

St. Thomas Law Review

Volume 21
Issue 3 Spring 2009 - St. Thomas University
School of Law 25th Anniversary Alumni Issue

Article 2

2009

Congressional Responsibility in Controlling the War Machine

Jeffrey A. Botelho

Follow this and additional works at: <https://scholarship.stu.edu/stlr>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey A. Botelho, *Congressional Responsibility in Controlling the War Machine*, 21 ST. THOMAS L. REV. 305 (2009).

Available at: <https://scholarship.stu.edu/stlr/vol21/iss3/2>

This Article is brought to you for free and open access by the STU Law Journals at STU Scholarly Works. It has been accepted for inclusion in St. Thomas Law Review by an authorized editor of STU Scholarly Works. For more information, please contact jacob@stu.edu.

CONGRESSIONAL RESPONSIBILITY IN CONTROLLING THE WAR MACHINE

JEFFREY A. BOTELHO¹

Preamble: News Leading Up to and Covering the Iraq war	306
Introduction	311
I. History of Constitutional War Powers	314
A. Constitutional Text, Articles of Confederation, and Intent of the Framers.....	314
B. Use of Military from 1787 to 1950	317
C. The Korean War.....	318
D. The Vietnam War	319
E. The War Powers Resolution and its Enforceability	320
F. The Persian Gulf War of 1990	321
G. Constitutionality of President’s Use of U.S. Military in Iraq.....	321
II. Inherent Presidential Power in Theory, in Practice, and in Precedent.....	322
A. Unilateral Presidential Actions Leading to War	323
B. Judicial Proclamations of Inherent Presidential Power: The <i>Curtiss-Wright</i> Case	324
C. Refuting Justice Sutherland’s Reasoning.....	326
D. The Limits of Presidential Power to Make War & The Role of the Judiciary in Mediating Constitutional Disputes Between Congress and the President.....	328
III. Congressional Spinelessness: From a Gang of Patriots to Playing the Blame Game.....	332
A. Background.....	332
B. News Coverage Leading up to and Including Passage of the Joint Resolution	334
1. August, 2002	337
2. September, 2002	337
3. October, 2002	343
C. Vox Clamantis in Deserto: A Lone Voice Crying in the Wilderness: Sen. Robert Byrd	345
D. The Congressional Record of the Authorization to Use Force.....	347
E. National Intelligence Estimate on Iraq.....	351
F. What Went Wrong?.....	355

1. B.A., Dartmouth College (1996); J.D., St. Thomas University School of Law (Miami Gardens, FL) (2007). I thank Professor Lauren Gilbert at St. Thomas for inspiring me to question the actions of our leaders and to hold them accountable to the Constitution, and especially for helping me formulate and flesh out the ideas for this article.

IV. Conclusion: The Aftermath—Cleaning Up the Mess	358
Appendix A: Votes of Congressmen on Joint Resolution to Use Force Against Iraq.....	362

PREAMBLE: NEWS LEADING UP TO AND
COVERING THE IRAQ WAR

Reports on diplomatic efforts to convince Iraq to allow weapons-inspectors entry into the country after years of non-cooperation, and American government reaction:

Secretary General Kofi Annan smiled broadly when he stepped to the microphones on Monday afternoon to report the breakthrough: Iraq would allow the United Nations weapons inspectors to return “without conditions.” But his news made United States officials furious. . . . At home, the White House found itself working hard to persuade doubting Democrats in Congress to provide an open-ended authorization for a military attack.²

Secretary of Defense Donald Rumsfeld in September of 2002:

We have what we believe to be credible information that Iraq and Al Qaeda have discussed safe haven opportunities in Iraq, reciprocal nonaggression discussions We have what we consider to be credible evidence that Al Qaeda leaders have sought contacts in Iraq who could help them acquire weapons of mass destruction capabilities.

. . . Iraq provided unspecified training relating to chemical and/or biological matters for Al Qaeda members.³

2. Julia Preston with Todd S. Purdum, *Threats and Responses: Diplomacy; Bush's Push on Iraq at U.N.: Headway, Then New Barriers*, N.Y. TIMES, Sept. 22, 2002, § 1, at 1.

3. Todd S. Purdum & Elisabeth Bumiller, *Threats and Responses: Legislation; Congress Nearing Draft Resolution on Force*, N.Y. TIMES, Sept. 27, 2002, at A1 (internal quotation marks omitted).

President George W. Bush, in October 2002 speech at a Cincinnati museum:

There is no easy or risk-free course of action Some have argued we should wait—and that is an option. In my view, it is the riskiest of all options, because the longer we wait, the stronger and bolder Saddam Hussein will become. We could wait and hope that Saddam Hussein does not give weapons to terrorists, or develop a nuclear weapon to blackmail the world. But I am convinced that is a hope against all evidence.⁴

Richard Gephardt, Democrat House Minority Leader, on his agreement with President Bush on a draft of a congressional resolution to use force against Iraq in early October of 2002:

Mr. Gephardt's agreement with Mr. Bush, which angered some in his party, was pivotal to the deal announced today in the Rose Garden and put holdouts in the Senate Democratic caucus in a corner.

. . . .

"This should not be about politics," Mr. Gephardt said as he stood next to Mr. Bush in the Rose Garden. "We have to do what is right for the security of the nation."⁵

From National Intelligence Estimate presented to Congress before votes on resolution to use force in October of 2002:

We judge that Iraq has continued its weapons of mass destruction (WMD) programs in defiance of UN resolutions and restrictions. Baghdad has chemical and biological weapons as well as missiles with ranges in excess of UN restrictions; if left unchecked, it probably will have a nuclear weapon during this decade. . . . If Baghdad acquires

4. Todd S. Purdum, *Threats and Responses: News Analysis; Stern Tones, Direct Appeal*, N.Y. TIMES, Oct. 8, 2002, at A1 (internal quotation marks omitted).

5. Elisabeth Bumiller & Alison Mitchell, *Threats and Responses: The Congressional Resolution; Bush Strikes Deal for House Backing on Action in Iraq*, N.Y. TIMES, Oct. 3, 2002, at A1.

sufficient fissile material from abroad it could make a nuclear weapon within several months to a year.⁶

The Senate voted overwhelmingly early this morning to authorize President Bush to use force against Iraq, joining with the House in giving him a broad mandate to act against Saddam Hussein. The resolution authorizes Mr. Bush to use the armed forces “as he determined to be necessary and appropriate” to defend the nation against “the continuing threat posed by Iraq,” and to enforce “all relevant” United National Security Council resolutions on Iraq. . . .⁷

Selected language of joint resolution authorizing the President to use force against Iraq:

(a) AUTHORIZATION.—The president is authorized to use the armed forces of the United States as he determines to be necessary and appropriate in order to—

(1) defend the national security of the United States against the continuing threat posed by Iraq; and

(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

....

(c) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8 (a) (1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5 (b) of the War Powers Resolution.⁸

6. NATIONAL INTELLIGENCE ESTIMATE, IRAQ’S CONTINUING PROGRAMS FOR WEAPONS OF MASS DESTRUCTION 5 (2002), available at <http://www.fas.org/irp/cia/product/iraq-wmd-nie.pdf> [hereinafter N.I.E.]; see also, *infra* note 7.

7. Alison Mitchell & Carl Hulse, *Threats and Responses: The Vote; Congress Authorizes Bush to Use Force Against Iraq, Creating a Broad Mandate*, N.Y. TIMES, Oct. 11, 2002, at A1.

8. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501.

President Bush, in December 2003 interview with Diane Sawyer: “And if he doesn’t have weapons of mass destruction?” Ms. Sawyer asked the president

“Diane, you can keep asking the question,” Mr. Bush replied. “I’m telling you—I made the right decision for America because Saddam Hussein used weapons of mass destruction, invaded Kuwait. But the fact that he is not there is, means America’s a more secure country.”⁹

Kenneth Pollack, a Clinton administration national security official, on how he and others had been misled into believing the invasion of Iraq was necessary:

In the months leading up to the war, Mr. Pollack says, he received numerous complaints from friends in the intelligence community that administration officials showed aggressive, negative reactions when presented with information that contradicted what they believed about Iraq. They allegedly subjected the analysts to barrages of questions, requests for more information and fights over the credibility of sources that passed beyond responsible oversight to become a form of pressure.¹⁰

January 17, 2007: “Iraqi Death Toll Exceeded 34,000 in 2006, U.N. Says”¹¹

9. Richard W. Stevenson, *The Struggle for Iraq: White House Memo; Remember ‘Weapons of Mass Destruction’? For Bush, They Are a Nonissue*, N.Y. TIMES, Dec. 18, 2003, at A26.

10. Editorial, *Intelligence on the Eve of War*, N.Y. TIMES, Feb. 1, 2004, § 4, at 10. The article identifies the most important intelligence document leading up to the invasion as the National Intelligence Estimate, which it contends was “hastily assembled and presented to Congress shortly before the vote on a resolution authorizing the use of force in Iraq. This document contended that Iraq had chemical and biological weapons in hand, as well as active programs to enhance its capabilities in all areas.” *Id.* at 10. The admissions of CIA Director George Tenet in his new book confirm that characterization. See Scott Shane & Mark Mazzetti, *George Tenet, in Book, Denounces Cheney over Iraq*, INT’L HERALD TRI., Apr. 27, 2007, at 6.

11. Sabrina Tavernise, *Iraqi Death Toll Exceeded 34,000 in 2006, U.N. Says*, N.Y. TIMES, Jan. 17, 2007, at A1.

January 27, 2007: “Representative Steny H. Hoyer, the House majority leader, said Friday that Congress might consider legislation revising the authorization it gave President Bush in 2002 to use military force in Iraq.”¹²

February 16, 2007: “A sharply divided House of Representatives passed a resolution on Friday formally repudiating President Bush’s decision to send more than 20,000 new combat troops to Iraq.”¹³

February 23, 2007: “Senate Democrats Keep Pressure on Bush With Plan to Limit Iraq Mission to Counterterrorism.”¹⁴

April 16, 2007: “Attacks Surge As Iraq Militants Overshadow City.”¹⁵

April 18, 2007: “The Department of Defense has identified 3,302 American service members who have died since the start of the Iraq war.”¹⁶

12. Kate Zernike, *Democrats Try to Increase Leverage over Iraq Policy*, N.Y. TIMES, Jan. 27, 2007, at A8.

13. Jeff Zeleny & Michael Luo, *A Divided House Denounces Plan for More Troops*, N.Y. TIMES, Feb. 17, 2007, at A1 (emphasis deleted).

14. Carl Hulse, *Senate Democrats Keep Pressure on Bush with Plan to Limit Iraq Mission to Counterterrorism*, N.Y. TIMES, Feb. 23, 2007, at A10.

15. Richard A. Oppel, Jr., *Attacks Surge as Iraq Militants Overshadow City*, N.Y. TIMES, Apr. 16, 2007, at A1.

16. *Names of the Dead*, N.Y. TIMES, Apr. 18, 2007, at A10.

April 19, 2007: “Bombs Rip Through Baghdad in Wave of Attacks, Killing 171”¹⁷

INTRODUCTION

A study of the events leading up to the March 2003 U.S.-led invasion of Iraq and its subsequent aftermath gives rise to many questions. These questions arise particularly because it is now conventional wisdom that Iraq most likely possessed neither weapons of mass destruction prior to invasion nor the capability to attack the United States.¹⁸ Further, any ties that may have existed between Iraq and Al-Qaeda were tenuous at best.¹⁹ The war has continued for over five years and counting, and has caused the deaths of more than three thousand Americans and tens of thousands of Iraqis, many the result of sectarian violence and acts of terrorism in the vacuum left after Saddam Hussein’s fall from power.²⁰ An initial question about what appeared to be an almost baseless war of aggression is whether the war was, in fact, illegal in the eyes of U.S. law. Aside from questions into the nature of misrepresentations and exaggerations made by the Executive Branch of the threat posed by Iraq, my research, which I will share here, showed me that the decision to go to war was, in fact, constitutionally sound. This is true in light of both houses of Congress passing a joint resolution authorizing the President to use force against Iraq in October of 2002. The most important question that we should ask, given the disastrous human and political consequences the war has exacted, is why Congress voted so decisively and quickly to enter this conflict?²¹

17. Kirk Semple, *Bombs Rip Through Baghdad in Wave of Attacks, Killing 171*, N.Y. TIMES, Apr. 19, 2007, at A1.

18. See Charles Lewis & Mark Reading-Smith, *False Pretenses*, PUB. INTEGRITY, Jan. 23, 2008, <http://projects.publicintegrity.org/WarCard>.

19. *Id.*

20. See Congressman Ron Paul, 300 American Deaths in Iraq, Address Before the U.S. House of Representatives (Jan. 5, 2007), available at <http://www.house.gov/paul/congrec/congrec2007/cr010507.htm>.

21. I initially intended to pose the question of whether additional safeguards should be mandated into law to avoid a repeat of the same mistakes recounted here. Such safeguards could

Without the support of Congress, it is doubtful that President George W. Bush would have unilaterally ordered the invasion of Iraq.²² So the ultimate responsibility for the carnage and mayhem in Iraq does not fall on his shoulders alone, but on both branches of government. Only through a thorough examination of the debates and news coverage leading up to the passing of the resolution can we hope to identify the mistakes and avoid them in the future.

Certain events in Congress in 2007, including a joint resolution passed to reprimand President Bush for his plan to send an additional 20,000 troops to Iraq,²³ separate spending proposals linking war spending to timetables for withdrawal,²⁴ and discussion of limiting the initial resolution to use force to combat only terrorist threats to the U.S. in Iraq,²⁵ pose altogether different questions. Can Congress, once it gives the President a broad mandate to go to war, then go back and restrict the way he can exercise that right, even though the President is the Commander-in-Chief of the armed forces? These are sticky questions because of the broad discretion afforded to the President as Commander-in-Chief. Can Congress tie funding for a war to a timetable for withdrawal? While the answer may be *yes*, such an appropriations bill is nothing more than a statement against Administration policy.²⁶ Finally, what will happen if a conflict between Congress and the President, on the president's use of military force, comes to a head—does the judiciary have the power, constitutionally, to mediate such a dispute? The answer is *yes*, but Congress would have to pass

be constitutionally based, such as allowing Congress to conduct thorough fact-finding investigations, independent from the Executive Branch, prior to giving authorization for an American-led invasion of a foreign country. Other safeguards could be legislative, such as a constitutional amendment or a statute requiring a popular vote prior to committing U.S. troops to any major foreign invasion. Consideration of these safeguards begs the larger question of the distinction to be made between a *defensive war* to protect the security of the United States and an *offensive war* fought for U.S. interests but not necessary to ensure the security of Americans living in the United States. However, in the end, Professor Gilbert, commented that such measures would quite probably not stand up to judicial scrutiny under the current conservative composition of the Court, with its recent additions of Chief Justice John Roberts and Justice Samuel Alito. I agree with her that it is more useful to discuss the reasons why Congress authorized the war, as it is future Congressional action that will ultimately decide if we repeat these same mistakes down-the-line (YV).

22. See John Dean, *Pursuant to the Constitution, and Despite Claims to the Contrary, President Bush Needs Congressional Approval Before Declaring War on Iraq*, FINDLAW.COM, Aug. 30, 2002, <http://writ.news.findlaw.com/dean/20020830.html>.

23. See Zeleny & Luo, *supra* note 13, at A1.

24. See Sheryl Gay Stolberg, *Cheney Predicts Bush Will Win Struggle over War Spending*, N.Y. TIMES, Apr. 16, 2007, at A9.

25. See Hulse, *supra* note 14, at A10.

26. See Zeleny & Luo, *supra* note 13, at A1.

restrictive legislation, by a veto-proof two-thirds majority, before the judiciary could entertain such questions.²⁷

What happened in Congress in the Spring of 2007 was, to a large degree, political damage control. This article will not focus on damage control, but on preventing a repeat of the kinds of ill-advised, sloppy, and incompetent decisions that led to this war through a thorough analysis of the legislative process that resulted in congressional authorization for the President to invade Iraq. I will explain that while the judiciary does have the authority to mediate disputes between Congress and the President, it can make no decisions unless Congress speaks clearly, within its own powers, against presidential action.²⁸ In the end, this article underscores the importance of maintaining integrity in the political process, and the need for a Congress that is well-informed, selfless, and committed to the good of the nation rather than playing politics or making deals with the Executive branch.²⁹ On the whole, this article points out the grave deficiencies in our political system due to strict partisanship and the undercurrent of ignorance, cowardice, and laziness that characterize the actions of some of its members.

Part I reviews the constitutional enumeration of congressional and executive war powers and their historical use from the days of the Framers to the current U.S.-Iraq conflict, and goes on to evaluate the constitutionality of the President's initiation of this war.³⁰

Part II discusses the judicially-created idea of inherent presidential power and its constitutionality, and examines more recent cases that addressed the abilities of Congress to restrict and limit power.³¹ The section concludes by addressing the judiciary's (rarely-utilized) role in mediating disputes between the President and Congress.³²

Part III addresses the lack of accountability of our Congress in the fall of 2002, and traces the discussions and debates leading to the affirmative vote for the authorization to use force against Iraq.³³ This section aims to emphasize the need for Senators and Congressmen to perform their jobs competently and without political self-interest if our nation is to avoid future foreign policy disasters.³⁴

27. See Stolberg, *supra* note 24, at A9; U.S. CONST. art. I, § 7, cl. 2.

28. See *infra* note 150 and accompanying text.

29. See *infra* note 181.

30. See *infra* Part I.

31. See *infra* Part II.

32. See *infra* Part II.D.

33. See *infra* Part III.

34. I had a few other ideas to prevent future foreign policy disasters, which are more radical.

Part IV concludes by addressing some of constitutional issues posed by the efforts, in the Spring of 2007, by the newly elected Democrat-controlled Congress to change policy in Iraq by conditioning appropriations to timing for troop withdrawals.³⁵ However, the primary purpose of this section is to address lessons learned and urge for more vigilance and prudence by the American people and its representatives in the future.

I. HISTORY OF CONSTITUTIONAL WAR POWERS

A. CONSTITUTIONAL TEXT, ARTICLES OF CONFEDERATION, AND INTENT OF THE FRAMERS

The Constitution confers to Congress many powers related to the defense of the United States.³⁶ Congress has the power to collect taxes to be used for the common defense.³⁷ It has the power to declare war and to grant letters of marque and reprisal (a power related to more limited wars), and to make rules concerning captures on land and water.³⁸ It has the power to raise and support armies through appropriations, but may not set aside an appropriation of money for that purpose to last longer than two years, limiting the ability of one Congress to bind another to its actions in this respect.³⁹ It is charged with making rules for the government and regulation of land and naval forces,⁴⁰ and can call on the militia (of the states) to execute the laws, suppress insurrections, and repel invasions, among other powers.⁴¹ The President, conversely, is Commander-in-Chief of the armed forces and of the militia of the several states, when they are called to duty,⁴² and is charged with the faithful execution of the laws

I will recount them here, but will qualify them by saying that unless all congressmen, and the American people who they represent, begin to pay attention and to view the recommendations of each President and his departments critically, these measures also would result in future failures. They are legislation mandating: (1) independent Congressional fact-finding prior to commitment of U.S. troops in offensive wars; and (2) a two-thirds popular vote of the American citizenry prior to new deployment of large numbers of U.S. troops in foreign countries (in addition to the required Congressional authorization), an idea with bases in the original Articles of Confederation, which required the states to assent to any decision of the Continental Congress to make war.

35. *See infra* Part IV.

36. *See* U.S. CONST. art. I, § 8.

37. *Id.* art. I, § 8, cl. 1.

38. *Id.* art. I, § 8, cl. 11.

39. *Id.* art. I, § 8, cl. 12.

40. *Id.* art. I, § 8, cl. 14.

41. *Id.* art. I, § 8, cl. 15.

42. *Id.* art. II, § 2, cl. 1.

passed by Congress.⁴³ A simple comparison of the breadth of war powers conferred upon Congress (at least eight different enumerations) with those of the President (one or two, if faithful execution of laws passed by Congress can be construed as a war power) suggests that the power to make war—i.e., to take the country from a state of peace to one of war—lies exclusively with Congress.⁴⁴

Prior to the enactment of the Constitution, the Articles of Confederation conferred all war powers upon Congress, stating in Article IX that “the sole and exclusive right and power of determining on peace and war” was vested therein and granted Congress numerous other powers in the realm of foreign policy, such as appointment of ambassadors and entry into treaties and alliances, which would later be vested in the President.⁴⁵ In fact, the Articles did not provide for an independent, tenured executive to control military and foreign policy, so Congress established commissions and committees directly responsible to it for this purpose.⁴⁶ This was not seen as a defect—in fact, John Jay and George Washington seem to have preferred it, to an extent, fearing that the people would be willing to accept a monarchy in order to obtain security.⁴⁷ Even Alexander Hamilton, who thought national powers should have an independent executive for international affairs, still thought Congress should control the military.⁴⁸ The Articles reserved to the states the power to repel sudden attacks (Article VI), and required their assent for Congress to go through with any war, treaty, or appropriation it determined to make, so that congressional decisions became little more than recommendations.⁴⁹ The Framers found this means of government unwieldy, as some states ignored congressional requests for funds and concluded their own treaties with foreign countries.⁵⁰ For these reasons and others, the Framers, in 1787, undertook to make Congress more effective so that the national

43. *Id.* art. II, § 3.

44. *Compare id.* I, § 8, cl. 1, cl. 11-15, with *id.* art. II, § 2, cl. 1, and *id.* art. II, § 3.

45. EDWARD KEYNES, UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER 25 (1982).

46. *See id.* at 27–28. This historical example and its support among the Framers provide a valuable lesson for today’s leaders. A revival of heightened independent fact-finding by Congress is essential to counterbalance the Executive branch’s dominance of the intelligence-gathering function in today’s government.

47. *See id.*

48. *See id.* at 28–29.

49. *See id.* at 20.

50. *See id.* at 27. For example, Virginia ignored congressional requests for funds, ratified its own treaty with France, concluded a loan with Spain, and extended its credit to other nations to buy arms during this period. *See id.*

government could fulfill the country's international responsibilities.⁵¹ At that time in the young nation's history, fears of executive military power were fueled mainly by expectations of domestic tyranny, not of the initiation of hostilities abroad.⁵²

The record of debate during the Constitutional Convention of 1786 and the history of early exercises of the war powers both confirm that the ability to make war lies with Congress. In the end, the States voted 8-1 to vest the power to declare war in Congress, leaving the President the power to repel sudden attacks.⁵³ It should be noted that the Presidency was a new institution that had never existed before in the Framers' imagination.⁵⁴ It is doubtful that they would have imagined a President who controlled a globally-deployed military used to launch pre-emptive strikes on sovereign nations he perceived to be a threat.⁵⁵ There also is the question of whether the Framers believed a formal declaration of war by Congress was needed prior to initiation of any hostilities.⁵⁶ The Framers were no strangers to undeclared wars; in 1754, George Washington commanded British troops against the French in the Ohio Valley, in an action that was undeclared.⁵⁷ In the first few drafts of the document, Congress was given the power to *make* war; however, this word was changed to *declare* to leave the President the ability to repel sudden attacks.⁵⁸ So the distinction lay between the initiation of offensive wars versus defensive ones.⁵⁹ Some of the Framers, like George Mason, preferred *declare* to *make* because such formal declarations would clog efforts at war and facilitate peace.⁶⁰ Tellingly, only one delegate, Pierce Butler, favored vesting the power to commence war in the President.⁶¹ On the surface, the intention of the framers seems clear—Congress has the power to initiate offensive hostilities, while the President has the power to repel sudden attacks; however, the scope of the President's power to make defensive war was never defined.⁶² How far could the President go in resisting military threats to national security and independence? First of all, the Constitution does

51. See KEYNES, *supra* note 45, at 32.

52. *Id.*

53. *Id.*

54. See *id.* at 33.

55. See *id.*

56. See *id.*

57. *Id.* at 36.

58. KEYNES, *supra* note 45, at 34. Charles Pinckney believed Congress would be too slow to repel such attacks. *Id.*

59. See *id.* at 34–35.

60. *Id.* at 35.

61. See *id.*

62. See *id.* at 36.

not provide for the President to commit troops to any action, declared or undeclared, without the consent of Congress.⁶³ The fact that the power to grant letters of marque and reprisal was vested in Congress shows the Framers' intent that even the use of limited force (by private actors) against other nations be authorized therein, and not by the President acting alone.⁶⁴ Similarly, Congress's power to make "Rules concerning Captures on Land and Water" shows its authority over the conduct of limited war.⁶⁵

B. USE OF MILITARY FROM 1787 TO 1950

The early military history of the United States confirms Congress's power over limited wars.⁶⁶ In 1798–99, Congress passed more than twenty laws, setting aside funds for the navy, artillery, and ships, and empowering President Adams to raise a provisional army and seize French ships in the conduct of a limited naval war (the "Quasi War") with France.⁶⁷ From 1801 to 1805, during a conflict between American shipping and the Barbary Pirates in the Mediterranean, President Jefferson ordered a small U.S. Navy squadron to protect American navigation and commerce in the area prior to receiving Congressional authorization to do so.⁶⁸ However, in a post-hoc communication to Congress, he explained that since none of the American ships had authorization from Congress for an offensive war, once one of the enemy ships was disabled, its crew was let free.⁶⁹ This (quasi) respect for congressional authority did not extend to all actions of agents of the executive; for example, at the end of the same conflict described above, General William Eaton, a U.S. Consul, led a 6,000 man expeditionary force against the Bey of Tripoli without authorization.⁷⁰

There were struggles, from time to time, between Congress and the President or his agents over the use of unauthorized military power.⁷¹ The legality of the deployment and use of troops surely depends on the respect of the Executive for the Congress.⁷² In the middle of the 19th century, President Polk received a reprimand from the House of Representatives for

63. *See id.* at 37.

64. *See* KEYNES, *supra* note 45, at 37.

65. *Id.*

66. *See id.* at 36–37.

67. *See id.* at 37.

68. *See id.* at 38–39.

69. *See id.* at 38.

70. *See* KEYNES, *supra* note 45, at 39.

71. *See* Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1777, 1780 (1968).

72. *See id.* at 1777–80.

deploying troops in disputed territory along the U.S.-Mexico border.⁷³ Future president Abraham Lincoln, a congressman at the time, explained: “they resolved to so frame the Constitution that no one man should hold the power of bringing the oppression upon us.”⁷⁴ After the Civil War, when an English diplomat asked for the support of U.S. naval forces in England’s military action against China, the U.S. Secretary of State explained that the “war-making power of the United States was not vested in the President, but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken.”⁷⁵

From 1898 to World War II, Congress formally declared war three times: the Spanish-American War, World War I, and World War II; undeclared actions over the same period included pirate fights, landings of small naval forces on the coasts, and dispatches of troops to chase bandits or cattle rustlers along the Mexican border, among others.⁷⁶ The judiciary, in the mid-1800’s, recognized the Executive’s authority to act in such a limited capacity with respect to the use of U.S. naval forces to conquer the port of Tampico during the Mexican-American war: “As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed *by law* at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”⁷⁷ This reasoning, importantly, recognizes the need for such executive action to be subject to some lawful authority conferred upon the President by Congress.⁷⁸

C. THE KOREAN WAR

In 1950, President Truman entered into the Korean War without any congressional authorization, claiming authority in some U.N. sanctions

73. See Louis Fisher, *Historical Survey of the War Powers and the Use of Force*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES 11, 18 (Gary M. Stern & Morton H. Halperin eds., 1994).

74. *Id.* Some historians have criticized Lincoln for these statements, noting them to be hypocritical considering that as President he ordered troops to attack the confederate states without Congressional approval, at the start the Civil War; to be fair, he did so under very different circumstances—in a state of national emergency, within the borders of his own country (not in territory disputed by a foreign power)—and he did so with great reservations and with the knowledge that he was infringing on the powers of Congress. *Id.*

75. Chae Chan Ping v. United States, 130 U.S. 581, 591 (1889); Fisher, *supra* note 73, at 19.

76. Fisher, *supra* note 73, at 19–20. Congressional acquiescence to such limited uses of military power over time almost certainly provided fuel for the judicial concept of inherent presidential war powers later.

77. Fleming v. Page, 50 U.S. 603, 615 (1850) (emphasis added); Fisher, *supra* note 73, at 19.

78. See Fisher, *supra* note 73, at 19–20.

against that country, and in a Security Council vote calling upon North Korea to cease hostilities in South Korea and to withdraw its forces.⁷⁹ The U.S. claimed to be acting under the authority of the United Nations, but Truman had committed U.S. forces a day before the U.N. called for military action, and the U.N. exercised no authority over the control of the war; other than limited support from a few nations, it was a U.S. war.⁸⁰ When Dwight Eisenhower became President, he sought congressional authority for actions he took in the Formosa Straits and in the Middle East, believing that Truman had made a serious constitutional error in going to war without congressional approval.⁸¹ Future Presidents would try to capitalize on the failure of Congress to stop Truman from taking this mode of action and use U.N. sanctions as authority to pull the United States into armed conflicts overseas.⁸²

D. THE VIETNAM WAR

The Tonkin Gulf Resolution of 1964, passed in the context of the Cold War and aimed at Communist expansion in Southeast Asia, granted the President broad powers to “take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression,” including the “use of armed force.”⁸³ Sometime after the initiation of hostilities in Vietnam, funding to pay for the war was authorized by regular appropriations bills, which the judiciary (finally, after some disagreement) decided that such bills did not necessarily, in themselves, give authorization for the war operations on which they will be spent.⁸⁴ When the war became unpopular, Congress sought to end the war by denying the President funds by way of an appropriations bill; however, when that happened in 1973, President Nixon vetoed the bill, forcing Congress to negotiate with the President. Congress’ failure to pass the bill by the required two-thirds majority resulted in an additional forty-five days of bombing in Southeast Asia.⁸⁵

79. *See id.* at 22.

80. *See id.*

81. *See id.*

82. *See id.* at 23.

83. *Id.*; *see* Tonkin Gulf Resolution: Joint Resolution for the Maintenance of Peace and Security in Southeast Asia, Pub. L. No. 88-408, 78 Stat. 384 (1964).

84. *See* Fisher, *supra* note 73, at 23 (citing *Mitchell v. Laird*, 476 F.2d 533, 538 (D.D.C. 1973)).

85. *See id.* at 23–24.

E. THE WAR POWERS RESOLUTION AND ITS ENFORCEABILITY

After Vietnam, Congress wanted to avoid giving the President the type of broad authority he had in the Tonkin Resolution.⁸⁶ This idea grew out of and expanded on the National Commitment Resolution, passed by the Senate in 1969, which expressed the view that military commitments should only result from joint affirmative action of both houses of Congress and the President.⁸⁷ The War Powers Resolution, passed in 1973, authorized Presidents to introduce U.S. forces into hostilities only pursuant to a declaration of war, specific statutory authorization, or a national emergency, such as an attack on the United States, its territories, or its armed forces; however, the statute does recognize the power and need of the President to act without Congressional authorization for limited periods.⁸⁸ The statute establishes procedures for the President and Congress to “interact when the use of military force is anticipated or initiated.”⁸⁹ In the 1980’s, several members of Congress brought lawsuits to enforce the statute to contest the President’s use of the armed forces in undeclared armed conflicts; prior to 1990, the courts rejected all suits as non-justiciable political questions to be settled by Congress.⁹⁰ Then, in 1990, the District of Columbia Circuit recognized that courts may grant injunctive relief against executive action in cases where congressional remedies are exhausted and the President ignores the wishes of Congress.⁹¹ In that case, fifty-four members of Congress sued the President over the build-up of troops in the Persian Gulf region prior to the initiation of *Operation Desert Storm*.⁹² The congressmen argued that the initiation of the war required congressional authorization; although the court denied their request for injunctive relief as not yet ripe, it held that such an injunction would be appropriate if the President intended to launch hostilities in the face of an expressed will by Congress *against* the use of force.⁹³

86. *See id.* at 24.

87. *See id.*

88. *See id.* Military actions, which have occurred since the Resolution was passed, suggest the President can use military force without Congressional consent for up to ninety days. *Id.*

89. Gary M. Stern & Morton H. Halperin, *Introduction to THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 1, 3 (Gary M. Stern & Morton H. Halperin eds., Greenwood Press 1994).

90. *Id.*

91. *See Dellums v. Bush*, 752 F. Supp. 1141, 1152 (D.D.C. 1990); *see also* Stern & Halperin, *supra* note 89, at 4.

92. *See* Stern & Halperin, *supra* note 89, at 4.

93. *See Dellums*, 752 F. Supp. at 1143, 1149.

F. THE PERSIAN GULF WAR OF 1990

President George H.W. Bush tried to take the same approach as President Truman to enter the Persian Gulf War, arguing that authority to use force from the U.N. Security Council was sufficient for his deployment of troops, with no need for additional approval from Congress.⁹⁴ Both he and Dick Cheney, his Secretary of Defense at the time, cited the U.N. authorization as sufficient, although the President ultimately asked for, and received, a Congressional resolution authorizing force.⁹⁵ It has been argued that the U.N. resolution *authorized* force, but *did not require* it to be used by any of the member nations; therefore, the President needed congressional approval prior to the deployment of troops.⁹⁶ Furthermore, although the President's Article II power to enter into treaties with other nations, subject to the advice and consent of the Senate, could be argued by proponents of inherent executive power to be a means for the President to use military force without the approval of both houses of Congress, the enumeration of the numerous war powers of Congress vitiates against such an idea.⁹⁷ Also, the simple fact that Truman acted unconstitutionally in the conduct of the Korean War neither legalized the events of that war nor provided a magic precedent on which future presidents could rely on.⁹⁸

G. CONSTITUTIONALITY OF PRESIDENT'S USE OF U.S. MILITARY IN IRAQ

The initial use of the U.S. military in the current Iraqi conflict appears to have been, for the most part, grounded in constitutional principles and established legal precedents. In October of 2002, Congress passed the Authorization for the Use of Military Force Against Iraq.⁹⁹ The resolution met the requirements of the War Powers Resolution, in that it specifically authorized the use of force against Iraq and was passed by both houses of Congress.¹⁰⁰ On October 11, 2002, the Senate voted seventy-seven to twenty-three and the House 296 to 133 in favor of the bill.¹⁰¹ That joint resolution limited the scope and purpose of the presidential action to two main goals: (1) to defend the national security of the United States

94. See Fisher, *supra* note 73, at 25.

95. See *id.*

96. See *id.*

97. See *id.* at 26; see also *supra* notes 36–40 and accompanying text.

98. See Fisher, *supra* note 73, at 25.

99. 116 Stat. at 1498.

100. 116 Stat. at 1500.

101. Allison Mitchell & Carl Hulse, *supra* note 7, at A1.

from the continuing threat posed by Iraq; and (2) to enforce all relevant U.N. Security Council resolutions regarding Iraq.¹⁰²

Inquiry into these purposes raises some questions: does Iraq, six years after U.S. forces invaded, pose a continuing threat to U.S. national security? Given the deplorable lack of security in Iraq after four years of fighting, and the fact that the terrorist attacks showing complete disregard for the lives of non-combatant civilians are now a regular occurrence in Iraq, the answer to the first question may very well be *yes*;¹⁰³ however, it is highly debatable whether the terrorists now active in Iraq have the technological capabilities to launch an attack against the continental United States.¹⁰⁴ Secondly, given that Saddam Hussein has been removed from power (and executed by the new government that replaced him) it would appear there is less danger that the new Iraqi government will disregard the U.N. Security Council resolutions.¹⁰⁵

In the Spring of 2007, Congress proposed to restrict the President's future conduct of the war by tying the financing of the war, through an appropriations bill, to a timeline for the withdrawal of American troops.¹⁰⁶ This situation posed an interesting question: what happens if Congress and a President end up directly at odds on this issue? What would the judiciary say to a dispute between the two branches in a ripe suit against the President brought by members of Congress? The next section of this article sets out to answer this question by examining the evolution of the judiciary's views on presidential power and the ability of Congress to place checks on that power.

II. INHERENT PRESIDENTIAL POWER IN THEORY, IN PRACTICE, AND IN PRECEDENT

We have looked at the text of the Constitution and concluded that the war powers are shared by the President and Congress, but that only Congress has the power to change the state of the nation from one of peace

102. *See id.*

103. *See Semple, supra* note 17, at A1.

104. *See* Ivan Eland, *What Should the United States Do About Saddam Hussein?*, 50 EMORY L.J. 833, 837–41 (discussing the availability of weapons and technology to Iraq and the likelihood that it serves as a threat to the United States).

105. *See* Matthew L. Sandgren, *War Redefined in the Wake of September 11: Were the Attacks Against Iraq Justified?*, 12 MICH. ST. J. INT'L L. 1, 37–41 (discussing Saddam Hussein's continued defiance of U.N. resolutions and how an ideal Iraq would comply with U.N. resolutions).

106. *See* Jeff Zeleny & Jim Rutenberg, *No Solution in Sight as Bush and Lawmakers Discuss Iraq Spending Measure*, N.Y. TIMES, Apr. 19, 2007, at A10.

to one of war.¹⁰⁷ However, historical uses of Presidential power in the realm of foreign policy coupled with an acceptance of the idea of *inherent presidential power* in the same regard have fueled the arguments of those who advocate broad presidential war powers.¹⁰⁸ The weight of this problem and its difficulty stems in large part from the establishment of a large standing army and navy, now deployed globally under the President's command, a circumstance not contemplated by the Framers,¹⁰⁹ who envisioned that congressional approval would have to be demonstrated, at the least, through appropriations.¹¹⁰ They probably contemplated a small standing army of several thousand, with militiamen stationed at the northern and western frontiers, and a coastal navy to protect shipping in the Atlantic and the Caribbean.¹¹¹ Given that the Constitution does not define the President's power to defend against global threats to our national security, judiciary pronouncements on Executive war powers are even more important to consider.¹¹²

A. UNILATERAL PRESIDENTIAL ACTIONS LEADING TO WAR

An early example of how having a large standing army at the Executive's command led to the abuse of presidential power are the actions of President Polk during the Mexican-American War of 1848 (which eventually led to the U.S. annexation of New Mexico, Arizona, and California from Mexico).¹¹³ This example is particularly helpful because of the insinuation, made during a time when the American government had tried, unsuccessfully, to purchase vast tracts of land from Mexico, that war was necessary to "take redress of the wrongs and injuries which [the United States] has so long borne from Mexico into our own hands."¹¹⁴ The idea is more than vaguely similar to the idea of going to war to protect the *national security* interests of the United States in foreign wars such as Vietnam and Iraq. The real reason for the war was the desire for acquisition of California and New Mexico, and Polk saw fit to use the

107. See *supra* notes 36–41 and accompanying text.

108. Neil Kinkopf, *Inherent Presidential Powers and Constitutional Structure*, PRESIDENTIAL STUD. Q., Mar. 1, 2007, available at <http://www.encyclopedia.com/doc/1G1-165310555.html>. Inherent Presidential power means the issue of whether presidential power is subject to limitation by Congress. *Id.*

109. See KEYNES, *supra* note 45, at 32.

110. See Fisher, *supra* note 73, at 14.

111. See *id.*

112. See *id.*

113. See Note, *supra* note 71, at 1780.

114. President James K. Polk, State of the Union Address (Dec. 8, 1846), available at http://www.let.rug.nl/usa/P/jp11/speeches/jp_1846.htm.

build-up of a military presence on the border as a means to pressure Mexico into giving up those territories.¹¹⁵ Polk ordered General Zachary Taylor to disputed territory along the Texas-Mexico border while he concluded with his Cabinet that in the event of a clash between the opposing forces, he would ask Congress for a declaration of war.¹¹⁶ When such a clash did, in fact, occur, Polk told Congress that Mexico had invaded American territory and “shed blood upon the American soil,” and that the nations were in a state of war.¹¹⁷ While several congressmen expressed the sentiment that the president had no power to say when the nation was at war, as this was expressly reserved to the legislature, Polk received a declaration of war from Congress.¹¹⁸ Polk was later censured by the House of Representatives for his (successful) efforts to secure the much-desired portions of Mexican territory, including California, on the ground that the war had been “unnecessarily and unconstitutionally begun by the President of the United States.”¹¹⁹ Polk, for his part, said that while the United States had not gone to war for conquest, the Mexicans would not be able to make up for “her long continued wrongs and injuries” which had “forced us to wage” war by any other means than by selling the desired lands at low-cost, because “it was well known that the Mexican Government had no other means of indemnifying us.”¹²⁰

B. JUDICIAL PROCLAMATIONS OF INHERENT PRESIDENTIAL POWER: THE *CURTISS-WRIGHT* CASE

The judiciary helped to expand the role of the President to act in the vague interest of national security with some irresponsible and historically baseless dicta in the *Curtiss-Wright* case.¹²¹ In that case, the Supreme Court was asked to decide whether Congress had delegated too broadly in allowing the President to impose an arms embargo if he determined that it “may contribute to the reestablishment of peace” between warring parties

115. See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 40 (2d ed. 2004).

116. See *id.* at 41.

117. *Id.*

118. See *id.* at 41–42. Senator John Calhoun said, at the time:

There may be invasion without war, and the President is authorized to repel invasion without war. But it is *our* sacred duty to make war, and it is for us to determine whether war shall be declared or not. If we have declared war, a state of war exists, and not till then.

Id. at 41.

119. *Id.* at 43.

120. *Id.*

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

in South America.¹²² Instead of simply answering the question in the positive and declaring that Congress could grant the President more discretion in foreign affairs than in those domestic, Justice Sutherland, writing for the majority, declared:

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority *plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress*, but which, of course, like every governmental power, must be exercised in subordination to the applicable provisions of the Constitution.¹²³

Of course, it is unclear how the President can be limited by the Constitution as to powers which are not attributed to him in that document. According to Sutherland, the President received powers of external sovereignty directly from the Crown of England, and was in a better position than Congress for deciding the best course for foreign policy decisions: “Sovereignty is never held in suspense. *When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union.*”¹²⁴ “The states were not ‘sovereigns’ [A]s political beings, [the sovereigns] were dumb, for they could not speak to any foreign sovereign whatever.”¹²⁵

It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.

. . . .

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of that power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates.

. . . .

. . . [H]e, not Congress, has the better opportunity of knowing the

122. FISHER, *supra* note 115, at 43.

123. *Curtiss-Wright*, 299 U.S. at 319–20 (emphasis added).

124. *Id.* at 317 (emphasis added).

125. *Id.*

*conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials.*¹²⁶

A reading of the above excerpts is chilling, in light of the events from the fall of 2002 to the present.¹²⁷ In our times, the President, who, with his intelligence agencies and the Department of Defense working to obtain information on the state of Iraq and the threat it may have presented to the United States, acted in the same way envisioned above, with disastrous results. The United States military now finds itself locked in the middle of a raging civil war in Iraq, with large doses of terrorist activity, directed at Iraqi citizens and American soldiers, a daily occurrence.¹²⁸

C. REFUTING JUSTICE SUTHERLAND'S REASONING

It is important to note that the history invoked by Justice Sutherland in the *Curtiss-Wright* decision was false, and the concept he floated about with such confidence, that of executive prerogative, was in fact rejected by the Framers.¹²⁹ In 1776, when the Declaration of Independence was signed, there was no President, nor a separate executive branch; there was only the Continental Congress, which took charge of all duties, legislative, executive, and judicial.¹³⁰ Furthermore, the states operated as sovereign entities, and could make treaties, borrow money, lay embargoes, and conduct their own military campaigns.¹³¹ Under the Articles, the assent of the states was required prior to the conduct of any war, the conclusion of any treaty, or the issuance of any letter of marque or reprisal or

126. *Id.* at 318–20 (emphasis added).

127. Compare *id.* at 317–20 (depicting the President's power over external affairs as vast and his role as superior to Congress), with *supra* text accompanying notes 1–16 (chronicling events leading up to Iraq War).

128. See, e.g., Richard A. Oppel Jr., *4 Americans Killed in Iraq; U.S. Attack Kills 6 Iraqis*, N.Y. TIMES, Mar. 23, 2008, at A8 (reporting the deaths of American soldiers and Iraqi civilians due to a militant attack); Sharon Behn, *Female Bombers Spread Terror Iraqis Grow Wary of Women*, WASH. TIMES, Mar. 20, 2008, at A1 (discussing a female suicide bomber's attack, which killed five persons and wounded two police officers); Alissa J. Rubin, *Iraqi Allies of U.S. Forces Are Killed in Three Attacks*, N.Y. TIMES, Oct. 5, 2007, at A15 (chronicling numerous extremist attacks that killed a tribal leader, two Iraqi policemen, and a government official); Edward Wong, *Car Bomb Kills More than 60 in Iraq Market*, N.Y. TIMES, July 2, 2006, § 1, at 1 (reporting the detonation of a suicide car bomb in a Shiite neighborhood).

129. See *Curtiss-Wright*, 299 U.S. at 317–320.

130. See LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 180 (Texas A&M Univ. Press 1998) (1981).

131. See *id.*

determination of any appropriations by the Continental Congress¹³²—a situation that can fairly be characterized as a total mess, but which directly refutes Sutherland’s recounting of events.¹³³ As Keynes notes, “[t]he Articles of Confederation constitute a broken link in the mystical chain of events between the American Revolution and the Federal Convention”;¹³⁴ therefore, there was no unbroken line of thought between the British Crown, which had an undefined residual power over foreign affairs, and the American Presidency.¹³⁵ Furthermore, when the Constitution was drawn up, Congress and the President explicitly shared the powers of external sovereignty, with more such powers vested in the former than the latter.¹³⁶

It appears that Sutherland, who had been a Senator from Utah and a member of the Senate Foreign Relations Committee prior to being appointed to the Supreme Court,¹³⁷ believed that the President possessed a power known as executive prerogative, which had been held by the British Crown.¹³⁸ Prerogative is “the power to determine the public good or interest in circumstances that were unforeseen or unforeseeable by the legislature,” and to “act *contrary to standing law or in the face of silence in existing laws to preserve the nation from an external threat of internal violence.*”¹³⁹ The Framers, in carefully enumerating powers over foreign affairs in the Constitution and splitting those powers between Congress and the Executive, demonstrated their belief that the best way to preserve a republic is a system of checks and balances across branches.¹⁴⁰ As John Adams said: “It is by balancing each of these powers [Legislative, Executive, and Judicial] against the other two that the efforts in human nature towards tyranny can alone be checked and restrained.”¹⁴¹ There is no evidence that the framers intended the President to possess an unenumerated gray zone of power, which it inherited directly from the British Crown.

Subsequent Supreme Court Justices characterized much of Sutherland’s opinion as mere dictum,¹⁴² and other federal justices were

132. See KEYNES, *supra* note 45, at 26.

133. See *Curtiss-Wright*, 299 U.S. at 304.

134. KEYNES, *supra* note 45, at 26.

135. See *id.*

136. See Fisher, *supra* note 73, at 12.

137. See JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND A MAN AGAINST THE STATE 48, 93 (1951).

138. KEYNES, *supra* note 45, at 12.

139. *Id.*

140. See *id.* at 10.

141. *Id.* at 17.

142. See FISHER, *supra* note 130, at 179.

careful to qualify the opinion with statements such as this one: “[t]o the extent that denominating the President as the ‘sole organ’ of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization.”¹⁴³

D. THE LIMITS OF PRESIDENTIAL POWER TO MAKE WAR & THE ROLE OF THE JUDICIARY IN MEDIATING CONSTITUTIONAL DISPUTES BETWEEN CONGRESS AND THE PRESIDENT

Two cases in particular treat the point of whether the judiciary has the authority to decide constitutional disputes between the branches. In *Goldwater v. Carter*, some members of Congress sued the President, claiming his action in terminating a treaty with Taiwan without congressional assent “deprived them of their constitutional role with respect to a change in the supreme law of the land.”¹⁴⁴ While Justice Rehnquist and three other justices thought the suit presented a non-justiciable political question, which the Court could not decide, the plurality opinion ordered the dismissal of the case on ripeness grounds, as Congress had not passed legislation declaring the presidential action illegal, and as such had not exhausted the remedies available to it prior to filing suit.¹⁴⁵ Justice Powell, writing for the plurality, wrote:

Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. . . . The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.¹⁴⁶

This means that once Congress repudiates the president’s actions by declaring that congressional (or in that case, Senate) approval is required for the President to take action on a matter over which it has enumerated power, the Court must decide a case in which the President has acted contrary to the wishes of the legislature.¹⁴⁷ The case was ruled not ripe because Congress took no action to repudiate the President.¹⁴⁸ As Justice Brennan stated in his concurrence: “Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of

143. *Id.* (citing *Am. Int’l Group v. Islamic Republic of Iran*, 657 F.2d 430 (D.C.Cir. 1981)).

144. *Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979).

145. *See id.* at 996.

146. *Id.* at 997.

147. *See id.*

148. *See id.* at 998.

any mutual defense treaty, . . . no final vote has been taken on the resolution.”¹⁴⁹ More importantly, contrary to the concurrence filed by Justice Rehnquist, the Court’s plurality opinion suggested that the case did not present a non-justiciable political question, which the Court was unable to decide.¹⁵⁰ Justice Brennan analyzed the three situations, which give rise to non-justiciable political questions. There are three inquiries: (1) whether the issue involves resolution of questions committed, by the text of the Constitution, to another branch of government; (2) whether resolving the question would require the Court to move beyond areas of judicial expertise, if there exist a “lack of judicially discoverable and manageable standards” to resolve a case; and (3) whether judicial intervention would be imprudent for reasons such as the existence of policy questions beyond the reach of the judiciary, the possibility of impermissible judicial interference in the field of foreign affairs, the existence of a real possibility of embarrassment to the judiciary which would result from “multifarious pronouncements by various departments on one question” or if the circumstances present “an unusual need for unquestioning adherence to a political decision already made.”¹⁵¹ Brennan concluded that none of the three situations applied, reasoning that: (1) no constitutional provision explicitly confers upon the President to terminate treaties, making the dispute one appropriate for judicial resolution; 2) the questions presented were appropriate for the judiciary, as they involved application of normal principles of constitutional interpretation to the provisions at issue; and (3) no prudential considerations would preclude the judiciary from deciding the case, if it were ripe, given that the Court’s resolution of the case “would eliminate, rather than create, multiple constitutional interpretations.”¹⁵² As he so eloquently put it: “The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and Congress would require this Court to provide a resolution pursuant to our duty ‘to say what the law is.’”¹⁵³ This was clearly a case that, if Congress and the President had come to a head, would have been fit for the Court to decide.¹⁵⁴

Dellums v. Bush, a case brought by congressmen against President George H.W. Bush on the eve of the 1990 Persian Gulf War, treats more

149. *Id.*

150. *See Goldwater*, 444 U.S. at 998.

151. *Id.*

152. *Id.* at 998–1001.

153. *Id.* at 1001 (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974)) (internal quotation marks omitted).

154. *See generally id.* 996.

specifically the ability of the Court to mediate disputes between Congress and the President as they relate to each branch's respective war powers.¹⁵⁵ In the context of this article, the case is very instructive, and emphatically underscores the need for congressional debate and action when war is pending.¹⁵⁶ The court ultimately found that the case was not ripe for decision for two reasons: (1) Congress had taken no legislative action to require a declaration of war prior to an invasion of Iraq; and (2) the acts of the President, in deploying 400,000 troops to the region to oust Iraqi forces remaining in Kuwait after January 15, 1991, were not considered a definitive course of executive action sufficient to support ripeness.¹⁵⁷ However, prior to so holding, the court stood by the reasoning of the plurality opinion of Justice Powell (and to a large extent that of Justice Brennan) in *Goldwater v. Carter*, writing that "if the Congress decides that United States forces should not be employed in foreign hostilities, and if the Executive does not of its own volition abandon participation in such hostilities, action by the courts would appear to be the only available means to break the deadlock in favor of the constitutional provision."¹⁵⁸ The court rejected arguments by the Department of Justice that the Executive had the power to determine whether any particular military operation was a *war* requiring a formal declaration, stating that "courts do not lack the power and the ability to make the factual and legal determination of whether this nation's military actions constitute war for the purposes of the constitutional War Clause."¹⁵⁹ However, the opinion continuously emphasizes the need for congressional action if the issue is to be decided. Here are some examples of language in the opinion that illustrate this requirement:

[I]t is therefore clear that congressional approval is required *if Congress desires to become involved*.

. . . .

Although . . . in principle, an injunction [that President order troops not to invade Iraq] may issue at the request of Members of Congress to prevent the conduct of a war which is about to be carried on without congressional authorization, *it does not follow that these plaintiffs are*

155. See generally *Dellums v. Bush*, 752 F. Supp. 1141, 1141 (D.D.C. 1990).

156. See *id.*

157. *Id.* at 1152.

158. *Id.* at 1144.

159. *Id.* at 1146. The court also cited the *Prize Cases* in a footnote on this point, where the Court responded to the parties' claims that the Civil War was not a war because it had not been officially declared by saying they "cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race." *Id.* at n.14. Note the typical American overstatement.

entitled to relief at this juncture. . . .

. . . .

*No one knows the position of the Legislative Branch on the issue of war or peace with Iraq It would be premature and presumptuous for the Court to render a decision on the issue of whether a declaration of war is required when the Congress itself has provided no indication whether it deems such a declaration either necessary, on the one hand, or imprudent, on the other.*¹⁶⁰

Therefore, the combined effect of *Goldwater* and *Dellums* is to emphasize *the need for congressional responsibility and action* when the President appears to be taking steps toward war or exercising some other constitutional duty shared by the Executive and the Legislative branches (such as revoking the effect of a treaty).¹⁶¹ While the optimist may view the fact that federal courts actually heard these two cases, the realist will note that neither decision stopped the President from doing what he wanted to do, and both cases pointed to Congress’s failure to speak, as one body, against each respective president’s actions.¹⁶²

So, notwithstanding the fact that the judiciary *can* “say what the law is”¹⁶³ when the Executive and Legislative branches reach an impasse, courts

160. *Id.* at 1145, 1149–50 (emphasis added) (footnote omitted).

161. *See generally* *Goldwater v. Carter*, 444 U.S. 996, 996 (1979); *Dellums*, 752 F. Supp. at 1141.

162. *See Goldwater*, 444 U.S. at 997–98; *see also Dellums*, 752 F. Supp. at 1143–44.

163. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). In the area of foreign affairs, the model of presidential power the Court seems to espouse appears to be that of *legislative accountability* as described by Professor Erwin Chemerinsky. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 332 (2002). Under this approach, the president, for the most part, may take any action not prohibited by the Constitution or a statute. *Goldwater* and *Dellums* suggest that this approach, enunciated by Justices Frankfurter and Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (as applied to a domestic presidential action based on foreign policy considerations) applies also to presidential infringements on Congressional war powers, *when they are exercised in a manner contrary to presidential wishes*. CHERMERINSKY, *supra*, at 332–33. Justice Jackson’s opinion in *Youngstown* is extremely important and instructive for the way he delineated “three zones of presidential authority.” *Id.* at 333. Chemerinsky’s prose and use of Jackson’s words is much better than mine would be, so I include it here:

First, Jackson said that “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” Under such circumstances, the president’s acts are presumptively valid.

Jackson’s second zone covers circumstances “[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” Jackson said it is impossible to formulate general rules as to the constitutionality of actions in this area .

. . . .

are powerless, especially with regards to foreign policy issues, unless it is absolutely clear that Congress has acted *as one body* by passing legislation which goes against the contemplated presidential action (not as small groups of disgruntled congressmen looking for the judiciary to validate their shared position).¹⁶⁴ Furthermore, it is important to recognize that in the many instances where the presidential war power has been exercised without any congressional authorization, such as by Polk prior to the Mexican-American War, Truman in the Korean War, and George H.W. Bush prior to the Persian Gulf War, Congress has either acquiesced to or ratified the Executive action.¹⁶⁵ This shows that the ideas expressed in the *Curtiss-Wright* opinion still carry significant weight in presidential and congressional practice; while Congress could have forced the President's hand in any of the foregoing instances, it did nothing.¹⁶⁶ This suggests that our efforts would be well spent, not through further discussion of case law, which either expands or limits the scope of presidential war powers, but by addressing the inability or unwillingness of Congress to act contrary to the wishes of any given President who asks them to support (or silently acquiesce to) his or her acts or recommendations of war.¹⁶⁷ We should start by evaluating the political events leading up to Congress's authorization of the President to use force in Iraq in October of 2002.

III. CONGRESSIONAL SPINELESSNESS: FROM A GANG OF PATRIOTS TO PLAYING THE BLAME GAME

A. BACKGROUND

Let us go back to the early fall of 2002. The principal issue was the failure of Saddam Hussein's regime to fully cooperate with United Nations weapons inspectors; on September 12, President George W. Bush asked the

Third, Jackson argued that "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb." Because the president is disobeying a federal law, such presidential actions will be allowed only if the law enacted by Congress is unconstitutional.

Id. (alterations in original). It is the existence of this very real *twilight zone* of presidential power that Justice Jackson describes, which makes necessary the need for deliberate, informed, and decisive legislative actions by Congress. *Id.* Congress, when acting within its enumerated powers, can take presidential actions out of the twilight zone and into the light, where courts are in a better position to determine their validity. *See id.*

164. CHEMERINSKY, *supra* note 163, at 333.

165. *See* Arthur Schlesinger, Jr., *Presidential War: See if You Can Fix Any Limit to His Power*, N.Y. TIMES, Jan. 7, 1973, at 13.

166. *See id.* at 14.

167. *See* Bruce Ackerman, *The Legality of Using Force*, N.Y. TIMES, Sept. 21, 2002, at A15.

U.N. to take collective action against Iraq.¹⁶⁸ Five days later, Iraq offered to readmit international weapons inspectors, an offer that countries like Russia and France were willing to take at face value, while the United States rejected its sincerity, and the White House released a detailed chronology of Saddam Hussein's past acts of obstruction, including his refusal in the past to provide complete access to inspection teams.¹⁶⁹ Although one might expect such an offer would cause administration officials to pause for a moment, in spite of the dubious timing of Iraq's offer, Vice President Dick Cheney instead lobbied Congress to quickly pass a resolution authorizing force against Iraq.¹⁷⁰ Why the hurry? It appears administration officials planned a January or February invasion because during those months it would be cool enough for American soldiers "to wear full chemical and biological protective gear."¹⁷¹ Senior members of Congress were receptive to the idea of a quickly-passed resolution; Tom Dacshle, the Senate Democratic Minority leader, predicted a vote *well before the election* because the administration had yielded to the Democrats in asking the U.N. for action and for consulting Congress prior to taking military action, and said, "now we are reciprocating."¹⁷² The House Democratic leader, Richard Gephardt, showing his support for the administration, said: "After 12 years of Saddam Hussein's defiance of United Nations resolutions, his regime's new offer to admit inspectors does not address my concerns about the threat he poses to the United States and the international community."¹⁷³ With a Republican administration (pushing for war) and the Republican party dominating Congress, these comments by the minority congressional leadership showed, at that early point in time, the high likelihood that a congressional resolution to use force against Iraq would be secured.¹⁷⁴ Why?

A New York Times editorial written on September 20, 2002, offers some clues, and, if taken at face value and seen in retrospect, points out the glaring deficiencies in our political system and the values of the

168. See Todd S. Purdum, *Threats and Responses: News Analysis; U.S. Hurries; World Waits*, N.Y. TIMES, Sept. 18, 2002, at A1.

169. See *id.*

170. See *id.*

171. *Id.* at A18. This apparent concern for the soldier's welfare is ironic given the Administration's extreme impatience with efforts to reach a peaceful solution, which would have protected soldiers much better than any gas mask or flak jacket possibly could.

172. *Id.* at A1. The idea that Democrats saw Bush's overture to the U.N. and subsequent request for congressional authorization as a *favor* that required reciprocity (even *with* mid-term elections so near) is ridiculous in light of our discussion of Congress's war powers in Part One.

173. *Id.* at A18.

174. See Carl Hulse, *Top Democrats Say a War Against Iraq Is Premature*, N.Y. TIMES, Mar. 7, 2003, at A15.

representatives who play key roles within it:

The newly bellicose mood on Capitol Hill materialized almost overnight. Last week, Democrats wanted the [U.N.] Security Council to act first and were calling for measured consideration of the political and military issues involved in going to war. The haste is unfortunate, all the more so because it is clearly motivated by campaign politics. Republicans are already running attack ads against Democrats on Iraq. Democrats favor fast approval of a resolution so they can change the subject to domestic economic problems.

....

No doubt the memory that haunts Congress these days is the vote taken in 1991 authorizing Mr. Bush's father to use force to repel Iraqi troops from Kuwait. The overwhelming majority of Democrats opposed it, and many have regretted their votes ever since. Many fear that a reprise now would expose them to Republican charges that they are soft on national security issues. Before risking the lives of American troops, Democrats and Republicans should closely examine Iraq options and make a decision on the merits rather than on the advice of their campaign strategists.

. . . Democrats owe Mr. Bush careful deliberation about the possibility of war. They do the nation, and Mr. Bush, no service by charging ahead in lock step with the White House.¹⁷⁵

B. NEWS COVERAGE LEADING UP TO AND INCLUDING PASSAGE OF THE JOINT RESOLUTION

While it is sickening to think that members of Congress would base a vote that would surely result in a great loss of life on purely political considerations, such as being re-elected, or achieving or maintaining a party majority in the House or the Senate, there is probably some truth to this editorialist's observations.¹⁷⁶ A thorough review of news coverage leading up to passage of the joint resolution reveals some major themes.

First, the President and his lawyers initially asserted that they could invade Iraq without any additional authorization from Congress, based on prior U.N. resolutions put in place at the conclusion of the Persian Gulf War, making subsequent overtures seeking specific authorization to use force seem like a political favor to Congress, for which they were (unreasonably) grateful.¹⁷⁷

Second, the prospect of invading Iraq was consistently and repeatedly

175. Editorial, *The Politics of War*, N.Y. TIMES, Sept. 20, 2002, at A26.

176. *See id.*

177. *See id.*

framed, by the Bush Administration, in the context of the 9/11 terrorist attacks and the subsequent *War on Terror* it declared, and congressmen were afraid to be perceived as *soft* on terror and on *national security issues* in general.¹⁷⁸ In public statements, the Administration played upon the fears of Americans of another terrorist attack in order to garner their reluctant support for a pre-emptive strike.¹⁷⁹

Third, President Bush's appeal to the United Nations for a resolution that, if Iraq did not cooperate, would call for stricter inspections and authorization for the use of force, gave some lawmakers the mistaken impression, on which many later acted, that a congressional resolution authorizing force would facilitate U.N. support for a stiffer resolution and obviate the need for unilateral military action by the United States (or bilateral action with the U.K.).¹⁸⁰ Congressmen and the President rationalized that the resolution was needed, not so force could be used, but to give the U.S. position more weight with the U.N. Security Council and lead them to authorize a multilateral effort, eliminating the need for a unilateral U.S. attack.¹⁸¹ This reasoning was faulty, in part, because the resolution authorizing force was a *de-facto* declaration of war. Once Congress voted, they had little chance of reigning in the President.¹⁸²

Fourth, reports of military intelligence emphasizing vast stores of *weapons of mass destruction*, including chemical and biological weapons, a capacity to produce a nuclear bomb within a year, and linking Iraq to members of al-Qaeda, created an alarmist atmosphere and a sense of urgency to pass the resolution and discouraged Democrats, many of whom feared being perceived as unpatriotic or weak on national security issues, from delaying a voting on it until after congressional elections.¹⁸³

Fifth, the Bush Administration pushed hard for authorization to invade Iraq, and Congress, in the end, for political reasons, bought its arguments—hook, line, and sinker.¹⁸⁴ For example, administration officials looked, almost eagerly, for signs that Iraq would not cooperate with more rigorous U.N. inspections in order to justify their request for authorization

178. *Id.*

179. See Robert Byrd, *Iraq's WMD Intelligence: Where Is the Outrage?*, COMMON DREAMS.ORG, Jun. 5, 2003, <http://www.commondreams.org/views03/0605-13.htm>.

180. See Julia Preston with Todd S. Purdum, *Threats and Responses: Diplomacy: Bush's Push on Iraq at U.N.: Headway, Then New Barriers*, N.Y. TIMES, Sept. 22, 2002, at 24.

181. See *id.* at 1, 24.

182. See Seth Weinberger, *Presidential War Powers in a Never-Ending War*, 13 ILSA J. INT'L & COMP. L. 221, 221–22 (2006).

183. Editorial, *supra* note 175, at A26.

184. See Preston and Purdum, *supra* note 180 at 24.

to use force.¹⁸⁵ When members of Congress expressed a need to act with the U.N., Bush chastised what he perceived as their lack of resolve on issues of national security, an act of political arm-twisting ending in the Democrats giving in.¹⁸⁶

Finally, the loyalty of Republicans to the President's stance was shockingly absolute, with only token dissent coming from members of the G.O.P. in both houses of Congress.¹⁸⁷ This *loyalty* ensured that almost all serious debate centered on the Democrats, making the political pressure exerted by the Administration on its members even more effective.¹⁸⁸

In the end, despite the responsibility the Bush Administration should suffer for pushing the headlong rush into war, it was ultimately Congress that authorized the President to use force.¹⁸⁹ Congress, and Congress alone, has the constitutional authority to change the state of the nation from one of peace to one of war, and it is ultimately the responsibility of its members to make sure that they have ample reason to do so.¹⁹⁰ The events leading up to the resolution to use force demonstrate that Congress failed miserably in carrying out this responsibility, a mistake for which the people of the United States, the people of Iraq, and to some extent, people across the globe will be paying for years to come.¹⁹¹

185. *See id.* Saddam Hussein sent a letter to the U.N. declaring that Iraq had no weapons of mass destruction and qualified the renewed invitation of the weapons inspectors by saying that they would have to respect Iraqi sovereignty, offering no guarantees of complete cooperation, and complaining that the proposed plan for inspections seemed to impose new conditions on his country. *Id.* President Bush saw in Saddam Hussein's vacillations the leverage he needed, and he used it to ask Congress for authorization to use military force in Iraq. *Id.*

186. Preston and Purdum, *supra* note 180 at 1.

187. *See* David Postman, *Washington Congressional Democrats Say They're Wary of Attack on Iraq*, THE SEATTLE TIMES, Aug. 28, 2002, at A12. Although Democrat's believe a vote is necessary, Republican's disagree, and maintain that the President has authority under the War Powers Act. *See id.*

188. *See* Janet Hook & Richard Simon, *Senate Sets Debate on War Plans*, LOS ANGELES TIMES, Oct. 2, 2002, at 1. Critics say that the political pressure on Democrats was to mute their opposition and suppress their reservations. *Id.*

189. *See* Michael J. Glennon, *Go Long? Go Big? Go Back to Congress*, THE WASHINGTON POST, Dec. 7, 2006, at A31. Congress in 2002 authorized imperfect war in approving the use of force in Iraq for specific, limited objectives. *See id.*

190. 50 U.S.C. § 1541 (2009).

191. *See* Ivo H. Daalder & James M. Lindsay, *It's Too Soon to Give Bush War Power in Iraq*, NEWSDAY (Long Island, N.Y.), Sept. 25, 2002, at A31. Because Bush's proposal was so broad it would authorize him to wage war not only against Iraq, but anywhere else in the region as well. *See id.* Congress needed to hold in-depth hearings to examine the many complicated issues raised by a possible war. *See id.*

1. August, 2002

The decision to go to war cannot be understood outside the context of the *War on Terror*.¹⁹² In early August of 2002, Bush Administration lawyers argued that, by linking Iraq to the September 11th attacks, the President could attack Iraq without congressional approval, since a September 14, 2001, Senate resolution authorized him to use “all necessary force” against those who “planned, committed, or aided” in the attack.¹⁹³ The President also claimed authority to attack based on his position as Commander-in-Chief and the 1991 resolutions supporting the Persian Gulf War.¹⁹⁴ Although, according to Senator Robert Byrd (West Virginia), who consulted several important constitutional scholars on the issue (and who is himself a leading constitutional scholar), the 1991 resolution had lost its force once Iraq capitulated in April of 1991,¹⁹⁵ it appeared to some, even then, that the need for a congressional resolution would not impede the President’s ability to invade.¹⁹⁶ Saddam Hussein’s notoriety as a tyrant and murderer of his own people made any opposition to his ouster unpopular among congressional leaders;¹⁹⁷ political analysts predicted, even then, that Democrats, not wanting to be perceived as on the *wrong side* of a war on terrorism, would give wide support for a resolution authorizing the use of force in Iraq.¹⁹⁸

2. September, 2002

Although the month began with reports that Saddam Hussein was willing to let U.N. weapons inspectors back into his country and to inspect “whatever they liked,”¹⁹⁹ politicians in Washington were focused on the prospect of war, as Vice President Dick Cheney, Secretary of Defense Donald Rumsfeld, and CIA Director George Tenet attended several

192. Ian S. Lustick, *An All-Consuming ‘War On Terror,’* THE BALTIMORE SUN, Dec. 31, 2006, at 17A. The official mantra is that we fight in Iraq because it is the “central front in the War on Terror.” *Id.* Its invention was required in order to fight in Iraq. *See id.*

193. Dave Boyer, *Lawmakers Likely to OK Hitting Saddam,* WASHINGTON TIMES, Aug. 6, 2002, at A01.

194. *See* Stephen Dinan, *Rumsfeld Called to Hill to Discuss Iraq; Warner Seeks Information,* WASHINGTON TIMES, Aug. 29, 2002, at A01.

195. *Id.*; *see also* Paul J. Nyden, *Byrd Intensifies Challenge to War Powers Assumptions,* CHARLESTON GAZETTE (w. Va.), Aug. 29, 2002, at P2A.

196. *See* Dinan, *supra* note 194. This is because of the administration’s signaling that an assault is imminent. *Id.* Moreover, Vice President Cheney, and Donald Rumsfeld both made speeches advocating the case for pre-emptive action against Iraq. *Id.*

197. *See* Boyer, *supra* note 193.

198. *Id.*

199. Adel Darwish, *Sorting Out Saddam,* MIDDLE EAST (London), Sept. 1, 2002, at 6.

meetings with members of Congress to share intelligence information about Iraq.²⁰⁰ At that stage, the Senate Majority Leader, Democrat Tom Daschle was still skeptical of the administration's plans, remarking, prior to meeting with Cheney and Tenet, that "I would hope that we would not lose one American life because the American people were left in the dark" about the consequences of attacking Iraq.²⁰¹ However, Daschle, a key figure in gaining the support of Senate Democrats, was more subdued after the meeting and promised that he would consult with his colleagues on what he had heard, although he urged the administration to seek U.N. approval for action against Iraq.²⁰² The attitude of some Republicans, however, was in stark contrast—some stated bluntly that they would support a war against Iraq without the need to see evidence showing that Iraq posed a threat.²⁰³ For example, Senator James Inhofe of Oklahoma, a member of the Armed Services Committee, made the following statement at that time: "The administration doesn't have to make a really strong case. We have elected a strong leader, and we need to give him our full support. There's no reason for us to believe what Saddam Hussein says."²⁰⁴ Subsequent events over the next month and a half would show that, with a few small exceptions, almost all Republican congressmen were of the same mind.²⁰⁵ In a matter of life or death, or in Bushspeak, in a matter of *national security*, the Administration would have only to convince the Democrats, the minority in the House and the hairline majority in the Senate.²⁰⁶ The stage was set for a class in *Party Politics 101*.²⁰⁷

A key part in this discussion was the intelligence information that was shared with Congress, both through these closed meetings and, later, in both houses prior to the vote on the resolution.²⁰⁸ As a major British newspaper report wisely noted: "No one who does not have access to

200. Dave Boyer, *Congressmen Get 'Troubling' Iraq Briefing; Daschle Brings Up Vietnam*, WASHINGTON TIMES, Sept 6, 2002, at A01. A Pentagon briefing on Iraq was given to about two dozen senators by Mr. Cheney, Mr. Rumsfeld, and Mr. Tenet. *Id.*

201. *Id.*

202. *See id.*

203. *See id.* (saying that Saddam Hussein has been a consistent threat to the world).

204. *Id.*

205. *See* John H. Cushman Jr., *Threats and Responses: Politics; Congressman Says Bush Would Mislead U.S.*, N.Y. TIMES, Sept. 30, 2002, at A14. Democratic congressmen, who visited Iraq stirred up anger amongst Republicans when they questioned the reasons President Bush used to justify possible military action. *Id.* This drew rebukes from Republicans at a time when the political furor over Iraq and over a bill on domestic security sharply divided leaders of the two parties. *Id.*

206. *Id.*

207. *Id.*

208. *See* Boyer, *supra* note 200, at A01.

intelligence information, which itself may be mistaken, can know what weapons Saddam Hussein has already developed. Nor can anyone outside the top circle of the US Administration . . . know what plans the US has for achieving victory over Saddam Hussein.”²⁰⁹ As of September 13th, many Democratic leaders were still not convinced.²¹⁰ Senator Joe Biden, a key Democratic leader, said Congress should continue to gather information on the Iraqi threat, and should wait until after the November congressional elections before voting on the issue; House (Democrat) Minority Leader Richard Gephardt agreed with him, saying “[w]e have got to divorce all of this from politics to the greatest possible extent”;²¹¹ and Tom Daschle remained unconvinced that the case for a pre-emptive attack had been made at that point.²¹²

But President Bush’s appeal to the U.N., in a September 12 speech to its members, to pass a resolution for more stringent inspections and authorize force, if necessary, to carry them out, proved to be a great political bargaining chip to get the Democrats to support him.²¹³ The timeline for action was moved up, and Daschle reported that a debate on the resolution would probably occur before the November elections.²¹⁴ “Every time the president speaks out, he strengthens his case,” he said.²¹⁵ At that time, Bush attacked Democrats who wanted a U.N. resolution prior to passing a congressional authorization to use force, saying:

Democrats waiting for the U.N. to act? I can’t imagine an elected . . . member of the United States Senate or House of Representatives saying, ‘I think I’m going to wait for the United Nations to make a decision’ . . . It seems to me that if you’re representing the United States you ought to be making a decision on what’s best for the United

209. William Rees-Mogg, *Iraq Must Be Dealt with, One Way or the Other*, TIMES (U.K.), Sept. 9, 2002, at 18.

210. See American Political Network, *National Briefing Iraq I: Hill Opposition Wanes; Vote Timing Now Front and Center*, THE HOTLINE, Sept. 13, 2002 (citing Nick Anderson, *The World; DEBATE ON IRAQ; Republicans in Senate Press Democrats for Vote on Iraq; Policy: Quick Action Will Aid Bush in Building an International Coalition, GOP Leaders Say. Biden, Daschle Are Cautious on How Fast Congress Goes.*, LOS ANGELES TIMES, Sept. 13, 2002).

211. *Id.* (citing Julie Mason & Cynthia Lee, *Bush to U. N.: Act Now on Iraq; Push for War Vote May Be Casualty of Politics on Hill*, THE HOUSTON CHRONICLE, Sept. 13, 2002).

212. See *id.* (citing Anderson, *supra* note 210).

213. See *id.* The Hotline quotes congressmen praising Bush’s move from articles from the following sources and more: *Walton*, LINCOLN JOURNAL STAR (9/13/02); *Hardball*, MSNBC (9/12/02); and *Early Show*, CBS (9/13/02).

214. See *id.* (citing Dan Balz & Jim VandeHei, *Bush Speech Aids Prospect for Support Congress—Timing of Vote Remains Issue Among Legislators*, WASHINGTON POST, Sept. 13, 2002).

215. *Id.* (citing Balz & Vandehei, *supra* note 214).

States.²¹⁶

Some hopeful Democratic presidential candidates, like John Edwards, obliged him by saying that Saddam Hussein should be deposed;²¹⁷ Senator Joseph Lieberman also said he was “fully supportive of military action right now.”²¹⁸ The general consensus on Bush’s speech among all congressmen, both Democrats and Republicans, was that they appreciated Bush’s effort to give the U.N. a chance to take action and applauded him for making his case.²¹⁹ In the words of Senator Mary Landrieu, Democrat from Louisiana:

[T]he president made a very right and necessary step . . . today by going to the U.N., and his speech has gotten high marks. . . . [H]e did a beautiful job laying out the evidence, the case, a compelling case for why this particular leader and this particular regime is so dangerous to the world.²²⁰

The Administration kept on the offensive, continuing to *make its case*.²²¹ Vice President Dick Cheney, in a speech, said: “[W]ars are never won on the defensive. We must take the battle to the enemy.”²²² Secretary of State Donald Rumsfeld emphasized the need for urgency in his statements to the Armed Services Committee:

No terrorist state poses a greater or more immediate threat to the security of our people and the stability of the world than the regime of Saddam Hussein in Iraq.

216. American Political Network, *supra* note 210 (omissions in original) (citing Barry Schweid, *Bush Says He Doubts Saddam Would Meet U.N. Deadline to Disarm*, ASSOCIATED PRESS, Sept. 13, 2002).

217. *See id.* Edwards, perhaps in hopes that he could refer back to quotations to himself on this issue for his future presidential campaign, spoke out of both sides of his mouth from September through October. He appears to have calculated that, depending on the outcome of U.S. actions against Iraq, he could either invoke the most damaging quote to the Bush administration or, if things went well, point out to voters his exemplary record on national security issues, despite personal feelings against Bush. As the *Financial Times* reported:

In a Washington speech, Mr. Edwards accused the Bush administration of “gratuitous unilateralism” that could undermine the war against terrorism. However, Mr. Edwards is a co-sponsor of the Iraq resolution in the Senate and is expected to vote in favor of granting Mr. Bush the authority he seeks to confront Iraq.

Richard Wolffe & Deborah McGregor, *Bush Seeks to Allay Concerns Over Iraq*, FINANCIAL TIMES (London), Oct. 8, 2002, at A21.

218. Anne Q. Hoy, *Debate on Presidential Power: Congress Struggles Over Iraq*, NEWSDAY (Long Island, N.Y.), Sept. 15, 2002, at A21.

219. *See id.*

220. American Political Network, *supra* note 210 (citing *Fox on the Record with Greta Van Susteren* (FNC television broadcast Sept. 12, 2002) (transcript on file with author)).

221. *Id.*

222. Stephen J. Hedges & Howard Witt, *Bush Aides at Last Find Unity on Iraq Plan*, CHICAGO TRIBUNE, Sept. 15, 2002, at 1.

....

... The goal isn't inspections. The goal is disarmament. ...

....

... Delaying a vote in Congress would send the wrong message, in my view

....

... Iraq is part of the global war on terror. Stopping terrorist regimes from acquiring weapons of mass destruction is a key objective of that war. And we can fight all elements of the global war on terror simultaneously.²²³

This pressure was exerted, very effectively, in a political climate in which Democrats faced an election in which they stood to lose many hotly-contested seats in both houses.²²⁴ Republican Senator John McCain explained, simply: "A lot of Democrats remember the vote in 1991 which they deeply regretted and that's the politics of it."²²⁵ CNN analyst Dana Bash said about Bush:

He has Democrats in a box It's very hard for them to oppose the president, especially just weeks before the November election. Many . . . remember in 1991 that there was a Persian Gulf resolution where only 10 Democrats voted for it, and they regretted it afterwards. But other Democrats remember . . . the Gulf of Tonkin resolution, . . . and look what happened after that. So they're very conflicted about it. But the political stakes are very high for them, no question about it.²²⁶

A senior Democratic leadership aide admitted that Democratic candidates in closely-contested seats would back a resolution authorizing force, explaining that in such races, "our members are very much in support of an aggressive stance toward Iraq"; resistance to the pressure came only from those Democrats who were either *safe or not running*.²²⁷ Fulfilling their role in the system, Republican candidates attacked Democratic incumbents

223. *All Things Considered: Defense Secretary Donald Rumsfeld Testifies on Capitol Hill on the US Stance Toward Iraq* (NPR radio broadcast Sept. 18, 2002) (transcript on file with author). I'm sorry, but I would love to see Rumsfeld on the streets of Baghdad, perhaps in the Sunni Triangle, fighting the global war on terror with a detachment of American troops (or, better yet, alone). Maybe he would re-think this statement and stop talking about things he doesn't understand. Or maybe that is just wishful thinking.

224. See Hoy, *supra* note 218.

225. *Id.*

226. American Political Network, *National Briefing Iraq I: Bush Has Big MO on the Hill but Timing Questions Grow*, THE HOTLINE, Sept. 16, 2002.

227. Mark Wegner, *House Dems Ready for Iraq Vote After Bush Makes Case*, CONGRESS DAILY, Sept. 19, 2002.

who did not vote for the 1991 resolution for the Persian Gulf War.²²⁸ John Thune, the Republican Senate candidate in South Dakota, called on Tim Johnson, a vulnerable Senate Democrat, to support Bush on the authorization to use force, while Senator Paul Wellstone was on the receiving end of a similar attack in Minnesota.²²⁹ Democrats, in an effort to keep their resistance from becoming a campaign issue, dropped their resistance to a vote prior to the mid-term elections.²³⁰ Senator Biden explained: “The president’s plan is working. This should be a cooperative thing. We are not at odds with the president.”²³¹ In a political atmosphere in which a President was pursuing a popular war on terror, the Democrats felt the pressure to comply or risk losing many key seats in Congress.²³² The resistance to the Administration’s onslaught was beginning to crumble.²³³

With the majority of Democrat resistance neutralized, the focus of debate shifted to the actual wording of the resolution that would go to the House and Senate floors.²³⁴ Democrats wanted to make sure the President did not receive authority to operate in other countries in the Middle East besides Iraq.²³⁵ In other words, the Democrats had all but capitulated on

228. *See id.*

229. *See* Dave Boyer, *Democrats Drop Delay on Iraq Vote but Hold Off on Advocating Use of Force*, WASHINGTON TIMES, Sept. 18, 2002, at A1. The United States attempted to exert pressure in a similar manner on the international stage. *See* Jeffrey Simpson, *Washington’s New (Old) ‘War Party,’* GLOBE AND MAIL (Can.), Sept. 21, 2002. As the *Globe and Mail* reported:

The U.S. ambassador to Germany put the matter squarely: Germany’s opposition to military action against Iraq “makes the job more difficult” for German American relations.

....

... As George W. Bush put it in launching his “war” on terror: You’re with us or against us.

That was fine for terrorism. But now that philosophy has extended to Iraq, whose links to al-Qaeda are so unproved that even Mr. Bush doesn’t hang his case on them.

The philosophy will apparently extend further. In this unilateralist, muscular phase of U.S. foreign policy, where pre-emptive strikes against unfriendly regimes have become official operating doctrine, American allies had better prepare themselves for a “with us or against us” approach on all international security issues.

Id.

230. *See* Boyer, *supra* note 229.

231. *Id.*

232. *See id.*

233. *See id.*

234. *See* Susan Milligan, *Democrats Hoping to Revise Resolution*, BOSTON GLOBE, Sept. 24, 2002.

235. *See id.* The White House draft of the resolution would allow the use of force to “defend the national security interest of the United States against the threat posed by Iraq, and restore international peace and security to the region.” *Id.* It was this last phrase that concerned Democratic lawmakers. *See id.*

the idea of authorizing force for the U.S. military to invade Iraq.²³⁶ In late September, Bush continued to pressure everyone (the U.N., Congress, and anyone else who would listen) and to politicize the debate: “I want him [Hussein] to do what he said he would do, but for the sake of your future, now’s the time. Now’s the time. For the sake of your children’s future we must make sure this madman never has the capacity to hurt us with a nuclear weapon.”²³⁷ Bush made no effort to divorce his campaign for the war in Iraq from the campaigns of the candidates he supported, as he referenced the need to address Iraq at various political fund-raisers, which he attended every day of the last week of September.²³⁸ He made generalized, vague accusations linking Saddam Hussein with al-Qaeda, describing Hussein as “a man who hates America, a man who loves to link up with Al Qaeda, a man who is a true threat to America.”²³⁹ Earlier that week, in commenting on the stalling of legislation to create a new Department of Homeland Security, Bush (either calculatingly or incredibly irresponsibly, given the heightened simultaneous debate on the need to act on Iraq) remarked that the (Democrat-controlled) Senate was stalled because “the Senate is more interested in special interests in Washington, and not interested in the security of the American people.”²⁴⁰ The Administration would not back down until they had their vote, and the Bushspeak would continue until Congress gave the green light.²⁴¹

3. October, 2002

Despite the positive reception to Bush’s September appeal to the U.N., the prospect that its members would act in a manner acceptable to the Bush Administration was increasingly doubtful, as major international players France, Russia, and China, each of which held veto power on the Security Council, resisted approving a resolution that might lead to a war with Iraq.²⁴² Belgium, Sweden, and Germany expressed their opposition as well; some foreign leaders believed it was not within the mission of the U.N. to get rid of Saddam Hussein, while others had not found

236. *See id.*

237. *NPR Weekend Edition: President Bush Discussing National Security and Pressuring Congress to Act on Appropriations Bill* (NPR radio broadcast Sept. 28, 2002) (transcript on file with author).

238. *See* Elisabeth Bumiller, *Bush Stumps for G.O.P. and Against Iraq*, N.Y. TIMES, Sept. 28, 2002, Section A.

239. *Id.*

240. *Id.*

241. *See id.*

242. Susan Milligan, *Iraq Hurls Defiance at Threat of Attack ‘Fierce War’ Promised as US Seeks Wider Support*, BOSTON GLOBE, Sept. 29, 2002, at A1.

substantiating evidence to warrant an attack.²⁴³ The Bush Administration had achieved much more success in garnering support for its position at home than abroad.²⁴⁴

On October 3rd, the Central Intelligence Agency produced a ninety-page National Intelligence Estimate on the threat posed by Iraq.²⁴⁵ Although Senator Bob Graham, chair of the Senate Intelligence Committee, accused CIA officials of obstructionism, complained that the only report that was produced was delivered too late and did not address Iraq's progress in developing weapons of mass destruction, none of that seemed to affect the prospects of passing the resolution.²⁴⁶ The declassified contents of the report are discussed below.

Bush continued to sell the resolution, even though the prospects of its passage were high, by saying that its passage was important to send a message to the United Nations that "America speaks with one voice and is determined to make the demands of the civilized world mean something."²⁴⁷ He downplayed the imminence of the war, a stance that played to opinion polls showing that, if armed conflict were to become inevitable, Americans favored multilateral action backed by allies rather than a unilateral approach.²⁴⁸ The poll, conducted by *CBS News* and the *New York Times*, found that 63% of the American public believed the Bush Administration should wait and give the U.N. more time to send weapons inspectors into Iraq.²⁴⁹ On the other hand, the poll also reflected the success of the Administration's campaign to act: it showed that 67% of the public approved of some kind of military action against Saddam Hussein.²⁵⁰

Bush continued to lay it on thick as the vote on the resolution neared, smothering any potential opposition to it by uttering quotable, fear-mongering phrases like this one offered at a speech in Cincinnati: Facing clear evidence of peril, "we cannot wait for the final proof – the smoking gun – that could come in the form of a mushroom cloud."²⁵¹ Republican

243. Brian Knowlton, *Russia Criticizes U.S. Over Iraq Campaign: Allies Cite Concerns, as Signs Emerge White House May Relent on Resolution*, INTERNATIONAL HERALD TRIBUNE, Oct. 1, 2002.

244. See Boyer, *supra* note 229; see also Milligan, *supra* note 242.

245. Neil A. Lewis, *Threats and Responses: The Intelligence Dispute; Senator Insists C.I.A. Is Harboring Iraq Reports*, N.Y. TIMES, Oct. 4, 2002, at 14.

246. See *id.*

247. Wolffe & McGregor, *supra* note 217.

248. See *Calming Words: Bush Downplays Imminence of War with Iraq*, SAN DIEGO UNION TRIBUNE, Oct. 8, 2002, at B8.

249. *Id.*

250. *Id.*

251. Edwin Chen, *Bush Tells Nation the Threat by Iraq Is 'Simply Too Great,'* LOS ANGELES

strategists continued to try to capitalize on the foreign policy focus as elections neared.²⁵²

With mid-term elections nearing and with many congressional seats contested, the pressure from the Bush administration permeating the minds of Americans, with Republicans offering strict loyalty to the President, and with the conventional perception among many Democrats that voting against the resolution would constitute political suicide, the political groundwork had been laid for passage of the resolution against Iraq.²⁵³

C. VOX CLAMANTIS IN DESERTO: A LONE VOICE CRYING IN THE WILDERNESS: SEN. ROBERT BYRD

Senator Robert Byrd of West Virginia was by far the most vocal and able congressional advocate against authorizing the President to use force against Iraq.²⁵⁴ He warned of the dangers of voting for such a measure so close to elections and of the responsibility of representatives to do their duty, “not simply hand it off to this or any other president.”²⁵⁵ His was one voice that contrasted with those of many other Democrats, such as Senator John Edwards, who disagreed with Bush’s push for unilateral force yet agreed to vote for it for political reasons.²⁵⁶ In retrospect, the clarity of his thought and language at the time stood in stark contrast to the political deal making with the Administration to which the core of the Democratic party leadership had capitulated.²⁵⁷ A few other senior Senators, such as Ted

TIMES, Oct. 8, 2002 at A1; *see also* Brian Knowlton, *Bush Steps Up Push for War Resolutions: Focus on Congress After Tough Speech*, INTERNATIONAL HERALD TRIBUNE, Oct. 9, 2002.

252. *See* Mark Preston, *Embattled Incumbents in the Spotlight*, ROLL CALL (Wash., D.C.), Oct. 10, 2002. Republicans had Senator Wayne Allard of Colorado, who was at the time in a tight election race with former U.S. Attorney Tom Strickland (D) take a fine photo opportunity with Secretary of State Colin Powell and the four primary sponsors of the use-of-force resolution against Iraq. *See id.* At a time when foreign policy issues were at the forefront, Republican strategists hoped that sending such messages to voters (I am strong on national security) would give them an advantage in the elections. *Id.* As one Senate Republican aide cynically remarked: “We try to find creative and innovative ways to give Senators the national spotlight If a few thousand viewers in Colorado saw that news clip, all the power to them.” *Id.* (internal quotation marks omitted).

253. *See id.*

254. *See id.*

255. Senator Robert C. Byrd, *Congress Must Resist the Rush to War*, N.Y. TIMES, Oct. 10, 2002.

256. *Cf. id.*

257. *See* Kathy Kiel & Judy Keen, *How Deal Was Won; Courtship of Lawmakers Converts Key Holdouts*, USA TODAY, Oct. 11, 2002, at A10. USA Today linked the successful passage of the resolution to the President’s political maneuvering, and specifically to the many “intimate meetings between the president and small groups of fence-sitting lawmakers and top-secret briefings in the White House Situation Room” that took place beginning in September, which

Kennedy, were also vocal in opposition to Bush's push for war, but the voices of many others were silent.²⁵⁸ Byrd asked the important questions in an open letter to his fellow congressmen, printed on October 10th in the *New York Times*. He wrote:

How have we gotten to this low point in the history of Congress? Are we too feeble to resist the demands of a president who is determined to bend the collective will of Congress to his will—a president who is changing the conventional understanding of the term “self-defense”? And why are we allowing the executive to rush our decision-making right before an election? Congress, under pressure from the executive branch, should not hand away its Constitutional powers. We should not hamstring future Congresses by casting such a shortsighted vote. We owe the country a due deliberation.

I have listened closely to the president. I have questioned members of his war cabinet. I have searched for that single piece of evidence that would convince me that the president must have in his hands, before the month is out, open-ended Congressional authorization to deliver an unprovoked attack on Iraq. I remain unconvinced.

....

... We must not allow any president to unleash the dogs of war at his own discretion and for an unlimited period of time.

....

Members of Congress should take time out and go home and listen to their constituents. We must not yield to this absurd pressure to act now, 27 days before an election that will determine the entire membership of the House of Representatives and that of a third of the Senate. Congress should take the time to hear from the American people [B]ecause while it is Congress that casts the vote, it is the American people who will pay for a war with the lives of their sons and daughters.²⁵⁹

Byrd's appeal would, for the most part, fall on deaf ears. On Thursday, September 10th, the House of Representatives approved the resolution authorizing the President to use force against Iraq, with 296 in favor and 133 opposed; the Senate passed the resolution the next day, Friday October 11th, by a similarly decisive seventy-seven to twenty-three

resulted in the agreement of Senator Liberman, House Democratic leader Gephardt, and the *reeling back* of a *key defector* in his own party, Senator Richard Lugar of Indiana. *Id.* These efforts resulted in a Rose Garden ceremony showing a bipartisan backing for the resolution on October 2nd, which gave the resolution “such an air of inevitability that all but the most hard-core opposition collapsed.” *Id.*

258. See Conor O'Clery, *US Steps Up War Plans Against Iraq After Congress Approval*, THE IRISH TIMES (Dublin, Ireland), Oct. 14, 2002, at 12.

259. Byrd, *supra* note 255.

vote.²⁶⁰

In the House, almost every Republican voted in line with the President, as *yes* votes were cast by 215 Republicans and eighty-one Democrats; of the *no* votes, 126 were cast by Democrats; one *no* was cast by an independent; *only six Republicans in the House voted no.*²⁶¹

*In the Senate, twenty-nine Democrats voted for the resolution and twenty-one voted against it; only one Republican, Senator Lincoln Chaffee, voted no.*²⁶²

D. THE CONGRESSIONAL RECORD OF THE AUTHORIZATION TO USE FORCE

A review of the voluminous Congressional Record containing the debate on the resolution to use force against Iraq in the House of Representatives yields several oft-repeated themes by its proponents.²⁶³ Those in favor of the bill repeatedly remarked on Saddam Hussein's possession of weapons of mass destruction and biological and chemical weapons and his capacity and willingness to use them on his neighbors or provide them to terrorist organizations that would use them to attack the United States.²⁶⁴ Some of these same proponents pointed out that Saddam Hussein, if left unchecked, could develop a nuclear weapon in less than a year, and contended that he would not hesitate to use it, mentioning the atrocities he had committed on the people living within his own borders as well as against those of Iran.²⁶⁵ Many representatives mentioned the attacks of September 11, 2001, and saw the war on Iraq as part of the larger *War on Terror*.²⁶⁶ Many repeated the fact, cited by President Bush, that Saddam Hussein was closely linked to members of al-Qaeda.²⁶⁷ Others likened Hussein to evil dictators like Hitler and Stalin and expressed the

260. Lynn Sweet, *Congress Gives Bush Power to Attack Iraq; Use of Force OK'd; Focus Shifts to UN*, CHICAGO SUN TIMES, Oct. 11, 2002 at 6.

261. *Id.*

262. O'Clery, *supra* note 258, at 12. Future presidential hopefuls Hillary Clinton and John Edwards both voted for the resolution, while Democratic Senators Ted Kennedy and Patrick Leahy voted against it. *Id.*

263. *See generally* 148 CONG. REC. H7178-03 (2002); 148 CONG. REC. H7189-01(2002), 148 CONG. REC. H7268-01 (2002); 148 CONG. REC. H7309-03 (2002); 148 CONG. REC. H7375-01 (2002); 148 CONG. REC. H7413-01 (2002); 148 CONG. REC. H7706-01 (2002); 148 CONG. REC. H7739-06 (2002). A reading through approximately twenty-five pages of any part of the record will yield these oft-repeated central themes.

264. *See, e.g.*, 148 CONG. REC. H7178-03 at H7179.

265. *See id.*

266. *See, e.g.*, 148 CONG. REC. H7189-01 at H7202.

267. *See, e.g.*, 148 CONG. REC. H7268-01 at H7271.

need to stop him immediately, while there was still a chance.²⁶⁸ Many imitators of President Bush emphasized the imminent threat that Hussein posed to the people of the United States, with some saying they did not want the blood of hundreds of thousands of constituents on their hands, which would be shed if Saddam Hussein were given the chance to produce a nuclear weapon.²⁶⁹ A few expressed the need to pass the resolution to show the United Nations that the United States was unified in its opposition to Iraq and was prepared to use force to support the cease-fire and inspections agreements that Saddam Hussein had ignored for so many years;²⁷⁰ they reasoned that with the resolution, the changes that the United States would secure multi-lateral support from the U.N. was that much greater.²⁷¹ These were the recurring themes expressed among the proponents, and anyone reviewing the record would be hard-pressed to find too many original thoughts among them.²⁷² This is because all of these ideas, in some form or another, had been placed into these representatives heads in the months leading up to the debate by the President of the United States and by members of his Administration through their aggressive and fear-mongering rhetoric.²⁷³

In the Senate, where the Democrats held more seats than Republicans, one might have expected a less lopsided outcome than the House vote, or perhaps something akin to loyalty to a cause, even if that cause consisted merely of opposing the other party's President.²⁷⁴ Most would expect a different outcome than that of the House, in which the resolution passed by a two-thirds majority.²⁷⁵ It was not meant to be; Democrats voted twenty-eight to twenty-one or twenty-nine to twenty-one within their own party in favor of the resolution,²⁷⁶ and the final vote was seventy-seven to twenty-three.²⁷⁷ Senator Byrd proposed an amendment limiting the time the President had to use American troops to one year,

268. *See id.*

269. *See, e.g.*, 148 CONG. REC. H7189-01 at H7200.

270. *See, e.g.*, 148 CONG. REC. H7178-03 at H7178-79.

271. *See id.* at H7184.

272. *See generally* 148 CONG. REC. H7178-03 (2002); 148 CONG. REC. H7189-01 (2002); 148 CONG. REC. H7268-01 (2002); 148 CONG. REC. H7309-03 (2002); 148 CONG. REC. H7375-01 (2002); 148 CONG. REC. H7413-01 (2002); 148 CONG. REC. H7706-01 (2002); 148 CONG. REC. H7739-06 (2002).

273. *See* Doug Ireland, *Carte Blanch: Congress Capitulates to Bush's Call for War*, IN THESE TIMES, Oct. 11, 2002, available at <http://www.inthesetimes.com/article/677>.

274. *See id.*

275. Sweet, *supra* note 260.

276. O'Clery, *supra* note 258.

277. Sweet, *supra* note 260.

which was instantly rejected.²⁷⁸ He proposed another amendment, to allow the President to engage Iraq as long as an *imminent threat* or *in the event of a sudden or direct attack on the United States* existed, which was also defeated.²⁷⁹ Another proposed amendment authorizing force only if a future U.N. security resolution provided for the same was also defeated, after Senator Lieberman argued, “to subject our capacity to defend ourselves against that threat to a veto by the United Nations Security Council is inappropriate and wrong.”²⁸⁰ Another proposal limiting the use of force to that necessary to combat the threat posed by Iraq’s weapons of mass destruction was also defeated,²⁸¹ an indication that the war would be as much about nation-building as it would be about deposing Saddam Hussein.

Toward the beginning of the session, Senator Lieberman thanked Democrat majority leader Tom Daschle “for the work that he and his staff did in negotiations with the White House and with Members of the House to get this resolution to where it is.”²⁸² In debate on the version of the resolution, which was eventually passed, high profile Senate Democrats gave their reasons for supporting the war.²⁸³ Hillary Clinton, in casting her vote in favor, said it was “not a vote to rush to war; it is a vote that puts awesome responsibility in the hands of our President. And we say to him: Use these powers wisely and as a last resort.”²⁸⁴ Joseph Biden, in an extremely lengthy speech, argued that “a strong vote in Congress . . . increases the prospect for a tough, new U.N. resolution on weapons of mass destruction . . . [and] decreases the prospects of war, in my view.”²⁸⁵ John Edwards justified his *yes* vote by giving a run-down on Saddam Hussien’s

278. 148 CONG. REC. S10233-07 (2002).

279. *Id.* at S10250.

280. *Id.* at S10253, S10264. The Senators who voted in favor of this amendment were: Akaka, Bingaman, Boxer, Byrd, Chafee, Conrad, Corzine, Dayton, Durbin, Feinstein, Harkin, Inouye, Jeffords, Kennedy, Kohl, Leahy, Levin (the sponsor), Mikulsi, Reed, Rockefeller, Sarbanes, Stabenow, Wellstone, and Wyden. All others (75) voted against it, except for Senator Bennett, who abstained.

281. *Id.* at S10272.

282. *Id.* at S10240 (statement of Sen. Lieberman).

283. *See generally id.*

284. 148 CONG. REC. S10233, S10288-89 (statement of Sen. Clinton). Why Congress had so much confidence in the President at that early stage in his presidency is anyone’s guess; the probability is that they did not have confidence in him, but dared not challenge him in that political climate.

285. *Id.* at S10290-91 (statement of Sen. Biden). Biden also referred with hope to the President’s remark, in the week before debate on the resolution, that “War is neither imminent or inevitable.” *Id.* He also hinged on to the Commander-in-Chief’s statement that any military action would take place “with allies at our side.” *Id.* at S10291. He later said: “Our best chance of avoiding war is through the passage of a tough resolution.” *Id.* at S10291.

weapons programs and his demonstrations, in the past, of his will to use them, and mentioned his pursuit of nuclear weapons; he also made the argument that a strong resolution would “strengthen America’s hand as we seek support from the Security Council.”²⁸⁶ Lieberman, at the tail end of the debate, spoke at length on Saddam Hussein’s past use of chemical and biological weapons, his continuous production of these weapons, and the imminent threat that he posed to the United States.²⁸⁷ “Saddam Hussein is uniquely evil,” he said, “the only ruler in power today—and the first one since Hitler—to commit chemical genocide. Is that enough of a reason to remove him from power? I would say yes, if ‘never again’ is in fact actually to mean ‘never again.’”²⁸⁸ Obviously, none of their speeches addressed the political climate discussed above.²⁸⁹

Senator Byrd, however, did mention the political grandstanding,²⁹⁰ and at several points spoke eloquently in opposition to the resolution. First, he stated: “I didn’t swear to support and defend the President of the United States when I came here. I pledged on the bible up there on the desk to support and defend the Constitution of the United States, so help me God.”²⁹¹ Then, he also stated:

286. *Id.* at S10325 (statement of Sen. Edwards).

287. *See id.* at S10338 (statement of Sen. Lieberman). He said:

There is no dictator in power anywhere in the world who has, so far in his career, invaded two neighboring countries; fired ballistic missiles at the civilians of two other neighboring countries; tried to have assassinated an ex-president of the United States; harbored al-Quaida fugitives; attacked civilians with chemical weapons; . . . conducted biological weapons experiments on human subjects; committed genocide; and then there is, of course, the matter of weaponized aflatoxin, a tool of mass murder and nothing else.

Id. at S10339.

288. 148 CONG. REC. S10233, S10339.

289. *See generally id.*

290. *See id.* at S10242 (statement of Sen. Byrd). In congratulating Tom Daschle on the floor, Byrd remarked: “[I] congratulate him on refusing to stand with other leaders of my party on the White House lawn” (referring to the photo opportunity in which other Democratic leaders engaged with President Bush on October 2nd to show their support for the resolution at an early stage, laying the groundwork for its eventual passage). *Id.*

291. *Id.* at S10238. Byrd was referring to what he perceived as the broad grant of authority being granted to the President to combat against all threat to the national security of the United States posed by Iraq. He argued that it conferred too much discretion on the President to determine what constituted a threat to the United States and tied Congress’s hands by not allowing it to limit the scope of the war to be fought. *Id.* Byrd went on to say:

In the newly published “National Security Strategy of the United States,” the document which I hold in my hand . . . the President asserts that: “The constitution has served us well.” There you have it, 31 pages, and that is the only reference to the Constitution . . . And note, too, that the word “constitution” . . . is in lower case. It doesn’t begin with a capital letter, it begins with a lower-case letter, “the constitution.”

Id. at S10275.

Ours was a great country before it became a great nation. Those values do not include striking first at other countries, at other nations. Those values do not include using our position as the strongest and most formidable Nation in the world to bully and intimidate other nations.

There are no preemptive strikes in the language of the Constitution, I do not care what other Senators say. Those values do not include putting other nations on an enemies list so we can justify preemptive military strikes.

....

I only hope that when the tempest passes, Senators will reflect upon the ramifications of what they have done and understand the damage that has been inflicted on the Constitution of the United States.

....

In the greatest oration . . . ever delivered in the history of mankind, the oration "On the Crown," delivered in the year 331 B.C. by Demosthenes in his denunciation of Aeschines, he asked this question: Who deceives the state? He answered his own question by saying: The man who does not speak what he thinks. Who deceives the state? The man who does not speak what he thinks.²⁹²

Byrd was right: many Senators did not speak what they thought.²⁹³ Republicans voted in line with their party's President, almost exclusively.²⁹⁴ The majority of Democrats, for whatever reason, whether political or otherwise, accepted the Administration's facts and arguments on the war with blind faith, reiterating them in their own justifications for supporting the resolution.²⁹⁵ Senator Lieberman acted the part of Republican *hawk* to a tee with his itemization of the offenses committed by Saddam Hussein in arguing his support.²⁹⁶

E. NATIONAL INTELLIGENCE ESTIMATE ON IRAQ

In all fairness, members of Congress were given intelligence information suggesting that Saddam Hussein had blatantly ignored U.N.

292. *Id.* at S10276–77.

293. *See id.* at S10342.

294. *See id.* (showing that 47 Republicans voted in support of the resolution while 2 voted against).

295. *See* Stephen Zunes, *Democrats vs. the Peace Movement?*, COMMON DREAMS NEWS CENTER, July 8, 2006, <http://www.commondreams.org>.

296. 148 CONG. REC. S10233, S10240 (statement of Sen. Byrd). It should be noted here that the idea that Saddam Hussein should be deposed simply because he was evil runs in direct contrast to the Administration's policy with respect to countries like Sudan, whose Arab government has committed mass genocide on a large part of its own African population for several years with no interference from the United States.

Security Council resolutions forbidding him from keeping weapons of mass destruction and chemical or biological weapons.²⁹⁷ In October 2002, the CIA produced a National Intelligence Estimate that was submitted to members of Congress prior to the vote on the resolution.²⁹⁸ The report was alarmingly entitled “Iraq’s Continuing Programs for Weapons of Mass Destruction.”²⁹⁹

Among the conclusions drawn by the report were the following. First:

We judge that Iraq has continued its weapons of mass destruction (WMD) programs in defiance of UN resolutions and restrictions. Baghdad has chemical and biological weapons as well as missiles with ranges in excess of UN restrictions; if left unchecked, it probably will have a nuclear weapon within this decade.³⁰⁰

Second: “We judge that we are seeing only a portion of Iraq’s WMD efforts, owing to Baghdad’s vigorous denial and deception efforts.”³⁰¹

Third: “Since inspections ended in 1998, Iraq has maintained its chemical weapons effort, energized its missile program, and invested more heavily in biological weapons; in the view of most agencies, Baghdad is reconstituting its nuclear weapons program.”³⁰²

Fourth: “How quickly Iraq will obtain its first nuclear weapon depends on when it acquires sufficient weapons-grade fissile material.”³⁰³

Fifth: “We judge that all key aspects—R&D, production, and weaponization—of Iraq’s offensive BW [biological weapons] program are active and that most elements are larger and more advanced than they were before the Gulf war.”³⁰⁴ Finally: “Iraq maintains a small missile force and several development programs, including for a UAV [unmanned vehicle] probably intended to deliver biological warfare agents.”³⁰⁵

Despite the alarming (and, as later revealed, misleading and false) nature of these conclusions, the report should have been analyzed by the representatives to address the issue of whether Iraq posed an imminent

297. See generally N.I.E., *supra* note 6.

298. See *id.*

299. *Id.*

300. *Id.* at 5.

301. *Id.*

302. *Id.*

303. N.I.E., *supra* note 6, at 5.

304. *Id.* at 6.

305. *Id.* at 7.

threat to the national security of the United States.³⁰⁶ There are several assessments in the report that give rise to a reasonable doubt on that issue.³⁰⁷ Here are some examples. First: “We have low confidence in our ability to assess when Saddam Hussein would use WMD.”³⁰⁸ Second: “Baghdad for now appears to be drawing a line short of conducting terrorist attacks with conventional or CBW [chemical or biological weapons] against the United States, fearing that exposure of Iraqi involvement would provide Washington a stronger cause for making war.”³⁰⁹ Third: “Iraq *probably* would attempt clandestine attacks against the US Homeland if Baghdad feared an attack that threatened the survival of the regime were imminent or unavoidable, or possible for revenge. Such attacks—more likely with biological than chemical agents—*probably* would be carried out by special forces or intelligence operatives.”³¹⁰

Fourth: “Saddam, *if sufficiently desperate, might* decide that only an organization such as al-Qaeda—with worldwide reach and extensive terrorist infrastructure, and already engaged in a life-or-death struggle against the United States—could perpetrate the type of terrorist attack that he would hope to conduct.”³¹¹ Fifth:

State/INR [Assistant Secretary of State for Intelligence and Research]
 Alternative View of Iraq’s Nuclear Program

. . . The activities we have detected do not, however, add up to a compelling case that Iraq is currently pursuing . . . an integrated and comprehensive approach to acquire nuclear weapons. . . .

INR considers the available evidence inadequate to support such a judgment Iraq’s efforts to acquire aluminum tubes is central to the argument that Baghdad is reconstituting its nuclear weapons program, but *INR is not persuaded that the tubes in question are intended for use as centrifuge rotors. INR accepts the judgment of technical experts at the U.S. Department of Energy who have concluded that the tubes Iraq seeks to acquire are poorly suited for use in gas centrifuges to be used for uranium enrichment and finds unpersuasive the arguments advanced by others . . . that they are intended for that purpose.* INR considers it far more likely that the tubes are intended for another

306. *See id.* (reporting that the confidence is low to assess when Saddam Hussein would use WMDs).

307. *See id.* (reporting that the CIA has low confidence in regards to when Sadaam would use WMDs, whether he would attack U.S. homeland, and whether he would share weapons with Al-Qaeda).

308. *Id.* at 7.

309. N.I.E., *supra* note 6, at 8.

310. *Id.* (emphasis added).

311. *Id.* (emphasis added).

purpose, most likely the production of artillery rockets.³¹²

Finally: “[T]he claims of Iraqi pursuit of natural uranium in Africa are, in INR’s assessment, highly dubious.”³¹³

The *probably’s*, the *might’s*, and the *if-desperate’s* in the above selection should have given those congressmen in favor of the resolution pause on the issue of whether Saddam Hussein’s regime posed an imminent threat to the national security of the United States.³¹⁴ There is nothing in the report to suggest that Iraq had the capability to launch a missile attack, or any other kind of attack, on the United States through conventional means.³¹⁵ It is suggested that the only way he could have done so would have been through consulting and working with terrorist organizations like al-Qaeda, yet the report lays out no concrete evidence that such cooperation or plans had taken place.³¹⁶ The language stating Iraq’s capability to produce nuclear weapons was completely speculative (and was contradicted by the INR assessments laid out in the same report); those conclusions were based in large part on Hussein’s acquisition of aluminum tubes, which experts from the Department of Energy concluded could not be used for the purpose of nuclear enrichment.³¹⁷

Unfortunately, the CIA report provided to the congressmen and senators voting on the resolution left a lot of room to their collective imaginations, which were left to run wild.³¹⁸ Even more unfortunately, it was a case of who they believed, or worse yet, to whom they swore fealty, whether through party affiliation or through the coercive threat of being perceived as *weak on national security* or the *War on Terror* only weeks

312. *Id.* at 8–9 (emphasis added).

313. *Id.* at 84 (emphasis added).

314. *See id.*

315. *See generally* N.I.E., *supra* note 6.

316. At the time of this writing, then Director of Central Intelligence (CIA) George Tenet published a book, entitled *At the Center of the Storm*, about his experiences leading up to the current Iraqi conflict, in which he addresses the National Intelligence Estimate referred to herein. In an article for the *New York Times*, Tenet blames himself for the flawed report, which he describes as “one of the lowest moments of my seven-year tenure.” Scott Shane & Mark Mazetti, *Ex-CIA Chief, in Book, Assails Cheney on Iraq*, N.Y. TIMES, Apr. 27, 2007, available at http://www.nytimes.com/2007/04/27/washington/27intel.html?pagewanted=1&_r=2. He says there was no doubt in his mind that Saddam Hussein possessed unconventional weapons, and reasons that “we got it wrong partly because the truth was so implausible.” *Id.* The premise of Tenet’s book is that Vice President Dick Cheney and other Bush administration officials, including Paul D. Wolfowitz and Douglas J. Feith, pushed the country to war without ever conducting a serious debate about whether Saddam Hussein posed an imminent threat to the United States. *Id.* A White House spokesman, Gordon Johndroe, said that information from the 2002 National Intelligence Estimate was a basis for the President’s push for the war. *Id.*

317. *See* N.I.E., *supra* note 6, at 84.

318. *See id.*

before critical mid-term elections.³¹⁹ This political climate, in the context of which the Bush Administration had practically rammed the urgency for war down their throats, coupled with the vagueness of the threat presented by Saddam Hussein, presented our representatives in Congress with a difficult choice: either take the popular position and place a vote to authorize the war (a decision that would have no short-term political consequences) or demand more extensive and detailed answers from the Administration on the immediate threat to the United States posed by Iraq and vote against a resolution to authorize force based on the limited information available at that time.³²⁰ The choice the vast majority of our representatives made is now clear. On both sides of the fence, Democrats and Republicans were unwilling to sacrifice short-term political goals or to abandon blind party loyalty for the well-being of the nation, and they thrust our country into a drawn-out, terrible armed conflict in which we will be immersed for a long time to come.³²¹

F. WHAT WENT WRONG?

Although it is beyond the reach of this article to address all of the damaging effects caused by the hype from the Bush Administration urging support for an authorization to use force, there is enough background here to assist in our discussion of the abnegation of congressional responsibility under the circumstances. Which branch of government ultimately has the heavy responsibility of deciding whether to take the nation from peace to war? As discussed in the first part of this article, it is Congress, not the President.³²² So as much as any given President pushes for war, makes the case for war, urges Congress to take action in order to go to war, it is Congress that must deliberate the decision.³²³ Members of Congress should not view a presidential announcement that he will seek congressional authorization as some kind of favor (or with such a large degree of relief), despite the vast perceived expansion of presidential war powers in the last century; they should expect such requests and should legislate against unauthorized acts of war by any President. If need be, they should, as a

319. See Johann Hari, *U.S. Elections: Bush Fears the Mid-Term Blues*, THE INDEPENDENT (London), Sept. 6, 2006, available at <http://www.independent.co.uk/news/world/americas/us-elections-bush-fears-the-midterm-blues-414799.html>.

320. See *Threats and Responses: Excerpts from Bush's New Conference on Iraq and Likelihood of War*, N.Y. TIMES, Mar. 7, 2003.

321. See Hari, *supra* note 319.

322. See *supra* Part I and accompanying notes.

323. See *supra* Part I and accompanying notes.

body, either bring suit against any President that acts directly contrary to their expressed wishes or bring articles of impeachment against him.³²⁴

In any event, it is Congress's duty to deliberate, not on the President's schedule, but on its own schedule. Deliberation implies a large amount of congressional fact-finding and independent inquiries into the nature of a threat to national security. Despite the great resources of the Central Intelligence Agency, the fact that the same agency did not do anything to stop the attacks of September 11 should have given rise to some skepticism in Congress of the National Intelligence Estimate that was so crucial to the decision-making process prior to the vote on the resolution. There are so many lessons to be learned from what happened in October of 2002; here are a few main points:

- Members of Congress must ignore party affiliations when deciding, in effect, to declare war on a foreign country. Voting along party affiliations or in pursuit of any political agenda on questions of such magnitude is irresponsible, unethical, and bad for the American people.
- Members of Congress must conduct an independent inquiry of threats to our national security. Congress has the ability to create committees and call military personnel to hear testimony at any time. They should use these procedures liberally when it is necessary and proper to do so.³²⁵
- Members of Congress must not be bullied into holding a rushed vote by the President or any other members.
- Members of Congress must not view a presidential overture to them for authorization to use force (or a declaration of war) as a *favor* to them as a body. They should understand that it is *their* responsibility, not any president's to decide when and against whom the nation is to commence war, and should enforce their collective will in the face of presidential opposition without fear of hurting the dignity of the office.
- Members of Congress must be courageous, independent, and open to the voices of their constituents.³²⁶ As Senator Byrd stated, they must speak their minds and not remain silent or politicize their statements for some perceived future personal gain.

A cynic will read this and say, *yeah right*. Unfortunately, it is this

324. See *Dellums v. Bush*, 752 F. Supp. 1141, 1144 (D.D.C. 1990).

325. When invasion of sovereign nations are contemplated, it is necessary and proper to do so.

326. See Byrd, *supra* note 255.

author's view that it was a group of cynics who helped to authorize a war that was probably unnecessary and certainly was imprudent under pressure from the Bush Administration. If those who serve in Congress refuse to express their views sincerely and to vote based on their firm convictions rather than on political calculations, how can they expect the American people to have faith in them and in our system of government? Any system of government depends on the integrity of its members if it is to function as it was intended.³²⁷ Is the prestige and honor that goes with serving in Congress worth anything if the person who occupies the position fails to do their job? Would our Founding Fathers have respected the government if it were a group of men whose votes were a foregone conclusion based on their party affiliation and who did not think independently? What about those on the other side who fear being categorized as *pacifists* or *unpatriotic* by the dominant party and so yield to its will in order avoid being labeled as such?³²⁸ I am not speaking of the Senators who believed in their hearts that going to war was the right choice to make. I am speaking of those Senators who acted to save their political hides, or who voted because their vote was a foregone conclusion, or who failed to check the facts or raise the motions because they were just plain lazy. We cannot be sure who they were, but there are clues: future presidential candidates, like John Kerry, who made no statements on the bill, but voted for it,³²⁹ countless others who parroted the administration's arguments to justify their votes without feeling the need to conduct additional inquiries.³³⁰ There were many who did not speak their minds; in failing to do so, in failing to *use* their minds, and look into their hearts, they failed their constituents, and as a whole, they failed the American people. In acting to save their political hides, they showed their hides were not worth saving.

327. Cf. Byrd, *supra* note 255.

328. 148 CONG. REC. S10233, 10275 (2002). Senator Byrd emphasized the danger of this cowardice as he began his remarks on the floor by saying:

Mr. President, I wish to begin. I read this quote:

Naturally, the common people don't want war but, after all, it is the leaders of a country who determine the policy and it is always a simple matter to drag the people along. Whether it is a democracy or a fascist dictatorship or a parliament or a Communist dictatorship, voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for a lack of patriotism and exposing the country to danger. It works the same in every country.

Id. (Byrd quoted: "Hermann Goering, 1893–1946, field marshal, German Army, founder of the Gestapo, President of the Reichstag, Nazi parliament, and convicted war criminal[;] Speech, 1934.").

329. See 148 CONG. REC. S10233–342 (2002). *But see* 148 Cong. Rec. S10164, S10170–75 (2002) (statement by Senator Kerry).

330. See 148 CONG. REC. S10233–307 (2002).

IV. CONCLUSION: THE AFTERMATH—CLEANING UP THE MESS

This is the chaos that is now Iraq as of April 18, 2007:

Bombs ravaged Baghdad in five horrific explosions aimed mainly at Shiite crowds on Wednesday, killing at least 171 people in the deadliest day in the capital since the American-led security plan for the city took effect two months ago.

....

In the worst of the bombings, a car packed with explosives exploded at an intersection in the Sadriya neighborhood that serves as a hub for buses traveling to the Shiite district of Sadr City. The blast killed at least 140 people and wounded 150; incinerated scores of vehicles, including several minibuses full of passengers; and charred nearby shops, witnesses and the police said.

....

American commanders have said that the Baghdad security effort has reduced the kinds of sectarian killings associated with Shiite death squads, in part because of the decision by many militia fighters to lay low. But the plan has failed to curb the spectacular attacks, many of them suicide bombings, that have become a gruesome hallmark of the Sunni Arab-led insurgent group Al Qaeda in Mesopotamia. As a result, commanders say, overall civilian casualty rates are actually higher now than they were before the plan was initiated.

....

In the mayhem that ensued, even more people died. A sniper opened fire on the crowd, killing at least one person and wounding two others.

...

Rahim Rahim Karim Hmait, a 43-year-old taxi driver, said he tried to evacuate several wounded people to the hospital. But as he approached an army patrol at high speed, soldiers, perhaps thinking that he was a suicide bomber, opened fire on his taxi. He was hit in the abdomen, leg and hand, he said. "I lost control and the car smashed into one of the shops," he said in an interview at a hospital in Sadr City "Some of the wounded people died inside the car."³³¹

Some lawmakers are now, in the spring of 2007, trying to get our troops out.³³² On April 26, 2007, the House, which now has a Democratic majority (as does the Senate), passed a war appropriations bill that would condition funding on troop withdrawal, which would begin on October 1st

331. Semple, *supra* note 17.

332. See Carl Hulse & Jeff Zeleny, *House Approves War Spending Measure that Requires U.S. to Start Pullout from Iraq*, N.Y. TIMES, Apr. 26, 2007, at A12.

of this year.³³³ Predictably, some Republicans characterized it as “a cut and run in the fight against Al Qaeda.”³³⁴ The next day, the Senate narrowly passed the bill; however, the bill will not be signed into law—President Bush stated his intention to veto it when it is passed over to him.³³⁵ The bill does not have enough votes (a two-thirds majority is required in both houses) to override a Presidential veto.³³⁶ However, it is expected that the President will negotiate with congressional leaders and develop some kind of timetable for withdrawal of American troops from Iraq.³³⁷ Contrarily, congressional leaders could respond by passing additional legislation such as providing appropriations for a short period of time, with no withdrawal dates, thereby forcing the President to keep asking for money or reconsider his strategy.³³⁸

333. *See id.*

334. *Id.* President Bush and Vice President Dick Cheney also attacked the Democrats, accusing them of political opportunism in pushing the bill, with Bush saying: “Instead of fashioning a bill I could sign, the Democratic leaders chose to further delay funding our troops, and they chose to make a political statement.” Carl Hulse & Jeff Zeleny, *Bush and Cheney Hide Democrats on Iraq Deadline*, N.Y. TIMES, Apr. 25, 2007, at A1. Cheney attacked Senator Harry Reid of Nevada for what he perceived to be defeatist comments, saying “the timetable legislation that he is now pursuing would guarantee defeat. Maybe it is a political calculation.” *Id.* Reid responded: “The president sends out his attack dog often. That’s also known as Dick Cheney.” *Id.* He added, “I’m not going to get into a name-calling match with somebody who has a 9 percent approval rating.” *Id.*

335. *See Hulse & Zeleny, supra note 342.* As a kind of *in your face* to the President, the Democratic leaders planned to send the bill to the White House on May 1st, to coincide with the fourth anniversary of Bush’s May 1, 2003, speech on an aircraft carrier when he proudly declared the end of major combat operations in Iraq with the banner in the background that read “Mission Accomplished.” *Id.*

336. *See id.*

337. *See Joe Klein, Commentary: Making Bush Make a Deal*, TIME MAG., Apr. 30, 2007, at 33.

338. *See Hulse & Zeleny, supra note 342.* This is the approach that John M. Murtha of Pennsylvania said he favored. *See id.* It would rid the legislation of questions of its constitutionality while forcing those who are against withdrawal dates to sign it based on concerns that the troops would run out of money for equipment and supplies. *See id.* It is also the approach favored by Senator and presidential candidate Barack Obama, who thinks the best course of action may be to “keep the President on a shorter leash.” Klein, *supra note 337*. Senate Armed Services Committee Chair Carl Levin proposes to tie continued funding to reforms the Iraqi government has promised (and failed) to put in place, an idea he believes the President favors. *See id.* An alternate approach that Levin also favors is one proposed by Congressman Rahm Emanuel of Illinois, which would be to appropriate funds until September and condition future funding on the results of new U.S. military initiatives, such as whether the troop surge (+20,000) has been effective, whether the Iraqi government is meeting its benchmarks, and whether the U.S. military is standing up to the strain on its resources. *Id.* Such ideas are novel, but it is odd, given that the troops are obviously stationed in Iraq to assist in nation-building, to suggest that troops should be pulled out sooner because the Iraqi government is weak and ineffective in an extremely volatile country. Furthermore, if the success (or relative failure) of American military operations are to be considered as a benchmark to determine if troops should

These events raise some constitutional issues. While Congress has the complete power of the purse conferred by Article I, Section 8, Clause 12, with the power to appropriate funds for military operations,³³⁹ conditioning funding on withdrawal timetables will be construed by the White House as an infringement on the Executive's powers as Commander-in-Chief.³⁴⁰ Attacks and withdrawals are military concerns for which the Executive has responsibility; however, it is very probable that, given the current political climate, with the Administration under much fire for pushing the war, chances are Bush would comply with such a bill if it could be passed.³⁴¹

The point is moot, however—Congress does not have the votes. An example from history may be helpful here. During the Vietnam War, Congress attempted to use an appropriations bill to terminate funding (which had already been set aside); President Nixon vetoed the bill; because Congress did not have a two-thirds majority to override his veto, Congress was forced to compromise with him to find a solution (on troop withdrawal).³⁴² This is a similar situation to what is happening today; because there is no two-thirds majority in either house, the best solution, if Congress wants a troop withdrawal, is to vote for small appropriations bills of limited duration that would require the President to withdraw troops and equipment little by little, while pursuing negotiations with him (and assisting him, if need be) to complete the withdrawal.³⁴³

As a final note, I would like to say that I do not necessarily advocate large-scale troop withdrawal at this point; the Iraqis are in the middle of a civil war, and while there is no evidence that Al-Qaeda operated in Iraq prior to our invasion of that country, there is little question that now their members have gathered like flies.³⁴⁴ The best course of action is to

be withdrawn, will Bush agree to withdraw them and leave the Iraqis to fend for themselves? Joe Klein doesn't think so, and neither do I; it would hurt his legacy too much, in his eyes, to pull out before the mission was actually accomplished. *See id.*

339. *See Fisher, supra note 73, at 23.*

340. *See David B. Rivkin & Lee A. Casey, What Congress Can (and Can't) Do on Iraq, WASH. POST, Jan. 16, 2007, at A19, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/15/AR2007011500970.html>.*

341. *See Dick Morris, Bush Will Have to Pull Out of Iraq, or Face Political Obliteration, DICKMORRIS.COM, July 11, 2007, available at <http://www.dickmorris.com/blog/2007/07/11/bush-will-have-to-pull-out-of-iraq-or-face-historical-obliteration>.*

342. *See Fisher, supra note 73, at 23.*

343. *See id.* at 23–24 (explaining how Congress attempted to influence the President to withdraw from Vietnam in much the same manner).

344. *See generally Semple, supra note 17, at A1* (describing various acts of terrorism committed against United States and Iraqi forces).

continue to help stabilize the country, and then shift the focus of our military assistance on anti-terrorism efforts (such as trying to snuff out terrorist bombings before they happen). In any case, a thorough analysis of future policy alternatives is beyond the scope of this article.

This is a study of executive and congressional irresponsibility, and its purpose is to serve as a record for any American citizen, whether a lawmaker or a layperson, to maintain a closer guard in the future, and to do everything in their power to prevent this from happening again. This study is meant to turn cynics into believers in a constitutional ideal that seems to have been forgotten by many of our elected leaders in Congress. We do not know if and when the next opportunity to discuss another major deployment of American troops will occur; let us hope that it is not soon. But whenever it comes, we should remember and follow the example of the idiosyncratic, learned, and stubborn Senator from West Virginia, who probably will not be there next time to remind us of our duty:

I believe we ought to speak what we think. A political party means nothing, absolutely nothing to me, in comparison with this Constitution which I hold in my hand. It means nothing, political party means nothing to me, in comparison with this great old book which our mothers read, the Holy Bible.

It seems to me that in this debate – thinking about the 50,000 e-mails that have come to this country boy from the hills of West Virginia . . . the American people seem to have a better understanding of the Constitution than do those who are elected to represent them.

Now that is a shame, isn't it? I feel sorry for some of my colleagues. I love them; bless their hearts. I love them. I forgive them. But you might as well talk to the ocean. I might as well speak to the waves as they come with the tides that rise and fall. . . . They won't hear me. And it isn't because it is Robert Byrd. They just don't want to hear about that Constitution.

. . . [I]t may be that their understanding of the Constitution has not yet filtered through the prism of the election year politics. That's it – the election year politics.

. . . .

. . . I will stand for no administration—none—when it comes to this Constitution. If the administration took a position opposite that Constitution, forget it. I don't care if it is a Democrat.³⁴⁵

And finally: “As the Apostle Paul, that great apostle, said, ‘I have fought a

345. 148 CONG. REC. S10233-07, S10277 (emphasis deleted).

good fight, I have finished the course, I have kept the faith.”³⁴⁶

It is about time more Americans, especially the elected leaders who swear to uphold it, put their faith in the Constitution of the United States and take the duties required of them by it more seriously. The price that has been paid, by both Americans and Iraqis, for their failure to do so in October of 2002 is too great already; the price that will be paid if we ignore it again under such circumstances may prove too much for our country to handle.

APPENDIX A: VOTES OF CONGRESSMEN ON JOINT RESOLUTION
TO USE FORCE AGAINST IRAQ

148 Cong. Rec. H7739-06, H7799 (House of Representatives)

YEAS-296

Ackerman Aderholt Akin Andrews Arme y Bachus Baker Ballenger Barcia Barr Bartlett Barton Bass Bentsen Bereuter Berkley Berman Berry Biggert Bilirakis Bishop Blagojevich Blunt Boehlert Boehner Bonilla Bono Boozman Borski Boswell Boucher Boyd Brady (TX) Brown (SC) Bryant Burr Burton Buyer Callahan Calvert Camp Cannon Cantor Capito Carson (OK) Castle Chabot Chambliss Clement Coble Collins Combest Cooksey Cox Cramer Crane Crenshaw Crowley Cubin Culberson Cunningham Davis (FL) Davis, Jo Ann Davis, Tom Deal DeLay DeMint Deutsch Diaz-Balart Dicks Dooley Doolittle Dreier Dunn Edwards Ehlers Ehrlich Emerson Engel English Etheridge Everett Ferguson Flake Fletcher Foley Forbes Ford Fossella Frelinghuysen Frost Gallegly Ganske Gekas Gephardt Gibbons Gilchrest Gillmor Gilman Goode Goodlatte Gordon Goss Graham Granger Graves Green (TX) Green (WI) Greenwood Gucci Gutknecht Hall (TX) Hansen Harman Hart Hastert Hastings (WA) Hayes Hayworth Hefley Herger Hill Hilleary Hobson Hoeffel Hoekstra Holden Horn Hoyer Hulshof Hunter Hyde Isakson Israel Issa Istook Jefferson Jenkins John Johnson (CT) Johnson (IL) Johnson, Sam Jones (NC) Kanjorski Keller Kelly Kennedy (MN) Kennedy (RI) Kerns Kind (WI) King (NY) Kingston Kirk Knollenberg Kolbe LaHood Lampson Lantos Latham LaTourette Lewis (CA) Lewis (KY) Linder LoBiondo Lowey Lucas (KY) Lucas (OK) Luther Lynch Maloney (NY) Manzullo Markey Mascara Matheson McCarthy (NY) McCreary McHugh McInnis McIntyre McKeon McNulty Meehan Mica Miller, Dan Miller, Gary Miller, Jeff Moore Moran (KS)

346. *Id.* at S10276.

Murtha Myrick Nethercutt Ney Northup Norwood Nussle Osborne Ose
Otter Oxley Pascrell Pence Peterson (MN) Peterson (PA) Petri Phelps
Pickering Pitts Platts Pombo Pomeroy Portman Pryce (OH) Putnam Quinn
Radanovich Ramstad Regula Rehberg Reynolds Riley Roemer Rogers
(KY) Rogers (MI) Rohrabacher Ros-Lehtinen Ross Rothman Royce Ryan
(WI) Ryun (KS) Sandlin Saxton Schaffer Schiff Schrock Sensenbrenner
Sessions Shadegg Shaw Shays Sherman Sherwood Shimkus Shows Shuster
Simmons Simpson Skeen Skelton Smith (MI) Smith (NJ) Smith (TX)
Smith (WA) Souder Spratt Stearns Stenholm Sullivan Sununu Sweeney
Tancredo Tanner Tauscher Tauzin Taylor (MS) Taylor (NC) Terry Thomas
Thornberry Thune Thurman Tiahrt Tiberi Toomey Turner Upton Vitter
Walden Walsh Wamp Watkins (OK) Watts (OK) Waxman Weiner Weldon
(FL) Weldon (PA) Weller Wexler Whitfield Wicker Wilson (NM) Wilson
(SC) Wolf Wynn Young (AK) Young (FL)

NAYS-133

Abercrombie Allen Baca Baird Baldacci Baldwin Barrett Becerra
Blumenauer Bonior Brady (PA) Brown (FL) Brown (OH) Capps Capuano
Cardin Carson (IN) Clay Clayton Clyburn Condit Conyers Costello Coyne
Cummings Davis (CA) Davis (IL) DeFazio DeGette Delahunt DeLauro
Dingell Doggett Doyle Duncan Eshoo Evans Farr Fattah Filner Frank
Gonzalez Gutierrez Hastings (FL) Hilliard Hinchey Hinojosa Holt Honda
Hooley Hostettler Houghton Inslee Jackson (IL) Jackson-Lee (TX)
Johnson, E. B. Jones (OH) Kaptur Kildee Kilpatrick Kleczka Kucinich
LaFalce Langevin Larsen (WA) Larson (CT) Leach Lee Levin Lewis (GA)
Lipinski Lofgren Maloney (CT) Matsui McCarthy (MO) McCollum
McDermott McGovern McKinney Meek (FL) Meeks (NY) Menendez
Millender-McDonald Miller, George Mollohan Moran (VA) Morella
Nadler Napolitano Neal Oberstar Obey Olver Owens Pallone Pastor Paul
Payne Pelosi Price (NC) Rahall Rangel Reyes Rivers Rodriguez Roybal-
Allard Rush Sabo Sanchez Sanders Sawyer Schakowsky Scott Serrano
Slaughter Snyder Solis Stark Strickland Stupak Thompson (CA) Thompson
(MS) Tierney Towns Udall (CO) Udall (NM) Velazquez Visclosky Waters
Watson (CA) Watt (NC) Woolsey Wu

NOT VOTING-3
Ortiz Roukema Stump

148 Cong. Rec. S10233-07, S10342 (Senate)

YEAS-77

Allard Allen Baucus Bayh Bennett Biden Bond Breaux Brownback
Bunning Burns Campbell Cantwell Carnahan Carper Cleland Clinton
Cochran Collins Craig Crapo Daschle DeWine Dodd Domenici Dorgan
Edwards Ensign Enzi Feinstein Fitzgerald Frist Gramm Grassley Gregg
Hagel Harkin Hatch Helms Hollings Hutchinson Hutchison Inhofe Johnson
Kerry Kohl Kyl Landrieu Lieberman Lincoln Lott Lugar McCain
McConnell Miller Murkowski Nelson (FL) Nelson (NE) Nickles Reid
Roberts Rockefeller Santorum Schumer Sessions Shelby Smith (NH) Smith
(OR) Snowe Specter Stevens Thomas Thompson Thurmond Torricelli
Voinovich Warner

NAYS-23

Akaka Bingaman Boxer Byrd Chafee Conrad Corzine Dayton Durbin
Feingold Graham Inouye Jeffords Kennedy Leahy Levin Mikulski Murray
Reed Sarbanes Stabenow Wellstone Wyden