AMERICAN CONSTITUTIONALISM

VOLUME I: STRUCTURES OF GOVERNMENT

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Supplementary Material

Chapter 10: The Reagan-Bush Era – Separation of Powers

*Timothy E. Flanigan*, **Authority to Use United States Military Forces in Somalia** (1992)[[1]](#footnote-1)

*In the 1990s, the east African country of Somalia emerged as a leading example of a “failed state,” a country without a government capable of providing internal law and order. The result was humanitarian crises within the country and significant security crises outside the country (most famously, the emergence of Somalia pirates who posed a threat to well-traveled international shipping lanes). In the spring of 1992, the United Nations negotiated a ceasefire among competing clans in Somalia and launched an initiative to provide humanitarian assistance to people in the area. By the fall, however, the security situation had deteriorated in the country, and the United Nations Security Council adopted a resolution calling on member states to take “all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.” President George H.W. Bush responded by committing American military forces to take the lead in the international effort. The American peacekeeping mission became politically untenable in the United States as fighting escalated in Somalia in 1993. In October 1993, a group of army rangers failed in an effort to capture one of a Somalian military leader in the capital city of Mogadishu. American Black Hawk helicopters were shot down and several American soldiers were killed or wounded, along with hundreds of Somalians. Images of bodies of dead American soldiers being dragged through the streets of Mogadishu were widely circulated. President William Clinton soon decided to withdraw American troops from the region, a process that was completed in the spring of 1995. The Somalia experience cast a shadow over all subsequent political debates over peacekeeping missions in the 1990s.*

*In December 1992, the Bush White House asked the Department of Justice to provide a legal opinion on the president’s authority to deploy forces to Somalia in keeping with the call of the Security Council resolution. The president was advised that he had sufficient legal authority to act without the prior approval of Congress. Notably, the opinion authored by Assistant Attorney General Timothy Flanigan argued that presidential practice had established that the president could unilaterally send troops not only to protect American lives and property abroad but also for the purpose of assisting the Somalians themselves and supporting the credibility of the United Nations.*

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In our opinion, the President’s role under our Constitution as Commander in Chief and Chief Executive vests him with the constitutional authority to order United States troops abroad to further national interests such as protecting the lives of Americans overseas. Accordingly, where, as here, United States government personnel and private citizens are participating in a lawful relief effort in a foreign nation, we conclude that the President may commit United States troops to protect those involved in the relief effort. In addition, we believe that long-standing precedent supports the use of the Armed Forces to protect Somalians and other foreign nationals in Somalia. . . .

From the instructions of President Jefferson’s Administration to Commodore Richard Dale in 1801 to “chastise” Algiers and Tripoli if they continued to attack American shipping, to the present, Presidents have taken military initiatives abroad on the basis of their constitutional authority. . . . Against the background of this repeated past practice under many Presidents, this Department and this Office have concluded that the President has the power to commit United States troops abroad for the purpose of protecting important national interests. . . .

At the core of this power is the President’s authority to take military action to protect American citizens, property, and interests from foreign threats. . . . In *Durand v. Hollins*, 8 F.Cas. 111 (1860), an American naval officer, under orders from the President and the Secretary of the Navy, bombarded Greytown, Nicaragua, in retaliation for the Nicaraguan government’s refusal to make reparations for attacks against United States citizens and property. In a suit brought against the naval officer, Justice Nelson held that the offer properly took this action, observing that such an attack on American citizens and property required the sort of swift and effective response that only the Executive could make. . . .

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It is also essential to consider the safety of the troops to be dispatched as requested by Security Council Resolution No. 794. The President may provide troops with sufficient military protections to insure that they are able to carry out their humanitarian tasks safely and efficiently. He may also decide to send sufficient numbers of troops so that those who are primarily engaged in assisting the United Nations in noncombatant roles are defended by others who perform a protective function. . . .

Nor is the President’s power strictly limited to the protection of American citizens in Somalia. Past military interventions that extended to the protection of foreign nationals provide precedent for action to protect endangered Somalians and other non-United States citizens. For example, in 1965, President Lyndon Johnson explained that he had ordered United States military intervention in the Dominican Republic to protect both Americans and the citizens of other nations. . . .

. . . . Here, too, maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest, and will promote the United States’ conception of a “new world order.”

. . . . The President is entitled to rely on this [Security Council] resolution, and on its finding that the situation in Somalia “constitutes a threat to international peace and security,” in making his determination that the interests of the United States justify providing the military assistance the Security Council Resolution No. 794 calls for. Moreover, American assistance in giving effect to this and other Security Council resolutions pertaining to Somalia would in itself strengthen the prestige, credibility and effectiveness of the United Nations – which the President can legitimately find to be a substantial national foreign policy objective, and which will tend further to guarantee the lives and property of Americans abroad.

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1. Excerpt taken from 16 *Opinions of the Office of Legal Counsel* 6 (1992). [↑](#footnote-ref-1)