

January 17, 2007

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

The Honorable John Boehner
Minority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable John Conyers
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Congressional Leaders:

Since President Bush announced his intention to increase the number of troops deployed in Iraq, Americans have been debating the wisdom of his plan. Some have questioned whether Congress possesses the constitutional authority to affect that plan's implementation. Vital, therefore, to the public debate and to congressional deliberations is a clear understanding of the authority that the Constitution vests in Congress. We write as constitutional scholars to express our view that this authority is more than ample for Congress to give legal effect to its will with respect to the troop increase.

The Constitution's text is quite plain with respect to one mechanism by which Congress might give legal effect to whatever judgment it makes: Congress's spending powers. Congress clearly may cut off funds entirely and bring an armed conflict to an end. It may also take the intermediate step of providing that the President may not use military appropriations to alter the scope or nature of the conflict that Congress has authorized and funded, such as by prohibiting the President from using appropriated funds to increase troop levels or to broaden a conflict into additional nations or territories.

A question of current debate is whether Congress's spending powers provide the only check that Congress holds in the context of ongoing military hostilities. The Constitution confers on Congress the power to declare war, but it also makes the President the Commander in Chief. As Commander in Chief, the President possesses certain interstitial or inherent powers to act in the absence of congressional legislation – for example, to defend the nation even when Congress has not specifically provided

authority. But as Justice Jackson famously emphasized in *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure case), presidential power to act in the absence of congressional action must not be equated with presidential power to ignore statutory restrictions enacted pursuant to Congress's constitutional authorities.¹

The Constitution expressly grants Congress extensive powers relating to war, beyond the well-known appropriations power and the power to declare war. Specifically, the Constitution authorizes Congress to:

- Lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States;²
- Define and punish piracies and felonies committed on the high seas and offenses against the law of nations;³
- Declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;⁴
- Raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;⁵
- Provide and maintain a navy;⁶
- Make rules for the government and regulation of the land and naval forces;⁷
- Provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;⁸
- Provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;⁹
- Make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or in any department or officer thereof.¹⁰

These provisions plainly set forth an extensive role for Congress that goes far beyond the initial decision to declare war and subsequent decisions regarding its funding. This mass of war powers confers on Congress an ongoing regulatory authority with respect to the war. Indeed, these powers are so extensive that Chief Justice John Marshall opined (with some exaggeration, when read out of context) that “[t]he whole powers of war [are], by the Constitution of the United States, vested in Congress”¹¹

¹ 343 U.S. 579 (1952).

² U.S. Const. art. I, sec. 8, cl. 1.

³ *Id.* cl. 10.

⁴ *Id.* cl. 11.

⁵ *Id.* cl. 12.

⁶ *Id.* cl. 13.

⁷ *Id.* cl. 14.

⁸ *Id.* cl. 15.

⁹ *Id.* cl. 16.

¹⁰ *Id.* cl. 18.

¹¹ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

As Commander in Chief, the President's role is to prosecute the war that Congress has authorized within the legitimate parameters Congress sets forth. Congress has exercised precisely this power to define the parameters of armed conflict or war on a number of occasions, some of which concern recent military engagements.¹²

This understanding of Congress's role has also been the consistent interpretation of the courts. Early in our country's history, the Supreme Court set forth this interpretation in a series of cases arising from the naval war with France. The statutory basis for this conflict was a set of authorizations to use force against French maritime interests. These statutes empowered the President to use military force to take specific, limited sorts of actions against French vessels; they identified the places where force could be exercised and the purposes for which force should be employed.

In *Bas v. Tingy*, Justice Samuel Chase explained that these statutes "authori[z]ed hostilities on the high seas by certain persons in certain cases," but did not give the President the authority "to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port."¹³ This meant that Congress had authorized a limited war against France — a war, in the words of Justice Bushrod Washington, "confined in its nature and extent; being limited as to places, persons, and things."¹⁴ In such a war, those "who are authorised to commit hostilities . . . can go no farther than to the extent of their commission."¹⁵

¹² Some examples include U.S. Public Law No. 93-559, sec. 38(F)(1)-(2), The Foreign Assistance Act of 1974(imposing a personnel ceiling of 4000 Americans in Vietnam within six months of enactment and 3000 Americans within one year); U.S. Public Law No. 98-43, sec. 4(a), The Lebanon Emergency Assistance Act of 1983(mandating that the President to return to seek statutory authorization as a condition for expanding the size of the U.S. contingent of the Multinational Force in Lebanon); U.S. Public Law No. 91-652, The Supplemental Foreign Assistance Act of 1971, sec. 8 (prohibiting the use of any funds for the introduction of U.S. troops to Cambodia or provision of military advisors to Cambodian forces without the prior notification of the congressional leadership). Additional examples involve the use of the spending power: U.S. Public Law No. 93-50, sec. 307, The Second Supplemental Appropriations Act, 1973 ("None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purposes."); U.S. Public Law No. 98-215, sec. 108, The Intelligence Authorization Act for Fiscal Year 1984 (Boland Amendment, prohibiting certain covert military assistance in Nicaragua); U.S. Public Law No. 103-139, sec. 8151(b)(2)(B), The Department of Defense Appropriations Act, 1994 (limiting the use of funding in Somalia for operations of U.S. military personnel only until March 31, 1994, and permitting expenditure of funds for the mission thereafter only if the president sought and Congress provided specific authorization); U.S. Public Law No. 105-85, sec. 1203, The National Defense Authorization Act for Fiscal Year 1998 (prohibiting funding for Bosnia "after June 30, 1998, unless the President, not later than May 15, 1998, and after consultation with the bipartisan leadership of the two Houses of Congress, transmits to Congress a certification— (1) that the continued presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and Herzegovina is required in order to meet the national security interests of the United States; and (2) that after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or be used as, civil police in the Republic of Bosnia and Herzegovina.").

¹³ 4 U.S. (4 Dall.) at 43 (opinion of Chase, J.).

¹⁴ *Id.* at 40 (opinion of Washington, J.).

¹⁵ *Id.*

In *Little v. Barreme*,¹⁶ Chief Justice Marshall held that the President's war powers were subject to valid statutory limitation. This case considered the statute whereby Congress had authorized the U.S. Navy to intercept vessels bound to French ports, but did not authorize the President to intercept ships bound from such ports. In *Little* a U.S. Navy ship, acting pursuant to a presidential order to intercept ships bound to or from French ports, intercepted a commercial vessel suspected of coming from a French port. The Supreme Court ruled the action illegal because it went beyond the military force authorized by statute.

The Supreme Court has continued to adhere to this view of the war power. In modern times, the Court has consistently held that the President is bound by statutory restrictions in wartime. In *Youngstown Sheet & Tube*, the Court struck down President Truman's order that the nation's steel mills continue operating in order to keep United States troops in the Korean War armed. Justice Jackson's famous concurring opinion — which the Court has since acknowledged “brings together as much combination of analysis and common sense as there is in this area”¹⁷ — emphasized that the Constitution did not set forth an exclusive power in the Commander in Chief that would permit him to disregard Congress's statutory restrictions on his preferred means of conducting the war.

Most recently, the Supreme Court has applied Justice Jackson's framework to resolve challenges to President Bush's assertions of Commander-in-Chief power. In a number of recent Supreme Court cases, particularly *Rasul v. Bush*,¹⁸ *Hamdi v. Rumsfeld*,¹⁹ and *Hamdan v. Rumsfeld*,²⁰ the Bush Administration has asserted broad unilateral authority to conduct military operations (in those cases dealing specifically with the detention and treatment of enemy combatants). In none of these cases did the Supreme Court vindicate the Bush Administration's position. Indeed, in each case, the Court required the President to comply with applicable statutory limits.

We recognize the dictum first enunciated by Chief Justice Salmon P. Chase in his concurring opinion in *Ex Parte Milligan*: “The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns”²¹ This dictum is sometimes taken to mean that Congress may not enact laws designed to dictate tactical or command decisions. As the point is sometimes put, Congress may not micromanage the President's execution of a war.²²

¹⁶ 6 U.S. (2 Cranch) 170 (1804).

¹⁷ *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).

¹⁸ 542 U.S. 466 (2004).

¹⁹ 542 U.S. 507 (2004).

²⁰ 126 S. Ct. 2749 (2006).

²¹ 4 U.S. (4 Wall.) at 139-140 (Chase, C.J. concurring in the judgment); see also *Hamdan*, 126 S. Ct. at 2773-2774 (2006); accord *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (1952)(Jackson, J., concurring).

²² Some of us have significant doubts about the accuracy of this claim.

Wherever one comes down on the outer limits of legislative war powers, *Little v. Barreme* and *Bas v. Tingy* make clear that Congress retains substantial power to define the scope and nature of a military conflict that it has authorized, even where these definitions may limit the operations of troops on the ground. The proposed statutory restrictions relating to the war in Iraq that are the subject of this letter fall well within this long recognized authority.²³

Thus, Congress may limit the scope of the present Iraq War by either of two mechanisms. First, it may directly define limits on the scope of that war, such as by imposing geographic restrictions or a ceiling on the number of troops assigned to that conflict. Second, it may achieve the same objective by enacting appropriations restrictions that limit the use of appropriated funds. Indeed, the reason that the Constitution explicitly limits appropriations for the Army to two years is in order to ensure that Congress oversees ongoing military engagements.

The Constitution's drafters understood the immense national sacrifice that war entails. Moreover, they understood that during times of war presidential power tends to expand. For these reasons, the Constitution assigns Congress the power to initiate war and to fund and define the parameters of military operations. As James Madison wrote, "the constitution supposes what the History of all Gov[ernments] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ative branch]."²⁴ The Constitution's structure, then, clearly contemplates that important decisions regarding the scale of war will not necessarily be made by the President alone, but ideally should, and certainly can, be reached through the democratic process with all the deliberation that entails. Far from an invasion of presidential power, it would be an abdication of its own constitutional role if Congress were to fail to inquire, debate, and legislate, as it sees fit, regarding the best way forward in Iraq.

Sincerely,

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²³ Some commentators have extended the micromanagement objection to limit Congress's authority to use its spending powers. Their claim is that Congress may not utilize the spending power to impose unconstitutional conditions on the President. This is certainly true – Congress may not deploy its spending power to achieve unconstitutional ends. But this tells us nothing about what conditions are or are not constitutional. As with direct regulation of the nature and scope of war or other hostilities, it is not unconstitutional for Congress to deploy its spending powers to regulate the nature and scope of a conflict in ways that also have real consequences for how the war is conducted.

²⁴ Letter to Thomas Jefferson (April 2, 1798), in 6 Writings of James Madison 312 (Gaillard Hunt, ed. (1900-1910).

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