

**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

July 2002

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**A Report on the Legality and Constitutionality of the President's Authority to Initiate an Invasion of Iraq**

**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. An invasion of the scale and nature proposed by President George W. Bush would constitute a war under the Constitution and the War Powers Resolution and, thus, require Congressional authorization. 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 US Constitution. While there is room for some disagreement over these points, Congress is the proper body for deliberating and resolving them.

This report addresses the issue of the legality of a Presidentially-initiated, preemptive war in three steps:

(1) an examination of the Administration's support for a preemptive large-scale invasion of Iraq to preempt the possibility that Iraq will produce or acquire weapons of mass destruction and use those weapons against the United States or its interests, either directly or through terrorist organizations;

(2) an analysis of the US Constitution and other relevant law underpinning the respective authority of the Congress and the President to initiate war; and

(3) the recommendation of this Committee, based upon the foregoing Constitutional analysis and legal precedent, that a preemptive invasion of Iraq requires Congressional authorization.

## I. THE WHITE HOUSE SUPPORTS A PREEMPTIVE INVASION OF IRAQ.

*Preemptive Strike.* 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.<sup>1</sup> 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).<sup>2</sup> He suggested that the United States needed to act quickly against these nations but proposed no specific actions.<sup>3</sup> In March, Vice President Richard B. Cheney made somewhat clearer the Administration’s concerns

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<sup>1</sup> 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.”

<sup>2</sup> 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.”

<sup>3</sup> *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.

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.”<sup>4</sup> Most 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.”<sup>5</sup>

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

## II. UNDER THE CONSTITUTION AND FEDERAL LAW, ONLY CONGRESS MAY DECLARE WAR.

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. The Founders’ decision to

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<sup>4</sup> See Interview with Richard B. Cheney, *supra* note 1.

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

<sup>6</sup> See generally Peter Ford, ‘Evil axis’ and others talk back, CHRISTIAN SCI. MONITOR, Jan. 31, 2002, at 01, (describing US invasion plans); Ian Bruce, Pentagon draws up plans for invasion of Iraq, HERALD (Glasgow), Jan. 31, 2002, at 11 (explaining Pentagon plans to 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).

<sup>7</sup> 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.

use “declare” instead of “make” left the President the limited and clearly delineated power to “repel sudden attacks” against the United States.<sup>8</sup>

*B. War Powers Resolution.*<sup>9</sup> 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 US armed forces.<sup>10</sup> Unless Congress otherwise authorizes the military action (*i.e.*, with a declaration of war), the President must withdraw armed forces within sixty days of deploying them. A Congressional declaration of war waives these requirements and gives the President the full power to conduct a war. Some argue that the WPR is ineffective and that no president has recognized its constitutionality, but in large scale conflicts, the President sought Congressional authorization, most notably in the most closely

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<sup>8</sup> 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 jurists 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.”).

<sup>9</sup> See 50 USC §§ 1541-1548.

<sup>10</sup> The WPR exists to prevent the President from abusing both his authority as Commander-in-Chief and his ability to respond more quickly than Congress. Without the WPR, the President may deploy troops and undertake a military action that does not constitute a response to a sudden attack before Congress can act at all, or may deploy a sufficient number of troops quickly enough to create a self-fulfilling prophecy - that to remove US forces immediately after deploying them would be irresponsible and dangerous. If the President can commit troops and then 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 that 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.E (arguing that Congressional appropriations or other measures after military deployment are insufficient checks against unilateral action by the President).

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.<sup>11</sup> These writers deny the authority expressly granted to Congress under the Constitution (and, *a fortiori*, the WPR) 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 2<sup>12</sup> and as part of his generic powers as President.<sup>13</sup> 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

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<sup>11</sup> 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 merely 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 US citizens about the identity of the new enemy. Yoo calls this a Congressional exercise of judicial powers. See *id.* at 205.

<sup>12</sup> 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).

<sup>13</sup> See *id.* at 252-256 (arguing that President's war powers were continuation of British and colonial traditions and that 18<sup>th</sup> Century citizens expected a "paternal figure vested with the duty of protecting his fellow citizens.").

war against terrorism.<sup>14</sup> According to this view, Congress has also waived its authority over the years by acquiescing to numerous wars initiated by the President.<sup>15</sup>

These arguments deny or miscast the plain text of the Constitution giving Congress the sole authority to declare war. Conversely, no text gives the President the discretion to deploy US forces without Congressional approval in the absence of a sudden danger to national security.<sup>16</sup> 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.<sup>17</sup> Advocates of inherent executive authority to initiate wars argue that the American 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

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<sup>14</sup> See Delahunty & Yoo, *supra* note 12, 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).

<sup>15</sup> 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).

<sup>16</sup> 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.

<sup>17</sup> 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 16, 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 16, 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 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).

experienced.<sup>18</sup> The President's role as Commander-in-Chief emphasizes civilian control over the military and only gives him the power to execute Congress's decision to go to war.<sup>19</sup> Many Founders believed war declarations were simply not an executive function.<sup>20</sup>

*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.<sup>21</sup> 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's authorization, because the Security Council "is far less likely to be stampeded by combat fever than is Congress."<sup>22</sup> As examples,

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<sup>18</sup> See Telman, *supra* note 16, 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.

<sup>19</sup> 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).

<sup>20</sup> Madison, *Helvidius No. 1*, *supra* note 17, 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."

<sup>21</sup> 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).

<sup>22</sup> *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. See *infra* note 24.

proponents of this view observe that Presidents, on two previous occasions, have deployed US forces pursuant to Security Council authorizations: the Korean War<sup>23</sup> and the 1991 Gulf War.<sup>24</sup>

UN or NATO authorization does not absolve the President of his Constitutional duty to obtain Congress's approval. Whether the Security Council approves of an invasion of Iraq or not,<sup>25</sup> the Constitution requires a Congressional declaration of war. Treaty obligations, such as those under the UN Charter or NATO Treaty, are equivalent to federal statutory law<sup>26</sup> and, as such, never trump the Constitution.<sup>27</sup> Arguments relying on the Korean and Gulf Wars as examples are unconvincing. President Harry S. Truman's order sending US forces to Korea might be viewed as repelling a sudden attack – the North Korean invasion had nearly overrun South Korea, threatening irreparable harm to US security interests.<sup>28</sup> In any case, it appears that

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<sup>23</sup> Delhanty & Yoo, *supra* note 12, 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.”).

<sup>24</sup> See Fisher, *supra* note 8, 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).

<sup>25</sup> 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).

<sup>26</sup> 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”).

<sup>27</sup> 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 subject to the Bill of Rights and other prohibitions, restrictions, and requirement of the Constitution, and cannot be given effect in violation of them.”).

<sup>28</sup> Truman’s advisers believed that the sudden North Korean attack required an immediate US 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](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](http://www.trumanlibrary.org/whistlestop/study_collections/korea/large/week1/kw_4_1.htm)> (summarizing

President Truman sought UN approval as a figleaf for acting without Congress: he<sup>29</sup> had already ordered American forces to defend South Korea before obtaining UN authorization<sup>30</sup> and would have done so without receiving it.<sup>31</sup> Likewise President George H.W. Bush, despite obtaining UN authorization, sought (and received) Congressional approval for the Gulf War.

*E. Security Council Resolution 1373.* 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. Resolution 1373, passed in response to the events of September 11, affirms “the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.”<sup>32</sup> By this view, the broad language provides the United States a “blank check,” authorizing the President to invade states that are threats to international peace, *i.e.* Iraq.

Even if UN authorization allowed the President to order American forces into hostilities without Congress’s approval, Resolution 1373 does not authorize the United States to invade Iraq – the Security Council does not issue blank checks. Security Council resolutions are

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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).

<sup>29</sup> Truman, before the Korean War, had agreed that he must seek Congressional authorization before committing US troops to UN or NATO military actions. *See* Fisher, *supra* note 8, 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.’”).

<sup>30</sup> *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).

<sup>31</sup> *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.’”).

<sup>32</sup> S.C. Res. 1373, U.N. Doc. S/Res/1373 (2001).

explicit and limited mandates for particular military actions. For instance, Resolution 678 explicitly authorized UN member states to use force to expel Iraq from Kuwait.<sup>33</sup> In contrast, nothing in the plain, operative text of Resolution 1373 authorizes any state to invade Iraq.<sup>34</sup> There are also other flaws with citing Resolution 1373 as a blank check (*e.g.*, the phrase “combat by all means” appears in the preamble and is not binding). All this points to the fact that the President must get specific authorization from the Security Council to invade Iraq.

*F. Congress’s 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.<sup>35</sup> However, this check will often be useless against the President. Under this theory, Congress may only stop military actions once troops have been committed. The action may end, damage may be done, and lives (US and foreign) may be lost well before the withdrawal of funding is effective.<sup>36</sup> It may also be dangerous to withdraw funding once a large ground force

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<sup>33</sup> S.C. Res. 678, U.N. Doc. S/RES/0678 (1990). “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 [the resolutions calling for Iraq to leave Kuwait], to use all necessary means ... to restore international peace and security in the area.”

<sup>34</sup> Resolution 1373 resolves 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. *See* S.C. Res. 1373, *supra* note 32.

<sup>35</sup> *See* Yoo, *supra* note 11, 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.”).

<sup>36</sup> For instance, the Office of the Legal Counsel of the Department of Justice advised President George H.W. Bush that he could send US troops to Somalia on his own authority. 16 Op. Off. Legal Counsel 9 (1992) (cited by Yoo, *supra* note 11, 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 by withdrawn 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.

has been committed.<sup>37</sup> This view of war powers is backwards. 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 PREEMPTIVE INVASION IS A WAR.**

Under the Constitution, President Bush would have the unilateral authority to commit US troops to Iraq if he could show that such an action constituted “repelling a sudden attack.” The facts, however, show that he cannot and, therefore, he must seek Congressional approval, for four reasons:

(1) The commitment of at least 200,000 ground troops to an invasion of Iraq is a war. The *Dellums* court 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].”<sup>38</sup> Congress is more likely to acquiesce to unilateral executive decisions to deploy relatively small forces.<sup>39</sup> But Congress never waives its war powers and authority to declare war before troops are deployed. The deployment of 200,000 troops is practically and qualitatively different from the number of troops used in all recent US military interventions, except for the Vietnam and Gulf Wars. In each of these conflicts, the

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<sup>37</sup> 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 11, 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.

<sup>38</sup> 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.

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 get Congress's 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. 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.

(2) 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). Logically, any threat that Iraq poses is not of an immediate nature, or the White House would have proposed an immediate invasion, not one some months off. To call an invasion of Iraq a "repelling sudden attack" under these circumstances dangerously distorts the meaning of the phrase.

(3) Repelling sudden attack is not synonymous with any defensive action or any action to protect national security. While one might more easily show that an invasion of Iraq is in the interest of US national security, and that even if Iraq has not yet used force against the United States, Iraq provoked such an invasion; nearly every US military action responded to

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<sup>39</sup> Telman, *supra* note 16, 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."

provocation by another state. If the President has the authority to initiate any “defensive” action, then Congress retains only the absurd power to declare wars that are illegal under the UN Charter, Article 2(4) (banning offensive wars of aggression or conquest).

(4) In the case of a “sudden attack,” the time limitations provides the boundary between executive and legislative war powers. The President has the authority to repel sudden attacks because he can react more quickly than Congress. But if the need for military action is not immediate, thus leaving time to deliberate, what reason could there be not to request Congress to debate the matter? There seems to be no good reason. Perhaps a President who fears that his war plans will be rejected would not want to subject them to Congressional scrutiny. But the decision is not the President’s to make alone – he must convince Congress and the public<sup>40</sup> not only of the justness of the cause but the legitimacy of the means.

## CONCLUSION

So long as reasonable persons might disagree over any critical point – whether Iraq is a significant threat to US security, whether Saddam Hussein should be ousted, whether a ground invasion of Iraq is a “war” requiring Congress’s authority, whether a ground invasion is the prudent means of removing him – the Republic deserves a Congressional debate over a declaration of war. Swift action and enforcement of legislation is the President’s domain; decision-making from reasoned deliberation and determining America’s long-term security interests is required of Congress.

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<sup>40</sup> 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’s authority.

Administration officials, former White House officials, members of Congress, and academics have argued for and against removing Saddam Hussein, and even those who agree he must be ousted disagree as to whether using ground troops is the best means.<sup>41</sup> As such, the prudence of offensive military action – from the perspective of US national security – is far from self-evident. This controversy necessarily requires open and public debate about the merits of an invasion of Iraq. 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 by following the law (and the Constitution), and requesting a declaration of war from Congress before acting.

July 11, 2002

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Eleven members of the Committee have approved this report. One member dissents: Samrat S. Khichi. Four members have recused themselves due to conflicts of interest: Nicholas Rostow, Paul W. Butler, Steven C. Krane and Robert J. Cosgrove

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<sup>41</sup> These debates are not a matter of partisan politics. In addition to many Democrats, former G.O.P. 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 US security and arguing against a ground invasion).

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