

WebMemo



Published by The Heritage Foundation

No. 1347
February 6, 2007

Congress's Iraq Resolutions: Without Resolve or Constitutional Purpose

Todd Gaziano, Steven Groves, and Brian Walsh

Congress may soon consider one or more non-binding resolutions expressing its “disagreement” with President Bush’s plan to augment American forces in Iraq by 21,500 troops.¹ Such resolutions condemning the Commander in Chief’s considered strategy to achieve victory and promote peace and stability in Iraq may play well on the campaign trail, but they are an abuse of Congress’s authority and an unreasonable interference with the President’s exclusive constitutional authority to make strategic military decisions during wartime.

Congressional second-guessing of executive responsibilities has become sadly common, and few are willing to speak up to defend any policy that seems unpopular. But no degree of supposed unpopularity² can render constitutional actions unconstitutional—notwithstanding the confusion on such matters by the mainstream media and misstatements by academics or others with ideological axes to grind.

As most Members of Congress know, their control over the troops available to the President during a war or other conflict is limited to the number of commissioned officers Congress authorizes and the Senate confirms and the overall number of non-commissioned soldiers Congress authorizes and appropriates money for. The President’s constitutional authority as Commander in Chief to commit any number of these soldiers to battle, including his authority to augment the forces in Iraq, is almost absolute, with minor exceptions that are not relevant to the pending resolutions.³ Congress ex-

pressly authorized the President to prosecute the war in Iraq in any manner that he determines necessary and appropriate, but even a revocation of that authorization would not change the President’s constitutional duty to use any and all military forces Congress funds to defeat enemy soldiers bent on America’s destruction.

Congress does have sufficient power to starve the President of the funds necessary to win the war, but it cannot usurp the President’s strategic command over troops that are funded. Given the important but distinct powers each branch possesses, it is, at best, irresponsible meddling for Congress to publicly disparage the President’s command decisions. At worst, it is an attempted interference with his military command that is inconsistent with our constitutional design.

Congress’s Broad, but Limited, War Powers. The Constitution grants both Congress and the President considerable authority over war and approving peace treaties. To successfully win a protracted war, the Framers’ design requires some concerted action by both political branches. The Framers created an energetic President who could execute tactical decision unhindered by legislative direction or legislative committee interference. But in the long run, a deter-

This paper, in its entirety, can be found at:
www.heritage.org/research/MiddleEast/wm1347.cfm

Produced by the Center for Legal and Judicial Studies and
The Margaret Thatcher Center for Freedom

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002-4999
(202) 546-4400 • heritage.org

Nothing written here is to be construed as necessarily reflecting
the views of The Heritage Foundation or as an attempt to aid
or hinder the passage of any bill before Congress.

mined Congress has sufficient power to bend any President to its will, although it must then take responsibility for doing so.

Though Congress is limited to those powers specifically enumerated in Article I, those powers are not insubstantial. Some of the most important are:

- The power to raise and support a standing army and navy. Any protracted modern war requires supplemental appropriations far exceeding the military's baseline budget. Mere inaction by Congress is all that is necessary to defund modern wars.
- The power to "declare war," which clarifies certain international rights and obligations during an ongoing hostility.⁴
- The power to define whether, and under what circumstances, the President may call forth the militias of the several states into national service.
- The power to define the offenses against the laws of war.

- The power to make general rules of military justice for the armed forces.⁵

As broad as these powers are, however, they do not include seemingly lesser ones that Congress may desire to exercise. For example, during the Constitutional Convention, the Framers changed the language of Art. I, sec. 8, cl. 11, in part to make clear that the President is free to "engage in war" whether Congress has declared one or not. Moreover, the power to make rules for "the Government and Regulation" of military forces is the power to enact a general set of laws of military justice, analogous to the Articles of War enacted by the British Parliament. There is no convincing legal support, however, that Congress may use this power to dictate tactical commands.⁶ Congress simply cannot micromanage the tactical operations of the war under any of its powers.⁷

Presidential Authority During Wartime. Article II, Section 2 of the Constitution states, "The President shall be Commander in Chief of the Army and Navy of the United States...." Many of the resolu-

1. See, e.g., S. Cong. Res. 7. Some of the proposed resolutions would also impose periodic reporting requirements on the Iraqi government and the President. Such reporting requirements raise separate and serious constitutional concerns. In order to survive constitutional scrutiny, reporting requirements from the President must be treated as mere requests, for the Constitution provides that the President may report to Congress "such Measures as he shall judge necessary and expedient." Art. II, sec. 3 (emphasis added). Any reporting required from the Iraqi government is even more questionable because it may interfere significantly with the President's constitutional responsibility to conduct diplomatic communications with foreign governments. See *ibid.* (granting the President, not Congress, the authority to "receive Ambassadors and other public Ministers").
2. Citizens are always unhappy in times of war when the forecast of a quick and easy victory does not materialize, but that does not mean that there is majority support for any strategy other than victory. During the American Civil War, Lincoln's war strategy was roundly criticized by Members of Congress and many others, sometimes with justification. Lincoln and his perceived policies were truly unpopular because they did not achieve a swift end to the war. But then as now, few who remained loyal to the Union wanted the President to abandon the resolve necessary to win the war.
3. For example, if Congress did not create a standing Army or Navy, it could establish laws governing when the President could call the state militias into national service. By its refusal to fund ships, planes, or other armaments, Congress could also render it practically impossible for the President to commit certain troops to battle.
4. See *The Heritage Guide to the Constitution* (Washington, D.C.: Regnery, 2005) for more on the constitutional provisions mentioned herein. The *Guide's* entry on Article I, sec. 8, cl. 11, pp. 127-29, fairly summarizes the arguments regarding whether the power to "declare war" prevents the President from "making war" or "engaging in war" absent such a declaration. Text, history, and practice strongly suggest that he can. An extended, and convincing, discussion of this point can be found in John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11* (University of Chicago Press, 2005), ch. 4.
5. This is the "make rules" clause of Article I, sec. 8, cl. 14, which is frequently misread by those who wish to expand Congress's power. See further discussion *infra*.
6. While falling asleep on duty is usually not a crime in civilian life, it can be in military service. Congress is empowered to codify such military crimes and specify the range of punishment for such offenses. But Congress's authority to establish a general code of military conduct is not in conflict with, and cannot faithfully be interpreted to reach, a military officer's discretionary command decisions in a particular operation, including which troops to deploy and when to do so.

tions under consideration proceed from a mistaken understanding of that phrase. Some argue that making the President the Commander in Chief means nothing more than that the military shall have a civilian commander and, thus, that Congress can command the President in his command. This would render the Commander-in-Chief power completely empty, or at least impose no limitations on how Congress could alter it.

The constitutional Separation of Powers would collapse if any one branch had the power to *define* the powers of the other branches, rather than the power to *check* the other branches with its own powers. The Commander-in-Chief power can no more be defined by Congress than the President can unilaterally define what the Congress's spending power means (e.g., by issuing line item vetoes or impounding appropriated funds). The Commander-in-Chief power does not trump any of Congress's enumerated powers, but it does necessarily include the power to decide which soldiers at his disposal to detail to different stations or battlefields, which to hold in reserve, which to commit to particular operations, and precisely when to do any of these things.

Moreover, since the beginning of our Republic, Presidents have exerted military force on foreign soil without congressional authorization. Congressional declarations of war have never been deemed essential to the President's conduct of military action.⁸ One among many possible examples illustrates the scope and magnitude of the President's war powers. In 1962, John F. Kennedy used military force to blockade Cuba—a traditional act of war under established international law. That blockade brought America to the brink of nuclear war in a

standoff with the Soviet Union over the missiles it was providing to Fidel Castro's regime. President Kennedy neither sought nor secured permission or approval from Congress. Indeed, while the United States has used military force on over 100 occasions, Congress has declared war only five times.⁹

Congress Is Ill-Suited to Prosecute a War. Although policymakers are not at liberty to tinker with the constitutional design except by amendment, history has vindicated the choices made by the Framers. Those choices allow a determined Congress to end a war (if it uses its own powers), and it grants the President independence of action and ultimate responsibility for prosecuting any war Congress funds. The Framers knew that successful war efforts require decisiveness, fixed will, and determined leadership that does not vacillate in the face of adversity and setbacks. Timidity, equivocation, and hand-wringing compromises almost always result in defeat.

The Framers of our Constitution understood that war-making powers are best vested in a single Executive. They rejected a proposal for the executive power to be shared by a committee or privy council, even one wholly within the executive branch.¹⁰ In contrast to the "energy" and "responsibility" they intended the President to have, they sought to make congressional action more cumbersome, as befitting "the most dangerous branch." Thus by design, Congress's decision-making process is often tedious and inconclusive. The ultimate decisions of Congress are, invariably, political compromises. The Framers sought to ensure such deliberations and internal checks as they related to the government's domestic actions, but they expressly rejected this result for "external threats."

7. The critics' reliance on the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer* (*The Steel Seizure Case*) is misplaced for several reasons, only one of which needs to be mentioned here. Mobilization of munitions and war materials is admittedly a legislative prerogative, as is the regulation of domestic commerce under the Commerce Clause, but both facts are irrelevant to the resolutions at issue. The *Youngstown* case also reaffirms the constitutional truth that no congressional act can displace the exclusive constitutional authority of the President, 343 U.S. 579 (1952), and this necessarily includes his unilateral power as Commander in Chief of the military forces at his disposal.
8. See John Yoo, "Energy in the Executive: Re-examining Presidential Power in the Midst of the War on Terrorism," The Heritage Foundation, *First Principles* No. 4, April 24, 2006.
9. Yoo, *The Powers of War and Peace*.
10. See Todd Gaziano, *The Opinion Clause*, *The Heritage Guide to the Constitution* at 201-03 (discussing the debates over what became U.S. Const., Art. II, sec. 2, cl. 1).

For external threats, they wanted to ensure presidential secrecy, dispatch, and decisiveness.

Congressional deliberation is perfectly appropriate for passing legislation, particularly regarding domestic concerns, but not for prosecuting—much less micromanaging—a war. Whether the President's war plans are flawed or not, Congress has not yet devised—and does not even propose to devise—a single set of comprehensive recommendations for the war in Iraq on which it can agree.

The recent hearings and debate to confirm General David Petraeus to command U.S. forces in Iraq are indicative of why Congress is unfit to prosecute a war. The Senate unanimously confirmed General Petraeus—a proponent of the “surge” strategy.¹¹ That the Senate would confirm General Petraeus so easily and subsequently pass a resolution disputing the strategy he believes is necessary for victory is an unjustifiable inconsistency.

Irresponsible Resolutions. Any attempt to impose unconstitutional benchmarks or reporting requirements on the Executive's war-making power would be void. Perhaps for this reason, most of the provisions of Congress's questionable Iraq resolutions are non-binding. This has caused some to suggest that there is no harm in Congress expressing its opinion that the troop increase would be useless and signaling to the world that its support for the war may soon end. To be sure, it is not unconstitutional for Congress to strengthen the resolve of our enemies by signaling that it may cut off funding and interfere with the President's prosecution of the war. But that makes such action no less harmful to the success of the war.¹²

While not unprecedented (Congress has acted imprudently before), congressional resolutions expressing disagreement with the President's tactical war decisions are still inappropriate and potentially irresponsible. In short, they are inconsistent with the responsibilities that Congress shares with the President for the success of any military action in which the nation is engaged. Indeed, Congress's

independent authority to terminate a war with its own powers is what renders so problematic its public criticisms of, and attempted meddling with, the President's independent authority to execute his war plans. Congress's Iraq resolutions violate the comity Congress owes the President's exercise of his constitutional duties; attempt to evade the responsibility Congress shares with the President for the war; and betray the duty Congress owes to the nation not to needlessly make victory more difficult.

The following analogy from the corporate context illustrates this point. The board of directors of a leading auto manufacturing company is expected to publicly support the company's major initiatives, at least until it ended any such project. For example, imagine that the board approves the CEO's bold plan, which requires the company to devote enormous resources to producing a new, energy-efficient car with an unproven technology. In this, the CEO is staking the company's reputation on the success of the endeavor, which he acknowledges is risky but may be the only plan that will maintain the company's leadership position for the long run.

Now imagine a few years into the project that there is a shift in the board, and the majority elects a new chairman opposed to the plan. Rather than seek to end the project, as the board could do, the chairman grants interviews to leading business magazines and declares that he strongly supports the company's workers but believes they are being terribly misused. He is angry that they have been set up to fail, because no set of workers could ever design and build a car as envisioned in the CEO's plan. Furthermore, even if the car could be designed and built as advertised, consumers would never buy it. In fact, consumers have never wanted a car of this type. Indeed, the company should never have attempted to enter or win in this market.

If this hypothetical came to pass, it would be taught in every business school in America as an example of the most irresponsible board in the land, one that breached its duty to stockholders and the

11. Ann Scott Tyson, “Petraeus Expresses Confidence in Buildup,” *Washington Post*, January 24, 2007, at www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR2007012300185.html.

12. See Helle C. Dale, “Memo to Congress on Iraq: Don't Legislate Defeat Again!” Heritage Foundation *WebMemo* No. 1338, February 5, 2007, at www.heritage.org/Research/MiddleEast/wm1338.cfm.

company's employees. The board can communicate its concerns to the CEO privately without damaging the company's stock price, providing valuable support to the company's competitors, and demoralizing its workers. But if the board pushed its agenda publicly, it would appear to any reasonable observer that the board does not want the company's plan to succeed and that the board is more concerned with ruining the CEO than in the company's success. Some stockholders might be fascinated by corporate squabbling and infighting, but the great majority would simply want the company to succeed.

There is more at stake in the Afghan and Iraq wars than in business-school lessons. But like the example above, Congress must content itself with its real powers *and* use them responsibly. American stockholders want a victory in Afghanistan and Iraq. They do not want irresponsible grandstanding.

Conclusion. Resolutions being debated in Congress that undermine America's resolve will not assist U.S. armed forces in achieving success in Iraq. Sadly, the possibility that the resolutions may aid U.S. enemies in Iraq is seemingly dismissed by proponents of the resolution with a shrug of their shoulders. The only thing that the resolution is cer-

tain to accomplish is to undermine the work U.S. soldiers have been giving their lives to complete.¹³

The presidential election is the appropriate constitutional process for determining who should lead the nation in times of war. The 2004 presidential election—the only poll that really counts—reflected the American public's willingness to persevere to victory in Iraq. The President prevailed against an opponent with exemplary antiwar credentials and who (more or less) opposed the President's plan for Iraq. Since the election, U.S. soldiers have not lost courage, hope, or the will to fight and help secure Iraq. Nor have the Iraqi people abandoned their desire for free elections and self-government. For Congress to throw up its hands in despair and pass a resolution condemning the President's last, and possibly best, chance to achieve success in Iraq would be petulant and shortsighted.

—Todd Gaziano is the Director of, and Brian Walsh is Senior Legal Research Fellow in, the Center for Legal and Judicial Studies at The Heritage Foundation. Steven Groves is the Bernard and Barbara Lomas Fellow in the Thatcher Center for Freedom at The Heritage Foundation.

13. See Roxana Tiron, "Petraeus Criticizes Anti-Surge Resolutions During Hearing," *The Hill*, January 24, 2007, at www.hillnews.com/thehill/export/TheHill/News/Frontpage/012407/surge.html.