

# LEGAL RESPONSES TO INTERNATIONAL TERRORISM: CONSTITUTIONAL CONSTRAINTS ON PRESIDENTIAL POWER\*

*Robert F. Turner\*\**

Watching the news this morning on CNN, and reading the front page of this morning's *USA Today*, I learned there is a heavy-weight championship fight coming up in a few days; and I was wondering if this morning's panel was going to seem like a preliminary bout to that contest. If anyone has that expectation, I fear I may disappoint you, as neither Michael Reisman nor Lori Damrosch said much with which I would disagree. Indeed, if Lori had stopped after the first twenty minutes, I would have had difficulty thinking of *anything* that either of them had said with which I would wish to dissent.

As always, Michael's presentation was absolutely brilliant. He made a couple of points I might elaborate on, and after we each expanded our views there might be some fine differences; but I found nothing in his presentation with which to quarrel. Similarly, Lori's presentation was excellent. Early in her presentation she indicated she felt I would disagree on how soon we should resort to the use of lethal force, but I don't disagree in principle at all that the use of force is a last resort—and *must* be a last resort if it is to be permissible under international law. When we get into the War Powers Resolution I am confident some differences will emerge, but as a general principle I found myself quite comfortable with both presentations.

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\* To aid the reader, footnotes have been added by the Editors.

\*\* Professor Turner received both his JD and SJD from the University of Virginia School of Law, where he co-founded the Center for National Security Law in 1981 and continues to serve as its Associate Director. A former three-term Chairman of the ABA Standing Committee on Law & National Security and for many years Editor of the ABA *National Security Report*, during 1994–95 he occupied the Charles H. Stockton Chair of International Law at the U.S. Naval War College. An Army veteran of two tours in Vietnam, he served for five years as national security adviser to a member of the Senate Foreign Relations Committee in the mid-1970s and later as Principal Deputy Assistant Secretary of State for Legislative Affairs and as the first President of the U.S. Institute of Peace.

## I. THE THREAT OF TERRORISM

Michael made the point, which I had not heard before, that more Americans may die each year from bee stings than die in terrorist attacks. As a factual matter the point may well be valid, but I suggest it has less to do with the risks we face than with our remarkable good fortune—*thus far*. It was a clever comment. But I do not think Michael would disagree with me that America faces a serious threat of terrorism, and perhaps because we have been so lucky, many Americans do not take the threat seriously enough.

Let me illustrate my point with a reference to the February 26, 1993, World Trade Center bombing, which killed half-a-dozen people. To be sure, in the big picture, that is not a vast number. However, the possible number of fatalities could have been much greater considering that an estimated *fifty thousand* people were evacuated from the twin towers following the bombing—roughly the number of Americans killed during the entire thirteen year Vietnam conflict. If the participants in that attack had been a little smarter, we might well have been burying Americans by the tens of thousands. To put it mildly, we were *lucky*.

If America's luck is the good news, there is also bad news. The World Trade Center attack was with *conventional* explosives. If a single terrorist attack with conventional explosives might have killed as many people in a few minutes as we lost in thirteen years of combat in Indochina, what can we expect if our adversaries elect to use a weapon of mass destruction?

Michael mentioned a little about what is being done with "bugs"—things like anthrax, smallpox, and the plague. Literally *tons* of these agents have been produced around the world for use in weapons, and our ability to deal effectively with such an attack is extremely limited. I have been involved in some military war gaming—examining the likely consequences if a terrorist sprayed a little anthrax around a major international airport, or . . . well, I do not want to give anybody any ideas by going into details. Let's just say we are talking about a risk of millions of people losing their lives in a matter of days under some of these scenarios.

With our marvelous Internet, of course, we also face the possibility of a combined effort involving ideological or theological terrorists, drug cartels, international organized crime, and perhaps other extremists joining in a common cause to launch coordinated attacks in major population centers around the globe. The timing of Osama bin Laden's

embassy bombings last August<sup>1</sup> is but a primitive warning of what may lie ahead.

The threat is real. Twenty-six countries are currently developing chemical agents or chemical weapons—despite the fact that they are illegal.<sup>2</sup> Ten countries are currently conducting research into, or already have, biological weapons in violation of international law.<sup>3</sup> More than fifteen foreign terrorist groups have the ability and motivation to operate inside the United States.<sup>4</sup> We have been very lucky thus far.

## II. PRESIDENTIAL POWER TO USE FORCE

Now let me get more controversial by turning to the question of the constitutional constraints on the President's power to use military force against terrorists or for other purposes. I gather that is really supposed to be the central focus of our panel, and it is a topic I have spent some years writing and thinking about.

Most serious historians acknowledge that, from the earliest days of the first term of President Washington, American Presidents have been the senior partners in matters of war and peace.<sup>5</sup> But the post-Vietnam conventional wisdom is that this was a constitutional fluke—that Washington clearly usurped the proper powers given by the Constitution to Congress. This modern view is typified by the views of such scholars as Harold Koh, a colleague of Michael's at Yale who is now at the State Department.<sup>6</sup>

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1. See Lynne Duke, *Ninth Suspect Charged in Embassy Bombings; Tanzanian Man Arrested in S. Africa*, WASH. POST, Oct. 9, 1999, at A2 (reporting that Saudi millionaire Osama bin Laden has been linked, by U.S. officials, to the bombings of two U.S. embassies in Africa).

2. See *Global Spread of Chemical and Biological Weapons: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Gov't Affairs*, 101st Cong. 86 (1989) (statement of Senator John Glenn, Chairman).

3. See *id.*

4. See *The Threat to the United States Posed by Terrorists* (visited Oct. 29, 1999) <<http://www.fbi.gov/pressrm/congress/freehct2.htm>> (statement of FBI Director Louis J. Freeh, before the U.S. Senate Comm. on Appropriations).

5. See, e.g., JOHN NORTON MOORE, ET AL., NATIONAL SECURITY LAW, 764 (1990) (quoting 1 WILLIAM M. GOLDSMITH, THE GROWTH OF PRESIDENTIAL POWER 404 (1974)); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903, 946 (1994) [hereinafter Turner].

6. See HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR ix (1990). In general, Harold Koh's position is that there has been a departure from the framers' intent that one branch of government not dominate foreign affairs. See generally Harold Hongju Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122 (1991); Harold Hongju Koh, *Foreign Affairs and the Constitution: The Roles*

Proponents of this theory believe that President Washington seized the power, and everybody loved the old man so much that nobody wanted to mention the fact that he had just violated his oath of office.<sup>7</sup>

Where in the Constitutional text, we are asked, is the President given preeminence in this area? Harold Koh believes that it was not until 1793 that anyone suggested the Executive Power Clause was the basis of constitutional authority.<sup>8</sup> However, I submit that the answer lies in the largely ignored language of Article II, Section 1 of the Constitution, which provides that “[t]he executive Power shall be vested in a President of the United States of America.” That “executive Power” includes foreign affairs.

In both theory and uniform practice of the era, what John Locke termed the business of “War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth”<sup>9</sup> was recognized as being “executive” in nature.<sup>10</sup> Locke argued persuasively that these matters were “much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good.”<sup>11</sup>

James Madison argued, in the early days of the first session of the First Congress, during the summer of 1789, that the Executive Power Clause gave the President “all power of an Executive nature not particularly taken away” and vested elsewhere by the Constitution, and that the exceptions were to be construed narrowly.<sup>12</sup> In April of 1790, Thomas Jefferson pointed to this same clause in explaining to President Washington that “[t]he transaction of business with

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*of Congress, the President, and the Courts, The Treaty Power*, 43 U. MIAMI L. REV. 101, 106 (1988); Harold Hongju Koh, *War and Responsibility: A Symposium on Congress, The President, and The Authority to Initiate Hostilities, War and Responsibility in the Dole-Gingrich Congress*, 50 U. MIAMI L. REV. 1 (1995).

7. See Turner, *supra* note 5, at 937, 946.

8. See KOH, THE NATIONAL SECURITY CONSTITUTION, *supra* note 6.

9. MOORE, *supra* note 5, at 750 (quoting JOHN LOCKE, TWO TREATISES OF GOVERNMENT: A CRITICAL EDITION WITH AN INTRODUCTION AND APPARATUS CRITICUS § 146, at 159–60 (P. Laslett rev. ed. 1963) (3d ed. 1698)).

10. See, e.g., MOORE, *supra* note 5 at 750, 752 (detailing Montesquieu’s and Blackstone’s agreements with Locke on the issue of executive power).

11. *Id.* at 750 (quoting LOCKE, *supra* note 9, § 147, at 159–60).

12. Letter from James Madison to Edmond Pendleton (June 21, 1789), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON, 1769–1793, at 477–78 (J.B. Lippincott & Co. ed., 1867).

foreign nations is Executive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.”<sup>13</sup>

Three days later, President Washington wrote in his diary that he had discussed Jefferson’s view with Madison and Chief Justice John Jay, and they shared his view that the business of foreign intercourse was confided to the President except for the specific exceptions vested in Congress or the Senate.<sup>14</sup>

In 1793, Alexander Hamilton made the argument a bit more publicly, writing in his first *Pacificus* Letter:

The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[al]ifications* which are expressed in the instrument.

. . . .

It deserves to be remarked, that as the participation of the Senate in the making of Treaties and the power of the Legislature to declare war are exceptions out of the general “Executive Power” vested in the President, they are to be construed strictly—and ought to be extended no further than is essential to their execution.<sup>15</sup>

This interpretation of Article II, Section 1, was in fact supported by the First President,<sup>16</sup> a majority of both Houses of the First Congress,<sup>17</sup> the First Chief Justice of the United States,<sup>18</sup> the heads of both of our early Political Parties, all

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13. MOORE, *supra* note 5, at 775 (quoting THOMAS JEFFERSON, *Opinion on the Question Whether the Senate has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions*, in 3 THE WRITINGS OF THOMAS JEFFERSON 15–18 (A. Lipscomb & A. Bergh eds., 1904)).

14. See MOORE, *supra* note 5, at 776 (quoting 16 PAPERS OF THOMAS JEFFERSON, at 380 (J. Boyd ed., 1961)).

15. MOORE, *supra* note 5, at 761–62 (quoting Alexander Hamilton, *Pacificus No. I*, Philadelphia, June 29, 1793, *reprinted in* 15 THE PAPERS OF ALEXANDER HAMILTON 33, 36–40, 41–42 (H. Syrett ed., 1969)).

16. See MOORE, *supra* note 5, at 775–76 (discussing President Washington’s interpretation of the Constitution’s Executive Power Clause).

17. See 1 Annals of Cong. 515–17 (J. Gales ed., 1799).

18. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW B-1 (13th ed. 1997); THE FEDERALIST NO. 64 (John Jay), *in* THE FEDERALIST AND OTHER CONSTITUTIONAL PAPERS 352, 355 (E.H. Scott ed., 1894).

three authors of the *Federalist Papers*,<sup>19</sup> and by leaders of Congress until about the time of the Vietnam War.<sup>20</sup>

This last statement may indeed be shocking. But let me illustrate the point by reading a quote from a speech reprinted in the *Cornell Law Quarterly*, in 1961:

The pre-eminent *responsibility* of the President for the formulation and conduct of American foreign policy is clear and unalterable. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation’s power, which can be moved by his will alone—the armed forces, the diplomatic corps, the Central Intelligence Agency, and all of the vast executive apparatus. As Commander-in-Chief of the armed forces, the President has full responsibility, which cannot be shared, for military decisions in a world in which the difference between safety and cataclysm can be a matter of hours or even minutes. . . . It is important to note, however, that while this responsibility is indeed very broad, his authority is often infringed upon or thwarted in practice by unauthorized persons.<sup>21</sup>

This speech was by none other than Senate Foreign Relations Committee Chairman J. William Fulbright.<sup>22</sup>

And then, as the controversy in Vietnam stretched the fabric of American society, it was as if we had a massive hard drive memory crash, and a whole school of revisionist scholars emerged to tell us that Congress was intended to be the boss. My friends Louis Fisher<sup>23</sup> and Harold Koh<sup>24</sup> are among the best of this group, but they are mistaken.

19. See MOORE, *supra* note 5, at 756, 773–74, 776 (listing Alexander Hamilton, James Madison and John Jay as authors of the *Federalist Papers* and noting their emphasis on the foreign relations power as the essential element of the executive power grant).

20. See Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 871 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)).

21. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 3 (1961) (emphasis in original).

22. See *id.*

23. Louis Fisher is a Senior Specialist in Separation of Powers, Congressional Research Service, The Library of Congress. See, e.g., Louis

Put simply, no declaration of war or other specific statutory authorization is necessary for the President to take action against a terrorist or terrorist group unless the strategy involves launching a large-scale aggressive war against another sovereign state. That, at least, was the original understanding. I would go further and say that the President requires no congressional authority (other than funds and a military force to command) to use U.S. troops to carry out peacekeeping operations authorized by the U.N. Security Council. At least one thing is clear: The senators who, in 1945, voted 89–2 to consent to the ratification of the U.N. Charter,<sup>25</sup> in addition to the members of both houses who voted overwhelmingly to enact the U.N. Participation Act<sup>26</sup> later that same year, did *not* believe any congressional role was necessary or appropriate when the Security Council voted to meet force with force.<sup>27</sup>

For example, the unanimous *Report* of the House Foreign Affairs Committee<sup>28</sup> recommending enactment of the U.N. Participation Act stated:

Preventive or enforcement action by these [U.S.] forces upon the order of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war. Consequently, the provisions of the Charter do not affect the exclusive power of the Congress to declare war.

The committee feels that a reservation or other congressional action . . . would also violate the spirit of the United States Constitution under which the President has well-established powers and

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Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 39 n.a1. Generally, Louis Fisher's position is that a President's decision to place U.S. troops in combat abroad requires approval by Congress in advance. See *id.* at 37. For further details, see LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* (4th ed. 1998); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995); LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* (1985).

24. See Koh, *supra*, note 6.

25. See 91 CONG. REC. 8134, 8190 (1945) (Senate's vote on the U.N. Charter).

26. U.N. Participation Act of 1945, Pub. Law No. 79-264, 59 Stat. 619 (codified as 22 U.S.C. § 287(a)–(e) (1994)).

27. See 91 CONG. REC. 8142 (1945) (Senate's vote on the U.N. Charter); 91 CONG. REC. 11,392, 11,407 (1945) (Senate's vote on the U.N. Participation Act); 91 CONG. REC. 12,267, 12,288 (1945) (House of Representative's vote on the U.N. Participation Act).

28. See H.R. REP. NO. 79-1383 (1945), *reprinted in* 1945 U.S.C.C.S. 927.

obligations to use our armed forces without specific approval of Congress.<sup>29</sup>

Indeed, on December 4, 1945, the final day of Senate consideration of the U.N. Participation Act, Senator Burton Wheeler (R-Mont.) attempted to include an amendment requiring the President to seek prior legislative sanction before sending U.S. troops into combat pursuant to a decision of the Security Council.<sup>30</sup> His amendment stated in part:

[T]he President shall have no authority, to make available to the Security Council any armed forces to enable the Security Council to take action under article 42 of said Charter, unless the Congress has by appropriate act of joint resolution authorized the President to make such forces available . . . in the specific case in which the Council proposes to take action.<sup>31</sup>

After extensive debate during which the bipartisan Senate leadership denounced this amendment as an effort to subvert the Charter obligation already assumed by the United States, the Wheeler Amendment was rejected by a margin of more than seven to one, receiving only nine affirmative votes.<sup>32</sup>

The first real test of the U.N. system came in June of 1950, when North Korea invaded South Korea.<sup>33</sup> President Truman immediately went to Congress and asked whether he should seek a formal declaration of war.<sup>34</sup> The bipartisan leadership of both houses told him not only that he had ample authority under the Constitution and the U.N. Charter to act, but Senate Foreign Relations Committee Chairman Tom Connally (D-TX) and Majority Leader Scott Lucas (D-IL) were joined by most congressional leaders in discouraging Truman from seeking a formal resolution of approval or even addressing a joint session of Congress.<sup>35</sup>

29. *Id.* at 934.

30. *See* 91 CONG. REC. 11,404 (1945).

31. *Id.*

32. *See id.* at 11,404–05.

33. *See* U.S. DEP'T OF STATE, PUB. NO. 6446, 2 AMERICAN FOREIGN POLICY 1950–1955, at 2536–37.

34. *See* U.S. DEP'T OF STATE, PUB. NO. 8859, 7 FOREIGN RELATIONS, 1950, at 160 (1976).

35. *See* TOM CONNALLY, MY NAME IS TOM CONNALLY (1954). The following exchange is illustrative:

[Truman] hadn't as yet made up his mind what to do

Put simply, the idea that President Truman intentionally bypassed or ignored Congress at the time of the Korean invasion is a *myth*. An even greater myth is that President Johnson ignored Congress in getting the United States involved in a major war in Indochina.<sup>36</sup> Indeed, President Johnson felt that Truman had erred in not insisting upon a congressional vote in 1950, and in August, 1964, Johnson asked Congress to debate and vote on a joint resolution that even Senator Fulbright admitted at the time gave the President authority to commit the nation to “war.”<sup>37</sup>

The right of the President to protect the nation against terrorist threats is constitutional rather than statutory in origin, and may not be taken away by a simple statute like the War Powers Resolution, any more than Congress could, by statute, vitiate the pardon power.<sup>38</sup> Congress does possess the power of the purse and may refuse to appropriate requested funds, but Congress may not place “conditions” on appropriations which are designed to usurp independent

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“Do you think I’ll have to ask Congress for a declaration of war if decide to send American forces into Korea?” the President asked.

“If a burglar breaks into your house,” I said, “you can shoot at him without going to the police station and getting permission. You might run into a long debate by Congress, which will tie your hands completely. You have the right to do it as commander-in-chief and under the UN Charter.”

*Id.* at 346 (recalling his meeting with President Truman on June 25, 1950); see also 2 MEMOIRS BY HARRY S. TRUMAN, YEARS OF TRIAL AND HOPE 338 (1956) (“The congressional leaders approved of my action. On that same day [June 27, 1950] Thomas E. Dewey, Republican leader, pledged his full support.”); see also Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the “Imperial President” Myth*, 19 HARV. J.L. & PUB. POL’Y 533, 567, 574–75 (1996).

36. See 110 CONG. REC. 18,237 (1964) (reporting President Johnson’s recommendation that Congress adopt a resolution expressing support for all necessary action to protect the U.S. Armed Forces and to help the free nations of the area to defend their freedom after he had already directed air action); *Id.* at 18,416–18 (revealing that President Johnson was present during the Senate’s consideration of a joint resolution to promote the maintenance of international peace and security in southeast Asia).

37. See *id.* at 18,409. During the Senate floor debates for the Gulf of Tonkin Resolution, in August of 1964, the following exchange occurred between Democratic Senator Fulbright, from Arkansas, and Republican Senator Cooper, from Kentucky:

Mr. COOPER: Then, looking ahead, if the President decided that it was necessary to use such force as could lead into war, we will give that authority by this resolution?

Mr. FULBRIGHT: That is the way I would interpret it.

*Id.*

38. See *United States v. Klein*, 80 U.S. (13 Wall.) 128, 141 (1871).

power vested in the President by the Constitution or which otherwise conflict with the overall constitutional scheme.<sup>39</sup>

When Congress passes a law saying that the President can not spend any money to deploy troops, or to take certain actions, Congress is actually trying to take away the discretionary power given by the American people to the President, as Commander-in-Chief and Chief Executive. That is an unconstitutional use of Congressional power, as much so as when Congress tried to vitiate the presidential pardon power in *U.S. v. Klein*.<sup>40</sup>

The President has independent constitutional authority to apply whatever resources are placed at his disposal by Congress to intentionally use lethal force against terrorists when necessary for self-defense or to meet non-aggressive obligations established by treaty.<sup>41</sup> Killing someone like Osama bin Laden, who is engaged in an ongoing campaign of lethal violence against Americans, is an act of self-defense, not an act of murder, and since "assassination" is by definition a form of "murder," that issue is not raised by such a policy.<sup>42</sup> Further, even were this not true, the prohibition against "assassination" in Executive Order 12,333 is not a "law," but merely a presidential pronouncement which may be repealed, modified, or suspended on an *ad hoc* basis by an incumbent President.<sup>43</sup>

The President has a duty, and thus the power, to see the nation's laws faithfully executed. This gives him authority to carry out the nation's obligations under treaties, consistent with other provisions of the Constitution.<sup>44</sup> If the U.N. Security Council authorizes the use of lethal force in a setting not otherwise justified by self-defense (e.g., Haiti), the President is authorized to act on behalf of the United States pursuant to that decision. However, if the action involved is aggressive in nature and otherwise would warrant a declaration of war, the President must first obtain legislative

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39. See *United States v. Lovett*, 328 U.S. 303, 306-07 (1946).

40. See *Klein*, 80 U.S. (13 Wall.) at 147.

41. See John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1392-94 (1988) (interpreting section 2(c) of the Constitution).

42. See Robert F. Turner, *In Self-Defense, U.S. Has Right to Kill Terrorist bin Laden*, USA TODAY, Oct. 26, 1998, at 17A.

43. See Boyd M. Johnson, III, *Executive Order 12,333: The Permissibility of an American Assassination of a Foreign Leader*, 25 CORNELL INT'L L.J. 401, 403 (1992).

44. See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

sanction.<sup>45</sup> No authorization from the Security Council is necessary for uses of force justified by self-defense, which includes at least some right of anticipatory self-defense.<sup>46</sup>

For prudential reasons, a wise President will normally consult carefully with Congress and seek to approach terrorism in a bipartisan and comprehensive manner, while at the same time preserving the operational secrecy necessary for success and the safeguarding of intelligence sources and methods. But both the lead and the final decision are his so long as Congress has given him the wherewithal to achieve his objective.

### III. INTERNATIONAL LAW CONSTRAINTS

The U.N. Security Council has declared "the suppression of acts of international terrorism" to be "essential for the maintenance of international peace and security" and has called upon all states "to adopt, in accordance with international law and as a matter of priority, effective and practical measures for security cooperation, for the prevention of such acts of terrorism, and for the prosecution and punishment of their perpetrators."<sup>47</sup>

When operating outside the territory of a sovereign state, terrorists have no greater "rights" than pirates or other lawless bands and ought to be considered enemies of all mankind. They are protected by fundamental human rights guarantees like the prohibition against torture, but when terrorists engage in the wrongful use of lethal force they are not immune from necessary and proportional acts of a defensive nature.

If a sovereign state is actively involved in supporting international terrorism or terrorist groups, states which are the target of lethal attacks by those terrorists (and other states acting in collective self-defense pursuant to a victim state's request) should have a right to use necessary and proportional lethal force in the territory of the sponsoring state for the purpose of protecting themselves from terrorist attacks.

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45. See *The Brig Amy Warwick*, 67 U.S. (2 Black) 635, 649 (1862).

46. See U.N. CHARTER art. 51, reprinted in *BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER* 16, 23-24 (Burns H. Weston, et al. eds., 2d ed. 1990); see also Robert F. Turner, *STATE SOVEREIGNTY, INTERNATIONAL LAW, AND THE USE OF FORCE IN COUNTERING LOW-INTENSITY CONFLICT* 74-78 (Alberto R. Coll et al. eds., 1995).

47. S.C. Res. 1189, U.N. SCOR, 3915th mtg. at 1, U.N. Doc. S/RES/1189 (1998).

If a sovereign state is not supporting terrorists, but has been made aware that terrorists are operating on its territory and lacks either the ability or the will to take effective measures to bring these activities to an end, then victim states should have the right to enter the territory of the host state for the limited purpose of neutralizing the terrorist threat if less intrusive alternatives are not available. This is a last resort, but, if peaceful means of protecting their interests are not available, it is a legal right. Obviously, if the host state is acting in good faith, it is generally wiser to try to work with it to end the threat or to obtain consent prior to using lethal force on its territory. But those are prudential considerations.

#### IV. ASSASSINATION ISSUE

In a setting where defensive lethal force is otherwise lawful, no rule of international law prohibits the intentional targeting of an individual terrorist or terrorist leader when necessary to neutralize an ongoing series of terrorist attacks, as long as peaceful remedies have been exhausted and alternative strategies would result in a greater loss of human life.

Members of the United Nations have a duty under Article 25 of the Charter to accept and carry out a decision of the Security Council.<sup>48</sup> However, in the absence of an Article 43 Agreement,<sup>49</sup> the Security Council does not have the power to compel a Member State to contribute military forces or otherwise to engage in military activities.<sup>50</sup> It does, however, provide legal justification for actions taken pursuant to and in accordance with such a resolution.

My time is running out, so let me briefly make just one more point—to close with something I hope will be no more controversial than my opening observation that we face a serious terrorism threat. Wherever possible, as a policy matter, the United States should seek to address problems of international terrorism multilaterally through the Security

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48. See U.N. CHARTER art. 25, *supra* note 46, at 20.

49. An Article 43 Agreement is a negotiated pact among Security Council members to provide to the Security Council “armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.” *Id.* art.43, at 22.

50. See *id.* art. 43 ¶ 2, at 22 (emphasizing that “[s]uch agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided”).

Council or in cooperation with like-minded states in other fora. If the Security Council is blocked from acting by the veto of a Permanent Member, we may need to look to other organizations or try to form an *ad hoc* coalition of like-minded states. If that fails, we may ultimately find it necessary to act alone. But, whenever possible, we ought to recognize that these are multinational problems that warrant multinational responses. And as we plan such operations, we ought to make certain that the international lawyers are right there in the operations center advising at every stage of the process.

We have a right to protect our citizens and the citizens of other states from terrorist attacks. We also have a self-interest in upholding the rules of international and constitutional law. Fortunately, these interests are not incompatible.