

"Command" versus "Operational Control": A Critical Review of PDD-25

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On May 3, 1994, President Bill Clinton signed Presidential Decision Directive 25 (PDD-25), a policy directive outlining the administration's position on reforming multilateral peace operations. 1 The result of a 14-month inter-agency review of U.S. policy regarding multinational peacekeeping operations, PDD-25 sets forth several stringent requirements that must be satisfied before the U.S. will participate in future international peacekeeping operations and suggests ways in which the U.N. could improve its management of such operations. 2 In one of PDD-25's provisions, the Clinton Administration attempts to clarify the position of the United States with regarding command and control of United States military personnel participating in a multilateral peacekeeping operations. 3 The Directive defines "command" of United States armed forces and "operational control" of those forces, distinguishes the two, and maintains that although the President never relinquishes "command" over United States military personnel, he may place United States military personnel under the "operational control" of a non-U.S. commander for limited and defined purposes. 4

Although much of the debate regarding the President's authority to commit U.S. troops to participate in United Nations peacekeeping, enforcement actions, and "peace enforcement" actions has centered primarily around Congressional war powers, 5 PDD-25 raises a significant question of the relevance and constraining effect of another of the Constitution's provisions regarding war powers: the Commander-in-Chief clause. 6 Despite the fact that the Commander-in-Chief clause has traditionally been viewed and invoked as the source of broad and expansive powers by the President, the rise in the number of peace operations under the auspices of the United Nations and the increasing control that the U.N. has exerted over these operations have spawned serious questions about whether and how much the Commander-in-Chief clause constrains the President's ability to lend United States armed forces to United Nations military operations. 7 PDD-25 attempts to answer this question by distinguishing between "command" and "operational control" of United States armed forces; however, a substantial question that PDD-25 virtually invites to be asked is whether that distinction is relevant for constitutional purposes. In other words, is "operational control" divorceable from "command" over U.S. forces, and accordingly, it constitutional for the President to place United States military personnel under the "operational control" of the United Nations or a foreign commander? Careful examination of PDD-25's provisions, the history of the Commander-in-Chief clause, and of historical examples of command over U.S. military forces by foreign powers lead to two conclusions. First, it would not only be inconsistent with PDD-25 for the United States to enter into or abide by an Article 43 agreement with the United Nations putting a set number of U.S. troops on call for use by the U.N. Security Council, but would be unconstitutional as well. 8 Second, participation by U.S. forces in U.N. operations where the U.S. does not retain full command and operational control over U.S. forces is at the very least constitutionally problematic. 9

THE RISE AND DECLINE OF "ASSERTIVE MULTILATERALISM"

With the collapse of the Soviet Union, the prospect of a greater role for the U.N. in world affairs began to emerge. President Bill Clinton in his campaign and during his early days in office indicated that he would seek an increased role for the U.N. in maintaining international peace. 10 In a speech entitled "A New Covenant for American Security," delivered at Georgetown University in 1991, then Governor Bill Clinton advocated "shift[ing] the burden of maintaining peace to a wider coalition of nations of which America will be a part" and exploring the possibility of establishing a U.N. Rapid Deployment Force "that could be used for purposes beyond traditional peacekeeping, such as standing guard at the borders of countries threatened by aggression; preventing attacks on civilians; providing humanitarian relief; and combatting terrorism and drug trafficking." 11 Upon taking office, President Clinton acted quickly to make good on his promise provide a greater role for the U.N., 12 a policy which his administration dubbed "assertive multilateralism." 13 In apparent response to Secretary General Boutros Boutros-Ghali proposal that member states enter Article 43 agreements with the U.N. and " earmark" forces for participation in U.N. peace operations, 14 The Clinton Administration made it known that it was going to explore the possibility of implementing Article 43. 15 Additionally, in actions he considered as setting precedents for the future, President Clinton authorized several thousand U.S. logicians to serve in Somalia under the auspices of United

Nations Operation in Somalia (UNOSOM), 16 and he also authorized U.S. troops to serve as peacekeepers under the control of the U.N. in Macedonia. 17 President Clinton in Presidential Review Directive 13 (PRD-13) also directed his administration to commence an interagency policy study on the U.S.'s role in peacekeeping, the result of which was PDD-25. 18

However, October 1993 marked the beginning of the end for this hope for an expanded role for U.N. command structures in peace operations. On October 3, 1993, a team of U.S. Army Rangers sent to capture Mohammed Farah Aideed was ambushed in Mogadishu, resulting in eighteen American deaths and the sight of dead U.S. soldiers being dragged through the streets of Mogadishu on the evening news. 19 After that incident, the Clinton Administration's policy regarding the involvement of the U.S. in peace operations began a pronounced change. 20 In a speech to the U.N. General Assembly only days after the ambush, President Clinton declared that the "United Nations simply cannot become engaged in every one of the world's conflicts. If the American people are to say yes to U.N. peacekeeping, the United Nations must know when to say no." 21 Shortly thereafter, President Clinton announced that U.S. troops would participate in U.N. peace operations only if they served under a U.S. chain of command. 22 A few months later in May 1994, the Clinton Administration promulgated PDD-25 and its strict guidelines for U.S. participation in U.N. peace operations, among which included Section V regarding command and control of U.S. forces.

PDD-25 AND THE DISTINCTION BETWEEN "COMMAND" AND "OPERATIONAL CONTROL"

Section V of PDD-25 sets forth U.S. policy with regard to command and control of U.S. forces participating in U.N. operations. 23 Section V begins by emphatically declaring that the President "retains and will never relinquish command authority over U.S. forces." 24 However, PDD-25 states that the President, on a case-by-case basis, may authorize the placement of U.S. troops under the operational control of a "competent UN commander for specific UN operations authorized by the Security Council." 25 The directive then states that if a U.N. operation is likely to involve a large role for U.S. forces or the prospect of combat involving U.S. forces, then the President would be less likely to authorize U.N. operational control over U.S. forces and instead would insist on conducting any such operation under U.S. command and operational control, through regional organizations like NATO, or through ad hoc coalitions such as the coalition formed to expel Iraqi forces from Kuwait in 1991. 26

In an effort to bolster this policy, PDD-25 attempts to define the terms "command" and "operational control." 27 The directive defines "command" as "the authority to issue orders covering every aspect of military operations and administration." 28 It emphasizes that U.S. commanders derive their authority from the Constitution, federal law, and the Uniform Code of Military Justice. 29 Moreover, this authority "flows from the President to the lowest U.S. commander in the field. The chain of command from the President to the lowest U.S. commander in the field remains inviolate." 30 The directive goes on to define the term "operational control." 31 Describing it as a "subset of command," the directive states that "operational control" is "the authority to assign tasks to U.S. forces already deployed by the President, and assign tasks to U.S. units led by U.S. officers." 32 However, "operational control" does not include the authority to alter the composition of units, discipline personnel, confer promotions, redistribute supplies, separate units, or to "change the mission or deploy U.S. forces outside the area of responsibility agreed to by the President." 33 The directive makes the bold assertion that "[n]o President has ever relinquished command over U.S. forces," but it concedes that "[i]t [may] sometimes [be] prudent or advantageous (for reasons such as maximizing military effectiveness and ensuring unity of command) to place U.S. forces under the operational control of a foreign commander to achieve specified military objectives." 34 It bolsters this assertion by stating that U.S. military personnel have served under the "operational control" of foreign commanders during both world wars, Operation Desert Storm, and under NATO since the establishment of the alliance, and that U.S. military personnel have served in various U.N. peace operations since 1948. 35

PDD-25 emphasizes that even when U.S. military personnel are under the operational control of a foreign commander, the "fundamental elements" of U.S. command and control continue to apply. 36 In particular, the U.S. commander of a unit placed under the operational control of a U.N. commander retains the right to report separately to his superiors in the U.S. chain of command as well as the U.N. commander in charge of the operation. 37 Moreover, if a U.S. commander receives an order from a U.N. commander which he feels is illegal under international law or without the mission mandate, and if he is unable to resolve the dispute with the immediate U.N. commander, he may refer the order to "higher U.S. authorities." 38 The directive insists that "[u]nity of command remains a vital concern," and that many issues regarding the legality of orders

and the extent of the mission mandate will be constantly reviewed "'on the ground' before orders are issued." 39

Although the distinction PDD-25 attempts to draw between "command" and "operational control" may not be especially sharp, it represents a sharp departure from the original position the Clinton Administration took with regard to establishment and use of U.N. military power. 40 The directive endeavors to carve out a distinction that will not only satisfy demands from within the country that the President retain ultimate control over U.S. military personnel, but one which will also satisfy increasingly apparent constitutional restrictions while at the same time not precluding the U.S. from participating in peace operations under the auspices of the U.N. Still, an examination of the meaning of the "new found" constraint imposed by the Commander-in-Chief clause as well as the proffered historical precedents of "operational control" of U.S. military personnel by foreign commanders is in order to determine if the distinction passes constitutional muster.

THE COMMANDER-IN-CHIEF CLAUSE AND ITS CONCEPTION OF COMMAND AND CONTROL

The phrase "Commander-in-Chief" was not a new term to the Framers of the Constitution; the phrase had existed in British law since 1639 when Charles I appointed a "Commander-in-Chief" over the army fighting in the First Bishop's War. 41 These Commanders in Chief, as appointees of the British crown, could act legally only at the direction of the King himself, his Secretary of War, or Parliament. 42 The Continental Congress also employed the term and its understood meaning when it appointed George Washington "General and Commander-in-Chief of the Army of the United Colonies" in 1775. 43 However, Congress required Washington, under the terms of his commission, to obey its orders and directions. 44 Additionally, Congress, still fearful of standing armies, required Washington to report regularly to Congress and to acknowledge Congress's ultimate authority in the selection of his top officers. 45 But as the Revolutionary War dragged on, Congress eventually realized that conducting war by committee was not practical; it eventually formed the Board of War, which conveyed orders from Congress to General Washington. 46

The Framers of the Constitution employed the term "Commander-in-Chief" in the Article II, Section 2, clause 1 in outlining the powers of the President of the United States:

The President shall be Commander-in-Chief of the Army and the Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States. . . . 47

The clause received scant discussion at the Constitutional Convention, 48 and Alexander Hamilton stated tersely in *The Federalist* No. 69 that the clause established the President at "the first admiral and general of the Confederacy" and vested in him "supreme command and direction of the military and naval forces." 49 The clause did not receive much more discussion during the state ratifying conventions. 50 What discussions did take place at the state ratifying conventions concerning the Commander-in-Chief clause centered primarily around concerns that the President might use the armed forces to impose dictatorial rule. 51 Other concerns expressed the fears of some that the clause might enable the President to exercise direct control over the armed forces. 52 Supporters of the Constitution countered that the clause vested in the President only traditional Commander-in-Chief powers, powers which could be exercised only over forces constituted by Congress pursuant to its constitutional powers. 53

In addition to establishing clear civilian control over U.S. military forces, the Commander-in-Chief clause vests ultimate control over the nation's armed forces in the President. 54 Having learned the difficulties of conducting "war by committee" by subordinating the military to the control of the Continental Congress, the Framers vested control over the military in the President in order to ensure consistency in the command of the armed forces. 55 While Congress received the power to make the political decision of whether to commit the nation to war, the President received the authority "to command the troops in day-to-day operations." The President's ultimate and plenary control over the military is underscored by his power to take actual command over troops in the field and to make tactical decisions ordinarily left to military generals, a power which several Presidents have seen fit to exercise. 56 Indeed, some of the Framers and state ratification convention delegates proposed amendments that would have forbidden the President from taking actual command over the military. However, those amendments were soundly defeated, indicating an understanding that the clause permitted the exercise of such a power. 57 The President also has the authority to direct the movements of the armed forces, 58 even to the extent of ordering them to deploy outside the United States in time of peace. 59

In view of this discussion of the Commander-in-Chief clause, it is apparent that the definition of "command" outlined in PDD-25 is consistent in large part with the Commander-in-Chief clause. The Commander-in-Chief clause contemplates a hierarchical command structure for the military with the President sitting at its apex, 60 as does PDD-25. 61 Furthermore, the clause and PDD-25 contemplate that the President has the ultimate and undelegable (outside the military command structure) power to move troops, promote officers and enlisted personnel, enforce discipline, and alter the internal organization of military units. 62 This view of "command" is consistent with the broad scope of power Presidents have claimed under the Commander-in-Chief clause.

Although the Commander-in-Chief clause vests power over the military in the President, it can also be said that the clause also binds him by making him the person ultimately responsible for the exercise of that power and the consequences that flow therefrom. In other words, the Commander-in-Chief clause serves not only as the source of Presidential authority, but also serves as a constraint on the President. PDD-25 implicitly acknowledges the constraining effect of the Commander-in-Chief clause by its declarations that the President always has and never will relinquish command over the armed forces. 63 Given this revised construction of the Commander-in-Chief clause as a constraint on as well as a grant of Presidential power, an examination of whether participation by U.S. armed forces in military operations conducted the U.N. is permitted by our Constitution.

ARTICLE 43 AGREEMENTS AND THE COMMANDER-IN-CHIEF CLAUSE

As part of the United Nations Charter, the founders of the United Nations provided a mechanism through which the organization could fulfill the wish of its founders to be the guarantor of world peace and stability. Article 43 of the United Nations charter calls upon all members of the U.N., "in order to contribute to the maintenance of international peace and security," to conclude special agreements with the U.N. Security Council to make "armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security. 64 Popularly referred to as "Article 43 agreements," the agreements were to specify the types and strength of forces that would be made available, their location and degree of readiness, and what facilities and assistance would accompany the troops. 65 Article 43 exhorts the charter's signatories to conclude these special agreements with the Security Council "as soon as possible on the initiative of the Security Council," and additionally, it states that the special agreements would be "subject to ratification by the signatory states in accordance with their respective constitutional processes." 66

The force arrangement contemplated by Article 43 was the result of a desire by the United States to establish a framework for collective security that could be enforced by use of military power to eliminate threats to world peace and stability, but also to limit the commitment of U.S. forces to such endeavors. In particular, President Roosevelt opposed any arrangement that would bind the U.S. to provide forces for enforcement of collective security without its consent, any establishment of an international standing army, and any arrangement that did not permit the U.S. to restrict the number and type of armed forces that could be deployed outside the Western Hemisphere. 68 Nevertheless, the drafters seriously considered providing for a standing United Nations army, but they eventually scuttled the idea in favor of the framework outlined in Article 43. 69

The U.N. charter also established the Military Staff Committee (MSC) in Article 47. 70 The MSC was to be composed of the Chiefs of Staff of the permanent members of the U.N. Security Council or their nominees and any additional representatives the MSC deemed it necessary to associate. 71 The MSC's duties were to assist and advise the Security Council on the number of forces required to maintain international peace and security 72 and to be responsible for the strategic direction of armed forces made available to the Security Council, presumably pursuant to Article 43 agreements. 73 Article 47 also tersely provides that "[q]uestions relating to command of such forces shall be worked out subsequently." 74

In considering the constitutional implications of Article 43 during the debates on ratification of the United Nations Charter, the United States Senate concentrated almost exclusively on the potential effect Article 43 would have on Congressional war powers. 75 In particular, some Senators vehemently argued that Article 43 was tantamount to a delegation of the congressional war powers to the Security Council or to the U.S. representative on the Council. 76 Other Senators stressed that the President should not be able to enter an Article 43 agreement without congressional approval of the agreement, or Congress would have in effect relinquished its power raise and support armies. 77 The Truman Administration assured Congress that the language in Article 43 that agreements to be concluded under it would be subject to ratification by the

"constitutional processes" of member countries. 78 Despite the concerns of some of its members, the Senate overwhelmingly ratified the United Nations charter by a vote of 89-2. 79 Congress shortly thereafter passed the United Nations Participation Act (UNPA), which in part required the President to submit any proposed Article 43 agreement to Congress for its approval. 80 But once an Article 43 agreement was concluded, the President would not be required to seek congressional permission to make the agreed upon number of forces available to the Security Council upon its request. 81

The MSC convened its first meeting London in 1946 at the request of the Security Council to begin drafting a model Article 43 agreement. 82 While all the members agreed that the Permanent Members of the Security Council would contribute most of the forces under Article 43 agreements and to reject establishing a U.N. army not subject to the control of the Security Council (or the veto of any of the five permanent members), the onset of the Cold War and the ensuing distrust that developed between the U.S. and the Soviet Union quickly disposed of the possibility of large commitments of forces from either country. 83 The MSC also failed to reach agreement on many other issues relating to Article 43 agreements, in particular the size of forces to be pledged, where the forces would be based when not under the control of the Security Council, responsibility for supplying pledged forces, etc. 84 By 1948, the MSC was hopelessly deadlocked and moribund. 85 With the demise of the MSC, any hope of concluding Article 43 agreements quickly vanished, and Article 43 has remained largely dormant since that time.

The new restrictions on command and control of U.S. forces outlined in PDD- 25 illustrate not only would it contravene U.S. policy for the U.S. to comply with an Article 43 agreement, but it would most likely be unconstitutional as well. PDD-25 emphasizes that the President must always retain command over U.S. forces. 86 However, the collective security scheme envisioned by Article 43 and Article 47 would require the President to cede command over U.S. forces pledged under an Article 43 agreement to the Security Council. Once called by the Security Council for service in an enforcement action, forces pledged under an Article 43 agreement would come under the political and strategic control of the Security Council, which would then be responsible for the strategic and political decisions regarding the use of those forces. 87 The MSC would act not only in an advisory capacity to the Security Council, but would also act as a conduit through which the strategic and political decisions of the Security Council regarding the use of Article 43 forces would be implemented. 88 Such an arrangement is clearly inconsistent with the position taken by the Clinton Administration in PDD-25 since it would require the President to relinquish command over U.S. forces pledged under an Article 43 agreement to a command structure completely outside the U.S. chain of command. 89 It is also inconsistent with the Constitution, implicitly contemplates a hierarchical command structure with the President at its top. 90

Additionally, the U.S. most likely would not be able to recall troops placed at the disposal of the Security Council. While the U.S., as a permanent member of the U.N. Security Council, could always block passage of resolutions calling forth Article 43 forces by use of its veto, thus avoiding having to commit U.S. forces to the Security Council in the first place, 91 once the Security Council passed a resolution calling Article 43 forces into service and command passed to the Security Council, the U.S. most likely would not be able unilaterally to withdraw its pledged forces without violating the Article 43 agreement, and accordingly, its treaty obligations under the U.N. Charter. 92 Only a subsequent resolution by the Security Council, passage of which the U.S. could not assure, could return command of Article 43 forces back to their respective countries. In contrast, PDD-25 declares that "[t]he U.S. reserves the right to terminate participation at any time and to take whatever actions it deems necessary to protect U.S. forces if they are endangered." 94 PDD-25 also specifies that when U.S. forces are placed under the "operational control" of a U.N. commander, the "fundamental elements of U.S. command still apply," among which being the right of U.S. commanders to refer questionable orders to their U.S. superiors. 95 Thus, given the degree of control PDD-25 would require the U.S. to retain over Article 43 forces, it seems clear not only that the U.S. not only comply with an Article 43 agreement, but also probably could not enter one either. Furthermore, given that the Constitution vests command over U.S. armed forces in the President, it is difficult to see how the President could remain the Commander-in-Chief of U.S. forces when they are placed under the command of the Security Council. 96

Thus, it appears not only that the United States will no longer support the revival of Article 43 for political reasons, it also appears that the U.S. probably should never seek to revive it because of the constitutional problems an Article 43 agreement with the Security Council would generate. Accordingly, Article 43 is likely to forever remain in the dustbin of bold visions never to be fulfilled.

"COMMAND" VS. "OPERATIONAL CONTROL": A CONSTITUTIONALLY ILLUSORY DISTINCTION

While PDD-25 clearly prohibits placing of U.S. troops under the "command" of a U.N. commander, PDD-25 attempts to hedge this position by declaring that the U.S. may place its forces under the "operational control" of a U.N. commander when it finds that it is advantageous to U.S. interests to do so. 97 PDD-25 describes operational control as a "subset of command" that entails the ability to "assign tasks" to U.S. forces that the President has already deployed, but operational control does not include certain other elements of command that are reserved to the President and are never vested in a U.N. commander. 98 The directive declares that this position is not a new one, and it cites instances from history in which U.S. troops, according to the directive, have served under the "operational control" of foreign commanders, the most notable being "World War I, World War II, Operations Desert Storm and . . . NATO from its inception." 99 However, when examined more closely, the distinction PDD-25 attempts to draw between "command" and "operational control" is arguably not a valid one when it is examined under the Commander-in-Chief clause. Accordingly, the President's authority to place U.S. troops under the "operational control" of a U.N. commander is, at the very least, constitutionally questionable.

Firstly, the directive's own concession that "operational control" is a "subset of command" deserves some attention. By defining operational control to be a "subset of command," PDD-25 implies that President is free to allow a U.N. commander to exercise such over U.S. forces without thereby relinquishing command. Unfortunately, it is not clear that this conclusion follows. As discussed earlier, the Constitution vests plenary power to command the armed forces in the President by virtue of the Commander-in-Chief clause. 100 Moreover, the President as Commander-in-Chief has the power to take personal command of the armed forces. 101 Of course, Presidents have rarely taken actual command (and for good reason), and most of the time actual command is delegated to the President's subordinates in the military chain of command. But although actual command and control is delegated to the President's subordinates, they ultimately remain responsible and accountable to the President for the exercise of this power. 102 However, it cannot be said that a U.N. commander is ultimately accountable to the President in the same way since a U.N. commander most likely has not taken an oath to support and defend the Constitution of the United States and to follow the orders of the President, whereas U.S. military personnel are required to take such an oath. 103 Just as the authority to command must flow from the President down through the chain of command, 104 accountability must flow back up through the chain of command to the President. Under this view, operational control is not merely a "subset of command" but is an inseparable component of it which cannot be relinquished because of the break in the chain of accountability. PDD-25's attempt to provide accountability by specifying that U.S. forces must retain the right to refer questionable orders separately to their U.S. superiors is not entirely persuasive since although a U.S. commander may be held accountable to the President, his U.N. commander might not be. Additionally, the Commander-in-Chief clause by its very language implies that all phases and aspects control over U.S. forces is vested in the President. A President who does not, through the chain of command, retain operational control over U.S. forces, "cannot be said to be 'in command'" of those forces. 107

Secondly, and more importantly, the historical precedents of "operational control" by foreign commanders fail to support the position PDD-25 attempts to stake out. An examination of the proffered instances of foreign control over U.S. troops reveal that they fall into two categories: instances of actual command over U.S. forces by foreign generals in emergency situations, and instances where foreign control has been at most nominal and where the U.S. command structure has remained virtually intact.

U.S. troops served under the command of foreign generals in both World War I and World War II, contrary to PDD-25's implication that they were merely under foreign operational control. When the U.S. found itself dragged into World War I in 1917, it was ill-equipped to deploy an army in Europe, primarily because it did not anticipate participation in the war. Until the U.S. could raise sufficient forces to deploy its own army in Europe, President Wilson authorized U.S. troops to fight under the command of the Allies in Europe. 109 Once in Europe, U.S. forces were integrated into British and French units and participated in several major battles under foreign command during 1917 and 1918. U.S. troops also fought under actual foreign command in World War II. 111 In 1942, the U.S. and Britain agreed to conduct "coalition operations:" the U.S. Joint Chiefs of Staff became a component of the Combined Chiefs of Staff (CCS), which organized field units composed of U.S. and British soldiers. Britain's General Montgomery commanded U.S. troops in Europe for a time, but by 1944 U.S. General Dwight D. Eisenhower had assumed command of all allied forces in Europe. 113

In each instance of foreign control over U.S. troops during the World Wars, U.S. forces were integrated into foreign units, and those forces reported directly to their respective foreign commanders. However, had PDD-25 been in effect during the World Wars, it would have flatly barred this level of control over U.S. troops. PDD-25 expressly states that a foreign commander exercising operational control over U.S. forces may not "separate units" or "change their internal organization,"

a principal which would have been violated by the integration of U.S. troops into foreign military units. 115 Also, U.S. troops were subsumed into command structures that were almost completely outside the U.S. chain of command, a situation PDD-25 implicitly rejects as inconsistent with the U.S. policy of the President retaining command over U.S. forces at all times. While placing U.S. troops under foreign command in these situations may have been constitutional exercises of the Commander-in-Chief power given the wartime exigencies involved, 117 these examples simply do not lend much, if any, support to the command/operational control distinction.

U.S. forces have also served in traditional U.N. peacekeeping missions since the founding of the organization. Traditional peacekeeping operations involve the deployment of military and civilian personnel between formerly warring parties in order to monitor cease fires and provide a "zone of disengagement" between the parties. Peacekeeping forces are ordinarily deployed only with the consent of all concerned parties; peacekeepers carry only light arms to be used only in self-defense. Peacekeeping forces are under the political control of the Security Council; however, the Secretary General is responsible for coordinating the day-to-day activities of peacekeeping forces. The Secretary General delegates this authority to the Under Secretary General for Peacekeeping Operations, who is assisted by the Military Advisor. 121 The Secretary General selects the force commander, subject to ratification by the Security Council, and the force commander reports to the Under Secretary. 122

As should be apparent, the command structure employed in traditional peacekeeping operations operates completely outside the U.S. military command structure, and the ultimate sources of command and control authority are the Secretary General and the Security Council. Placement of U.S. forces under the control of this command structure appears to be inconsistent with the hierarchical command structure contemplated by the Constitution. Not only is there requirement that the force commander be a U.S. military officer, there is no guarantee that the peacekeeping force will be a U.S. military unit. Accordingly, this command and control arrangement does not appear to fall within the category of "operational control" as described in PDD-25. The fact that U.S. military personnel have served under traditional peacekeeping command structures in the past does not necessarily mean that the service was consistent with the Constitution. Traditional peacekeepers are generally not in harms way. The recent controversy concerning command and control over U.S. forces participating in U.N. peace operations only arose when U.S. soldiers were placed in harms way and only erupted after U.S. soldiers were killed. Recent events have only now forced us to pay closer attention to a constitutional problem that has always been present.

PDD-25 also cites Operation Desert Storm and NATO as examples where U.S. forces have served under the operational control of foreign commanders. However, an examination of both the proffered examples and similar situations reveal that in reality, these forces have actually operated under firm U.S. command and control. During the Korean War, President Truman appointed General Douglas MacArthur as commander of all United Nations forces in Korea, forces which eventually were comprised of contingents from sixteen nations. Although lower levels of the command structure had multinational characteristics, the top level of the command structure "was essentially identical to what one would expect for a multilateral United States operation." 125 The U.S. exercised complete political and strategic control over U.N. forces. 126 Foreign troops were integrated into U.S. units, and all foreign contingents fought under the command of the U.S. Eighth Army, which General MacArthur himself commanded. During Operation Desert Storm, U.S. forces remained under the command of President George Bush and the United States Central Command (CENTCOM), while Islamic forces operated under Saudi Arabian command. The initial agreement between the U.S. and Saudi Arabia that allowed the U.S. to send its armed forces into Saudi Arabia specified that the Saudi Military was to provide the "strategic direction" for U.S. forces. 129 However, the term was never defined, and CENTCOM eventually interpreted the term as allowing "general guidance at a strategic level with no actual command authority." 130 The U.S. specifically sought to avoid any foreign or U.N. control over U.S. troops in the Persian Gulf. Finally, U.S. troops stationed in Western Europe are only under the nominal command of NATO, as the top general in NATO "has always been a double-hatted U.S. commander."

CONCLUSION

PDD-25 is an attempt by the Clinton Administration to fashion a compromise between its desire to have the U.N. play more of a role in maintaining international peace and stability, and the demands of our form of government and the American people that the U.S. retain control over the U.S. forces that are required for the U.N. to be able to fulfill this role. Despite the austerity of the new position with regard to command and control of U.S. forces participating in U.N. operations set forth in Section V, some commentators have criticized PDD-25 as not going far enough, and legislation has been introduced in both houses of Congress that would impose restrictions on the President's ability to place U.S. forces at the disposal of the U.N.

well beyond those imposed by PDD-25. Nevertheless, PDD-25 and the legislation currently before Congress implicitly recognize that the Commander-in-Chief clause acts not only as a grant of power to the President, but also acts as a constraint on the power the President may exercise with regard to U.S. armed forces. The Commander-in-Chief clause is indeed a "forgotten constraint" ¹³⁵ that has only now been discovered and averred to when the demand for a constraint has arisen. Future participation by the U.S. in U.N. operations will invariably be weighed against this newly-found constraint, and as this paper has argued, "Commander-in-Chief clause analysis" not always likely to yield a conclusion of constitutionality, especially where the U.S. proposes to have the U.N. exercise control over U.S. armed forces. PDD-25 fails to do an adequate job of addressing this constraint, and accordingly, its proposed solution to the problem is not entirely convincing.

2. Id. at 795.

3. Id. at 807.

4. Id. at 808.

5. U.S. Const. art. I, 8, cl. 11; See *infra* notes 75-77 and accompanying text.

6. Id. art. II, 2, cl. 1.

7. See , e.g., 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, 1587-95 (1994).

8. See *infra* notes 86-96 and accompanying text.

9. See *infra* notes 97-132 and accompanying text.

10. Glennon. *supra* note 7, at 1574; James W. Houck, *The Command and Control of United States Forces in the Era of "Peace Enforcement"*, 4 Duke J. Comp. & Int'l L. 1, 3 (1993) [hereinafter Houck I]

11. Governor Bill Clinton, *A New Covenant for American Security*, Address at Georgetown University (December 11, 1991).

12. Houck I , *supra* note 10, at 3.

13. Peter W. Rodman, *Declarations of Dependence* , Nat'l Rev. , June 13, 1994, at 32.

14. Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations* , 81 Geo. L. Rev. 597, 599 (1993) (citing *An Agenda for Peace: Preventive diplomacy, peacemaking and peace-keeping: Report of the Secretary-General, U.N. G.A., 47th Sess., 44, U.N. Doc. A/47/277 (1992)*).

15. As Madeline Albright, U.S. Ambassador to the United Nations, stated during her Senate confirmation hearings,

We need to really explore and think about how we use the various options that we have for fulfilling the promise of Article 43.... I think that we ought to give life to Article 43 and I think that what we need to do is make sure that our constitutional prerogatives are properly preserved and that we in fact see how we can create a way that the United Nations can have some teeth.

Confirmation Hearing for Madeline Albright as Ambassador to the United Nations Before the Senate Comm. on Foreign Relations (Jan. 21, 1993), quoted in James W. Houck, *The Commander-in-Chief and United Nations Charter Article 43: A Case of Irreconcilable Differences?* , 12 Dick. J. Intl. L. 1, 2 (1993).

16. Houck I , *supra* note 10, at 1.

17. Rodman, *supra* note 13, at 32.

18. Id.

19. See U.N. Downplays U.S. Directive on Peacekeeping , Inter Press Service , May 6, 1994.

20. Id.

21. Houck I , supra note 10, at 1.
22. Id.
23. PDD-25 , supra note 1, at 807.
24. Id.
25. Id. at 808.
26. Id.
27. Id.
28. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id. at 808-09.
35. Id. at 808.
36. Id. at 809.
37. Id.
38. Id.
39. Id.
40. See supra notes 10-18 and accompanying text.
41. Glennon, supra note 7, at 1588 (citing Francis D. Wormuth & Edwin B. Firmage, To Chain the Dog of War 105-06 (1989)).
42. Id.
43. Id.
44. Glennon, supra note 7, at 1588.
45. Warren W. Hassler, With Shield and Sword: American Military Affairs, Colonial Times to the Present 25 (1982). Congress also instructed Washington to consult with his top officers for their counsel regarding major decisions. Id.
46. Id.
47. U.S. Const. art. I , 2, cl. 1.
48. Glennon, supra note 7, at 1589.
49. The Federalist No. 69 (Alexander Hamilton), at 465 (Jacob E. Cooke ed., 1961), quoted in Id. at 1589, 1591 n.114.
50. Glennon, supra note 7, at 1588-89.
51. Id. at 1589.
52. Id. ; See infra note 56.
53. Id.
54. Id. at 1591.

55. Id. Glennon and Hayward note that the "Framers' allocation of war powers guaranteed both civilian control of the military and unity of command." Id. at 1590 n.115 (citing Warren W. Hassler, *The President as Commander-in-Chief* 7 (1971)).

56. For example, during the Civil War, President Lincoln assumed actual command over the military force during the campaign against the Confederate port at Norfolk, VA. Dorothy Schaffter and Dorothy M. Mathews, *The Powers of the President as Commander-in-Chief of the Army and Navy of the United States* 4 (1956); but See Clarence A. Berdahl, *War Powers of the Executive in the United States* 120 (1921) (stating that Lincoln never assumed "actual personal command" over the military). President Lincoln also made it a point to visit his generals during field operations to advise them and to assist them in drawing up battlefield plans. Berdahl, *supra*, at 120. Additionally, President Washington rode out to take actual command over the militia forces called up to put down the Whiskey Rebellion of 1794 although he did not actually do so when he arrived to find his good friend and Revolutionary War compatriot Harry Lee, governor of Virginia, present to lead the force. Hassler, *supra* note 55, at 60; See also Berdahl, *supra*, at 120. President Polk paid close attention to the movements of the military on the battlefield during the Mexican War, and he insisted to his generals that his orders be regarded as military orders to be carried out promptly. Berdahl, *supra*, at 120. During the Vietnam War, President Johnson, in consultation with Secretary of Defense Robert McNamara and other military advisers, selected bombing targets in North Vietnam from the Oval Office during the Operation Rolling Thunder in 1965 and exercised "iron control" over what targets would and would not be hit. See Robert Leckie, *The Wars of America* 986-87 (1992). However, Presidents have occasionally, and probably unconstitutionally, delegated their plenary control over the military to other persons. For instance, when war with France seemed imminent, President Adams appointed former President Washington "Commander-in-Chief of the Army and Navy of the United States," a nomination overwhelmingly approved by the Senate. Schaffter, *supra*, at 2. Furthermore, during World War I, President Wilson, a committed pacifist, virtually delegated his control over the military to, among others, Secretary of War Baker and General Pershing, commander of the American Expeditionary Force (AEF). Hassler, *supra* note 55, at 264-65. Hassler notes that President Wilson, by delegating the power to make "critical decisions [which] should have been made only by the republic's commander in chief" to others in the military establishment "almost abdicated his responsibilities in this vital post." Id. at 265 (footnote omitted).

57. Berdahl, *supra* note 56, at 119.

58. See Schaffter, *supra* note 56, at 19; Glennon, *supra* note 7, at 1590.

59. Glennon, *supra* note 7, at 1590 & n.111.

60. See *supra* notes 54-59 and accompanying text.

61. PDD-25, *supra* note 1, at 808 ("The chain of command from the President to the lowest U.S. commander in the field remains inviolate.").

62. Id. at 807 (noting what U.N. commanders may not do with regard to U.S. troops under their operational control); See Berdahl, *supra* note 56, at 126-30 (discussing the President's power, subject to limitations imposed by Congress and the Constitution, to appoint and dismiss officers, and to appoint and dismiss persons from particular duties within the armed forces); Schaffter, *supra* note 56, at 19 (arguing that a Commander-in-Chief who does not direct the movement of the armed forces cannot be said to be "in command" of the armed forces).

63. PDD-25, *supra* note 1, at 808.

64. U.N. Charter art. 43, para. 1.

65. Id. art. 43, para. 2.

66. Id. art. 43, para. 3.

67. See Glennon, *supra* note 7, at 1577-78.

68. Id. at 1578.

69. Houck I, *supra* note 10, at 8 n.20 (citing Robert C. Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* 140-22 (1990)).

70. Id. art. 47.
71. Id. art. 47, para. 2.
72. Id. art. 47, para. 1.
73. Id. art. 47, para 3.
74. Id.
75. See Stromseth, *supra* note 14, at 602, 605-06.
76. Id. at 602 & n.25.
77. See Id. at 605 & n.33.
78. Id. at 604.
79. Glennon, *supra* note 79, at 1581.
80. United Nations Participation Act, ch. 583, 6, 59 Stat. 621 (1945) (codified as amended at 22 U.S.C. 287d (1988)).
81. Id. However, in 1949, Congress amended the UNPA to provide that 22 U.S.C. 286d should not be construed to authorize the President to commit forces beyond those specified in the Article 43 agreement, except as provided in 287d-1. Act of Oct 10, 1949, ch. 660, 4, 63 Stat. 735 (1949)) (codified at 22 U.S.C. 287d (1988)).
82. Glennon, *supra* note 7, at 1581; Ralph N. Goldman, *Is it Time to Revive the UN Military Staff Committee?* 7 (1990).
83. Goldman , *supra* note 82, at 7.
84. Id.
85. Id. at 7-8.
86. PDD-25 , *supra* note 1, at 807-08.
87. Houck I , *supra* note 10, at 8.
88. Id. Houck emphasizes that because the signatories of the U.N. Charter intended for the Security Council to have "plenary authority in all matters of peace and security," it is not surprising that they also intended the Security Council to exercise command over Article 43 forces. Id.
89. See PDD-25, *supra* note 1, at 808-09. While command over the national contingents would be vested in commanders designated by their respective countries, the Security Council would still have the authority to appoint a supreme commander over Article 43 forces. Houck I , *supra* note 10, at 11.
90. See Glennon, *supra* note 7, at 1593; See *supra* notes 47-59 and accompanying text.
91. Glennon, *supra* note 7, at 1594.
92. Id. at 1594-95. Glennon and Hayward also state that unilateral withdrawal of U.S. forces by the President might make the U.S. subject to a Chapter VII enforcement action by the U.N. Id. at 1595.
93. See Id. at 1595.
94. PDD-25 , *supra* note 1, at 808-09.
95. Id. at 809.
96. The Constitution on its face simply does not envision the President relinquishing command over the armed forces or any part of them to a foreign commander. See U.S. Const. art 2, 2, cl. 1. In contrast, the Constitution expressly provides that the President is Commander-in-Chief of the militia "when called into the actual Service of the United States." Id. The Constitution thus envisions that the state governors have primary command over their states' militia forces; however, the Constitution removes command over the militia from state governors and vests it in the President when the militia is

"federalized." See Berdahl , supra note 56, at 130. No similar provision exists that would appear to authorize the President to cede command over U.S. forces to any other entity.

97. PDD-25 , supra note 1, at 808.

98. Id. ; See supra text accompanying note 32.

99. Id.

100. See supra notes 47-59 and accompanying text.

101. See supra note 56 and accompanying text.

102. Of course, the President may not delegate his power to the extent that delegation becomes relinquishment. See supra note 56 and accompanying text.

103. 10 U.S.C. 502 (1988 & Supp. V).

104. PDD-25 , supra note 1, at 808.

105. This "end run" scheme contemplated by PDD-25 is somewhat curious given the usual requirement of almost unquestioned obedience to the orders of a superior officer that is normally demanded in a military command structure, even in response to orders that put soldiers at extreme risk. See *Chappell v. Wallace*, 462 U.S. 296, 300 (1983). An early draft of PDD-25 would have claimed the right for U.S. commanders to disregard orders from U.N. commanders which they considered to be "imprudent" or subjecting U.S. forces to "needless risk." John Gerard Ruggie, *Peacekeeping and U.S. Interests*, Wash. Q. , Autumn 1994, at 175 n.17. In response to this proposed position, a U.S. Marine colonel who served in Somalia commented that he was glad the Pakistani soldiers sent in by the U.N. to rescue the U.S. Army Rangers ambushed in Mogadishu on October 3, 1993 did not invoke any right to disregard that order based on "needless risk" or "imprudence." Id.

106. Cf. Schaffter , supra note 56, at 19 ("To 'command' is to 'direct.' In military affairs, one of the phases of command is the determination of the paces to which armed forces shall be moved.").

107. Id.

108. Glennon, supra note 7, at 1584.

109. Id. at 1585; Berdahl , supra note 56, at 122-23.

110. Glennon, supra note 7, at 1585.

111. Id. at 1586.

112. Id.

113. Id.

114. See supra notes 109-12 and accompanying text.

115. PDD-25 , supra note 1, at 808.

116. See supra note 24 and accompanying text.

117. Thus the troops ordered to France during [World War I] were sent for the general purpose of waging active war against the German military forces and of bringing about their defeat; were with that end in view instructed to cooperate with the Allies even to the extent of being intermingled on occasion with Allied troops and placed under the command of superior Allied officers; and were withdrawn from foreign soil as rapidly as possible after that purpose had been accomplished.

Berdahl , supra note 56, at 122-23.

118. Houck I , supra note 10, at 22-23.

119. Id. at 23.

120. Id. at 22-23.

121. Id. at 23-24.

122. Id. at 25.

123. See *supra* notes 19-22 and accompanying text.

124. Houck I , *supra* note 10, at 17.

125. Id.

126. Id. at 13-14.

127. Id. at 17.

128. Id. at 17-18.

129. Id. at 18 n.81.

130. Id.

131. Stromseth , *supra* note , at 643, 647.

132. Rodman , *supra* note 13, at 32.

133. E.g. , Clark Simmons, Keep GIs Out of U.N. Control , Times-Picayune , Aug. 10, 1994, at B6 (criticizing PDD-25 and arguing that "[t]he Constitution does not authorize the president [sic] or Congress to transfer control over U.S. military forces to any foreign jurisdiction. . . . Placing U.S. personnel at the disposal of the United Nations should never be done."); Rodman , *supra* note 13, at 32 ("As a matter of constitutional principle, the subordination of U.S. forces and U.S. decisions to foreign command or control is simply not acceptable.").

134. The National Security Revitalization Act, H.R. 7, 104th Cong, 1st Sess. (1995), would prohibit the President from placing U.S. troops under the command or control of the U.N. and would bar expenditures of Department of Defense funds for U.S. military personnel placed under the command or control of the U.N. unless the President certifies that the U.N. command and control arrangement is required "to protect the national security interests of the United States," the commander of a unit of U.S. armed forces placed at the disposal of the U.N. retains the right to report separately to his U.S. superiors and to decline to comply with orders he finds to be "illegal, militarily imprudent, or beyond the mandate of the mission," the forces remains under U.S. administrative command for "such purposes as discipline and evaluation," and that the U.S. retains the right to withdraw its forces at any time or to take any other action it deems necessary to protect its troops. Id. 401(a), 402(a). The President must also supply a detailed report to Congress detailing, in part, the command and control arrangements involved and that the arrangements are required in order to further U.S. national security interests. Id. 401(a), 402(a). The President may not submit a certification unless he also submitted a memorandum of law "explaining why the placement of elements of United States armed forces under the command or operation control of a foreign national acting on behalf of the U.N. does not violate the Constitution." Id. 401(b), 402(b). The Peace Powers Act, S. 5, 104th Cong., 1st Sess. (1995), would impose virtually the same obligations on the President. Id. 5. Senator Bob Dole (R-KS), the Senate Majority Leader and sponsor of the Peace Powers Act, has criticized PDD-25 as "[ratifying] the status quo, and has lead to little or no reduction in the Administration's proclivity to rubber-stamp U.N. peacekeeping." Senator Bob Dole, Congress Can Reshape the U.S. Role in Peacekeeping Around the World , Roll Call , Feb. 6, 1995. Still, these two pieces of legislation would not totally bar the President from placing U.S. forces under the control of the U.N., but would merely impose "a higher standard to delegate command and control of American fighting men and women to foreign nationals." Id.

135. See Glennon, *supra* note 7, at 1587.