

## **Clinton, Bush, Congress and War Powers:**

### **A Comparative Analysis of the Military Strikes on Iraq and Bin Laden**

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One of the most important policy decisions a democratic government can make is the choice to go to war. By definition, the decision involves placing the state's armed forces in peril. Political scientists, legal analysts and historians have devoted considerable research to the constitutional requirements and duties this question places on the United States Congress and the commander in chief. Yet despite the scores of articles and books already published on this issue, the constitutional debate over war powers is as relevant today as it was over 200 years ago at the Constitutional Convention. With the ongoing wars in Iraq and Afghanistan, coupled with the increasingly high disapproval ratings for President George W. Bush and his handling of Iraq, the issue of war powers remains on the American political landscape.

Although Presidents Bill Clinton and George W. Bush are from different political parties and served during very different strategic circumstances, both presidents used force on Iraq and Osama Bin Laden during their administrations. Although the constitution gives the president the responsibility to serve as commander in chief, Congress was given the power to "declare war," along with a host of constitutional powers dealing with military matters. This paper provides a comparative analysis of the military actions taken by Presidents Clinton and Bush against Iraq and Bin Laden, focusing on how each president interacted with Congress prior to the use of force. The findings suggest that in the post Cold War era, and now after the September 11

terrorist attacks, the Congress generally continues its practice of deference to the commander in chief, granting him wide latitude in determining how and when to use force. The recent surge of congressional activism witnessed after the discovery of the poor treatment of Iraqi prisoners of war is an uncharacteristic challenge to the commander in chief, and generally is not reflective of an otherwise acquiescent legislative branch on war powers.

The paper begins with a short historical recall of war powers, including a discussion of war powers in the constitution, the War Powers Resolution, and how both documents may relate to the issue of terrorism. The paper then turns to an examination of the congressional-executive interplay for the military actions taken by President Clinton against Iraq and Osama Bin Laden, and follows with attention devoted to the Bush administration and its interactions with Congress prior to military action in Afghanistan and Iraq.

### **War Powers and the Constitution<sup>1</sup>**

Although one may easily get the impression that the commander in chief is the United States' sole decision maker on military matters, the founding fathers took great care to ensure that checks and balances would shape executive-legislative relations on war powers. Congress was first granted with the most critical power for the United States: the power to declare war.

According to James Madison's notes on the Constitutional Convention, the founding fathers understood that the President was authorized to "repel sudden attacks" against the United States, but otherwise the Congress was to be the decision maker on whether force would be used abroad.<sup>2</sup> The Founders also gave Congress the power to provide for the common defense; To grant letters of Marque and Reprisals; To raise and support Armies; To provide and maintain a

Navy; and To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.<sup>3</sup> In reviewing the constitution's basic tenets, coupled with even a cursory overview of the debates surrounding this issue, it seems clear that the Founders intended Congress to be a critical decision maker for the United States on matters of war and the use of force abroad.<sup>4</sup>

Since the acceptance of the constitution, analysts contend that Congress's war powers were largely respected in the 19<sup>th</sup> and first half of the 20<sup>th</sup> centuries. There is a long history of presidents turning to Congress for statutory approval for military action. Prior to the Second World War, presidents did not claim unilateral authority as commander in chief to engage in military combat operations overseas.<sup>5</sup> With the Cold War's onset and the public's acceptance that communism posed an unambiguous threat to the United States, however, presidents began to assert wide war powers, while congress increasingly deferred to the president.<sup>6</sup>

In effort to check the increasingly omnipotent powers exercised by the commander in chief, Congress passed the War Powers Resolution (WPR) in 1973. The WPR called for the president to consult with Congress "in every possible instance," prior to and during the use of force. The president was also required to notify Congress in writing within 48 hours of any military action where American troops were engaged. If the president did not gain Congress's explicit support of the military action after 60 days, the president was required to bring the troops home. Moreover, if any troops were engaged in "hostilities," the WPR could be invoked.<sup>7</sup>

For a number of reasons, including the poorly defined "consult" clause as well as the ambiguous "hostilities" requirements, the WPR is viewed as a near complete failure by most analysts.<sup>8</sup> Moreover, all presidents since its passage have viewed it as an unconstitutional attempt

to limit their perceived authority as commander in chief.<sup>9</sup> Although Congress has arguably placed some restraints on presidential military ambitions, and perhaps also exercises a tacit checking power by sending political signals to the president regarding use of force options, it seems clear that the WPR itself has proved to have a limited checking influence on the president.

With regard to terrorism against the United States, neither the constitution nor the WPR speaks specifically to the appropriate constitutional interplay to such threats. What can be drawn from both documents, however, is that the commander in chief does have the authority to act defensively to protect the United States. The WPR permits the president to use force when there is a declaration of war, specific statutory authorization, or in the event of a national emergency that has been precipitated by an attack “upon the United States, its territories or possessions, or its armed forces.”<sup>10</sup> Both the Constitution and WPR recognize the principle of checks and balances. If there was not a need to “repel a sudden attack” against the United States or a national emergency precipitated by an attack, the president would be obligated to first gain congressional approval. In short, according to the Constitution and the WPR, only under very specific conditions can the president use force unilaterally.<sup>11</sup>

## **War Powers in the Clinton Administration**

### **The Strikes on Iraq**

President Bill Clinton used force on Iraq a number of times. Overt American military strikes on Iraq occurred in 1993, 1996, 1998, and on at least 130 occasions for violations of the American-imposed no-fly zones over northern and southern Iraq. On June 23, 1993, the president struck

Iraq due to evidence that implicated Iraqi compliance in a failed assassination plot against former President George Bush when he traveled to Kuwait in April 1993. Twenty-three tomahawk missiles were used to hit Iraqi military sites. On September 3 and 4, 1996, President Clinton launched forty-four cruise missile strikes in southern Iraq in response to Saddam's Hussein's military actions against Kurdish resistance groups in the north, who had received Iranian military support. In 1998, the Clinton Administration in conjunction with the United Kingdom, conducted Operation Desert Fox; four days of military strikes on Iraq for its repeated unwillingness to cooperate with the United Nations Special Commission on Weapons Inspection. In the two years that followed, multiple aircraft strikes were conducted against Iraq for violations of the no-fly zones.

In reviewing the political interplay and dialogue between each branch prior to military action in each case, it is striking how little Congress knew about the strikes. In 1993, the Clinton administration attempted to contact Congressman Ron Dellums (D-Ca) prior to the strikes, but failed to reach him. Other than this attempt, no other evidence at this time suggests that any member of Congress was involved in the decision to strike Hussein or had prior knowledge of the strikes. In the planning sessions for the strikes, and in the discussions over Iraqi complicity in the previously planned strike, no member of Congress was in Clinton's inner circle of advisors. In this case, it is also noteworthy that no national emergency existed, nor had any *actual* strike taken place against the United States. Although an airstrike against Hussein for his ostensible involvement in the planned assassination may have been a wise policy move, the constitution and WPR demands that checks and balances are respected. Despite Congress's absence from these critical meetings, most members of Congress supported the president, and few

constitutional qualms were raised. As in the Cold War, Congress deferred to presidential leadership.<sup>12</sup> The strike involved minimal risk to American forces, involved no ground troops, and was “limited” in its response.<sup>13</sup> Clinton also received strong public backing for his action, which is perhaps the most important political element of Congress’s deference. Since the political incentives were so low to check the president, Congress accepted the president’s decision.

Similarly, in 1996, no consultation with Congress took place prior to the strikes. As in 1993, the United States had not been attacked, there was no clear need to “repel a sudden attack” against the United States, and no national emergency that had been precipitated by Hussein’s actions. Some members of Congress, notably Senators Trent Lott (R-Miss.), John Kyl (R-Az) and John McCain (R-Az) raised questions about the president’s constitutional authority to conduct the attack. This opposition was short-lived, however, as the Republican party’s presidential nominee, Robert Dole (R-Ks) rallied behind Clinton for his actions on Iraq.<sup>14</sup> Like in 1993, the attack involved minimal risk to American troops and no ground troops. The public also generally backed the president. Although traces of opposition on constitutional grounds occurred, Congress again acquiesced to the commander in chief.

In 1998, Operation Desert Fox was a far more sustained military strike, which involved four days of military action against Iraq. In the month prior to the strikes, Clinton had essentially given Saddam Hussein his “final warning” that military action would result if Hussein did not comply with U.N. weapons inspectors. “Desert Fox” also took place on the eve before the House of Representatives was scheduled to vote on the articles of impeachment, stemming from

President Clinton's extramarital relations with a White House intern, which placed a new and different political variable in play.

In this case, it appears that some members of Congress were notified prior to the strikes. Secretary of Defense William Cohen spoke with some senior congressional leaders prior to the strikes. Again, however, no member of Congress had any meaningful role in the actual decision to strike Iraq. Through National Security Advisor Sandy Berger's own admission, secrecy was protected, as the need for a quick and surprise attack was critical in his view.<sup>15</sup>

Most members of Congress backed the president, although a sizeable minority (including about 40 percent of public opinion) challenged the president motives in noting that the timing of the attacks matched quite closely with the president's domestic political problems.<sup>16</sup> The questioning that existed, however, did not revolve around the president's constitutional authority to conduct military action. At the constitutional level, again Congress followed the president, despite the fact that no attack had been made on the United States, no U.N. Security Council Resolution specifically authorized military action against Hussein if he did not comply, and no national emergency existed. Again, the pattern of executive-legislative relations were quite similar to the strikes in 1993 and 1996. After Desert Fox, the Clinton administration bombed Iraqi frequently for violations of the northern and southern no-fly zones; it is difficult to find any member of Congress who raised constitutional concerns with the multiple strikes conducted.

In sum, wide deference was granted to President Clinton for his military actions on Iraq. Although Congress could have asserted its war powers authority on numerous occasions, instead it chose to acquiesce to the president. Congress's deference can likely be explained by the public's support for Clinton's actions on Iraq, and because the American strikes entailed minimal

risks in conducting their bombing operations. Clinton also never seriously discussed the use of ground troops either, which was also likely helpful in keeping Congress at a distance. At the same time, Clinton asserted wide powers as commander in chief to conduct the operations. Much like the American public during the Cold War, who accepted the Soviet Union as a clear threat to the United States, the Congress and the public viewed Saddam Hussein in similar fashion: a threat that demanded strong presidential leadership, and thus an exercise of congressional war powers was never pushed by the public given the acceptance that Hussein was a risk to the United States.

### **The Strikes on Osama Bin Laden**

On August 7, 1998, two American embassies in Africa were victims of terrorist strikes. By August 14, Director of Central Intelligence Agency George Tenet informed President Clinton that Osama Bin Laden was responsible for the attacks. Six days later, on August 20, the Clinton administration launched seventy-nine tomahawk missiles against alleged Al-Qaeda outposts in Afghanistan and Sudan.

The executive-legislative war powers interplay prior to this strike was somewhat different from the practice in place before the strikes on Iraq. Although there was no open congressional vote to authorize action on Bin Laden, the journalistic evidence suggests that key members of Congress were fairly well briefed on the issue prior to the strike. In the aftermath of the strike, Speaker of the House Newt Gingrich ( R-Ga.) suggested that he had prior knowledge of Bin Laden's complicity in the strikes on the U.S. embassies, and that he felt that the consultation had been "professional." In fact, Gingrich went to considerable lengths to discourage any partisan



challenge [either from Congress or GOP media allies] to the president after the strikes. Other key congressional leaders, including Senate Majority Leader, Trent Lott (R-Miss.) and Senate Minority Leader Tom Daschle (D-S.D.) also had prior knowledge of the strikes. Lott noted that the intelligence against Bin Laden was “compelling.” Clinton officials also made some effort to contact House Minority Leader Dick Gephardt (D-Mo.), who was traveling in Europe at the time.<sup>17</sup> Director of Central Intelligence George Tenet also informed, at minimum, Senator Robert Kerry (D-Ne), who served on the Senate Intelligence Committee, of the forthcoming strikes. □ Thus, the level of consultation prior to this bombing was certainly greater than all the strikes conducted on Iraq.

The circumstances surrounding Clinton’s military actions on Bin Laden was also different from his bombings of Iraq, in that Clinton could much more easily make the case that he had unilateral authority as commander in chief to use force on Bin Laden. American embassies had been struck; Americans in the embassies had been killed; Bin Laden had issued two previous fatwas calling for strikes against the United States; and the Clinton administration later argued that Bin Laden was planning a second major strike against the United States. Clinton’s case for striking unilaterally as commander in chief was in fact quite strong. Clinton also took steps to notify Congress of the forthcoming strikes, and at least in Gingrich’s case, appeared to have shared important intelligence with the Speaker. In this respect, Clinton appears to have met the WPR requirement to “consult” with Congress.<sup>19</sup>

Multiple reasons help explain why this congressional-presidential interplay was so different from Iraq. First, public opinion polls showed strong support for taking action against terrorists, and the United States had been attacked. Such conditions, ostensibly, increased the

odds for consulting with Congress, in that the political momentum certainly favored presidential action. All people who received intelligence briefings felt that the intelligence on Bin Laden was convincing; thus, the president risked little politically by turning to some members of Congress.

Another political factor that may have added to the political climate is the President's admission three days earlier, on August 17, 1998 of an extramarital relationship with a White House intern. This admission came after months of denying a relationship, which had potential legal ramifications for the president. A potential strike, coming only a few days later, would likely raise suspicions that Clinton was using force to distract the public from his own domestic political scandal. Perhaps in an effort to quell such claims, administration officials may have felt the need to take extra steps to reach out to members of Congress prior to the strikes. Thus, from a number of perspectives, the political and strategic conditions were very different from all strikes on Iraq, which likely provide some insight on the reasons for higher levels of consultation in the 1998 strikes on Bin Laden.

### **Clinton, Congress and War Powers**

In the previous military actions discussed, a number of common themes surface. Despite the fact that President Clinton was the first commander in chief elected in the post Cold War era, military decision making was still dominated by the president. In all cases addressed, Congress deferred to presidential leadership. In the strikes on Bin Laden, the strongest case can be made that the president had unilateral authority to use force abroad, but ironically, in this case the level of congressional-executive interplay was the highest of any strike discussed here. This advanced

level of consultation is likely explained by the very different international and domestic political conditions prior to the strike.

Prior to the strikes on Iraq, there was minimal interaction with Congress on actual decisions to use force. In these cases, Congress more clearly acquiesced on its constitutional war powers, and also generally failed to raise questions regarding violations of the WPR. A case can be made that Iraq's actions prior to each American military response provide some security threat to the United States. At the same time, the United States had not been attacked and there was no national emergency. It is difficult to see the need for presidential action based on the need to "repel a sudden threat" to the United States. In the strikes in 1996 and 1998, the Clinton administration also maintained that it had prior authority to use force, referencing previous United Nations Security Council Resolutions, or Congress's vote on January 15, 1991 to authorize military action on Iraq in Operation Desert Storm. This argument, however, also has problems given the inconceivable claim that Congress intended in 1991 to grant the commander in chief unlimited discretion to bomb Iraq over the next decade whenever the president thought it necessary. Despite the arguments against such presidential claims of authority, Congress deferred to his military leadership. Given the public's acceptance that Saddam Hussein posed a threat to the United States, and since the bombings were "limited" in scope, Congress allowed the president discretion in determining how and when to use force—despite Congress's explicit war powers. Although the strategic circumstances were different for President George W. Bush, deference to the commander in chief again is an important aspect of the congressional-executive interplay in the years that followed.

## War Powers in the Bush Administration

### The Strikes on Osama Bin Laden and the Taliban<sup>20</sup>

The September 11 strikes unquestionably created a new security milieu for the United States. Never before had the United States been struck on its homeland with such tragic consequences and high casualties, as public opinion quickly rallied behind president. In the aftermath of the strikes, the Bush administration and Congressional leaders met to discuss an authorization to respond militarily. From a number of perspectives, the case can be made that the congressional-executive interplay was constitutional, although some degree of congressional acquiescence is clearly observable, both in the force authorization and in the interactions in the months that followed.

Bush administration officials and congressional leaders began to meet on September 12 to discuss a force authorization. It was the Bush administration who reached out immediately to the Congress for its approval. Bush could have made a strong case that he had unilateral authority to respond militarily, since the United States had been attacked in such an egregious manner.<sup>21</sup> At the same time, given the difficulty in identifying the enemy, the scope of their operations, and the level of complicity that certain states either knowingly or unknowingly had in supporting Al-Qaeda, it does not seem in the spirit of checks and balances to allow the president to do whatever he felt was militarily necessary, without some congressional oversight. With the public's outrage so high after the September 11 assault on the United States, Bush also took few political risks in turning to Congress to seek its approval, and thus politically Bush made a wise decision to seek Congressional support for military action.

In its final form, the key language in the actual authorization to use force in S.J. Res 23 reads as follows:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such organizations or persons. <sup>□</sup>

The Senate passed this resolution on September 14, 2001, and the House gave its approval on September 15. Only one member of Congress, Representative Barbara Lee (D-Ca.) voted against the authorization. <sup>□</sup> Otherwise, all members of Congress backed the president, and through a constitutional vote, authorized the president to take military action.

A case can also be made that the interplay was truly “consultative” in that members of Congress and their staffs debated over the language, and compromises resulted from the interplay. Senator Robert Byrd ( D-W.V.) noted that the Bush administration initially wanted unlimited appropriations powers to wage war when they approached Congress, which clearly was not acceptable to Byrd and others who viewed such a request as a usurpation of Congress’s constitutional powers.<sup>24</sup> It was also noted that the administration’s desire to include the word “pre-empt” in the authorization was replaced with “prevent,” which Senate leaders viewed as an important victory vis-a-vis the administration.<sup>25</sup> One other ostensible victory for Congress was the demand that explicit reference be made to the War Powers Resolution in S.J. Res 23, which was included in the final resolution language.<sup>26</sup> Clearly, key Democratic Senators felt that an appropriate level of debate and compromise had occurred, which lends additional evidence to the constitutionality of the interplay.

At the same time, other evidence suggests that some degree of congressional deference existed, both in the Resolution's language and in the interplay that followed. First, it is noteworthy that the Resolution's language is quite broad, and grants the president considerable discretion in determining potential targets for response. The targets may include "nations, organizations and individuals" associated with September 11. Such language grants the president with wide powers as commander in chief, and removes Congress from having a consultative role in determining who should be struck. As was witnessed with the use of the Hellfire missile, launched from an Unmanned Aerial Vehicle on suspected Al-Qaeda associates in Yemen in November 2002, it is quite clear that the administration chose to exercise S.J. Res 23 quite broadly, and Congress has accepted this application.

David Abramowitz, the Democratic chief counsel to the House International Relations Committee, also published his recollection of the negotiations over the language in S.J. Res 23. As a member of the negotiating team, he notes that on the evening of September 13, it was his understanding that differences still remained between the White House and Congress over the appropriate language, specifically in regard to the "consultation" requirement prior to actual military action.. He writes, however, that on the morning of September 14, "It can only be surmised that Senator Daschle and others considered the consultation and reporting requirements of the WPR sufficient to protect the prerogatives of the Congress, and felt the need to move immediately on the bill in its existing form."<sup>□</sup> Abramowitz's recall clearly suggests some remaining differences among Democrats over this issue, and the Senate's decision to move forward despite the differences. In this case, it appears that Senate Majority Leader Senate Tom Daschle (S-S.D.) played a key role in making S.J. Res 23 pass in the form it did. Once the Senate

leadership made its decision to move forward, the House Democrats were left without their Democratic allies in the Senate to demand additional changes in the authorization.

Since Operation Enduring Freedom was initiated, the public's support for President Bush and his handling of the war in Afghanistan has remained high. Members of Congress have raised few constitutional qualms with the president's conduct of the "war on terrorism." *Washington Post* journalist Bob Woodward's recently published book, *Plan of Attack*, however, highlights the deference that remains in the Congress. Woodward makes the claim that \$700 million appropriated for the war in Afghanistan was actually used to begin preparations for the war in Iraq, long before Congress had authorized military action on Iraq, and before the Bush Administration indicated that it had any intent to force a regime change in Iraq. Woodward's revelation appeared to catch Congress off-guard, indicating that Congress's oversight authority on military matters and the "war on terrorism" had perhaps not been exercised in a constitutional manner. Thus, after the initial discussions over S.J. Res 23 were concluded and voted upon, Congress has allowed the president considerably leeway in terms of target selection and appropriation powers. To be sure, President Bush noted that S.J. Res 23 in no way restricted his authority as commander in chief. On September 18, 2001, three days after the House's approval of the Resolution and approximately three weeks before the strikes in Afghanistan, Bush communicated his views of the Resolution to Congress:

I maintain the longstanding position of the executive branch regarding President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution. □

Thus, although the initial interplay was certainly constitutional, the case can be made that Congress still granted immense discretion to the president in the resolution itself, and in the

application of the resolution. Bush also made clear that he was not going to be limited in any way by the resolution. Bush's views square closely with President Clinton, and his post World War II predecessors.

### **The Strikes on Iraq**

Before moving to the interplay over Operation Iraqi Freedom, it is instructive to recall that President Bush's first major military operation occurred on Iraq on February 16, 2001. President Bush, in cooperation with the United Kingdom, employed 24 strike aircraft on Iraq for repeated violations of the no-fly zones. This strike has many close analogies to President Clinton's military actions on Iraq. The strike was limited in scope, involved minimal risk to American troops, and involved no ground troops. Journalistic evidence also suggests that President Bush, much like President Clinton, informed no member of Congress prior to the attack. □

In the aftermath of strikes, members of Congress raised no constitutional objections. Since the Democrats raised few constitutional objections to Clinton's military strikes, it would have been especially hypocritical and partisan to raise constitutional qualms at this point. Moreover, Bush received no negative backlash from the public for his military conduct. Thus, Bush's first strike was remarkably similar to Clinton's actions on Iraq, both in terms of the force used, the degree of threat experienced by the United States, as well as his disregard for Congress's war powers.

Congress's authorization to use force for Iraqi Freedom, however, was markedly different from Bush's previous strike on Iraq, and has no close analogy for any military operation conducted by President Clinton during his eight years in office. The only potential analogy that



can be made is in the Bush administration's initial views of the commander in chief's powers vis-a-vis Congress. Although this study does not examine all of President Clinton's military actions, Clinton consistently held the view, regardless of the type of military conduct U.S. armed forces were engaged in, that the commander in chief was authorized to use force in each circumstance he faced. Whether it was NATO combat operations in Bosnia, the 78 straight days of bombing in Kosovo, the deployment of troops to Haiti, or the military operations noted above, Clinton was consistent in his view that Congress had no authority to restrict him in any of these operations.<sup>30</sup> Similarly, Bush administration officials made sweeping claims of authority in the summer and early fall, 2002 regarding the President's authority to use force in Iraq.<sup>31</sup>

A number of members of Congress, including Senior Republicans in the Senate such as Chuch Hagel ( R-Ne.) and Richard Lugar ( R-In.), however, did not accept Bush's constitutional claims as commander in chief, and openly encouraged the president to go to Congress for approval. Such opposition, from Republican senators with distinguished records in foreign affairs, was likely important in encouraging the president to turn to Congress for its approval, which the president eventually did.

When the Bush administration turned to the Congress to seek its approval, again, key individuals within the Congress surface, who ended up playing critical roles in shaping the interplay. In this case, it was House Minority Leader Richard Gephardt (D-Mo.), who played the most determinative role in the authorization's language, which demanded that the United Nations Security Council be consulted prior to military action. In these discussions, Senate Majority Leader Tom Daschle (D. S.D.) played no role in determining the authorization language. When the Gephardt-negotiated compromise reached the House International Relations Committee,

Chairman Henry Hyde (R-Ill.) and ranking minority member Tom Lantos (D-Calif.) defeated all committee proposals to amend the resolution, which was later approved in the House in a vote of 296-133.<sup>32</sup>

After the House's action, the Senate took up the same bill. Because of the House's actions, the Senate Democrats were at a clear political disadvantage for challenging President Bush. If the Democrats were too aggressive in their challenges, they ran the risk of appearing excessively partisan. While a number of Senate Democrats challenged the President's movements toward war in Iraq, a number of other senior Democrats ended up siding with the Gephardt plan. Perhaps most importantly, Senator Joseph Lieberman (D-Conn.) aggressively supported President Bush, which resulted in a vote of 77-33 to support Bush's preferred plan.<sup>33</sup>

It is also noteworthy that the President and GOP leaders in both the House and Senate pushed aggressively for the resolution in the month prior to the November midterm elections. Given the widespread concern among the American public with Saddam Hussein, this political dynamic likely worked in the president's favor, as some Democrats no doubt would have wished to avoid the perception of being "weak" toward Hussein with an election only four weeks away.<sup>34</sup> Thus, the interplay was likely shaped by a host of factors, including the critical roles played by Congressman Gephardt, Senator Lieberman, the upcoming elections, and the public's concern for Saddam Hussein.

Since the onset of Operation Iraqi Freedom, the Congress has generally stood behind president. Only a few members of Congress, most notably, Senators Edward Kennedy (D-Mass.) and Robert Byrd (D-W.V.) have raised serious doubts with the war with Iraq, and President Bush's motives for the strikes. Otherwise, Congress has accepted the president's funding

requests and has otherwise been hesitant to openly criticize the president. Such continued deference is especially interesting, given that no weapons of mass destruction have been located, and the casualty count continues to climb, with April 2004 being the month with the highest number of casualties since the war began. It is only in recent days, with the revelation of the inhumane treatment of Iraqi prisoners that more vocal congressional opposition has surfaced. Members of Congress have been quite vocal in their disappointment with this issue, as a number of Democrats have called for Secretary of Defense Donald Rumsfeld's resignation. This issue, coupled with growing disappointment with the progress of the war, also appears to have motivated Congressman Jim Murtha (D-Penn.), ranking member of the House Armed Services Committee to call for a substantial increase in troop deployment to the region.

In sum, the war powers interplay over Iraq was different from anything witnessed in the Clinton administration. In this case, likely because GOP leaders requested it, the Bush administration turned to Congress for its support. Given that the president's military ambitions appeared to be so wide with Iraq, and that the use of ground troops was implicitly part of the plan, Congress forced the president to respect its war powers. As in the S.J. Res. 23, key congressional leaders also played critical roles in shaping the interplay. Congressman Gephardt's decision to back the administration's plan proved instrumental in getting the House's approval, and placed considerable pressure on the Senate to go along with House. Like President Clinton's uses of force, however, once military action ensued, Congress generally supports the commander in chief. In Bush's case, it is obviously much more difficult to challenge the president's constitutional authority to wage war since all members of Congress voted on the measure. At the same time, Congress's continued support, however, is striking given the ongoing casualties and

absence of located weapons of mass destruction. Congressional support for the president has generally remained high, despite the presence of political conditions that would seem to have generated more opposition on the hill.

### **Conclusion**

In the post Cold War era, and now in the Post September 11 era, it is clear that the president has retained his perceived expansive powers as commander in chief. Despite being from different political parties and the different security challenges faced, Presidents Clinton and Bush interacted with Congress much like their Cold War predecessors, in that both presidents claimed essentially omnipotent powers as commander in chief, and only when forced to do so, President Bush turned to the Congress for its approval.

Congress, too, acted much like Congresses during the Cold War. When it came to military action against terrorism, or when the president initiated “limited” military strikes that did not involve ground troops, Congress largely supported the president and granted him considerable discretion when force was used. Even when Congress did debate its war powers role, it still granted President Bush considerable discretion in determining how to respond militarily after September, as well as when and how to use force against Iraq. Thus, deference is still an important part of the executive-legislative interplay, even in those cases when Congress’s war powers are respected.

When Congress did exercise its war powers, as it did vis-a-vis President Bush prior to Operation Iraqi Freedom, a number of factors appeared to shape this interplay. First, the prospects of American casualties and the use of ground troops seemed to be real conditions that

the country would face if going to war. Second, although Congress had supported the limited strikes on Iraq conducted by Presidents Clinton and Bush, the prospect of a massive attack on Iraq with less clear security interests seemed to be another factor that motivated congressional activism. Congress had deferred to Presidents Clinton and Bush in their limited strikes on Iraq and when waging war on terrorism, but the strategic threat was not as clear with Iraq in 2002, when the Bush administration initially made its claims of unilateral authority as commander in chief.

Moreover, in this case, President Bush was challenged by Senior Republicans in the Senate, who encouraged Bush to come to Congress to gain its support. Yet once the President turned to the Congress, it still granted him considerably leeway in determining the military course of action for the United States. Additional factors, including the role played by Congressman Gephardt, as well as the forthcoming elections, played important roles in shaping the interplay.

Presidents Clinton and Bush's uses of force are not completely analogous, in that Bush's military actions have been much more sustained and ongoing, which provide another important analytical aspect of the interplay. Since Bush initiated Operation Enduring Freedom, Congress has raised few questions of the commander in chief, and has allowed tremendous discretion in using force abroad. Given that most Americans appear comfortable with such deference, and accept that terrorism represents a real security challenge to the United States, Congress's deference seems likely to remain the norm with "Enduring Freedom." Similarly, the congressional-executive interplay since the initiation of Operation Iraqi Freedom has also been characterized by Congressional deference, up until early May, when President Bush's public

approval ratings on Iraq showed a marked decrease, and with the revelation of the Iraqi prisoners' abuse, both of which seemed to be catalysts for congressional activism. Such assertiveness, however, came after essentially a year of deference and tacit support for the president. With expeditious political management of the prison abuse scandal, and a decrease in the number of casualties, it seems likely that the administration will be able to maintain congressional support in the short term. The progress over the next two months, especially with the June 30 deadline to create a new Iraqi government, will be another important benchmark for Iraq and a key date for assessing the war powers interplay.

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1 Much of what follows draws extensively from my previous work on American war powers. See Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress, and War Powers* (Nashville, TN: Vanderbilt University Press, 2002), and Ryan C. Hendrickson, “The Clinton Administration’s Strikes on Usama Bin Laden: Limits to Power,” in Ralph G. Carter ed., *Contemporary Cases in U.S. Foreign Policy: From Terrorism to Trade* (Washington, D.C., Congressional Quarterly Press, 2002).

2 James Madison, *Notes of Debates in the Federal Convention of 1787* (1966; reprint New York: W.W. Norton, 1987): 476.

3 U.S. Constitution, Article I, Section 8.

4 For more on the history of the ratifying conventions regarding war powers, see Charles A. Lofgren’s article, “War-Making Under the Constitution: The Original Understanding,” *Yale Law Journal* Vol. 81 (1972) and David Gray Adler, “The Constitution and Presidential Warmaking: The Enduring Debate,” *Political Science Quarterly* 103, 1 (1988): 1-36.

5 Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Powers of Congress in History and Law*, 2<sup>nd</sup> ed. (Urbana, IL: University of Illinois Press, 1989).

6 Gordon Silverstein, *Imbalance of Powers: Constitutional Interpretation and the Making of American Foreign Policy* (New York: Oxford University Press, 1997); Louis Fisher, *Presidential*

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*War Powers* (Lawrence, KS: University Press of Kansas, 1995); John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993).

7 Public Law 93-148 (November 7, 1973).

8 Among the wide array of analysts who support this view, see David Gray Adler and Louis Fisher, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly* 113, 1 (1998): 1-20; Michael J. Glennon, "Too Far Apart: The War Powers Resolution," *University of Miami Law Review* 50, 17 (1995): 17-31; Edward Keynes, "The War Powers Resolution: A Bad Idea Whose Time Has Come and Gone," *The University of Toledo Law Review* 23 (1992): 343-362; Eileen Burgin, "Congress, the War Powers Resolution, and the Invasion of Panama," *Polity* 25 (1992): 217-242; Mark L. Krotzki, "Essential Elements of Reform of the War Powers Resolution," *Santa Clara Law Review* 29 (1989): 607-752.

9 The Carter administration did suggest that it might be more willing to accept the constitutionality of the WPR, although in practice, prior to the failed rescue attempt of the American hostages in Iran, President Jimmy Carter purposefully did not consult with Congress. See Herbert Hansell, State Department Legal Advisor at *Senate Committee on Foreign Relations*, "A Review of the Operation and Effectiveness of the War Powers Resolution (1977): 188-190.

10 P.L. 93-148 Sec. 2 c.



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11 One rebuttal to this argument that some have raised, including most presidential administrations, is that the president may use force to enforce treaties and other multilateral security agreements. More specifically, presidents have maintained that they may deploy troops in United Nations or NATO operations without congressional approval. This argument neglects much of the legislative history surrounding American membership in these organizations. For more on this view, see Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act,” *American Journal of International Law* 89 (1995); Michael J. Glennon, “The Constitution and Chapter VII of the United Nations Charter,” *American Journal of International Law* 85 (1991): 74-88; Matthew D. Berger, “Implementing a United Nations Security Council Resolution: The President’s Power to Use Force with the Authorization of Congress,” *Hastings International and Comparative Law Review* 15 (1991): 83-109; and Michael J. Glennon, “United States Mutual Security Treaties: The Commitment Myth,” *Columbia Journal of of Transnational Law* 24 (1986): 530-532.

12 Hendrickson, *The Clinton Wars*, 143-147.

13 “Limited” in the sense that the threat to American armed forces were not that high, and the actual military strikes ended quite rapidly.

14 Hendrickson, *The Clinton Wars*, 148.

15 Hendrickson, *The Clinton Wars*, 154-155.

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16 For an argument expressing doubt on the “diversionary” intent of these strikes see Ryan C. Hendrickson, “Clinton’s Military Strikes in 1998: Diversionary Uses of Force?” *Armed Forces and Society* 28 (2002): 309-332.

17 Hendrickson, *The Clinton Wars*, 106.

□ See George Tenet testimony to the September 11 Commission, March 24, 2004. Kerry offered this information to the panel during his questioning of Tenet, but his comments suggested that other members of the Senate Intelligence Committee may have also informed of the forthcoming strikes by Tenet.

19 Hendrickson, *The Clinton Wars*, 105-109. White House Press Spokesman Michael McCurry maintained that the “consult” requirement of the WPR had been met. See Mike McCurry, *Office of the Press Secretary*, “Remarks in Gaggle,” (August 20, 1998).

20 For a more detailed discussion of the strikes, as well analysis of the immediate response from the Bush administration, see Ryan C. Hendrickson, “United States vs. Terrorism: Clinton, Bush and Osama Bin Laden,” in Ralph Carter ed. *Contemporary Cases in U.S. Foreign Policy* 2<sup>nd</sup> edition (Washington D.C., Congressional Quarterly Press, forthcoming).

21 Robert F. Turner, “The War on Terrorism and the Modern Relevance of the Congressional Power to ‘Declare War’” *Harvard Journal of Law and Public Policy* 25 (2002): 520.

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· Public Law 107-40.

· For more on why Congresswoman Lee voted against the resolution, see Barbara Lee, “Why I Opposed the Resolution to Authorize Force,” *San Francisco Chronicle* (September 23, 2001).

24 *Congressional Record* (September 14, 2001): S9424.

25 *Congressional Record* (September 14, 2001): S9423.

26 *Congressional Record* (September 14, 2001): S9417. Nancy Kassop has also written on this topic. See her work “The War Power and Its Limits,” *Presidential Studies Quarterly* 33, 3 (2003): 513-514; See also G. Calvin Mackenzie, “Old Wars, New Wars, and the American Presidency,” in George C. Edwards III and Philip John Davies eds. *New Challenges for the American Presidency* (New York: Pearson-Longman, 2004).

· Quoted in David Abramowitz, “The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism,” *Harvard International Law Journal* 43, 1 (2002): 77.

· George W. Bush, “Statement on Signing the Authorization for Use of Military Force,” *Weekly Compilation of Presidential Documents*, (September 18, 2001): 1333.

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· James Dao and Steven Lee Meyers, “Attack on Iraq: The Overview; U.S. and British Jets Strike Air-Defense Centers in Iraq,” *New York Times* (February 17, 2001): A1. For the official discussion of the strikes from Pentagon officials, see United States Department of Defense, “Lt. Gen. Newbold on Military Strikes in Southern Iraq,” (February 16, 2001):

[http://www.defenselink.mil/news/Feb2001/t02162001\\_t216iraq.html](http://www.defenselink.mil/news/Feb2001/t02162001_t216iraq.html)

30 Hendrickson, *The Clinton Wars*.

31 Louis Fisher, “The War We Go To War: The Iraqi Resolution,” in Mark Rozell and Gary Gregg eds. *Considering the Bush Presidency* (New York: Oxford University Press, 2003).

32 Miles A. Pomper, “Senate Democrats in Disarray After Gephardt’s Deal on Iraq,” *Congressional Quarterly Weekly* (October 5, 2003): 2606.

33 Gebe Martinez, “Concerns Linger for Lawmakers Following Difficult Vote for War,” *Congressional Quarterly Weekly* (October 12, 2002): 2671.

34 Fisher, “The Way We Go To War.”