployed at many places around the world. Although these forces are not presently engaged in ongoing hostilities, in some instances they deal with conditions of appreciable danger. Indeed, continuously for the last forty years, American forces have been deployed under such conditions. The United States, for example, has maintained large military forces in Europe. At times, these troops have faced a genuine risk of war . . . .

The proposed deployment to Bosnia, therefore, is no innovation. As Commander in Chief, the President exercises "the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." 40 Op. Att'y Gen. 58, 62 (1941). . . .

The Constitution vests in Congress the power "[t]o declare War." The scope and limits of that power are not well defined by constitutional text, case law, or statute. Rather, the relationship of Congress's power to declare war and the President's authority as Commander in Chief and Chief Executive has been clarified by 200 years of practice. . . .

Historical practice supplies numerous cases in which Presidents, acting on the claim of inherent power, have introduced armed forces into situations in which they encountered, or risked encountering, hostilities, but which were not "wars" in either the common meaning or the constitutional sense. As the Supreme Court observed in 1990, "[t]he United States frequently employs Armed Forces outside this country - over 200 times in our history - for the protection of American citizens or national security." *United States v. Verdugo-Urquidez* (1990). In at least 125 instances, the President acted without express authorization from Congress. See Leonard C. Meeker, *The Legality of United States Participation in the Defense of Viet-nam* (1966). In reliance on this historical practice and understanding, our Office recently took the position that the President had an inherent authority to deploy up to 20,000 troops into Haiti on the invitation of that country's legitimate government. . . .

In deciding whether the proposed deployment of ground troops into Bosnia would amount to a "war" in the constitutional sense, considerable weight should be given to the consensual nature and protective purposes of the operation. The deployment is intended to be a limited mission that will ensure stability while the peace agreement is put into effect. Because the mission is in support of an agreement that the warring parties have reached as is at the invitation of those parties, it is reasonably possible that little or no resistance to the deployment will occur. The operation does not aim at the conquest or occupation of territory nor even, as did the planned Haitian intervention, at imposing through military means a change in the character of a political regime. Although combat conceivably may occur during the course of the operation, it is not likely that the United States will find itself involved in extensive or sustained hostilities. Moreover, as the President has made clear, the Allies agree that if there were a total breakdown in compliance, IFOR would be withdrawn.

We believe that the President has ample authority to undertake the planned operation. . . .

... To send United States forces to the region, in these circumstances, does not constitute "war" in any sense of the word. Historical practice reinforces the most natural reading of the constitutional language: at the least, the President may deploy United States forces here without express authorization to protect the national interests, even if deployment is not without some risk.

....

The [War Powers] Resolution presupposes the President's authority, even in the absence of express authorization by Congress, to deploy troops in circumstances such as those here. Where (as here) the President would be ordering United States forces into foreign territory while equipped for combat, the Resolution requires a report to Congress. The Resolution thus assumes that the President sometimes may order such deployments without prior statutory authorization. . . .

In our view, the Resolution lends support to the broader conclusion that the President has authority, without specific statutory authorization, to introduce troops into hostilities in a substantial range of circumstances. . . . The executive branch has traditionally taken the position that the President's power to deploy armed forces into situations of actual or indicated hostilities is not restricted to the three categories [declaration of war, congressional authorization, or attack on the United States] specifically marked out by the Resolution. . . .

We believe that the President has the authority to order the proposed deployment of United States forces in Bosnia, under the circumstances contemplated, without express statutory authorization.