

**THE LEGALITY AND CONSTITUTIONALITY OF THE
PRESIDENT'S AUTHORITY TO INITIATE AN INVASION OF
IRAQ**

A Report of
The Committee on International Security Affairs
of the
Association of the Bar of the City of New York

August 2002

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INTRODUCTION

The Committee on International Security Affairs of the Association of the Bar of the City of New York (“the Committee”) has considered the legal and constitutional aspects of the President’s authority to order an invasion of Iraq without Congressional approval, focusing on the scenario of a large-scale invasion proposed by the Bush Administration for the purpose of regime change, without either a prior attack by Iraq on the United States, an imminent threat of such an attack or evidence that Iraq aided in the perpetration of the terrorist attacks of September 11, 2001. Our examination of the Constitution leads us to conclude that an invasion of this nature would constitute a war within the contemplation of the Founders and would thus require prior Congressional authorization. We believe that such an invasion solely on the President’s orders would deny Congress its Constitutionally-granted powers and could be justified only by an excessively expansive notion of Presidential authority, one unsupported by the plain text of the U.S. Constitution.

This report addresses the issue of the legality of a Presidentially-initiated, large-scale invasion of Iraq in three steps:

- (1) An examination of the Administration’s stated rationale for undertaking a large-scale invasion of Iraq;
- (2) An analysis of the U.S. Constitution and other relevant law underpinning the respective authority of the Congress and the President to initiate such an invasion; and

(3) The conclusion of the Committee, based upon the foregoing analysis, that such an invasion of Iraq requires prior Congressional authorization.

I. THE WHITE HOUSE IS LAYING THE GROUNDWORK FOR AN INVASION OF IRAQ.

Since 9/11, the Administration has taken an increasingly assertive, proactive stance toward Iraq. In October 2001, the White House noted that evidence linked Iraq and the al Qaeda organization which was responsible for the attacks of September 11, 2001, but found nothing specifically linking Iraq to the attacks on the United States.¹ In the State of the Union Address on January 29, 2002, President Bush included Iraq in the “axis of evil,” a list of those countries that sponsored terrorists and possessed or were trying to acquire weapons of mass destruction (biological, chemical, or nuclear weapons).² He suggested that the United States needed to act quickly against these nations but proposed no specific actions.³ In March, Vice President Richard B. Cheney made somewhat clearer the Administration’s concerns regarding Iraq, a “possible marriage . . . between the terrorist organizations . . . and weapons of mass destruction capability, the kind of devastating materials that Saddam used against his own people in ‘88,” although no link to al Qaeda or other terrorist organizations has yet been publicly shown

¹ See Interview with Richard B. Cheney, Meet the Press, Mar. 24, 2002. With respect to the connection between Iraq and al Qaeda, “[W]e haven’t been able to pin down any connection there . . . We discovered, and it’s since been public, the allegation that one of the lead hijackers, Mohamed Atta, had, in fact, met with Iraqi intelligence in Prague, but we’ve not been able yet from our perspective to nail down a close tie between the al Qaeda organization and Saddam Hussein. We’ll continue to look for it.”

² President George W. Bush, State of the Union Address, Jan. 29, 2002, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>. “States like these [North Korea, Iran, Iraq], and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United States.”

³ *Id.* “[T]ime is not on our side. I will not wait on events while dangers gather. I will not stand by, as peril draws closer and closer. The United States of America will not permit the world’s most dangerous regimes to threaten us with the world’s most destructive weapons.”

or even claimed by the Administration.⁴ Recently, in a speech at West Point, the President made clear that the United States could no longer “wait for threats to fully materialize” but instead “must take battle to the enemy, disrupt his plans, and confront the worst threats before they emerge.”⁵

By late January, newspapers had reported that the White House was planning an invasion involving over 200,000 ground troops.⁶ By May, the Joint Chiefs of Staff had apparently convinced the Administration, which seemed to regard an offensive as “all but inevitable,”⁷ to postpone the proposed invasion of Iraq at least until after the brutal Iraqi summer.

The Administration has also made pronouncements that the invasion of Iraq is designed to replace that country’s leadership with one more amenable to the United States’ current international goals. Secretary of State Colin Powell said in recent testimony before the House International Relations Committee: “Regime change is something the United States might have to do alone.”⁸ Defense Secretary Donald Rumsfeld is quoted in June, 2002, in a Defense Department Report document describing his thoughts “that the world ‘would be a safer place if there were a regime change’ in Iraq. He pointed out that the United States and a number of its

⁴ See Interview with Richard B. Cheney, *supra* note 1.

⁵ President George W. Bush, United States Military Academy Graduation Speech, June 2, 2002.

⁶ See generally Peter Ford, ‘Evil axis’ and others talk back, CHRISTIAN SCI. MONITOR, Jan. 31, 2002, at 01, (describing U.S. invasion plans); Ian Bruce, Pentagon draws up plans for invasion of Iraq, HERALD (Glasgow), Jan. 31, 2002, at 11 (explaining Pentagon plans to use ground troops to expel Hussein); William Rees-Mogg, The countdown starts for Operation Saddam, TIMES (London), Feb. 18, 2002, Features (criticizing White House plans); Eric Schmitt, Cheney, at Marine Base, Reinforces Bush’s Stand On War Against Terror, N.Y. TIMES, Feb. 19, 2002, at A10 (reporting Cheney’s efforts to garner support in the United States for action against Iraq).

⁷ See Scott Ritter, Commentary: Behind ‘Plot’ on Hussein, a Secret Agenda: Killing weapons inspections would clear way for war, L.A. TIMES, June 19, 2002, at B13.

⁸ State Department Report: “Powell says U.S. is Examining Full Range of Options on Iraq”, Feb. 6, 2002, issued by U.S. Department of State International Information Programs, viewed at <http://usinfo.state.gov/topical/pol/arms/02020605.htm>

allies, backed by President Bush and the U.S. Congress, have expressed agreement on this because every new day means another opportunity for Iraqi weapons programs to mature further. ‘To the extent they become more mature,’ he said, ‘obviously, the capabilities both for weapons of mass destruction themselves, as well as the ability to deliver them, evolve as well.’”⁹ Finally, in what has been called “one of the strongest and most detailed explanations by a senior U.S. official of the need to oust Hussein”¹⁰, National Security Advisor Condoleeza Rice made a “moral case” for the invasion of Iraq:

“This is an evil man [Saddam Hussein] who, left to his own devices, will wreak havoc again on his own population, his neighbors and, *if he gets weapons of mass destruction and the means to deliver them*, on all of us. It is a very powerful *moral case* for regime change . . . We certainly do not have the luxury of doing nothing . . . if Saddam Hussein is left in power, doing the things that he’s doing now, *this is a threat that will emerge*, and emerge in a very big way.”¹¹

Thus, the Administration has made abundantly clear that such an attack is based on long-term foreign policy, if not moral reasons, and not on any concept of defending the United States from an imminent military threat. Regardless of the validity of the rationale set forth by the Administration, a massive campaign against Iraq does not appear to the Committee to be the type of emergency defensive action that is within the exclusive authority of the President to undertake.

⁹ *Defense Department Report: Afghanistan; Iraq*, June 17, 2002, issued by U.S. Department of State International Information Programs, viewed at <http://usinfo.state.gov/regional/nea/sasia/afghan/text/0617dodrpt.htm>

¹⁰ “Rice Lays Out Case for War In Iraq Bush; Adviser Cites ‘Moral’ Reasons,” WASH POST, Aug. 16, 2002, at 1, reported at <http://www.washingtonpost.com/wp-dyn/articles/A21333-2002Aug15.html>.

¹¹ Rice interview with BBC, reported at <http://news.bbc.co.uk/1/hi/world/americas/2193426.stm> Aug. 15, 2002. Brackets in original; emphasis added.

II. THE PRESIDENT DOES NOT HAVE THE AUTHORITY TO ACT UNILATERALLY TO UNDERTAKE THE LARGE-SCALE INVASION CONTEMPLATED.

(A) *War Powers Clause.*

The text is simple: Only Congress has the authority to declare war under Article I, Section 8, Clause 11 of the Constitution: “The Congress shall have Power . . . To declare War . . .” On this there is no question. Furthermore,

[T]he Founding Fathers drew a distinction between offensive and defensive hostilities. --- The records of the convention indicate that this was done to preserve for the executive the power to repel sudden attacks and to avoid the possible implication that Congress was expected to *conduct war* . . .¹²

As Louis Fisher notes, the Founders’ decision to use the word “declare” instead of “make” left the President the limited and clearly delineated power to “repel sudden attacks” against the United States.¹³ The difference between the respective war power authority of the two branches can be explained as the difference between “defensive” military action against actual or imminent attack; and all other military action which constitutes “war” under the

¹² R. Turner, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE*, (1983), at 17 [emphasis original].

¹³ Messrs. Madison and Gerry jointly introduced the amendment to substitute “declare” for “make.” They noted the change would “leav[e] to the Executive the power to repel sudden attacks.” M. Farrand, *The Records of the Federal Convention of 1787* (rev. ed. 1937), at 318, *cited in* *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, Congressional Research Service (1992), at 308, note 1420.

See Louis Fisher, *Sidestepping Congress: Presidents Acting Under the UN and NATO*, 47 CASE W. RES. L. REV. 1237 (1997) (arguing that the constitutional structure adopted by the Framers is “remarkably clear in its basic principles. The authority to initiate war lay with Congress. The President could act unilaterally only in one area: to repel sudden attacks.”). A number of leading commentators support this view. *See generally* JOHN H. ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); Lori Fisler Damrosch, *Constitutional Control Over War Powers: A Common Core of Accountability in Democratic Societies?*, 50 U. MIAMI L. REV. 181 (1995) (arguing that “the body of experience of the mature democracies in their war-and-peace decisions reflects a common core of commitment to democratic accountability.”). *See also* S. Con. Res. 133, 107th Cong. (2002) referred to Senate Foreign Relations Committee (expressing “the sense of Congress that the United States should not use

Constitution, the former being within the authority of the President as Executive and Commander in Chief, the latter within the exclusive authority of the Congress.¹⁴ The proposed invasion does not come close to the exigent defense against imminent or sudden attack contemplated by the Founders as within the Presidential authority.

(B) *War Powers Resolution.*¹⁵

In response to perceived excesses by Presidents Lyndon B. Johnson and Richard Nixon in initiating and expanding the war in South-East Asia, Congress resolved in 1973 to clarify its sole authority to declare war. The War Powers Resolution (the “WPR”) requires the President to report to and regularly consult with Congress after unilaterally choosing to deploy U.S. armed forces.¹⁶ Unless Congress otherwise authorizes the military action, the WPR seeks to require the President to withdraw armed forces within sixty days of deploying them. A Congressional declaration of war or enabling resolution waives these requirements and gives the

force against Iraq, outside of the existing Rules of Engagement, without specific statutory authorization or a declaration of war under Article I, Section 8, Clause 11 of the Constitution of the United States”).

¹⁴ See, e.g., William Whiting, *WAR POWERS UNDER THE CONSTITUTION OF THE UNITED STATES* (1871), at 38-40: “Congress has the sole power, under the constitution, to make [a] declaration [of war], and to sanction or authorize the commencement of offensive war . . . But this is quite a different case from a defensive . . . war. The constitution establishes the mode in which this government shall commence wars, the authority which may authorize, and the declarations which shall precede, any act of hostility; but it has no power to prescribe the manner in which others should begin war against us.”

¹⁵ See 50 U.S.C. §§ 1541-1548.

¹⁶ The WPR seeks to prevent the President from abusing both his authority as Commander-in-Chief and his ability to respond more quickly than Congress, as the President may deploy troops and undertake a military action that does not constitute a response to a sudden or imminent attack before Congress can act at all, or he may deploy a sufficient number of troops quickly enough to create a self-fulfilling prophecy—that to remove U.S. forces immediately after deploying them would be irresponsible and dangerous). If the President can commit troops offensively and only consult Congress when hostilities become inevitable (*i.e.*, shoot and ask questions later), then Congress has no real war powers. See Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT’L L. 58 (1994) (arguing that in the post-Cold War era, it is more important than ever to have “robust parliamentary debate and genuine deliberation” before military action, as required by WPR and the War Powers Clause). See also *infra* Part II.F (arguing that Congressional appropriations or other measures after military deployment are insufficient checks against unilateral action by the President).

President the full power to conduct a war. Some argue that the WPR is ineffective or even unconstitutional as it seeks to alter the Constitutional war powers framework and note that no President has recognized its constitutionality. However, in large-scale conflicts, Presidents have sought Congressional authorization, most notably in the most closely analogous military action when President George H.W. Bush sought support of Congress for the Gulf War of 1991.

(C) *Arguments for Executive Authority to Initiate War.*

Some writers have argued that the Founders reserved for the President the power to initiate wars and gave Congress the power merely to ratify them, *i.e.*, decide the legal status of the conflict initiated by the President.¹⁷ These writers deny the authority expressly granted to Congress under the Constitution and argue in support of the President's authority to undertake unilateral action by positing that the President has the "inherent executive authority" to initiate wars, as Commander-in-Chief under Article II, Section 2¹⁸ and as part of his generic powers as President.¹⁹ This argument, if accepted, gives the President wide-ranging powers to use force—not just to repel a sudden attack but also to initiate full-scale offensives as part of the war against

¹⁷ See generally John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996). Yoo argues that the Founders understood declarations of war not as legislative authorization to initiate war but as a mere acknowledgement by Congress that the legal status had changed, from peace to war, between the United States and a hostile state. It alerted all nations that violence committed against hostile states was official and public, not the work of pirates or rebels, and alerts U.S. citizens about the identity of the new enemy. Yoo calls this a Congressional exercise of judicial powers. See *id.* at 205.

¹⁸ Some argue that the President has more explicit and unchecked authority to use the armed forces under Article II, Section 2 ("President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states, when called into actual Service of the United States."). See generally Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002).

¹⁹ See Yoo, *supra* note 17, at 252-256 (arguing that President's war powers were continuation of British and colonial traditions and that 18th Century citizens expected a "paternal figure vested with the duty of protecting his fellow citizens.").

terrorism.²⁰ According to this view, Congress has also waived its authority over the years by acquiescing to numerous wars initiated by the President.²¹

These arguments deny or miscast the plain text of the Constitution granting Congress the sole authority to declare war. Conversely, no text gives the President the discretion to deploy U.S. forces without Congressional approval in the absence of a sudden danger to national security, not even for the “moral” reasons or concerns of “emerging” threats cited by the Administration.²²

Advocates of unilateral executive authority over war powers also claim to bring an originalist understanding to the War Powers clause that contradicts both the text and the clear (originalist) evidence that the Founders wished to prevent the President from having strong war powers.²³ Advocates of inherent executive authority to initiate wars argue that the American

²⁰ See Delahunty & Yoo, *supra* note 18, at 487 (“[T]he President had the innate power not only to retaliate against any person, organization, or state suspected of involvement in terrorist attacks on the United States, but also against foreign states suspected of harboring or supporting such organizations.”) Authors are in the Office of Legal Counsel of the Department of Justice (but do not claim to state official views of the Justice Department).

²¹ See John Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1179 (1999) (arguing that Congress has allowed the President to assume the initiative in war).

²² See D.A. Jeremy Telman, *A Truism That Isn’t True? The Tenth Amendment and Executive War Power*, 51 CATH. U. L. REV. 135, 189 (responding to Yoo and others who argue for increased executive war powers by arguing that such powers can only come from a theory of inherent authority because “there is no basis, in the constitutional text, in the writings of the Framers, in political theory, or in the constitutional history of the United States for transferring powers invested in the Legislature to the Executive.”). Critics like Yoo read “declare war” out of context, separating from neighboring clauses that clearly enumerate the power to raise, support, and regulate the armed forces (Cl. 12-16), all part and parcel of control when and how the United States goes to war.

²³ James Madison said that the Constitution “supposes . . . that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly, with studied care, vested the question of war in the Legislature.” James Madison, Letter From James Madison to Thomas Jefferson, Apr. 2, 1798, in 6 THE WRITINGS OF JAMES MADISON, 311, 312 (Gaillard Hunt Ed., 1906) (cited by Telman, *supra* note 22, at 152). Furthermore, during the Constitutional Convention, no one even seconded a motion to give the President the power to initiate wars. See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, (Max Farrand ed., 1937) (cited by Telman, *supra* note 22, at 152). Finally, Madison argued that the system of checks and balances required that Congress control the decision to initiate war: “Those who are to conduct a war cannot in the nature of

conception of executive war powers was largely shaped by Britain, even though the colonies revolted from Britain in part, as a reaction to the excess of British executive power they had experienced.²⁴ The President's role as Commander-in-Chief emphasizes civilian control over the military and, absent an immediate threat to the nation requiring defense, only gives him the power to execute Congress' decision to commence a war.²⁵ Many Founders believed war declarations were simply not an executive function.²⁶

(D) *UN or NATO Authorization.*

Some scholars argue that the President may undertake a military action without Congressional authorization if the UN or NATO has authorized such an action.²⁷ By this view, the purpose of the "declare war" clause is to ensure that the decision to initiate war does not rest with just one person. UN authorization avoids this problem, perhaps even more effectively than does Congress' authorization, because the Security Council "is far less likely to be stampeded by

things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded." James Madison, *Helvidius No. 1*, in 6 THE WRITINGS OF JAMES MADISON 145 (Gaillard Hunt ed., 1906).

²⁴ See Telman, *supra* note 22, at 180 ("Yoo's theory ignores the great efforts expended in the Revolutionary Era to free the United States from the problems associated with the excesses of executive power experienced when the American states had the status of English colonies."). Even Alexander Hamilton, once an advocate of constitutional monarchy, conceded that the powers granted the President were much inferior to those granted the King of Great Britain, who could declare war and raise and regulate armies. *Id.* at 182.

²⁵ Hamilton argued at the Constitutional Convention that the executive's war time functions were "to have the direction of war when authorized or begun"; nothing in his statement to the Convention indicated that the President should also have the power to decide whether to start a war. 5 DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMEND BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 205 (Jonathan Elliot ed., 2d ed. 1996).

This paper takes no position with respect to the authority the President may have to employ the armed forces in military operations other than war, such as peacekeeping, disaster relief, peacetime garrisons in foreign bases, training of U.S. and allied forces abroad and the like.

²⁶ Madison, *Helvidius No. 1*, *supra* note 23, at 148. "A declaration that there shall be war is not an execution of laws: it does not suppose pre-existing laws to be executed: it is not, in any respect, an act merely executive."

²⁷ See generally Thomas M. Franck & Faiza Patel, *UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63 (1991).

combat fever than is Congress.”²⁸ As examples, proponents of this view observe that Presidents, on two previous occasions, have deployed U.S. forces pursuant to Security Council authorizations: the Korean War²⁹ and the 1991 Gulf War.³⁰

UN or NATO authorization does not absolve the President of his Constitutional duty to obtain Congress’ approval. Whether the Security Council approves of an invasion of Iraq or not,³¹ the Constitution requires Congressional authorization for war. Treaty obligations, such as those under the UN Charter or NATO Treaty, are equivalent to federal statutory law³² and, as such, never trump the Constitution.³³

Arguments relying on the Korean and Gulf Wars as examples are unconvincing. President Harry S. Truman’s order sending U.S. forces to Korea might be viewed as repelling a sudden attack—the North Korean invasion had nearly overrun South Korea, threatening

²⁸ *Id.* at 74. “The purpose of the war-declaring clause was to ensure that this fateful decision did not rest with a single person. The new system vests that responsibility in the Security Council, a body where the most divergent interests and perspectives of humanity are represented and where five of fifteen members have a veto power.” *Id.* As a practical matter of restraining the President, it may be true that the Security Council, made up of different member states with different and often conflicting political interests, is less likely to authorize the use of American force than Congress. Such support seems unlikely under the circumstances.

²⁹ Delahunty & Yoo, *supra* note 18, at 504 (“Perhaps the most significant operation exercised on the President’s sole authority occurred during the Korean War, when President Truman ordered United States troops to fight a war that lasted for over three years and resulted in over 142,000 American casualties.”).

³⁰ See Fisher, *supra* note 13, at 1266 (observing that during the Gulf War, Richard B. Cheney, the Secretary of Defense, argued that Congressional authorization was not necessary for UN-approved actions).

³¹ Recent history suggests that three of five permanent members (Russia, China, France) of the Security Council would oppose an invasion of Iraq. RICHARD BUTLER, *THE GREATEST THREAT: IRAQ, WEAPONS OF MASS DESTRUCTION, AND THE GROWING CRISIS OF GLOBAL SECURITY* 91, 220-21 (2000) (describing Russian, French, and Chinese support for ending sanctions against Iraq, despite the lack of Iraqi compliance with UN weapons inspection regime, and self-interested political motives for this support).

³² See U.S. Const., Art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”).

³³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §111, Comment (a) (“In their character as law of the United States, rules of international law and provisions of international agreements of the United States are

irreparable harm to U.S. security interests.³⁴ In any case, it appears that President Truman sought UN approval as a fig leaf for acting without Congress; he³⁵ had already ordered American forces to defend South Korea before obtaining UN authorization³⁶ and would have done so without receiving it.³⁷ Likewise President George H.W. Bush, despite obtaining UN authorization, sought and received Congressional approval for the Gulf War.³⁸

subject to the Bill of Rights and other prohibitions, restrictions, and requirements of the Constitution, and cannot be given effect in violation of them.”).

³⁴ Truman’s advisers believed that the sudden North Korean attack required an immediate U.S. response: “To sit by while Korea is overrun by unprovoked armed attack would start a disastrous chain of events leading most probably to world war.” John Foster Dulles & John M. Allison, Telegram to Dean Acheson and Dean Rusk, June 25, 1950 (one day after the North Korean invasion began), *available at* http://www.trumanlibrary.org/whistlestop/study_collections/korea/large/week1/elsy_3_1.htm. Truman regarded the Korean invasion as the beginning of general Soviet aggression and expansion in the Far East. *See generally* Philip C. Jessup, Memorandum of Conversation, June 25, 1950, *available at* http://www.trumanlibrary.org/whistlestop/study_collections/korea/large/week1/kw_4_1.htm (summarizing discussion between Truman and his advisers about the Korean situation, its implications for China, Formosa, and Southeast Asia, and plans to strike at Soviet airbases and ships in the Pacific Ocean).

³⁵ Truman, before the Korean War, had agreed that he must seek Congressional authorization before committing U.S. troops to UN or NATO military actions. *See* Fisher, *supra* note 13, at 1245-46 (“After Roosevelt’s death, President Truman sent a cable from Potsdam stating that all agreements involving U.S. troop commitments to the United Nations would first have to be approved by both Houses of Congress.”). *See also id.* at 1255-56 (“In 1951, during Senate hearings on NATO, [Under Secretary of State Dean] Acheson ... acknowledged that the treaty does not compel any nation ‘to take steps contrary to its convictions, and none is obligated to ignore its national interests.’”).

³⁶ *Id.* at 1261 (indicating that Truman had ordered American support of South Korean forces, in the form of military supplies and air and sea cover, before the Security Council authorized states to repel the invasion by North Korea).

³⁷ *Id.* (“After he left the presidency, Truman was asked whether he had been willing to use military force in Korea without UN backing. He replied, with customary bluntness: ‘No question about it.’”).

³⁸ PL 102-1 (1991).

“Section 2. Authorization for use of United States Armed Forces

(a) Authorization. -- The President is authorized, subject to subsection (b), to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.”

(1) Security Council Resolution 678.

The Administration may argue that not only does UN authorization give the President authority to act without Congress, but that specifically, President Bush already has a UN mandate to invade Iraq. This 1990 Resolution states:

“The Security Council . . . Acting under Chapter VII of the Charter . . . Authorizes Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements Resolution 660 (1990) [calling for Iraq to withdraw from Kuwait] and all subsequent relevant resolutions, to use all necessary means . . . to restore international peace and security in the area.”³⁹

Congress stated in PL 102-1 that the President was “authorized to use United States Armed Forces *pursuant to* United Nations Security Council Resolution 678,”⁴⁰ and the subsequent relevant Security Council resolutions referred to in Resolution 660 and thus incorporated into Resolution 678 (including those establishing the Iraq weapons inspection regime), thereby extending Congressional authorization to such subsequent Security Council resolutions. That this is so is indicated by the President’s continued reporting to Congress under PL 102-1’s reporting requirements regarding the United States’ efforts to enforce those subsequent Security Council Resolutions and Congress’ acceptance of such reports.⁴¹

³⁹ S.C. Res. 678, U.N. Doc. S/RES/0678 (1990).

⁴⁰ *Id.* [emphasis supplied].

⁴¹ See e.g., Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate January 23, 2002, Office of the White House Press Secretary, January 24, 2002:

“Dear Mr. Speaker: (Dear Mr. President:)

Consistent with the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102-1) and as part of my effort to keep the Congress fully informed, I am providing a report prepared by my Administration on the status of efforts to obtain Iraq’s compliance with the resolutions adopted by the United Nations Security Council. The last report, consistent with Public Law 102-1, was transmitted on October 11, 2001.

Sincerely,

GEORGE W. BUSH”

Nonetheless, while it appears that Resolution 678 may still be in effect, and, further, a purely textual analysis of the Resolution may support a broad interpretation of purpose extending even to authorization of force for “regime change,”⁴² nonetheless, a review of that and the subsequent resolutions from the Security Council—along with a reading of the debate surrounding the adoption of the Authorization for Use of Force Against Iraq Joint Resolution—suggest that it did not authorize, intend or even contemplate the use of force against Iraq for “moral” reasons or purposes of “regime change.” The Committee concludes, therefore, that Resolution 678 does not provide authorization for the invasion contemplated by the Bush Administration.

(2) *Security Council Resolution 1373.*

Even if UN authorization allowed the President to order American forces into hostilities without Congress’ approval, Resolution 1373 passed in response to the events of September 11, does not appear to the Committee to authorize the United States to invade Iraq for the purpose of regime change or even moral reasons.⁴³ In contrast, nothing in the plain, operative text of Resolution 1373 authorizes any state to invade Iraq absent a connection with 9/11.⁴⁴ There are also other flaws with citing Resolution 1373 as a blank check (*e.g.*, the phrase

⁴² “From a purely textual perspective, that authorization seems to have few, if any, limits. “Area” is undefined and could mean Iraq or the entire Middle East. “Restoring international peace and security” could mean occupying Iraq, removing Saddam Hussein from power, or bombing Iraq’s military/industrial capacity.” Jules Lobel & Michael Ratner, *Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime*, 93 AM. J.I.L. 124 (Jan 1999), printed at <http://www.asil.org/ajil/lobel.htm>93, at text accompanying footnotes 59 and 60.

⁴³ *Id.*

⁴⁴ See S.C. Res. 1373 resolving (that states shall suppress the financing of terrorist acts (¶1), deny other support to terrorists or terrorist groups (¶2), cooperate with other states to exchange information, become parties to relevant anti-terrorism treaties, and prevent abuse of asylum laws by terrorists (¶3). No part of the text of the resolution urges or condones states to invade other states to prevent terrorism), S.C. Res. 1373, U.N. Doc. S/RES/1373 (2001).

“combat by all means” appears in the preamble and is not binding). All this points to the fact that the Resolution 1373 does not authorize the proposed war against Iraq.

(E) *1991 and 2001 Joint Resolutions of Congress.*

Congress has twice issued resolutions that might be used to support a contention that Congress has already authorized a future war against Iraq; yet, neither resolution currently applies. As noted above, President George H.W. Bush sought and received Congressional authorization for undertaking the Persian Gulf War’s Operation Desert Storm in January 1991 pursuant to Security Council Resolution 678 in the form of PL 102-1 (“Authorization for Use of Military Force Against Iraq Resolution”).⁴⁵ While, as explained above, from 1991 to the present three Presidents have continued to report to Congress under PL 102-1 regarding the United States’ efforts pursuant to Security Council Resolution 678, and both the U.S. and the British governments take the position that Resolution 678 continues in effect, neither the 1991 Authorization for Use of Military Force Against Iraq Resolution nor Resolution 678 were designed to authorize conquest of Iraq to achieve a change in regime.

More recently, in the immediate wake of 9/11, Congress authorized the President to use armed force against “those nations, organizations or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001.”⁴⁶ This sweeping resolution requires a connection with 9/11 and would only authorize war against Iraq if the President had determined that Iraq had “aided” in perpetrating the attacks. To date, the President

⁴⁵ Public Law 102 – 1, §2(b) (Joint Resolution to authorize use of military force against Iraq) Jan. 14, 1991. “The President is authorized . . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) . . .”

⁴⁶ United States Public Law 107-40, §2(a) (Joint Resolution to authorize the use of U.S. Armed Forces against those responsible for the recent attacks launched against the United States) Sept. 18, 2001.

has not made such a determination. It is important to note that the United States has not announced any causal link between the events of 9/11 and Iraq; Vice President Cheney has acknowledged as much explicitly.⁴⁷ It is thus clear the 2001 Joint Resolution To Authorize The Use Of U.S. Armed Forces Against Those Responsible For The Recent Attacks Launched Against The United States does not extend to authorize war against Iraq for the stated purpose.

(F) *Congress' Powers of Appropriation Are Insufficient.*

Some scholars argue that appropriations are a sufficient check, and the primary one intended by the Founders, against the executive authority to initiate war—Congress may simply refuse funding for further military operations.⁴⁸ However, this check will often be useless against the President. Under this theory, Congress may stop military actions once troops have been committed. The action may end, damage may be done, and lives (U.S. and foreign) may be lost well before the withdrawal of funding is effective.⁴⁹ It may also be dangerous to withdraw funding once a large ground force has been committed.⁵⁰ This view of war powers is backwards.

⁴⁷ See note 1.

⁴⁸ See Yoo, *supra* note 17 at 297 (“Recent events [*i.e.* United States-led military operations in Bosnia] confirm that Congress fully understands that its appropriations power may be used to check executive military operations.”).

⁴⁹ For instance, the Office of the Legal Counsel of the Department of Justice advised President George H.W. Bush that he could send U.S. troops to Somalia on his own authority. 16 Op. Off. Legal Counsel 9 (1992) (cited by Delahunty & Yoo, *supra* note 18, at 500 n.51). After a series of dramatic American setbacks, Congress directed the President to withdraw forces from Somalia pursuant to its authority clarified by the War Powers Resolution. See H.R. CON. RES. 170, 103d Cong., 139 CONG. REC. 9039 (1993). One might imagine that Congress could have ended the operation in Somalia (a military action far smaller than that contemplated in Iraq) by withdrawing funding instead. Either way, this example suggests that if the power to initiate war lies with the President, Congress has no effective check – it can only limit casualties once hostilities have begun because it cannot stop them from taking place.

⁵⁰ Yoo concedes that Congress may be reluctant to deny appropriations because of the risk of “creating the impression that they are leaving American troops at the front defenseless,” but that “a failure of political will should not be confused with a constitutional defect.” Yoo, *supra* note 17, at 299. He assumes that the risk of withdrawing funding as largely a perceptual or political danger, rather than one that may, in fact, involve the lives of deployed troops.

Congress should not be in a position to decide merely how many casualties the United States will accept but rather whether losses need be incurred at all.

III. UNDER THE CONSTITUTION, THE PROPOSED INVASION IS A WAR.

Under the Constitution, President Bush would have the unilateral authority to commit U.S. troops to Iraq if he could show that such an action constituted repelling a sudden or imminent attack or its modern day equivalent. Under the scenario addressed herein, however, the Committee believes he must seek Congressional approval. There are three reasons for this conclusion, which must be read cumulatively:

(1) The scale of the endeavor strongly suggests the action is a “war” under Constitution (although scale alone is insufficient to put the matter into the legislative domain as the type of war requiring Congressional authorization). The United States District Court for the District of Columbia had “no hesitation in concluding that an offensive entry into Iraq by several hundred thousand United States servicemen . . . could be described as a ‘war’ within the meaning of [the War Powers Clause].”⁵¹ (Congress is more likely to acquiesce to unilateral executive decisions to deploy relatively small forces,⁵² but despite any such acquiescence, Congress cannot waive its Constitutional war powers.)

The deployment of 200,000 or more troops (or, indeed, even a “smaller” invasion in conjunction with massive air attack) is practically and qualitatively different from the scale of

⁵¹ See *Dellums v. Bush*, 752 F. Supp. 1141, 1146 (D.D.C. 1990). See also Bruce Ackerman, *Commentary: Bush Must Avoid Shortcuts on Road to War: President should not try to sidestep Congress in any action against Iraq*, L.A. TIMES, May 31, 2002, at B15.

⁵² Telman, *supra* note 24, at 168. “Although Congress has generally acquiesced in the President’s unilateral power to commit the Armed Forces to actions of limited scope, that acquiescence in individual cases, no matter how numerous, cannot result in a transfer of war powers from one branch of the federal government to another.”

other recent U.S. military interventions, except for the Vietnam and Gulf Wars; in each of these two conflicts, the President specifically sought and received Congressional authorization. The Tonkin Gulf Resolution, while passed by Congress as a reaction to largely fabricated events, shows that even President Johnson believed he was Constitutionally compelled to attempt to obtain Congress' authorization before beginning a full-fledged war in Vietnam. President Johnson likely abused his authority to send troops to Vietnam. More important, in the context of this discussion on the separation of war powers, is how he might have abused his authority. President Johnson's actions, if anything, affirmed the legitimacy of the War Powers clause because he actively sought Congressional authorization for the Vietnam War.⁵³

(2) The invasion of Iraq for the purpose of regime change is plainly not for the purpose of repelling a sudden or imminent attack, as discussed above. Iraq has not, since the end of the 1991 Gulf War, used force against or directly threatened the United States (aside from attacks on allied airplanes in the no-fly zones). According to the National Security Advisor, any threat that Iraq poses is not of an immediate nature; if it were, the President would have proposed an immediate action, or, already acted on his own authority. To deem an invasion of Iraq repelling a sudden or imminent attack under these circumstances dangerously distorts the intent of the Founders.

(3) In the case of repelling a "sudden attack," or even the modern day equivalent such as disrupting a terrorist operation about to commence, time limitations help to provide an understanding of the boundary between executive and legislative war powers. The

⁵³ Johnson's failing was that he was willing to use false information (allowing the Pentagon to fabricate incidents suggesting North Vietnamese provocation) to get such authorization. The President has an obligation to be truthful when exercising his Executive and Commander-in-Chief war powers.

President has the authority and obligation to repel sudden attacks because the unitary Executive can react more quickly than Congress. In such cases there is time to deliberate. Perhaps a President who fears that his war plans will be rejected would not want to subject them to Congressional scrutiny. It is in precisely this situation, however, that the decision is not the President's to make alone; he must convince Congress⁵⁴ not only of the justness of the cause but the legitimacy of the means.

CONCLUSION

The Committee has set forth its reasoning and conclusion that the President needs Congressional authorization to launch a large-scale invasion of Iraq for the purpose of regime change or on “moral” grounds set forth.⁵⁵ Some may disagree with this conclusion. However, when the President seeks to take the nation from a state of peace to a state of war for reasons other than defense against actual or imminent attack, however valid those reasons may be, the Republic deserves—and the Constitution requires—a Congressional debate over whether to authorize such a war. Swift action in defense of the nation and enforcement of legislation are the President's obligations; decision-making from reasoned deliberation and determining America's long-term security interests is Congress'.

⁵⁴ If the reasons for a ground invasion depend on top secret intelligence, and public disclosure will compromise intelligence sources, then the President may provide this information to Congress behind closed doors. *See, e.g.,* the current Congressional investigation of possible intelligence breakdowns before 9/11, which remained largely closed to the public. Protecting intelligence sources may be a good reason not to reveal secrets but does not justify the President acting without Congress' authorization.

⁵⁵ The Committee takes no position regarding the validity of those stated reasons.

Administration officials, former White House officials, members of Congress, and scholars have argued for and against removing Saddam Hussein, and even those who agree he must be ousted, disagree as to whether using ground troops and a massive air assault in a large scale endeavor is the best means.⁵⁶ As such, the prudence of offensive military action—from the perspective of U.S. national security—is far from self-evident. This controversy necessarily requires open and public debate about the merits of a war against Iraq to effect regime change. Such deliberation in Congress and amongst citizens—before using force—is the hallmark of a democratic republic, as conceived of by the Founders and written in the Constitution. The President can best facilitate this necessary debate and honor the Constitutional separation of powers by requesting authorization from Congress for his proposed military action before acting.

Dated: August 22, 2002

⁵⁶ These debates are not a matter of partisan politics. In addition to many Democrats, former senior Republican officials who served during the Gulf War in the Administration of G.H.W. Bush argue against a ground invasion of Iraq. See interviews with James Baker and Brent Scowcroft, *Frontline: Gunning For Saddam*, Nov. 8, 2001 (arguing that Saddam Hussein is not the greatest threat to U.S. security and arguing against a ground invasion).

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