

LIMITED WAR AND THE CONSTITUTION: IRAQ AND THE CRISIS OF PRESIDENTIAL LEGALITY

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We live in an age of limited war. Yet the legal structure for authorizing and overseeing war has failed to address this modern reality. Nowhere is this failure more clear than in the recent U.S. conflict in Iraq. Congress self-consciously restricted the war's aims to narrow purposes—expressly authorizing a limited war. But the Bush Administration evaded these constitutional limits and transformed a well-defined and limited war into an open-ended conflict operating beyond constitutional boundaries. President Obama has thus far failed to repudiate these acts of presidential unilateralism. If he continues on this course, he will consolidate the precedents set by his predecessor's exercises in institutional aggrandizement.

The presidency is not solely responsible for this unconstitutional escalation. Congress has failed to check this abuse because it has failed to adapt its central power over the use of military force—the power of the purse—to the distinctive problem of limited war. Our proposal restores Congress to its rightful role in our system of checks and balances. We suggest that the House and Senate adopt new “Rules for Limited War” that would create a presumption that any authorization of military force will expire after two years, unless Congress specifies a different deadline. The congressional time limit would be enforced by a prohibition on future war appropriations after the deadline, except for money necessary to wind down the mission.

These new rules would not only prevent presidents from transforming limited wars into open-ended conflicts; they would also create incentives for more robust democratic debate. Under the Constitution,

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either the House or the Senate may adopt these rules unilaterally, thereby avoiding the threat of presidential veto. Building on this constitutional foundation, our proposal provides a practical way in which Congress may effectively reassert its constitutional power—and with it more effective democratic control—over the use of military force.

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INTRODUCTION

Traditional doctrine divides America's wars into two categories: unlimited wars, like World War II, and momentary interventions, like Grenada. But the recent conflicts in Iraq and Afghanistan fit into neither of these neat boxes. They are of limited duration and purpose, but far from momentary; we shall call them "limited wars." These modern conflicts challenge the

conventional understanding of power-sharing arrangements between the president and Congress over the use of military force.

There have been no truly unlimited conflicts since World War II.¹ American interventions in Korea, Vietnam, and Iraq were clearly different from Grenada, but they were not totalizing conflicts like the struggle against the Axis alliance. Nonetheless, the War Powers Resolution, passed in the wake of Vietnam, continues to suppose that wars come in only two sizes. It distinguishes between very short-term interventions and the rest. The resolution authorizes the president to make brief interventions unilaterally—giving him sixty days to use military force without legislative approval. But the president has to go to Congress for explicit authorization during this period if he wants to sustain his offensive for a longer period.²

The idea behind this compromise was simple: the president should have the power to fend off momentary threats, but he must work with Congress to carry out any significant military conflict. This allowed the country to maintain its deep commitment to interbranch cooperation while permitting it to respond to short-term emergencies. But the compromise failed to acknowledge that modern war is limited war. And the challenge of limited war is not merely to induce the president to seek Congress's approval at the start. The real problem is in enforcing the limits once the war is already underway.

The recent Iraq war exemplifies this challenge. When Congress authorized the invasion of Iraq in 2003, it did not give President Bush the *carte blanche* he sought. It self-consciously restricted the war's aims to narrow purposes, expressly authorizing a limited war. Yet the president transformed a well-defined and limited mission into an open-ended conflict with changing aims. The critical moment came during the final months of the Bush Administration. Despite Obama's victory at the polls, President Bush broke statutory limits on the war without requesting congressional approval. He asserted his authority to transform a limited war into an unlimited one by concluding an executive agreement with the Iraqi government. Despite the protests of congressional leaders, including then-Senators Joseph Biden, Hillary Clinton, and Barack Obama, the Bush Administration simply cut Congress out of the international lawmaking process, leaving the executive agreement as its legal legacy.

1. To be precise, we define an unlimited war as a conflict in which Congress pledges *all* the country's resources to ultimate victory. This is precisely the pledge that was made in the declarations against Japan, Germany, and Italy at the beginning of World War II. All three provided: "the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war" against the governments of each of the three countries "and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States." S.J. Res. 119, 77th Cong., 55 Stat. 796 (1941) (Declaration of War Against Germany); S.J. Res. 120, 77th Cong., 55 Stat. 797 (1941) (Declaration of War Against Italy); S.J. Res. 116, 77th Cong., 55 Stat. 795 (1941) (Declaration of War Against Japan). As will become abundantly clear, Congress—and the nation—was utterly unprepared to make such a pledge when authorizing the war in Iraq in 2002.

2. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-48 (2006)).

This represented a breathtaking assertion of presidential authority to re-define war aims without the consent of Congress. Once the Democratic leaders in the Senate took over the executive branch, however, they failed to challenge Bush's assertion of presidential prerogative. They silently accepted his unilateral actions, allowing them to serve as the foundation of their own Iraq policy. This failure threatens consolidation through acquiescence. Unless the current administration changes course, it will entrench the Bush precedents into our constitutional practice, making it much harder for a future Congress or president to recalibrate the constitutional balance of powers.

The radical transformation of limited into unlimited war was made possible by the erosion of Congress's most powerful tool for controlling military force—the power of the purse. Congress has failed to adapt this power to meet modern challenges. What was once a highly effective mechanism for forcing the president to operate within congressional limits has eroded over the course of two centuries.³

Taking a broad historical view permits us to move beyond the standard explanation for congressional passivity in the modern era.⁴ According to the conventional wisdom, Congress lacks the political will to use the power of the purse to stop presidential war-making in its tracks. While this may have been true in particular cases, Congress has in fact demonstrated political forcefulness on many occasions. The key modern problem is Congress's lack of institutional capacity to exercise its political will. It has allowed the budgetary process to evolve in ways that make it extraordinarily difficult to act decisively. As our Iraq case study shows, the Bush Administration was in a position to pay for the initial invasion with money appropriated for other purposes. It then funded the war through a series of well-timed requests for "emergency" supplemental appropriations. By deferring these requests to the last minute, President Bush put Congress in an untenable position. If it refused funding to enforce its statutory limitations on the war, it would be accused of abandoning the troops in the field. This was too high a political price to pay to force the president to retreat from Iraq, as the initial congressional authorization required.

3. See, e.g., Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (establishing the authorization and appropriation procedure for congressional appropriations); BILL HENIFF JR., CONG. RESEARCH SERV., RS 20371, OVERVIEW OF THE AUTHORIZATION-APPROPRIATIONS PROCESS (2006), available at <http://www.rules.house.gov/archives/rs20371.pdf>. Heniff states:

While the power over appropriations is granted to Congress by the U.S. Constitution, the authorization-appropriation process is derived from House and Senate rules. The formal process consists of two sequential steps: (1) enactment of an authorization measure that may create or continue an agency or program as well as authorize the subsequent enactment of appropriations; and (2) enactment of appropriations to provide funds for the authorized agency or program.

Id. at 1. We discuss this process at greater length in Part III.

4. For a related argument about the erosion of congressional power in the context of international lawmaking, see Oona A. Hathaway, *Presidential Power Over International Law: Restoring the Balance*, 119 YALE L.J. 140 (2009).

The strategic use of emergency appropriations allowed the president to engage in “bait-and-switch” tactics that undermined effective democratic control over the use of military force. Following the Iraq precedent, future presidents will be able to “bait” Congress and the American people into approving a limited war, and then “switch” to a much longer war with more ambitious objectives. Serious congressional consideration of these escalating war aims will be short-circuited by the repeated use of the “emergency” appropriations device.

This diagnosis suggests the need for an institutional remedy. The Iraq case shows that it is not enough for the initial authorization of force to specify the limited purposes of the war. It must also specify the limited time period for the conflict, requiring the president to return for an explicit reauthorization if he wishes to extend the war beyond the preset period.

This can be accomplished by either the House or the Senate using its constitutional authority to “determine the Rules of its Proceedings.”⁵ The Constitution gives either chamber the authority to change its rules governing future authorizations for the use of force. Under our proposed “Rules for Limited War,” all future authorizations will be valid for only two years unless the House or Senate sets a different time-limit—or declares that the war should continue, without limit, until victory is achieved. But unless Congress makes this decision explicit in its initial authorizing resolution, the two-year term will serve as a default rule. The new rules will be enforced through a prohibition on all war appropriations after the congressional deadline, except for money needed to wind down the mission over the course of one year.

Our proposal is designed to be both politically feasible and instrumentally effective in controlling the democratic pathologies of a presidential bait-and-switch. It builds on precedents developed by Congress to control the use of the appropriations power. Even if only a single chamber adopts the new rules, this action will catalyze a recalibration of our real-world system of checks and balances. The rules will have a significant impact on congressional–presidential relations long before matters reach the moment of final confrontation—when the president, after failing to convince Congress to authorize a further extension of the war effort, confronts a one-year “wind up” appropriation for the orderly withdrawal of troops from the battle zone.

It is important to analyze the options available to the president and Congress at this “showdown stage,” when the appropriations cut-off becomes operational. But it is no less important to consider how the prospect of a “final showdown” fundamentally alters incentives at earlier stages in the war-making process—starting with the moment the president asks Congress for an initial war authorization, and continuing through the period when the cut-off date begins to loom large on the horizon. In a properly designed system, the new rules will generate a far more candid and democratic process during these earlier periods, without the president and Congress ever pushing the matter to

5. U.S. CONST. art. I, § 5, cl. 2.

a final showdown. And the president will be confronted with very unattractive options if he forces a showdown by trying to extend the war unilaterally after the final one-year wind-up appropriation has expired.

Once one chamber adopts the new rules, its counterpart will be pressed to give them serious consideration and it may adopt the reform or join the effort through a concurrent resolution or statute. Our multiperiod analysis permits a more precise assessment of the extent to which these supportive efforts by the second chamber will enhance the system's operation. We also offer our framework as a more general model for the analysis of separation-of-powers problems—which typically content themselves with a static analysis without self-consciously considering the way rule systems affect institutional dynamics over time.

But before we push onward to a full analysis of our proposed reform, we begin by placing the problem in historical perspective. Part I demonstrates that the Constitution requires the president to respect congressional limits on the use of force. The Marshall Court made this clear very early in the history of the Republic, and this point has been repeatedly emphasized over the centuries. Part II shows how President Bush unilaterally transformed the limited war authorized by Congress into an unlimited war with escalating ambitions—and how President Obama has thus far acquiesced in President Bush's unilateral redefinition of the war's objectives. Part III shows how the transformation of appropriations practices over time imposes increasing barriers to the congressional use of the power of the purse to check presidential overreaching. This sets the stage for Part IV, which makes the case for our new Rules for Limited War. We conclude with a question: Will our Constitution emerge stronger from the Iraq experience as we deliberate on its lessons? Or will we allow the unilateralist precedents generated in the course of the war to set the stage for even more dramatic forms of presidential war-making in the future?

I. CONGRESS'S POWER TO AUTHORIZE LIMITED WAR

The Constitution and two centuries of practice have established a clear principle: Congress may impose limitations on the use of force and these limits are binding on the president.

We begin with the text. Congress not only has the power to “declare War” and to “raise and support Armies.”⁶ It also has the power to grant “Letters of Marque and Reprisal.”⁷ Although this latter power has fallen into disuse (as have formal declarations of war), it does suggest the pervasive character of the congressional role at the time of the Founding. In the eighteenth century, letters of marquee and reprisal enabled Congress to authorize

6. *Id.* § 8, cls. 11–12.

7. *Id.* cl. 11.

small-scale military actions by privateers—actions which could provoke retaliations that might lead to larger-scale war.⁸

There can be no mistaking, then, the Constitution's broad textual commitment to Congress's key role in the war-making system.⁹ Congress may declare war, but the president commands the troops. The president may nominate the high command, but the Senate confirms his choices. Congress has the power to raise and support armies—and hence to appropriate funds to support them—but the president directs their expenditure. Congress's power to authorize *limited* war fits into this larger pattern. Congress self-consciously framed the country's first significant engagement—the undeclared “Quasi War” with France in 1798—as a limited war.¹⁰ In *Bas v. Tingy*, Justice Washington explained that this war was not “the perfect kind” in which “one whole nation is at war with another whole nation.”¹¹ It was an “imperfect war” in which “hostilities . . . subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things” in which “those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their

8. A “marque”—as in “letter of marque” and “more fully letter(s) of marquee and reprisal”—is defined as follows by the Oxford English Dictionary:

Originally, a licence granted by a sovereign to a subject, authorizing him to make reprisals on the subjects of a hostile state for injuries alleged [Later:] [L]icense to fit out an armed vessel and employ it in the capture of the merchant shipping . . . and entitled by international law to commit against the hostile nation acts which would otherwise have been condemned as piracy.

9 OXFORD ENGLISH DICTIONARY 394 (definition 2 of “marque”). For example, letters of marquee and reprisal were used alongside U.S. military power during the Quasi War with France. See ALEXANDER DE CONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797–1801*, at 126–27 (1966) (“To supplement the naval establishment Congress authorized letters of marquee for merchant ships.”).

9. Many have argued this case, most famous among them John Hart Ely. See, e.g., JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993) (arguing that “[t]he power to declare war was constitutionally vested in Congress” but that executive overreach and congressional irresponsibility had together undermined this constitutional requirement); John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1386 (1988) (citing *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800), *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801), and *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), in support of the conclusion that the original meaning of the War Clause was that “all wars, whether declared or undeclared, had to be legislatively authorized”). Others include LOUIS FISHER, *PRESIDENTIAL WAR POWER 1–16* (2d ed. 2004); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990); Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29, 36 (1972); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 132–33 (1971); Lori Fisler Damrosch, *War and Uncertainty*, 114 YALE L.J. 1405, 1408 (2005); William Van Alstyne, *Congress, the President, and the Power To Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1, 5–6 (1972).

10. The Quasi War is discussed at some length by David Barron and Martin Lederman. Barron and Lederman argue that the Supreme Court has concluded again and again that “included within Congress’s authorizations for the use of military force in an undeclared war are implied statutory limitations on the Commander in Chief’s war powers that must be followed.” David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 968 (2008) (emphasis omitted).

11. *Bas*, 4 U.S. (4 Dall.) at 40 (opinion of Washington, J.).

commission."¹² Justice Chase joined the unanimous opinion, but wrote separately to emphasize the point:

Congress is empowered to declare a general war, or congress may wage a *limited war*; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.¹³

In launching its Quasi War with France, Congress had passed four separate acts allowing American vessels "[t]o resist the search of a *French* public vessel," to "capture any vessel that should attempt, by force, to compel submission to a search," to "re-capture any *American* vessel seized by a *French* vessel," and to "capture any *French* armed vessel wherever found on the high seas."¹⁴ According to the Court, these statutes amounted to a congressional decision to wage a "partial" or "limited" war.¹⁵

The Court followed *Bas v. Tingy* the next year with *Talbot v. Seeman*.¹⁶ This time, it was Chief Justice Marshall who insisted that Congress "may authorize . . . partial hostilities,"¹⁷ and that "[t]he whole powers of war being, by the constitution of the United States, vested in Congress, the acts of that body can alone be resorted to as our guides in this enquiry."¹⁸ He then examined the statutory language carefully to determine whether the recap-

12. *Id.* (emphasis added).

13. *Id.* at 43 (opinion of Chase, J.) (emphasis added); *see also id.* at 45–46 (opinion of Paterson, J.). Justice Paterson states:

An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authorised by the constitutional authority of our country. . . . As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations. . . . It is therefore a public war between the two nations, qualified, on our part, in the manner prescribed by the constitutional organ of our country.

Id.

14. *Id.* at 44.

15. *Id.*

16. 5 U.S. (1 Cranch) 1 (1801).

17. It is useful to put these words in larger context:

It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

. . . .

To determine the real situation of America in regard to France, the acts of congress are to be inspected.

Id. at 28–29.

18. *Id.* at 28; *see also* *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (reaffirming this proposition).

ture of a Hamburg vessel was within the terms of the “partial” war, and upheld a salvage fee only upon finding congressional authorization.¹⁹

These same points were reaffirmed three years later by Chief Justice Marshall in *Little v. Barreme*.²⁰ Writing for the Court, Marshall held that the commander of a U.S. ship of war acting under an executive order from the president could be held personally liable for damage done to a seized ship traveling from a French port because the executive order exceeded the limits expressly imposed by Congress.²¹ Marshall explained, “[The Act] gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port”; hence “the legislature seem to have prescribed . . . the manner in which this law shall be carried into execution,” and meant “to exclude a seizure of any vessel not bound to a French port.”²² A third case—also authored by Marshall—came to a similar conclusion.²³ Although modern proponents of presidential unilateralism trivialize these decisions, even John Yoo recognizes that “the Court held that Congress had the sole power to decide on the legal nature of hostilities.”²⁴

19. *Talbot*, 5 U.S. (1 Cranch) at 31–32. For a more recent restatement of this proposition, see *Holtzman v. Schlesinger*, 414 U.S. 1304, 1308 (1973) (“[T]he President is constitutionally disabled in nonemergency situations from exercising the war-making power in the absence of some affirmative action by Congress.”). This Court also stated:

At the very beginning of our history, Mr. Chief Justice Marshall wrote for a unanimous Court that: ‘The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied . . . that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.’ In my judgment, nothing in the 172 years since those words were written alters that fundamental constitutional postulate.

Id. at 1312 (quoting *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (citation omitted)); see also OFFICE OF THE LEGAL COUNSEL, U.S. DEP’T OF JUSTICE, LEGALITY OF THE USE OF MILITARY COMMISSIONS TO TRY TERRORISTS 22 (Nov. 6, 2001), available at <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf> (“Early in the Nation’s history the Supreme Court recognized that Congress has authority to acknowledge a state of war, and that its decision to do so, whether formally and fully or partially and by degrees, is not subject to judicial question.”) (citing *Talbot*, 5 U.S. (1 Cranch) at 28).

20. *Little*, 6 U.S. (2 Cranch) at 170.

21. *Id.* at 179.

22. *Id.* at 177–78.

23. Yet a third case on the power of Congress to authorize military action was authored by Chief Justice Marshall, *Brown v. United States*, 12 U.S. (8 Cranch) 110, 129 (1814), this time regarding a seizure of enemy property during the War of 1812. The Court held that Congress had not authorized the confiscation of enemy property and therefore the seizure was beyond the president’s power. The Court explained:

It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war. The Court is therefore of opinion that there is error in the sentence of condemnation pronounced in the Circuit Court in this case

Id. at 129. Harold Koh has noted that in none of these three cases “did the Court ever suggest that a legislative effort to regulate the issue in question would unconstitutionally intrude upon an exclusive or inherent presidential prerogative.” KOH, *supra* note 9, at 82.

24. John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 294 (1996). John Yoo dismisses the importance of *Bas v.*

The conflict with France was the first limited war, but it was not the last.²⁵ In 1940, for example, the Selective Training and Service Act prohibited the deployment of “[p]ersons inducted into the land forces of the United States . . . beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States.”²⁶ In several other instances, Congress placed specific limits on the deployment of troops.²⁷

Tingy, Talbot v. Seeman, and Little v. Barreme. He argues that “the precedent set by the trilogy remains quite modest. All three revolved around the question of how much of the value of a ship and its cargo, seized by an American commander during the naval operations against France, flowed to the commander instead of to the ship’s owner.” *Id.* at 293. Yet even Yoo acknowledges that the trilogy supports the conclusion that Congress can make limited declarations of war: “[i]n both cases the Court held that Congress had the sole power to decide on the *legal* nature of hostilities: whether they would be ‘general’ or ‘partial,’ ‘public’ or ‘private,’ ‘solemn’ and ‘imperfect’ or ‘limited’ and ‘imperfect.’” *Id.* at 294; see also Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 60–61 (2007) (citing *Talbot v. Seeman* and *Little v. Barreme* as support for the proposition that Congress can declare limited wars); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1620 (2002) (arguing that the Court’s holding in *Bas v. Tingy*, that “Congress was entitled to set limited goals for the hostilities” was “perfectly consistent with the eighteenth-century understanding of ‘declare war,’ which included the concept of limited declarations”).

25. Other examples of limited war include the First Barbary War, the Spanish-American War, and the First Gulf War. In the First Barbary War, Congress provided authorization “to equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite by the President . . . for protecting effectually the commerce and seamen thereof on the Atlantic ocean, the Mediterranean and adjoining seas.” An Act for the protection of the Commerce and Seamen of the United States, against the Tripolitan Cruisers, ch. 4, 2 Stat. 129, 130 (1802). Congress also provided the authority “to subdue, seize and make prize of all vessels, goods and effects, belonging to the Bey of Tripoli, or to his subjects . . .” *Id.* The congressional declaration of war in the Spanish-American War “directed and empowered [the president] to use the entire land and naval forces of the United States” for the specific purpose of ensuring that Spain “relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.” Joint Resolution of Apr. 20, 1898, 30 Stat. 738, 739. In the First Gulf War, Congress limited the authorization of the use of military force “to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677.” Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, § 2(a), 105 Stat. 3, 3 (1991).

26. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885, 886.

27. In 1915, for example, Congress restricted army tours of duty in the Philippines to two years and tours in the Canal Zone to three years, unless the member of the military requested otherwise. Act of Mar. 4, 1915, ch. 143, 38 Stat. 1062, 1078. This restriction was amended in 1934, Act of May 29, 1934, ch. 370, 48 Stat. 815, 816, and repealed in 1948, when it was replaced with a reporting requirement. Act of Mar. 8, 1948, ch. 103, 62 Stat. 70, 70–71. A similar restriction was included in the Treasury and Post Office Appropriation Act for 1934. It provided:

Assignments of officers of the Army, Navy, or Marine Corps to permanent duty in the Philippines, on the Asiatic Station, or in China, Hawaii, Puerto Rico, or the Panama Canal Zone shall be for not less than three years. No such officer shall be transferred to duty in the continental United States before the expiration of such period unless the health of such officer or the public interest requires such transfer, and the reason for the transfer shall be stated in the order directing such transfer.

ch. 212, tit. 2, sec. 12, 47 Stat. 1489, 1516 (1933).

Similarly, the Selective Service Act of 1948 provided that eighteen- and nineteen-year-old enlistees could not be assigned to land bases outside the continental United States, ch. 625, tit. 1, sec. 4(h), 62 Stat. 604, 608, and in 1956, 10 U.S.C. § 6015 prohibited assignment of female service members to duty on combat aircrafts and all vessels of the navy, 10 U.S.C. § 6015 (1956). For more examples, see JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., RL 33837, CONGRESSIONAL AUTHORITY TO LIMIT U.S. MILITARY OPERATIONS IN IRAQ 41–44 (2008).

Little v. Barreme's insistence on Congress's power to limit the scope of war was echoed in *Youngstown Sheet & Tube Co. v. Sawyer*.²⁸ Justice Jackson's concurring opinion has since become the classic statement of presidential power. Even in a time of "grave emergency,"²⁹ he explained, the president's power is circumscribed by express and implied limits imposed by Congress.³⁰ Under his familiar formulation, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . ."³¹ Justice Clark's less-noticed concurrence drew a direct line between *Youngstown* and the Marshall Court's landmark decisions on limited war: "I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand."³²

All these cases add up to a clear principle: the president must respect congressional limits on the use of military force. Congress's power is not unbounded. It may be limited, for example, in the degree to which it can interfere with the commander in chief's power to control military strategy.³³ But it can, as Justice Chase said in *Bas v. Tingy*, authorize "a limited war; limited in place, in objects, and in time."³⁴ These restrictions do not interfere with the president's authority to execute the war within these limits. If Congress authorizes war in Iraq, the president may not use the authorization to wage war in Iran. If Congress authorizes war to carry out a Security Council resolution, the president may not continue the war after the resolution has expired. And if Congress authorizes war for a period of two years, the president cannot wage war for a decade.

Time and again, the Court has reaffirmed Congress's power to limit the president's use of military force. This principle is now well-settled. The challenge, as the next Part shows, is for Congress to develop the institutional capacity to back up this principle with effective action when the president tries to violate it.

II. FROM LIMITED TO UNLIMITED WAR: THE CASE OF IRAQ

The constitutional limits on the use of force have been violated in two classes of cases. In the first, the president uses military force without congressional approval. A frequently mentioned example is President Clinton's

28. 343 U.S. 579 (1952).

29. *Id.* at 582.

30. *Id.* at 637 (Jackson, J., concurring).

31. *Id.*

32. *Id.* at 662 (Clark, J., concurring).

33. Even in the case of military strategy and tactics, it is far from clear that Congress may not regulate. David Barron and Marty Lederman, for example, argue that Congress can regulate the "strategy" of war by statute, just as it can regulate time, place and object. David J. Barron & Martin S. Lederman, *The Commander in Chief At the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 750–61 (2008).

34. 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.).

intervention in Kosovo in 1999 under the auspices of NATO. In the second, the president seeks and receives a limited authorization for the use of force from Congress but then ignores the limits. The first type of constitutional violation is troubling but infrequent—Kosovo notwithstanding. Since the adoption of the War Powers Resolution in 1973, modern presidents have repeatedly asserted the constitutional authority to commit troops without seeking congressional approval, but have nonetheless sought and received the congressional authorization that the War Powers Resolution requires (putting aside cases authorized by U.N. Security Council resolution).³⁵ The second type of violation is almost never discussed, but it poses a serious and very real threat to the constitutional allocation of power. This is the focus of our concern.³⁶

We emphasize its importance by detailing the events surrounding the U.S. war in Iraq. We show how Congress authorized a limited war in Iraq in response to specific assertions by the president. Next, we show how the war began within the limits established by Congress. Finally, we demonstrate how the limited war Congress authorized became an unlimited war run by the president alone.

We are likely to see this scenario repeated in the future. President Bush's successful bait-and-switch in Iraq has created a deeply troubling precedent that threatens the democratic check by Congress required by the Constitution. Instead of challenging this precedent, the Obama Administration is on the verge of consolidating it through acquiescence. There is a pressing need for institutional reform that allows Congress to restore our endangered balance of powers.

35. The president sought and received congressional approval for the 1983 intervention in Lebanon, S.J. Res. 159, 98th Cong. (1983), the first Persian Gulf War, H.J. Res. 77, 102d Cong. (1991), the 2001 invasion of Afghanistan, S.J. Res. 23, 107th Cong. (2001), and the 2003 Iraq War, H.J. Res. 114, 107th Cong. (2002). Other U.S. military engagements were authorized by U.N. Security Council resolutions rather than congressional legislation. This is true, for example, of the Korean War, S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950), the deployment of peacekeepers in the Second Liberian Civil War, S.C. Res. 1497, U.N. Doc. S/RES/1497 (Aug. 1, 2003), and the use of peacekeepers in Haiti in 2004, S.C. Res. 1542, U.N. Doc. S/RES/1542 (Apr. 30, 2004); S.C. Res. 1529, U.N. Doc. S/RES/1529 (Feb. 29, 2004). Fisher argues that Security Council authorization is not a sufficient replacement for congressional authorization by both houses of Congress, because the U.N. Charter was ratified by the Senate alone. He notes that the U.N. Participation Act of 1945 plainly states that congressional approval is required for any use of military force pursuant to the Charter. FISHER, *supra* note 9, at 92–93.

36. We do not mean to suggest that the first type of constitutional violation does not remain a serious threat. There are still those who take the position that the President has unlimited unilateral power to wage war. We recently learned that during the Iraq war, members of the Office of Legal Counsel asserted an almost unlimited presidential warmaking power in internal legal memoranda. See Office of Legal Counsel, OLC FOIA Reading Room, <http://www.justice.gov/olc/olc-foia.htm> (releasing memoranda by John Yoo and Jay Bybee, among others, that “in whole or part, may not necessarily be operative, . . . or otherwise reflect the Office’s current views”). Yet it is notable that even with these assurances, the Bush Administration decided to seek congressional authorization in advance of the invasion of Iraq. Nonetheless, the decision of the president to go to Congress at the outset of the war is not our central focus in this Article, as it has been addressed extensively in the existing literature. See *supra* note 9.

A. Congress's Limited War

We begin with the congressional resolution, signed into law by President Bush on October 16, 2002.³⁷ This 2002 resolution was the product of an intensive lobbying campaign by the president. He initially pressed for an unlimited grant of power, but Congress pointedly refused. When Congress did act, it placed clear limits on its authorization—limits the administration had strongly resisted.

In arguing for congressional support, the president left nothing to the imagination. Both he and members of his administration repeatedly asserted that Saddam Hussein's Iraq posed a direct threat to the United States. Here is Vice President Cheney speaking on August 28, 2002: "Simply stated, there is no doubt that Saddam Hussein now has weapons of mass destruction. There is no doubt he is amassing them to use against our friends, against our allies, and against us."³⁸ President Bush repeated these warnings at the United Nations on September 12, 2002:

We know that Saddam Hussein pursued weapons of mass murder even when inspectors were in his country. Are we to assume that he stopped when they left? The history, the logic and the facts lead to one conclusion: Saddam Hussein's regime is a grave and gathering danger. To suggest otherwise is to hope against the evidence. To assume this regime's good faith is to bet the lives of millions and the peace of the world in a reckless gamble, and this is a risk we must not take.³⁹

President Bush followed up by seeking a congressional resolution giving him unlimited authority to respond to the threat. The proposal, submitted to Congress on September 19, 2002, laid out his case for the war. Its preamble emphasized that Saddam Hussein's regime had "demonstrated its continuing hostility toward and willingness to attack the United States, including by attempting in 1993 to assassinate former President [George H.W.] Bush and by firing on many thousands of occasions on United States and coalition armed forces."⁴⁰ It also repeated the inaccurate claim that "members of Al Qaeda, an organization bearing responsibility for attacks on the United

37. Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-423, 116 Stat. 1498.

38. Vice President Richard Cheney, Speech to the Veterans of Foreign Affairs in Nashville, Tenn. (Aug. 28, 2002) (partial transcript available at <http://www.independent.co.uk/opinion/commentators/richard-cheney-saddam-hussein-is-a-danger-to-world-peace-641150.html>).

39. President George W. Bush, Remarks at the United Nations General Assembly (Sept. 12, 2002) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020912-1.html>). Colin Powell's famous speech before the U.N. Security Council was delivered on February 5, 2003, after Congress had passed the 2002 resolution. In it, Powell outlined the evidence he claimed showed that Iraq was evading inspections and developing weapons of mass destruction. The speech was aimed at persuading the international community that Iraq was in material breach of its disarmament obligations under Security Council Resolution 1441, thus providing a legal justification for the later U.S.-led invasion. For a transcript of the speech, see <http://www.americanrhetoric.com/speeches/wariniraq/colinpowellunsecuritycouncil.htm>.

40. *Military Action Against Iraq*, C-SPAN.ORG, http://www.c-span.org/executive/useofforce.asp?Cat=Current_Event&Code=Bush_Admin (last visited Oct. 15, 2010).

States, its citizens and interests, including the attacks that occurred on Sept. 11, 2001, are known to be in Iraq,” noting that “the attacks on the United States of Sept. 11, 2001, underscored the gravity of the threat that Iraq will transfer weapons of mass destruction to international terrorist organizations.”⁴¹ It concluded with an extraordinarily broad grant of authority:

The president is authorized to use all means that he determines to be appropriate, including force, in order to enforce the United Nations Security Council Resolutions referenced above, defend the national security interests of the United States against the threat posed by Iraq, and restore international peace and security in the region.⁴²

The administration’s resolution contained no time limits, no reporting requirements, and asked for authority to engage in military action within the entire “region,” not just Iraq.

Congress pushed back. Representative Jim McGovern criticized the resolution’s assertion of “‘broad, unchecked authority.’”⁴³ Representative Jim McDermott declared, “I’m not giving the president a blank check, period.”⁴⁴ Representative Lloyd Doggett said that the administration was asking for broader authority than the Gulf of Tonkin Resolution, which “did at least limit the president to repelling an armed attack and preventing future aggression, and to aiding certain treaty members who requested defense.”⁴⁵ Several others worried that the final clause, “and restore international peace and security in the region,” would give President Bush authority to widen the war beyond Iraq without returning to Congress.⁴⁶

The president and his administration responded by appealing for public support. On September 26, 2002, President Bush claimed that Saddam Hussein was “seeking a nuclear bomb, and with fissile material, could build one within a year.”⁴⁷ A week later, in the wake of a meeting with Congress, he repeated his urgent warnings:

On its present course, the Iraqi regime is a threat of unique urgency. . . . U.N. inspectors believe that Iraq could have produce[d] enough biological and chemical agent[s] to kill millions of people. The regime has the scien-

41. *Id.*

42. *Id.*

43. Christopher Marquis, *The World: The War Wagon; Democrats Play the Loyal Opposition*, N.Y. TIMES, Sept. 22, 2002, § 4, at 5.

44. Ron Fournier, *Bush’s Iraq war agenda sweeping: Seeks authority to ignore U.N., fight Saddam on his own terms*, ALAMEDA TIMES-STAR, Sept. 20, 2002.

45. *Id.*

46. Christopher Marquis, *Threats and Responses: Congressional Memo; Lawmakers Quibble Over the Words of War*, N.Y. TIMES, Sept. 26, 2002, at A17.

47. Press Release, White House, President Bush Discusses Iraq with Congressional Leaders (Sept. 26, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/09/20020926-7.html>.

tists and facilities to build nuclear weapons, and is seeking the materials needed to do so.⁴⁸

And in an address to the nation three days later, he renewed his dark warnings: “The danger to America from the Iraqi regime is grave and growing. . . . In defiance of pledges to the United Nations, Iraq has stockpiled biological and chemical weapons, and is rebuilding the facilities used to make more of those weapons.”⁴⁹ Although U.N. weapons inspections were ongoing, President Bush argued that U.S. action could not wait: “Delay, indecision, and inaction are not options for America, because they could lead to massive and sudden horror.”⁵⁰

Nevertheless, Congress refused to give the president the open-ended authority he was demanding. It focused instead on his claim that Saddam Hussein’s Iraq posed such a significant and imminent threat that the United States was justified in acting in “preemptive self defense.”⁵¹ The 2002 resolution’s preamble declared:

Iraq’s demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its

48. President George W. Bush, President, House Leadership Agree on Iraq Resolution (Oct. 2, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021002-7.html>.

49. President George W. Bush, Iraqi Regime Danger to America is “Grave and Growing” (Oct. 5, 2002), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021005.html>.

50. *Id.* In a similar vein, Condoleezza Rice, then national security advisor, famously argued:

We do know that he is actively pursuing a nuclear weapon. . . . We know that he has the infrastructure, nuclear scientists to make a nuclear weapon. . . . The problem here is that there will always be some uncertainty about how quickly he can acquire nuclear weapons. But we don’t want the smoking gun to be a mushroom cloud.

Late Edition with Wolf Blitzer: Interview with Condoleezza Rice (CNN television broadcast Sept. 8, 2002). President Bush made many more such statements, including the following: “The first time we may be completely certain he has nuclear weapons is when, God forbids, he uses one.” President George W. Bush, Address to the United Nations General Assembly (Sept. 12, 2002) (transcript available at <http://transcripts.cnn.com/2002/US/09/12/bush.transcript>). He also argued:

The history, the logic, and the facts lead to one conclusion: Saddam Hussein[’s] regime is a grave and gathering danger. To suggest otherwise is to hope against the evidence. To assume this regime’s good faith is to bet the lives of millions and the peace of the world in a reckless gamble. And this is a risk we must not take.

Id.

51. See H.R. REP. NO. 107-721 at 2, 7 (2002) (“Iraq both poses a continuing threat to the national security of the United States and international peace The continuing threat posed by Iraq is the motivation for the Committee’s favorable action on H.J. Res. 114.”); Richard Gephardt, U.S. Representative, President, House Leadership Agree on Iraq Resolution (Oct. 2, 2002) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021002-7.html>) (“In our view, Iraq’s use and continuing development of weapons of mass destruction, combined with efforts of terrorists to acquire such weapons, pose a unique and dangerous threat to our national security.”).

citizens from such an attack, combine to justify action by the United States to defend itself.⁵²

The resolution's operative provision gave the president authority to use force for two limited purposes. First, it permitted the president "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq."⁵³ Second, it authorized action to "enforce all relevant United Nations Security Council resolutions regarding Iraq."⁵⁴

In adding the second provision, Congress relied on the administration's stated intent to work with the United Nations in pressing for a more thorough regime of weapons inspection. Many in Congress had pushed for an even narrower resolution, authorizing the use of force only with the explicit approval of the United Nations. But the president suggested that the United Nations would be tougher on Saddam Hussein if he could credibly threaten military action. By giving him this bargaining chip, Congress would be increasing the likelihood that Hussein would permit rigorous and unimpeded U.N. inspections of his weapons facilities.⁵⁵ Bush indicated that he

52. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. pmb. (2002). Preambles do not have legally binding effect, but they do provide helpful context for interpreting the operational provisions. The first provision authorized the president to eliminate "the continuing threat posed by Iraq." *Id.* § 3(a)(1). Congress was not rubber-stamping military campaigns against threats that might emerge in the future. In particular, it did not view Iraq as merely another front in an open-ended "war on terror." Instead, the preamble makes clear that Congress viewed terrorism only as part of the "continuing threat" posed by Saddam Hussein, citing the danger that his government might provide weapons of mass destruction "to international terrorists," who would then attack the United States. *Id.* pmb. To put this point in the terms of the operational text, the threat provision only authorized "continuing threat[s] posed by Iraq." *Id.* § 3(a)(1) (emphasis added). It did not tell the president that he could fight an ongoing war against any and all "threats from Iraq" posed by future terrorist groups.

53. *Id.* § 3 (a).

54. *Id.* § 3 (a)(2). In addition to limiting the conditions under which force could be used, the authorization provided additional qualitative limits: Before the authority to use force could be exercised, the president was required to make a determination that "reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq" and that "acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001." *Id.* § 3(b)(1)–(2). The resolution also reiterated Congress's war powers, with a section entitled, "War Powers Resolution Requirements." *Id.* § 3(c). With it, Congress declared "that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." *Id.* § 3 (c)(1).

55. Congress repeatedly made clear that it strongly preferred to act only with the approval of the Security Council. Democrats agreed to vote on the war resolution only after extracting such a concession from Bush:

Many Democrats had wanted to postpone a vote until after the elections But in a shift, Daschle said he was now calling for early action because Bush had complied with most of the requests lawmakers had made: to consult with Congress, seek support from the United Nations and to make the case for action against Iraq more explicitly.

would move forward with an invasion only if the inspection regime broke down.⁵⁶

Congress's final compromise gave the president his bargaining chip—but it also envisioned a continuing role for the United Nations. If it turned out to be necessary to invade Iraq to destroy its weapons of mass destruction, this did not mean President Bush could continue the war indefinitely. If he eliminated the “continuing threat by Iraq” to American national security, the 2002 resolution allowed the further use of force *only* if the United Nations explicitly authorized it in additional Security Council resolutions.⁵⁷

The give-and-take generating the 2002 resolution vindicated the constitutional principles put in place centuries ago. The president was forced to make his case to Congress and the American people. After hearing his arguments and engaging in intense democratic debate, Congress did not give the president everything he asked for, but limited its grant of authority to the military actions he claimed were necessary to protect the security of the United States and its people.

But events would prove that Congress lacked the institutional capacity to insist the war remain within the limits it had imposed.

Janet Hook, *Senate Democrats End Resistance to Vote on Iraq Resolution*, ORLANDO SENTINEL, Sept. 18, 2002, at A4; see also Bob Deans, Hill, *Bush To huddle on Iraq: Drums of war: Leaders summoned as Congress is set to debate Action with or without the U.N.*, ATL. J. CONST., Oct. 1, 2002, at A1 (“Several senators from both parties, however, have insisted language be included urging Bush to build an international coalition for the campaign, a diplomatic effort Bush began three weeks ago with a speech to the United Nations.”); Lynn Sweet, *Once willing to go solo, Bush now wants backing*, CHI. SUN-TIMES, Sept. 5, 2002, at 3.

56. See Glenn Kessler, *A Muscular First Step; Bush Gains Freedom, Negotiating Power*, WASH. POST, Oct. 11, 2002 at A01 (“[O]fficials argue that the best way to prevent a war is strong support from Congress and the U.N. Security Council for a possible war, because it will demonstrate to Hussein that he has no choice but to give up his weapons of mass destruction. It’s an argument that swayed many skeptical members of Congress”); Editorial, *War Resolution Hands Bush Narrow Opening for Peace*, USA TODAY, Oct. 11, 2002, at 21A; President George W. Bush, *supra* note 49 (“By supporting the resolution now before them, members of Congress will send a clear message to Saddam: His only choice is to fully comply with the demands of the world. And the time for that choice is limited. Supporting this resolution will also show the resolve of the United States, and will help spur the United Nations to act.”). The administration’s characterization of the war was reflected in the House report accompanying the 2002 resolution, in which Congress wrote:

The Committee hopes that the use of military force can be avoided. It believes, however, that providing the President with the authority he needs to use force is the best way to avoid its use. A signal of our Nation’s seriousness of purpose and its willingness to use force may yet persuade Iraq to meet its international obligations, and is the best way to persuade members of the Security Council and others in the international community to join us in bringing pressure on Iraq or, if required, in using armed force against it.

H.R. REP. NO. 107-721 at 4–5.

57. This limitation reflected the overwhelming view of the public. The United Nation’s position was of great importance to most Americans—with 80 percent supporting an invasion of Iraq with Security Council consent, and only 37 percent if the United Nations was opposed. Lydia Saad, *Top Ten Findings About Public Opinion and Iraq: Public still supportive of Iraq invasion, but with reservations*, GALLUP NEWS SERVICE (Princeton, NJ), Oct. 8, 2002, available at <http://www.gallup.com/poll/6964/Top-Ten-Findings-About-Public-Opinion-Iraq.aspx>. As a consequence, Congress made it plain that U.N. cooperation was highly desirable, and designed the second limited authorizing provision with this mind.

B. War Within Limits

On March 19, 2003, the United States launched its invasion. Operation Iraqi Freedom was spurned by the United Nations. The Bush Administration had to turn instead to an ad hoc “coalition of the willing” to join its campaign. With blinding speed, the thirty-country coalition won a smashing victory. By April 9, 2003, Saddam Hussein’s regime had fallen. Coalition forces began the search for the weapons of mass destruction that provided the rationale for the preemptive war. They found nothing. All evidence indicated that Hussein had abandoned his weapons development program after the 1991 Gulf War.⁵⁸

There never had been a direct threat of the kind the Bush Administration had invoked in gaining congressional support for the war.⁵⁹ The administration responded to its acute political embarrassment by proliferating new rationales for the invasion. By late 2003, high-ranking officials were invoking humanitarian and regional security as justifications. They even claimed that the mere possibility of Saddam Hussein acquiring weapons of mass destruction sufficed as a rationale.⁶⁰

But such talk was blatantly inconsistent with the plain language of the 2002 resolution. Congressional authorization was expressly premised on the finding that “the current Iraqi regime” had “*demonstrated its capability and willingness to use weapons of mass destruction.*”⁶¹ And it authorized the use of force only as “necessary and appropriate” to “defend the national security of the United States against *the continuing threat posed by Iraq.*”⁶² But once Saddam Hussein’s government had fallen and the weapons of mass destruction turned out to be a phantom, there was no longer a “significant threat to the United States posed by Iraq.” The first authorized purpose for the use of U.S. forces had lapsed—indeed, it arguably never really existed in the first place.

58. Charles Duelfer, who was then an advisor to the director of central intelligence on Iraqi weapons, authored a more than 1,000-page report in 2004 in which he concluded that Iraq’s WMD program had been destroyed in 1991 and was not active at the time of the 2003 invasion by the United States. IRAQ SURVEY GRP., CENTR. INTELLIGENCE AGENCY, IRAQ SURVEY GROUP FINAL REPORT (2004), available at <http://www.globalsecurity.org/wmd/library/report/2004/isg-final-report/>. Duelfer testified to the same effect at a Senate hearing before the Armed Services Committee on October 6, 2004. *The Report of the Special Advisor to the Director of Central Intelligence for Strategy Regarding Iraqi Weapons of Mass Destruction Programs: Hearing before the S. Comm. on Armed Servs.*, 108th Cong. (2004) 46, 58 (statement of Charles A. Duelfer, Special Advisor to the Director of Central Intelligence for Iraqi Weapons of Mass Destruction), available at <http://homepage.ntlworld.com/jksonc/docs/duelfer-sasc-20041006.html>.

59. See, e.g., *The Report of the Special Advisor to the Director of Central Intelligence for Strategy Regarding Iraqi Weapons of Mass Destruction Programs: Hearing before the Senate Comm. on Armed Servs.*, 108th Cong. (2004), *supra* note 58, at 26 (statement of Charles A. Duelfer, Special Advisor to the Director of Central Intelligence for Iraqi Weapons of Mass Destruction).

60. For a good analysis of the evolving justifications offered by the Bush Administration, see Marc Sandalow, *Record shows Bush shifting on Iraq war: President’s rationale for the invasion continues to evolve*, S.F. CHRON., Sept. 29, 2004, at A1.

61. Authorization for Use of Military Force Against Iraq Resolution of 2002, H.R.J. Res. 114, 107th Cong. pmb1. (2002) (emphasis added) (enacted).

62. *Id.* § 3 (emphasis added).

This is when the United Nations came to the administration's legal rescue. On May 22, 2003, the Security Council passed Resolution 1483, "recognizing the specific authorities, responsibilities, and obligations" of the "Coalition Provisional Authority" that had been established by the United States and the "coalition of the willing."⁶³ This resolution was reinforced by a second in October that authorized a "multinational force," led by the United States, to "take all necessary measures to contribute to the maintenance of security and stability in Iraq."⁶⁴

The second resolution—the U.N. mandate—not only provided a legal basis for the occupation of Iraq under international law.⁶⁵ It also filled the legal gap left by the lapsed first provision of the 2002 resolution. Recall that Congress had added a second provision, granting the president the authority to "enforce all relevant United Nations Security Council resolutions regarding Iraq."⁶⁶ As long as the mandate remained in force, the president had a solid basis in American law to continue the military occupation. This was true even though Iraq no longer posed a significant threat to U.S. national security. The two grounds for presidential action were entirely independent of one another.

But the mandate would not last indefinitely; it expired once a new representative government was established in Iraq.⁶⁷ The Security Council left itself an escape hatch, however. It expressly envisioned a "future need for the continuation of the multinational force."⁶⁸ Operating within this framework, President Bush declared that the United States would return sovereignty to Iraq in July 2004 and that elections would be held in 2005.⁶⁹ This time, his predictions were accurate. In June 2004, an interim government replaced the Coalition Provisional Authority as the legal government of Iraq, though U.S. military personnel continued to provide most

63. S.C. Res. 1483, pmbi., U.N. Doc. S/RES/1483 (May 22, 2003). The resolution called upon the Coalition Provisional Authority to "promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future." *Id.* ¶ 4.

64. S.C. Res. 1511, ¶ 13, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

65. Under international law, the United States and other member countries with military troops in Iraq required the legal blessing of the Security Council in order to remain in place. In the absence of such approval, the troops' continuing presence would violate the U.N. Charter's fundamental obligation on all member states to "refrain . . . from the threat or use of force against the territorial integrity or political independence of any state." U.N. CHARTER, art. 2, para. 4.

66. H.R.J. Res. 114, § 3(a)(2).

67. It provided that the Security Council would review the "requirements and mission" of the multinational force in one year and that the mandate of the force would expire upon the completion of the political process put in place in the mandate for establishing a new representative Iraqi government. S.C. Res. 1511, *supra* note 64, at ¶ 15.

68. *Id.*

69. President George W. Bush, Remarks by the President on Iraq and the War on Terror (May 24, 2004) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2004/05/20040524-10.html>).

significant government services, including policing and national defense.⁷⁰ And in 2005, Iraq successfully held national elections, which were won by a coalition led by Prime Minister Nouri Al Maliki.

At this point, the Americans, Iraqis, and the Security Council took advantage of the mandate's escape hatch. Despite the existence of a sovereign and democratically elected government, the Security Council extended the mandate in 2005 and 2006—each time for one additional year.⁷¹ Then, just as it was about to expire again, the Security Council voted one final extension through December 31, 2008.⁷² This would be the last time, according to the new Iraqi government, that the mandate would be renewed—and when it expired the president would lose any domestic legal authority for the continuing use of force.⁷³ Congress's limited war was coming to an end.

There was only one problem: American troops weren't going home any time soon. At the start of 2007, President Bush ordered a "surge" of an additional 20,000 to 30,000 troops to stem the tide of sectarian violence.⁷⁴ He refused to establish an end date for the operation in Iraq, claiming that setting a timetable was tantamount to surrender.⁷⁵ He also vetoed a war-funding

70. The interim government was recognized as the new sovereign authority for Iraq by the United Nations in Security Council Resolution 1546. S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004). The resolution reaffirmed the authorization for the multinational force and added additional authorities, among them "maintenance of security and stability in Iraq . . . including by preventing and deterring terrorism." *Id.* ¶ 10. The resolution also recognized that an Iraqi interim government would take control of the country on June 30, 2004, which meant that the Coalition Provisional Authority would be disbanded.

71. The mandate was extended twice: S.C. Res. 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005), and S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006).

72. S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007).

73. The final renewal was the subject of significant controversy in Iraq. Prime Minister Maliki sent the letter requesting the renewal of the mandate on December 10, 2007, just twenty-one days before it was set to expire. His failure to seek parliamentary approval of the request unleashed a firestorm of criticism in Iraq. The critique centered on the Iraqi Constitution's requirement that any international agreement be approved by parliament. Maliki argued that the provision did not apply because neither the letter nor the resulting mandate was, in fact, a treaty or agreement. The debate suggested that further renewal of the mandate would likely need to be approved by parliament—and it was far from obvious that such approval would be forthcoming. See *The Extension of the United Nations Mandate in Iraq: What Role for the Iraqi Parliament?: Hearing Before the Subcomm. on Int'l Orgs., Human Rights, & Oversight of the H. Foreign Affairs Comm.*, 110th Cong. (2007) 17–18 (statement of Kenneth Katzman, Specialist in Middle Eastern Affairs, Congressional Research Service), available at <http://foreignaffairs.house.gov/110/kat121907.htm>.

74. The plan for a troop surge began to take shape in late 2006 and was executed in 2007. See David S. Cloud, *U.S. Considers Large, Temporary Troop Increase in Iraq*, N.Y. TIMES, Nov. 21, 2006, at A10; President George W. Bush, President's Address to the Nation (Jan. 10, 2007) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/01/20070110-7.html>) (outlining a plan to commit "more than 20,000 additional American troops to Iraq").

75. President Bush stated:

It makes no sense to tell the enemy when you plan to start withdrawing. All the terrorists would have to do is mark their calendars and gather their strength and begin plotting how to overthrow the government and take control of the country of Iraq. I believe setting a deadline for withdrawal would demoralize the Iraqi people, would encourage killers across the broader Middle East and send a signal that America will not keep its commitments. Setting a deadline for withdrawal is setting a date for failure, and that would be irresponsible.

measure that contained benchmarks for troop withdrawals.⁷⁶ The limited war authorized by Congress was coming to an end, but the president's war was just beginning.

C. War Beyond Limits

The Bush Administration started preparing to break free of the legal limits imposed by Congress in 2007. The transition to an open-ended war began first with a declaration by the president that the war would continue under a bilateral agreement with Iraq—an agreement Congress would not have a chance to see, much less approve, until it entered into force. Standing alongside Iraqi Prime Minister Nouri al-Maliki on November 26, 2007, President Bush proudly announced his plan to continue the war without Congress. According to the “Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship,”⁷⁷ the U.N. mandate would be replaced with a bilateral accord between the United States and Iraq.

These principles would serve as a framework for the negotiation of legally binding agreements to replace the U.N. mandate when it expired.⁷⁸ Iraq would give the United States direct permission to retain military forces in the country, satisfying international legal prohibitions on the nonconsensual use of military force against a sovereign nation. In turn, the United States would support “the Republic of Iraq in defending its democratic system against internal and external threats.”⁷⁹ It would also provide “security assurances and commitments to the Republic of Iraq to deter foreign aggression against Iraq that violates the sovereignty and integrity of its territories, waters, or airspace.”⁸⁰

At the news conference accompanying the Declaration of Principles, Lieutenant General Douglas Lute, Assistant to the President for Iraq and

President George W. Bush, Speech on the Iraqi Spending Bill (May 1, 2007), *quoted in* N.Y. TIMES, May 1, 2007.

76. Sheryl Gay Stolberg & Jeff Zeleny, *Bush Vetoes Bill Tying Funds to Exit Schedule*, N.Y. TIMES, May 2, 2007, at A1.

77. Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America, U.S.-Iraq, Nov. 26, 2007, *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071126-11.html>.

78. The agreement was itself nonbinding, but was designed as a blueprint for future binding agreements. Lieutenant General Douglas Lute described it in a White House press briefing on the day the agreement was announced:

Today's agreement is not binding, but rather it's a mutual statement of intent that will be used to frame our formal negotiations in the course of the upcoming year. It's not a treaty, but it's rather a set of principles from which to begin formal negotiations. Think of today's agreement as setting the agenda for the formal bilateral negotiations that will take place in the course of '08.

Lieutenant General Douglas Lute, Press Gaggle by Dana Perino and General Douglas Lute, Assistant to the President for Iraq and Afghanistan (Nov. 26, 2007), *available at* <http://merln.ndu.edu/archivepdf/iraq/WH/20071126-6.pdf>.

79. Declaration of Principles, *supra* note 77.

80. *Id.*

Afghanistan, was pressed to explain the role of Congress in the negotiations. He blandly responded that he saw no need for “formal inputs” from Congress, much less its approval.⁸¹ General Lute’s dismissive remark laid bare the administration’s intention to break free of constitutional restraints.

The exchange set off a firestorm of criticism.⁸² Congress responded with a wave of legislative proposals and a series of hearings. Senator Hillary Clinton introduced a bill that aimed to use the power of the purse to reassert congressional control.⁸³ It provided:

No funds may be authorized or appropriated to carry out any bilateral agreement between the United States and Iraq involving “commitments or risks affecting the nation as a whole”, including a status of forces agreement (SOFA), that is not a treaty approved by two-thirds of the Senate under Article II of the Constitution or authorized by legislation passed by both houses of Congress.⁸⁴

Her initiative gained the support of thirteen co-sponsors, including Senator Barack Obama.⁸⁵ Senator Joseph Biden submitted a similar bill of his own.⁸⁶

81. Lieutenant General Douglas Lute, *supra* note 78.

82. Several senators, including Hillary Clinton, signed an open letter to President George W. Bush on December 6, 2007, calling for congressional approval of any U.S.-Iraq security agreement. Letter from Robert P. Casey, Jr., et al., Senators, on Congressional Oversight of U.S.-Iraq Security Agreements to George W. Bush, President of the U.S., Regarding Congressional Oversight of U.S.-Iraq Security Agreements (Dec. 6, 2007), available at <http://casey.senate.gov/newsroom/press/release/?id=b5c15343-efa8-474f-895a-801689c33ae1>. Senator Biden also issued an open letter calling for congressional approval of any long-term security relationship between Iraq and the United States on December 19, 2007. http://biden.creativengine.com/press/press_releases/release/?id=f573c146-7ef1-4981-9f40-adbd4fe24400. And in early 2008, fifty-five members of Congress sent a letter to President Bush urging him to consult with Congress on the agreement with Iraq. See Ryan Grim, *Dems to Bush: Consult Congress on Iraq*, POLITICO LIVE (Feb. 8, 2008, 5:07 PM), http://www.politico.com/blogs/thecrypt/0208/Dems_to_Bush_consult_Congress_on_Iraq.html. Some of the criticism came from us. Bruce Ackerman, *Bush can't act alone: Separation of powers requires that Congress approve any long-term treaty with Iraq*, L.A. TIMES, Nov. 29, 2007, at A23; Bruce Ackerman & Oona Hathaway, Opinion, *An Agreement Without Agreement*, WASH. POST, Feb. 15, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/02/15/AR2008021502539.html>; Bruce Ackerman & Oona A. Hathaway, *Bush's Final Illusion: The president's agreement with Iraq bypasses Congress. Again.*, SLATE, Oct. 21, 2008, [hereinafter Ackerman & Hathaway, *Bush's Final Illusion*] <http://www.slate.com/id/2202771/>; Bruce Ackerman & Oona Hathaway, Op-Ed., *Into No-Man's Land*, L.A. TIMES, July 25, 2008, available at <http://www.latimes.com/news/opinion/la-oe-ackerman25-2008jul25,0,1077387.story>; Bruce Ackerman & Oona Hathaway, Op-Ed., *The War's Expiration Date*, WASH. POST, Apr. 5, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/04/AR2008040402581.html>; Bruce Ackerman & Oona Hathaway, *What Bush Will Surrender in Iraq*, TIME, Sept. 11, 2008, <http://www.time.com/time/nation/article/0,8599,1840274,00.html>; Bill Delahunt & Oona Hathaway, Op-Ed., *Bush should include Congress*, BOSTON GLOBE, Nov. 26, 2008, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2008/11/26/bush_should_include_congress/.

83. Congressional Oversight of Iraq Agreements Act of 2007, S. 2426, 110th Cong. (2007).

84. *Id.* § 3(c).

85. Legislative History and Co-Sponsors of S.2426, THOMAS—THE LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN02426:@@P> (last visited Oct. 16, 2010).

86. Iraq Security Agreement Act of 2008, S. 3433, 110th Cong. (2008), available at <http://thomas.loc.gov/cgi-bin/query/z?c110:S.3433.IS>: The bill garnered four cosponsors. During the heat of the presidential campaign, Senator Biden made a statement in support of his bill. Senator Joseph Biden, Statements on Introduced Bills and Joint Resolutions (Aug. 1, 2008) (transcript avail-

Members of the House also proposed several different initiatives. Representative Rosa DeLauro introduced a resolution that would “ensure that any such agreement is in the form of a treaty with respect to which the Senate has given its advice and consent to ratification.”⁸⁷ And Representative Barbara Lee introduced a resolution “[d]isapproving of any formal agreement emerging from the ‘Declaration of Principles . . .’ unless the agreement is approved through an Act of Congress.”⁸⁸

The administration responded by stonewalling Congress while hammering out a unilateral deal with the Maliki government. Over the course of the year, the president’s plan began to take shape—with Congress and the public learning only the vaguest outlines through occasional leaks to the press.⁸⁹ President Bush and Prime Minister Maliki’s representatives began to negotiate what they were calling a “Status of Forces Agreement,” or “SOFA.”⁹⁰ It would go into effect on January 1, 2009, just as the U.N. mandate expired,

able at https://www.votesmart.org/speech_detail.php?sc_id=397660&keyword=&phrase=&contain=?q=print). It read, in part:

We have not seen draft language. We do not definitively know which portions of the agreement will be binding, and which will not be. We are not in a position to evaluate whether the agreement will create obligations—either legal or political—that will constrain the next administration, whether Democratic or Republican. The President cannot make such a sweeping commitment on his own authority. Congress must grant approval. The legislation we introduce today requires that Congress be made part of the process.

Id.

87. Iraq Strategic Agreement Review Act of 2008, H.R. 4959, 110th Cong. (2008). In the interests of full disclosure, the authors of this Article consulted with the office of Representative DeLauro on this resolution.

88. H.R. 5128, 110th Cong. (2008). In the interests of full disclosure, the authors of this Article consulted with the office of Representative Lee on this resolution.

89. *Cf. The U.S.-Iraq Bilateral Agreement: Constitutional and other Legal Concerns: Hearing Before the Subcomm. on Int’l Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. (2008) (statement of Oona A. Hathaway, Professor, Berkeley School of Law), available at <http://www.internationalrelations.house.gov/110/hat111908.pdf> (discussing the president’s plan, the details of which were only available through a translation of a draft leaked to the Arabic language press); *Declaration and Principles: Future U.S. Commitments to Iraq: Hearing Before the Subcomm. on Middle E. and S. Asia and the Subcomm. on Int’l Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. (2008) (statement of Oona A. Hathaway, Professor, Yale Law School), available at <http://www.internationalrelations.house.gov/110/hat030408.htm> (same); Oona A. Hathaway, *The November 26 Declaration of Principles: Implications for UN Resolutions on Iraq and for Congressional Oversight: Hearing Before the Subcomm. on Int’l Orgs., Human Rights, and Oversight of the H. Comm. on Foreign Affairs*, 110th Cong. 16–23 (2008) (statement of Oona A. Hathaway, Professor, Yale Law School), available at <http://www.internationalrelations.house.gov/110/hat020808.pdf> (same); Ackerman & Hathaway, *Bush’s Final Illusion*, *supra* note 82 (challenging the legality of the proposed agreement and noting that the only detailed information about the agreement was available through an English translation of a draft leaked to the Arabic language press); Bill Delahunt & Oona Hathaway, *supra* note 82 (criticizing the Bush Administration for excluding Congress from discussions over the Iraq agreement); Oona A. Hathaway, *The Case for Replacing Article II Treaties with Ex Post Congressional-Executive Agreements*, AM. CONST. SOC’Y (Nov. 16, 2008), <http://www.acslaw.org/files/Hathaway%20Issue%20Brief.pdf> (providing a broader argument about how the United States should make its international agreements).

90. The inappropriately named “Status of Forces Agreement” would later be relabeled a “Security Agreement.” Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq, U.S.-Iraq, Nov. 17, 2008.

and it would set the terms under which U.S. troops would remain in Iraq and continue to fight.⁹¹

As negotiations proceeded, the administration even refused to provide members of Congress with the text of the agreement, despite repeated demands by members of both parties.⁹² Although the administration was invited to participate in all congressional hearings, it only sent Ambassador David Satterfield to a single session.⁹³

Satterfield was playing a leading role in negotiating the agreement.⁹⁴ He had ready responses to many of the committee's questions (though none

91. It also concluded a "Strategic Framework Agreement," which is mentioned below. Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, U.S.-Iraq, Nov. 17, 2008, available at http://iraq.usembassy.gov/media/2010-current-pdfs/strategic_framework_agreement.pdf.

92. Senators Hagel, Lugar, Kerry, and Biden wrote Secretary of State Rice and Secretary of Defense Gates a letter saying:

The prospects for lasting success of status of forces talks and other aspects of Iraq policy in the final months of this Administration will be enhanced by the full participation of the Foreign Relations Committee and Congress. We therefore urge you to provide substantive answers to all outstanding questions-for-the-record, to personally appear before the Committee in closed session, to share the text of the most recent draft agreements, and to commit to providing the Committee with the text of the final draft agreement before it is concluded with the government of Iraq. Thank you for your consideration.

Letter from Charles Hagel, Richard Lugar, John Kerry and Joseph Biden, U.S. Senators, to Condoleezza Rice, U.S. Sec'y of State, and Robert Gates, U.S. Sec'y of Def. (June 4, 2008), available at <http://www.fightthesmears.com/articles/26/SOFAsmear.html>. In October 2008, Representatives Delahunt and DeLauro wrote a letter to President Bush expressing "grave concern that [the] administration has not begun consultation with the Government of Iraq and members of the United Nations Security Council on the extension of the UN mandate of the Multinational Force in Iraq." Letter from Bill Delahunt and Rosa DeLauro, U.S. representatives, to George W. Bush, president of the U.S., (Oct. 29, 2008) (on file with authors). The letter further expressed concern that the administration had "started an Iraqi political process by submitting a draft text for public discussion and legislative approval, but has not done the same here in the United States." *Id.* Shortly before the agreement entered into effect, the White House finally released the text to Congress, but only on the condition that it not share the text with committee witnesses or the public. *Renewing the United Nations Mandate for Iraq: Plans and Prospects: Hearing Before the Subcomm. on Int'l Orgs., Human Rights, and Oversight of the Comm. on Foreign Affairs, H.R., 110th Cong. 4 (2008)* (statement of Rep. Bill Delahunt, Chairman, Subcomm. on Int'l Org., Human Rights, and Oversight) [hereinafter *Renewing the United Nations Mandate for Iraq*]. Delahunt stated:

Even now the National Security Council has requested that we do not show this document to our witnesses or release it to the public, a public that for over 5 years has paid so dearly with blood and treasure. Now, I find that incredible. Meantime, the Iraqi Government has posted this document on its media Web site so that anybody who can read Arabic can take part in the public discourse.

Id.

93. *Declaration and Principles: Future U.S. Commitments to Iraq: Joint Hearing Before the Subcomm. on the Middle E. and S. Asia and the Subcomm. on Int'l Orgs., Human Rights, and Oversight of the Comm. on Foreign Affairs H.R., 110th Cong. 6 (2008)* (statement of Rep. Dana Rohrabacher, member, Comm. on Foreign Affairs) [hereinafter *Declaration and Principles: Future U.S. Commitments to Iraq*], available at http://www.internationalrelations.house.gov/hearing_notice.asp?id=952.

94. *Id.* at 22 (statement of Rep. Gary L. Ackerman, Chairman of the Subcomm. on Middle E. and S. Asia).

provided significant new insights into the ongoing negotiations).⁹⁵ But Satterfield was entirely unprepared to answer the key constitutional question raised by Chairman Gary Ackerman: “[d]oes the Administration believe it has the constitutional authority to continue combat operations in Iraq beyond the end of this year absent explicit additional authorization from Congress?”⁹⁶ Satterfield was stumped and, as often happens in such situations, offered to answer later in writing.⁹⁷

On a personal level, Satterfield’s lack of preparation was understandable: he was a distinguished career diplomat, fluent in Arabic, but hardly a constitutional expert.⁹⁸ But Satterfield’s silence spoke louder than words—demonstrating that key negotiators had not even considered the constitutional limits on their authority.

His written answer, when it came, was equally revealing. It consisted of a single paragraph that announced three separate legal rationales in a conclusory fashion.⁹⁹ First, Satterfield cited Congress’s 2002 authorization to the president to use armed force to “‘defend the national security of the United States against the continuing threat posed by Iraq.’”¹⁰⁰ Second, he cited an earlier resolution passed by Congress in the immediate aftermath of September 11th, authorizing the president to take action in Afghanistan.¹⁰¹ This resolution authorized the president “‘to prevent any future acts of international terrorism against the United States’ by those same entities”¹⁰² that were responsible for the attacks on the Twin Towers and the Pentagon. In invoking this earlier resolution, Satterfield was relying on the president’s widely discredited efforts to connect Saddam Hussein to the September 11th attacks on the United States. He quoted from a March 18, 2003, determination by the president that the military operations in Iraq were “‘consistent with the United States and other countries continuing to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.’”¹⁰³

95. *Id.* at 17 (statements of Rep. Gary L. Ackerman, Chairman of the Subcomm. on Middle E. and S. Asia, and of David Satterfield, Coordinator for Iraq, U.S. Dep’t of State).

96. *Id.* app. at 61.

97. *Id.* at 17, 25.

98. *See Satterfield, David M.*, U.S. DEP’T OF STATE, <http://www.state.gov/outofdate/bios/76467.htm> (last visited Oct. 16, 2010).

99. *See Declaration and Principles: Future U.S. Commitments to Iraq*, *supra* note 93 app. at 61 (Written response of David M. Satterfield, Senior Adviser, Coordinator for Iraq, U.S. Dep’t of State, to Rep. Gary L. Ackerman, Chairman, Subcomm. on the Middle E. and S. Asia).

100. *Id.* (quoting Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501).

101. *Id.*

102. *Id.* at 62 (quoting Authorization for Use of Military Force, Pub. L. 107-40, § 2, 115 Stat. 224, 224 (2001)).

103. *Id.* (quoting Authorization for Use of Military Force Against Iraq Resolution of 2002 § 3(b)(2)). A careful comparison of Satterfield’s citation of the resolution shows an interesting change in phrasing. Satterfield states that the resolution authorizes the use of force against those

Finally, Satterfield noted that “Congress has repeatedly provided funding for the Iraq war, both in regular appropriations cycles and in supplemental appropriations.”¹⁰⁴

Each of the assertions was patently inadequate. First, his reliance on the 2002 resolution ignored the vast changes that had occurred in Iraq between 2002 and 2008.¹⁰⁵ The “continuing threat” posed by Saddam Hussein in 2002 no longer existed in 2008, when Iraq was led by U.S.-supported Prime Minister Maliki. Indeed, the draft of the U.S.–Iraq agreement leaked to the Arabic language press around the time of Satterfield’s statement directly undermined his claim. It stated:

Recognizing the important and positive developments in Iraq, and keeping in mind that the situation in Iraq is fundamentally different from that time the Security Council adopted resolution number 661 (1990), especially that the danger posed on the international peace and stability by the former Iraqi government is gone now.¹⁰⁶

Satterfield’s two other arguments were also groundless. No reasonable assessment of the situation in Iraq in 2008 could support the claim that continuing military operations were necessary to prevent future acts of terrorism against the United States by the same entities involved in the 2001 attacks. Finally, Satterfield’s reliance on the passage of appropriations bills was a predictable, but constitutionally unpersuasive, part of contemporary apologies for presidential unilateralism. It ignored the broad constitutional consensus that appropriations bills cannot substitute for express congressional authorization of military operations.¹⁰⁷ Nevertheless, Satterfield did

“involved” in the September 11th attacks, *id.* at 61, whereas the resolution actually authorizes the use of military force against those who “planned, authorized, committed, or aided” the attacks of September 11th—arguably a narrower class. Authorization for Use of Military Force Against Iraq Resolution of 2002 § 3(b)(2). Either way, there is no reasonable argument linking Iraq to the events of September 11, 2001.

104. *Declaration and Principles: Future U.S. Commitments to Iraq*, *supra* note 93 app. at 62 (Written response of David M. Satterfield, Senior Adviser, Coordinator for Iraq, U.S. Dep’t of State, to Rep. Gary L. Ackerman, Chairman, Subcomm. on the Middle E. and S. Asia).

105. *Cf.* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat 1498.

106. Agreement Regarding the Temporary U.S. Presence in Iraq and Its Activities and Withdrawal from Iraq between the United States and the Iraqi Government, art. XXVI, cl. 4, Oct. 8, 2008, available at <http://www.slate.com/id/2202771/sidebar/2202828/>.

107. While strong presidentialists, like John Yoo, assert that appropriations suffice to demonstrate congressional authorization, they are far outside the constitutional consensus. *See, e.g.*, John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996). Few share this reading of the applicable law. The Supreme Court has held that appropriations bills do not substitute for enactments except in very limited circumstances. The Court acknowledged that both substantive enactments and appropriations measures are “Acts of Congress,” but explained that “the latter have the limited and specific purpose of providing funds for authorized programs.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978). It is true that courts have been unwilling to intervene to stop wars funded by Congress, but usually on grounds that the cases were not justiciable. *See Massachusetts v. Laird*, 451 F.2d 26, 28, 34 (1st Cir. 1971) (affirming the lower court’s finding that the state’s claim was nonjusticiable); *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) (finding plaintiffs lacked standing); *Berk v. Laird*, 317 F. Supp. 715, 728 (E.D.N.Y. 1970) (concluding that whether Congress should have made explicit declaration of war

not even try to engage in the sustained legal argumentation made by earlier administrations.¹⁰⁸ His single-sentence assertion expressed the administration's unwillingness to even engage in a serious discussion of Congress's constitutional role.

Similarly, the administration refused to allow members of Congress to see the text of the agreements until they were finalized. Even then, members could take a look only if they agreed not to share the contents with the public or even with their staff.¹⁰⁹ These demands were especially absurd since the Arabic-language drafts of the agreement had been leaked to the local press, which eagerly published them. Up until the very end of the debate, the ordinary Iraqi had better information than a U.S. senator.¹¹⁰ The only way members of Congress could follow the negotiations was through English translations of leaked Arabic texts provided by nonprofit organizations like the American Friends Service Committee.¹¹¹

This roundabout made painfully clear the unilateralist pretensions of the Bush Administration: Not only was it determined to continue the war beyond the limits set by Congress, but it was entirely cutting Congress out of the ongoing conversation over the future of the war. Worse yet, the administration's strategy was successful. Its suppression of the free flow of information dampened public awareness of the importance of the Bush-Maliki negotiations, undermining efforts to mobilize broad support behind initiatives like those proposed by Senators Biden and Clinton.

Only after election day did the White House officially reveal the text of its agreement with the Maliki government. President Bush presented the nation, and his elected successor, with a *fait accompli*. He committed the country to two pacts: a "Security Agreement" (which had until recently been called a "status of forces agreement") and a "Strategic Framework Agreement,"¹¹² outlining the terms of a long-term relationship between the United States and Iraq. The agreements pledged that the U.S. military would remain

was a political question with respect to which the court would not interfere). We address the modern appropriations process—and why it is not a sufficient substitute for congressional authorization—below. *See infra* Part III.

108. *See, e.g.*, OFFICE OF LEGAL COUNSEL, AUTHORIZATION FOR CONTINUING HOSTILITIES IN KOSOVO, 2000 WL 33716980 (O.L.C.) (2000).

109. *See Renewing the United Nations Mandate for Iraq*, *supra* note 92 (statement of Oona A. Hathaway, Professor of Law, Berkeley Law, University of California Berkeley); *id.* at 4 (statement of William D. Delahunt, Chairman, H. Subcomm. on Int'l Orgs., Human Rights, and Oversight); Oona A. Hathaway, Congressional Briefing on U.S.-Iraqi Relations and the Bush-Maliki Agreement (Sept. 22, 2008).

110. *See Renewing the United Nations Mandate for Iraq*, *supra* note 92 (statement of Oona A. Hathaway, Professor of Law, Berkeley Law, University of California Berkeley).

111. *See Ackerman & Hathaway, Bush's Final Illusion*, *supra* note 82 (including a copy of the English translation of the agreement provided by Raed Jarrar, a consultant to the American Friends Service Committee).

112. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq, *supra* note 90; Strategic Framework Agreement for a Relationship of Friendship and Cooperation between the United States of America and the Republic of Iraq, *supra* note 91.

in Iraq through the end of 2011—a full three years beyond the congressionally authorized war—and promised that the United States would engage in cooperation on economic, diplomatic, cultural, and security matters.¹¹³ The signing ceremony took place in Baghdad on November 17, 2008, with Ambassador Ryan Crocker signing on behalf of the United States, a mere five weeks before President Bush would leave office.¹¹⁴

President Bush had now transformed a war authorized by Congress into a war authorized by the president alone. Gone was Saddam's "continuing" threat to the national security of the United States. Gone were the U.N. Security Council resolutions. In their place, the president presented Congress with a *fait accompli*—a document that committed the country to fight the war for three more years.¹¹⁵ But would the new administration go along with this unconstitutional power play? Only months before, Senators Obama, Biden, and Clinton had endorsed a resolution demanding the submission of any new Iraq agreement to Congress for approval.¹¹⁶ Now that they were president, vice president, and secretary of state, they could make their earlier resolution into reality.

As they pondered their next steps, developments in Iraq provided an ironic commentary. The new Iraqi constitution, like our own, required the chief executive to submit the bilateral agreements to the country's parliament for ratification. In stark contrast to President Bush, Prime Minister Maliki followed constitutional requirements, providing the Iraq assembly with an opportunity to deliberate upon and approve the bilateral agreement.¹¹⁷ Did Iraq's embryonic democracy have an important constitutional lesson to teach the oldest democracy in the world?¹¹⁸

113. Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq, *supra* note 90, at art. XXIV, cl. 1.

114. That did not entirely end the debate. The agreements faced a final obstacle. Under the terms of Iraq's constitution, which was heavily influenced by U.S. advisors, Prime Minister Maliki could not approve the agreement alone. He was required to first obtain the approval of the cabinet and of parliament. A heated public debate preceded parliamentary ratification of the agreement on November 27, 2008, by a vote of 149 out of 275 members in favor. Immanuel Wallerstein, *Iraq: The Thirteenth Hour*, MIDDLE E. ONLINE (Dec. 1, 2008), <http://www.middle-east-online.com/english/?id=29008>. Meanwhile, the Bush Administration stood firm on its assertion that congressional consent was unnecessary in the United States. It was enough, the administration asserted, that the agreement had been approved by the president.

115. In a forthcoming book, Douglas Kriner provides statistical analyses suggesting that the Iraq case may represent a turning point in congressional capacities to limit the presidential conduct of war. DOUGLAS L. KRINER, *AFTER THE RUBICON* 285 (forthcoming). Our institutional and constitutional analysis confirms this interpretation of Kriner's findings.

116. See *supra* notes 83–86 and accompanying text.

117. The Iraqi parliament subsequently approved the agreement on the condition that it would be put to a national referendum. That referendum was to be held in conjunction with parliamentary elections. See David Rising, *Biden vows to follow Iraq Wishes*, ASSOCIATED PRESS, Sept. 18, 2009, available at 2009 WLNR 18489958.

118. See Bruce Ackerman & Oona Hathaway, *America needs to prepare for early Iraq pullout*, FIN. TIMES, Aug. 23, 2009, <http://www.ft.com/cms/30169c54-900d-11de-bc59-00144feabdc0.html>; Oona Hathaway & Bruce Ackerman, *Opinion Shop: Insight: How Obama*

While campaigning for the presidency, Senators Obama and Clinton appeared to think so. But on January 20th President Obama and Secretary of State Clinton silently acquiesced in their predecessor's usurpation of congressional authority. They made no public effort to reconcile this decision with their previous protests. Their silent acceptance of Bush's agreement with Iraq—effectively ratifying it—had obvious political advantages: when Obama announced his determination to withdraw combat troops by August 2010, Republicans were in no position to denounce the administration's plans as tantamount to surrender, for the pronouncement was consistent with the plan announced in the agreement negotiated by President Bush.¹¹⁹

Congress joined in this act of collective amnesia—with politics, once again, serving as the obvious motivation. The Democrats in control of both houses had better things to do than embarrass their new president with constitutional objections to the ongoing military effort in Iraq. They were preparing themselves for the coming struggle over the stimulus package, health care reform, financial reform, and other high-priority initiatives. No one was prepared to fight for Congress's right to approve an agreement that was already in place and was serving as the basis of the country's war in Iraq.

Nor were minority Republicans inclined to act as the nation's constitutional conscience. This would not only involve a direct attack on Bush's earlier actions. It would (implicitly) suggest that President Obama had the constitutional prerogative to repudiate the Bush agreement and opt for a speedier pullout in Iraq—a policy few if any Republicans in Congress supported.

Political imperatives were now trumping the institutional logic of the separation of powers.¹²⁰ Both political parties had an interest in allowing President Obama to silently ratify President Bush's transformation of a limited war into an unlimited conflict. With no one contesting the matter, the media failed to note the odd disjunction posed by Iraq's turn to parliamentary participation and Washington's embrace of executive unilateralism.

But future presidents—and especially their legal defenders within the executive branch—will notice. When they too attempt to transform limited into unlimited war, they will see Iraq as a decisive precedent. The 2008 bilateral agreement between the United States and Iraq, they will explain, should not be viewed as a desperate effort by a lame-duck president to break

can fix an illegal war, S.F. CHRON. (Jan. 23, 2009, 9:14 PM), http://www.sfgate.com/cgi-bin/blogs/opinionshop/detail?&entry_id=35025.

119. During the campaign, Obama initially promised that he would withdraw from Iraq by the end of 2008. *Obama says he would withdraw from Iraq by end-2008*, REUTERS, Sept. 12, 2007, available at <http://www.reuters.com/article/idUSN1222671620070912>. But political reality caused him to gradually adopt later and later deadlines. See, e.g., Christina Bellatoni, *Obama outlines withdrawal from Iraq*, WASH. TIMES, Feb. 28, 2009, <http://www.washingtontimes.com/news/2009/feb/28/obama-outlines-withdrawal-from-iraq/>; Thom Shanker, *Obama's campaign promises on ending the war in Iraq now muted by reality*, N.Y. TIMES, Nov. 4, 2008, <http://www.nytimes.com/2008/12/04/world/americas/04iht-04military.18385946.html>.

120. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

free of congressional limitations after his Iraq policies had been repudiated by the electorate. They will predictably assert that Obama's acceptance of the agreement provides an altogether different meaning to this pivotal precedent: it should be viewed instead as part of a bipartisan project, endorsed by presidents of both parties and accepted by Congress, as a legitimate basis for dealing with the unanticipated consequences of limited war in the twenty-first century.

We will be offering a counter-interpretation: President Bush's unilateralism could occur only because Congress has allowed its power of the purse to atrophy over the course of two centuries. But it remains perfectly possible for the House and the Senate to reclaim the effective use of this power and restore their rightful role in assuring that limited wars remain limited—unless and until they give their deliberate consent to an expansion beyond the original war aims.

III. THE POWER OF THE PURSE AND ITS INSTITUTIONAL TRANSFORMATION

To make our case, let us return—one last time—to the final years of the Bush Administration. With Democrats in control of Capitol Hill and Republicans in control of the White House, the time was ripe for the assertion of congressional prerogatives. John McCain, running to succeed President Bush, was being punished in the polls, in no small part because of his support for Bush's war policies. Leading senators and representatives were calling for the president to respect their constitutional authority and seek formal approval of the bilateral agreement with Iraq. When President Bush utterly ignored these demands, why didn't Congress force him to comply with its initial war resolution?

Our answer is simple: Congress lacked the institutional capacity to launch an effective response.

Even if the proposals of Hillary Clinton and Barack Obama had passed through both houses, President Bush would have simply vetoed the effort, counting on his congressional supporters to block an override. That left Congress with the "power of the purse."¹²¹ As Reid Skibell put it, "There is a

121. FISHER, *supra* note 9, at 10–11. James Madison once wrote:

They, in a word, hold the purse; that powerful instrument by which we behold in the history of the British constitution, an infant and humble representation of the people, gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government.

THE FEDERALIST NO. 58, at 163 (James Madison) (The Lawbook Exch., 2005); *see also* WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 3 (1994); Peter Raven-Hansen & William C. Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 81 (1995); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 835–36 (1994); Colonel Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998); Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis*

general academic consensus that Congress can countermand an executive decision to commit troops abroad through spending restrictions. . . . [T]he spending power has become Congress's primary tool in influencing military . . . decisions."¹²² Even super-strong presidentialists like John Yoo agree:¹²³ "[A]ll Congress need do is nothing . . ."¹²⁴ and the war effort will be starved by lack of funds.

But Yoo's claim is deeply misleading. Congress has to act affirmatively if it wants to stop a war in its tracks. For starters, modern day appropriations give the president enormous discretion in military spending. As a Congressional Research Service memo explained at the dawn of the Iraq war: "In regular defense appropriations bills, money for operation and maintenance . . . is typically appropriated in very broad categories, which has allowed Administrations to deploy forces into regions of potential conflict without advance funding approval from Congress."¹²⁵ Once the president starts a war with already appropriated funds, he can make repeated use of last-minute emergency supplemental appropriations to bludgeon Congress into appropriating additional funds. Congressional opposition will predictably crumble if the only alternative is to deprive the troops of "bullets and body armor."¹²⁶ To act effectively, Congress must pass separate legislation cutting off further funding at some future date. But these cut-offs are subject to a presidential veto, requiring an override by a two-thirds majority in both houses.

It was not always this way. The appropriations power was once a highly effective mechanism for asserting congressional control over the president's use of the military. Because appropriations were narrow and precisely tailored, they gave Congress significant control over military action. Indeed, a single chamber of Congress could then prevent the initiation or continuation of a military conflict by refusing to fund the war. How did it happen that a

Situations, 13 GEO. MASON L. REV. 183, 194 (2004); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1674 (2002).

122. Skibell, *supra* note 121, at 194–95.

123. Yoo, *supra* note 121, at 1674.

124. *Id.*

125. STEPHEN DAGGETT, CONG. RESEARCH SERV., MEMORANDUM: BUDGETING FOR WARS IN THE PAST 1 n.1 (Mar. 27, 2003) [hereinafter DAGGETT, BUDGETING FOR WARS] (on file with authors); *id.* ("Congress has provided the Executive Branch with considerable flexibility in financing military operations in advance of specific congressional action on appropriations."). It continues: "The 'Feed and Forage Act' (41 U.S.C. 11) also allows the Defense Department to incur obligations for certain purposes in advance of operations, and a number of other provisions of law and Defense Department regulations allow additional funding flexibility." *Id.*

126. President George W. Bush, President Bush Discusses the War Supplemental (Oct. 22, 2007) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/10/20071022-8.html>) ("The [funding] bill provides for basic needs, like bullets and body armor, protection against [improvised explosive devices], and Mine-Resistant Ambush-Protected vehicles. It also funds training missions, vital embassy programs, improvements in . . . Iraqi security forces, and intelligence operations that protect our troops."); *see also, e.g.*, Dana Perino, White House Press Sec'y, Just the Facts: 2007 War Funding by the Numbers (Nov. 29, 2007) (transcript available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/11/20071129-6.html>) ("We have nearly 200,000 troops in combat in Iraq and Afghanistan and they are relying on this Congress to send them the funding they need to complete their mission.").

system allowing one chamber to stop a war has been transformed into a process that effectively requires two-thirds of both chambers to deny funding?

This Part traces the path of transformation over the course of two centuries.¹²⁷ The next considers how the House and Senate can reclaim their constitutional prerogatives by passing new Rules for Limited War and thereby reassert democratic control over limited wars.

A. The Founding Era

During the Founding period, Congress exercised fine-grained control over all funding decisions—including all military spending, which took up much of the federal budget.¹²⁸ The president and department secretaries could request funds, but it was Congress that allocated money among the different priorities. Congressional control was not only unquestioned, but it was exercised with a precision that seems amazing today. Appropriations specified everything from the precise numbers of troops to their allotted daily rations.¹²⁹

Congressional control was reinforced by the explicit constitutional prohibition on appropriations “[t]o raise and support Armies” that extended “for a longer Term than two years.”¹³⁰ Timed to match biennial congressional

127. We do not aim to provide a comprehensive and complete account of all U.S. military engagements from the Founding Era to the present. Our historical narrative simply illustrates the fundamental transformation whose detailed elaboration would require a book-length treatment.

128. Even Alexander Hamilton agreed that the power to raise and fund an army rested solely with Congress. In Federalist No. 24, he explained that the “whole power of raising armies was lodged in the legislature, not in the executive.” THE FEDERALIST NO. 24, at 150 (Alexander Hamilton) (The Lawbook Exch. 2005) (emphasis omitted). The point was reinforced in debates at state conventions, see 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 497 (Jonathan Elliot ed., Washington, 2d ed. 1836) [hereinafter ELLIOT’S DEBATES] (providing George Nicholas’s comments “that the army and navy were to be raised by Congress, and not by the President”); 4 *id.* at 107–08 (reporting the comments of James Iredell that Congress, not the president, has the power to declare war and raise armies), by President Washington, see Letter from George Washington to the House of Representatives (Aug. 10, 1789), in 1 J. HOUSE REPRESENTATIVES 75, 76 (Washington, D.C., Gales & Seaton 1826) (asking Congress to authorize the army’s continued existence), and by later constitutional commentators, see 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1178, at 68, § 1486, at 341–42 (Boston, Hilliard, Gray & Co. 1833) (noting that the power to raise and fund an army rests exclusively with Congress). For more on this point, see Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 321–24 (2008).

129. Act of Apr. 30, 1790, ch. 10 § 10, 1 Stat. 119, 1st Cong. (repealed 1795).

130. U.S. CONST. art. I, § 8, cl. 12. The two-year appropriation rule appears to be in part a legacy of—and reaction to—the British system. After the Glorious Revolution of 1689, parliament instituted annual appropriations for the army in order to keep it under legislative control, rather than the autonomous control of the Crown. RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802, at 3 (1975). The king responded, however, by building up his own forces in to a size capable of waging significant campaigns. See *id.* at 78 (“The two-year rule, like the annual mutiny act in Britain, provided for ongoing, active agreement by the legislative branch to the existence of an army so that forces could not continue because of bureaucratic momentum or parliamentary maneuvering.”). The debate at the Constitutional Convention demonstrates that the British example was not far from the Founders’

elections, this limitation required each new Congress to review the need for the very existence of a standing army,¹³¹ as well as the wisdom of any ongoing campaigns.¹³²

As a formal matter, these constitutional rules continue to govern us today. But form follows function—and appropriations functioned differently during the early Republic. Congress then made spending decisions without the benefit of standing committees.¹³³ Military funding occurred in two modes. On the one hand, Congress made an annual appropriation to the new War Department. On the other, it doled out funds for specific purposes. Both kinds of bill were exceedingly detailed by modern standards, giving Congress effective control over the shape of military operations.

Here are some examples from the early statute books. After creating the War Department, Congress passed an act adapting the existing military

minds. *See, e.g.*, 3 ELLIOT'S DEBATES, *supra* note 128, at 393–94 (June 14, 1788). James Madison stated:

Mr. Chairman, the honorable gentleman has laid much stress on the maxim, that the purse and sword ought not to be put in the same hands, with a view of pointing out the impropriety of vesting this power in the general government. . . . Apply it to the British government, which has been mentioned. The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist. . . . The purse is in the hands of the representatives of the people. They have the appropriation of all moneys. They have the direction and regulation of land and naval forces. They are to provide for calling forth the militia; and the President is to have the command, and, in conjunction with the Senate, to appoint the officers.

Id.

131. Elliot's Debates records the following exchange:

To the second clause Mr. GERRY objected, that it admitted of appropriations to an army for two years, instead of one, for which he could not conceive a reason; that it implied there was to be a standing army, which he inveighed against, as dangerous to liberty—as unnecessary even for so great an extent of country as this—and, if necessary, some restriction on the number and duration ought to be provided. Nor was this a proper time for such an innovation. The people would not bear it.

Mr. SHERMAN remarked, that the appropriations were permitted only, not required, to be for two years. As the legislature is to be biennially elected, it would be inconvenient to require appropriations to be for one year, as there might be no session within the time necessary to renew them. He should himself, he said, like a reasonable restriction on the number and continuance of an army in time of peace.

5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD IN PHILADELPHIA IN 1787, at 511 (Jonathan Elliot ed., Washington 1845).

132. The Convention initially considered and rejected a proposal to limit the size of a standing peacetime army to two or three thousand men. 2 U.S. CONSTITUTIONAL CONVENTION, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 329–30 (Max Farrand ed., rev. ed. 1937) (detailing the August 18th proposal by Mr. L. Martin and Mr. Gerry). Gerry in fact refused to sign the Constitution on the ground that he thought the power to raise and support an army too broad. KOHN, *supra* note 130, at 84. Many shared Gerry's views, and the topic of whether the Constitution gave the national government too broad a power to raise an army was a source of heated debates during the ratification conventions. *See id.* at 81–88.

133. Even after the first standing committees were created in 1802 (the House Ways and Means Committee was established as a standing committee in 1802, and the Senate Finance Committee was established in 1816), control over all revenue and spending legislation remained unified. *See ALLEN SCHICK, THE FEDERAL BUDGET 10* (3d ed. 2007).

establishment to the new Constitution.¹³⁴ President Washington sought and won a rider that allowed him to call the militia into service to defend the Western frontiers from “the hostile incursions of the Indians.”¹³⁵ To support his request, he sent Congress a letter from Governor St. Clair predicting war along the Ohio River if settlers were not restrained from retaliating against attacks by the Indian tribes. Congress responded with a provision authorizing St. Clair to call up the frontier militia to negotiate with the Indians “from strength.”¹³⁶ But it also included an explicit time limitation: it would “be in force until the end of the next session of Congress, and no longer”¹³⁷—which amounted to less than a year.¹³⁸

The next year’s legislation was also carefully calibrated. Congress expanded the regular army to “one thousand two hundred and sixteen non-commissioned officers, privates and musicians,” organized into one regiment with three battalions “and one battalion of artillery.”¹³⁹ It also specified details of pay (e.g., lieutenants received \$20 per month; privates, \$3), rations (e.g., four for a major, three for a captain, and two for a lieutenant), and that each noncommissioned officer shall receive daily “one pound of beef, or three quarters of a pound of pork, one pound of bread or flour, half a gill of rum, brandy, or whisky.”¹⁴⁰

Congress exercised a similar degree of control over military campaigns. When President Washington authorized St. Clair and General Josiah Harmar to strike various Indian nations along the Ohio-Kentucky border, the result was a disaster.¹⁴¹ The tribes killed more than two hundred men before General Harmar retreated in disarray.¹⁴² Washington wanted to redouble the war effort.¹⁴³ But he could not do it without once again seeking congressional

134. Act of Sept. 29, 1789, ch. 25, 1 Stat. 95.

135. *Id.* § 5.

136. KOHN, *supra* note 130, at 97.

137. § 6, 1 Stat. 95–96.

138. The act remained in effect through August 12, 1790, which was the end of the “next session” (the second session) of the First Congress. *See id.*

139. Act of Apr. 30, 1790, ch. 10, §§ 1–3, 1 Stat. 119.

140. *Id.* § 10. The same act gave the president permission to call the militia into service “for the purpose of aiding the troops now in service, or to be raised by this act, in protecting the inhabitants of the frontiers of the United States” under similar terms of pay and subsistence as approved for the regular troops. *Id.* § 16. No specific date of expiration for the authorization appears in the act itself. Although the act dedicates the funds, it does not appear to appropriate the funds necessary to carry out these commitments.

141. *See* KOHN, *supra* note 130, at 106. Kohn describes a situation in which the administration “made the decision in small, imperceptible steps, during a year in which the president and Knox were diverted by far more important questions.” *Id.* at 104.

142. *Id.* at 106.

143. Washington set the stage for a new request in his State of the Union Address on December 8, 1790. He stated:

It has been heretofore known to Congress, that frequent incursions have been made on our frontier settlements by certain banditti of Indians from the northwest side of the Ohio. . . . The lives of a number of valuable citizens have thus been sacrificed, and some of them under circumstances peculiarly shocking, whilst others have been carried into a deplorable captivity. . . .

approval.¹⁴⁴ Congress approved a new expedition of 3,000 men—wrapping it into the general appropriations bill in February 1791.¹⁴⁵ But once again, Congress provided remarkably detailed instructions to its appropriation “of one hundred thousand dollars, for defraying the expenses of an expedition lately carried on against certain Indian tribes.”¹⁴⁶ The accompanying report specified that this sum would provide for the pay, subsistence, and rations for 1,700 militia and similar expenses for 400 “continental troops”¹⁴⁷ for a period of 3 months. This act was soon extended by another for an “additional regiment of infantry” for “the protection of the frontiers”¹⁴⁸ and once again specified that this increase was would last only “for one year.”¹⁴⁹

The larger force, led by St. Clair, once again met with disaster—1,400 troops were routed by 1,000 Indians in November 1791.¹⁵⁰ President Washington returned to Congress, and Congress again appropriated additional money “for the support of the military establishment of the United States”¹⁵¹ in the amount of \$532,449.76 and 2/3 cents.¹⁵²

I have, accordingly, authorized an expedition, in which the regular troops in that quarter are combined with such drafts of militia as were deemed sufficient.

President George Washington, State of the Union Address (Dec. 8, 1790), in 2 ABRIDGEMENT OF THE DEBATES OF CONG. 251–53 (Thomas Hart Benton ed., New York, D. Appleton & Co. 1857).

144. Rufus Putnam, the leader of the Ohio Company, wrote Congress begging for federal troops to protect the settlers. He detailed the recent “butchering” of twelve men, one woman, and two children—the first such organized attack on civilians in the area since the 1780s. He warned that the Ohio Company—in which many of the members of government were personally invested—was “in the utmost danger of being swallowed up.” KOHN, *supra* note 130, at 110 (quoting a January 8, 1791, letter from Rufus Putnam to President Washington).

145. See Act of Feb. 9, 1791, ch. 6, 1 Stat. 190 (appropriating \$390,199.54 for “the department of war,” including “the sum of one hundred thousand dollars, for defraying the expenses of an expedition lately carried on against certain Indian tribes”).

146. *Id.*

147. Alexander Hamilton, *Estimates for 1791*, in 1 AMERICAN STATE PAPERS: FINANCE 82, 82 (Washington, Gales & Seaton 1832).

148. Act of Mar. 3, 1791, ch. 28, 1 Stat. 222.

149. *Id.* § 15. In order to fund the ongoing expedition in 1792, Congress was required to put in place new duties for the express purpose of providing for “the protection of the frontiers.” Act of May 2, 1792, ch. 27, 1 Stat. 259.

150. KOHN, *supra* note 130, at 115. The failed expedition was the subject of a congressional inquiry. For the results of the inquiry, see *Causes of the Failure of the Expedition Against the Indians, in 1791, Under the Command of Major General St. Clair*, in 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 36 (Washington, Gales & Seaton 1832).

151. Act of Nov. 8, 1791, ch. 1, 1 Stat. 226 (1791).

152. The funding was to go to, among other things, “defraying the expenses incurred in the defensive protection of the frontiers against the Indians” during 1790 and 1791, “by virtue of” the acts of September 29, 1789, and April 30, 1790, “for which no appropriations have been made.” *Id.* In its review of St. Clair’s defeat, Congress noted that “there were appropriated for the use of the War Department, for the year one thousand seven hundred and ninety-one, the sum of six hundred and fifty-two thousand seven hundred and sixty-one dollars and sixty-one cents.” *Causes of the Failure of the Expedition Against the Indians, in 1791, Under the Command of Major General St. Clair*, *supra* note 150, at 38. Not long thereafter, Congress separately granted the president authority to call forth the militia. See Act of May 2, 1792, ch. 28, § 1, 1 Stat. 264 (1792). The act states:

[W]henever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call

Note the 2/3 cents!¹⁵³

During the early Republic, the power of the purse *was* the power to enforce limits on the use of the armed forces.

B. Transformation

We live in a different constitutional world. Over time, Congress became an increasingly complex and differentiated institution. As it elaborated an intricate committee structure, the appropriations process became increasingly fragmented. Within the military sphere, this internal complexity was accelerated by the great wars of the nineteenth and twentieth centuries, the impact of technological innovation on the military budget, and the growing world dominance of the United States.¹⁵⁴ As the federal government became more complex and extensive, Congress gradually gave up the detailed budgetary oversight that it held at the Founding.

During the first century of development, it was war more than anything else that pushed up federal spending. These fiscal escalations made fine-grained congressional control of budgets increasingly dysfunctional and eventually, impossible. As Figure 1 shows, the federal budget hovered around \$100 million through 1811. The War of 1812 quadrupled that number to \$440 million in 1816. The Mexican War had a similar effect—almost doubling the budget—from \$590 million in 1846 to \$1.03 billion in 1847, before settling back to \$860 million as the war drew to a close in 1848. But it was the Civil War that dealt a death blow to detailed congressional control. Spending grew from \$1.29 billion in 1861 when the war began, to \$12.37 billion in 1865. Spending spiked again during the Spanish-American War.¹⁵⁵

The ten-fold jump in spending during the Civil War generated a fundamental reorganization in congressional committee structure—and one that would result, many decades later, in Congress relinquishing control over the federal budget to the president. Overwhelmed with work, the key fiscal committees in the House and Senate could no longer handle decision mak-

forth such number of the militia of the state or states most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasion

Id.

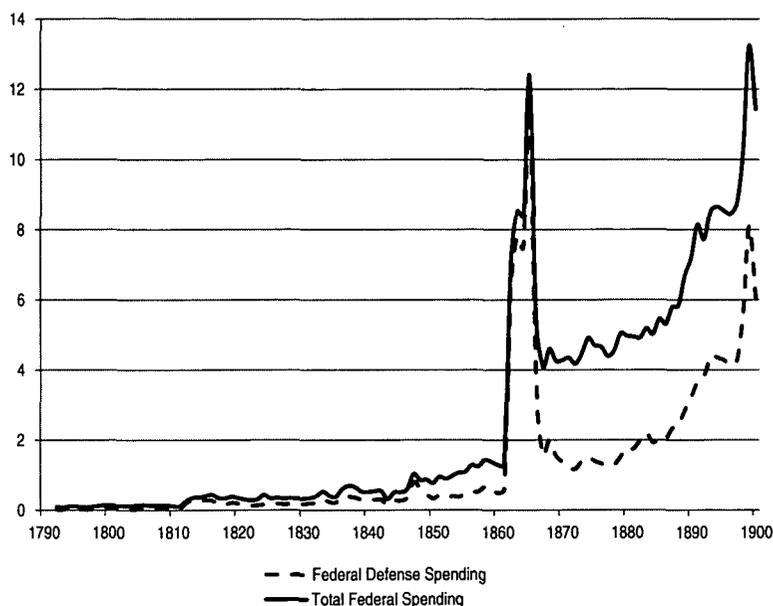
153. During this period, Congress was also well-understood to possess authority over the organization and regulation of the armed forces. In 1841, the Supreme Court interpreted a statute providing for the establishment of the Corp of Engineers to authorize only engineering duties, and did not permit the president to use the men to render other services. *Gratiot v. United States*, 40 U.S. (15 Pet.) 336, 371 (1841) (“[H]owever broad this enactment is in its language, it never has been supposed to authorize the President to employ the corps of engineers upon any other duty, except such as belongs either to military engineering, or to civil engineering.”).

154. Our account owes a debt to Allen Schick, who provides an explanation of the broader transformation of the federal budgetary and appropriations process over the centuries. SCHICK, *supra* note 133, at 8–38.

155. *Id.* Spending jumped from \$8.75 billion in 1897 to over \$13 billion in 1899 (in 2000 dollars). Government Spending Charts, U.S. GOV’T SPENDING, <http://www.usgovernmentsspending.com/charts> (last visited Oct 18, 2010).

ing on both revenue-raising and spending measures. When faced with this hard fact, both the House Ways and Means and Senate Finance Committees kept control over taxes, but ceded spending to new appropriations committees.¹⁵⁶

FIGURE 1
FEDERAL SPENDING, 1792–1900, IN BILLIONS
(INFLATION-ADJUSTED 2000 U.S. DOLLARS)¹⁵⁷



This reorganization had escalating organizational consequences. The new appropriations committees soon began to impose tight constraints on the committees in charge of substantive legislation in different areas.¹⁵⁸ Some successfully rebelled, winning back control over about half of total spending by the end of the nineteenth century. The successful rebels

156. SCHICK, *supra* note 133, at 13–14.

157. Data are from Total Budgeted Government Spending. Government Spend Charts, U.S. GOV'T SPENDING, <http://www.usgovernmentspending.com/charts> (last visited Oct. 18, 2010).

158. COMMITTEE ON APPROPRIATIONS, 126TH ANNIVERSARY, 1867–1993. S. DOC. NO. 103–17 (1993) (“After tolerating the committee for 32 years—institutional change comes slowly to the Senate—members in January 1899 adopted a rule stripping Appropriations of seven major funding bills and awarding them to the respective legislative committees. Not until 1922 did the Appropriations Committee recapture the full jurisdiction that it exercises today.”).

included the committees in charge of the army, the navy, and the military academies.¹⁵⁹

Without a central congressional authority disciplining the spending process,¹⁶⁰ expenditures soared and peacetime deficits emerged. The income tax provided a new source of revenue in 1913—just in time to fund the sharp jump in spending during World War I. But the underlying problem of undisciplined expenditure remained. After fifteen years of inadequate efforts at reform,¹⁶¹ Congress finally gave the president a formal budgetary role. The 1921 Budget and Accounting Act established the basic setup that more or less exists today: congressional committees no longer dealt directly with individual executive departments in determining appropriations. Instead, a new Bureau of the Budget would present to Congress an annual budget on behalf of the president, representing a coordinated proposal from the entire executive branch. This institutional change led to an immense transfer of fiscal power from Congress to the president.¹⁶²

On the military front, this transformation accelerated during and after World War II. A turning point came with the establishment of the Defense Department in 1947.¹⁶³ For the first 150 years, the services operated under the separate leadership of the Department of War and the Department of the Navy. But they were now joined together, with the air force, into a single, integrated whole. This permitted the Department of Defense to frame its budgetary requests in broader and broader categories of military activity. With technological innovations generating increasingly sophisticated weapons systems, fine-tuned congressional control over funding decisions began to seem anachronistic.¹⁶⁴

By the early 1960s, Congress had essentially lost control over the process: “the totals involved in the defense budget have become so great, the lump-sums and carry-overs so large, the discretion to shift funds from one category to another so extensive, that budgetary controls have actually provided Congress with little leverage over policy.”¹⁶⁵ Congress tried to retake the reins through a 1959 provision refusing to appropriate any “funds . . . after December 31, 1960, to or for the use of any armed force of the United

159. Jurisdiction over diplomatic and consular service, the army, the military academy, the navy, post offices and post roads, and Indians was granted back to legislative committees. DANIEL T. SELKO, *THE FEDERAL FINANCIAL SYSTEM* 86 (1940).

160. For more on this transformation, see *id.* at 77–102.

161. *Id.* at 98.

162. See *id.* at 103 (“The effect of the Budget and Accounting Act was to concentrate in the president all authority and responsibility for formulating the annual budget and promoting efficiency in administration.”). See generally SCHICK, *supra* note 133; SELKO, *supra* note 159, at 98–143.

163. The National Security Act of 1947, ch. 343, 61 Stat. 496 (codified as amended at 50 U.S.C. § 401).

164. Compare Military Appropriations Act of 1946, ch. 265, 59 Stat. 384, with National Military Establishment Appropriation Act, 1950, ch. 787, 63 Stat. 987, and Department of Defense Appropriation Act, 1961, Pub. L. No. 86-601, 74 Stat. 338.

165. Raymond H. Dawson, *Congressional Innovation and Intervention in Defense Policy: Legislative Authorization of Weapons Systems*, 56 AM. POL. SCI. REV. 42, 44 (1962).

States . . . unless the appropriation of such funds has been authorized by legislation enacted after [December 31, 1960].”¹⁶⁶ But after multiple revisions, this provision was finally repealed in 1973.

C. The Modern Era

Congress has lost the oversight capacity that made the power of the purse such a potent means of military control at the time of the Founding. Nevertheless, it has not given up trying to use its budgetary powers to keep limited wars from escalating. Despite the obstacles created by a transformed appropriations system, these efforts have been occasionally successful. But these successes have been so erratic and unpredictable that they will have little deterrent effect on future assertions of presidential unilateralism. If Congress hopes to police the boundaries of limited war, it must confront the transformations in the larger appropriations system, and create new Rules for Limited War that recalibrate the constitutional balance.

Easier said than done. The next Part suggests how the House and Senate can indeed reclaim the power of the purse. But first we review the most notable episodes in the modern period to establish that Congress has not abandoned its constitutional claims, to assess Congress’s occasional successes in asserting control, and to consider what lessons, if any, the past half century holds for future efforts to reset the balance of power between the president and Congress.

1. Vietnam

Vietnam ushered in the modern era. President Lyndon Johnson escalated the war by convincing Congress to pass the Gulf of Tonkin Resolution in response to his (very questionable) assertions of a naval attack by North Vietnamese warships in 1964.¹⁶⁷ The Gulf of Tonkin Resolution gave the president a “blank check” to escalate hostilities. But by 1971, a disillusioned Congress formally repealed the resolution.¹⁶⁸ It then enacted the Mansfield Amendment, calling for a “prompt and orderly” withdrawal of

166. Military Construction Act of 1959, Pub. L. No. 86-149, § 412(b), 73 Stat. 302, 322. Dawson argued that the provision grew in part out of members of Congress’s “sense of helplessness in the legislative branch to influence military policy decisions.” Dawson, *supra* note 165, at 43.

167. Joint Resolution of August 10, 1964, Pub. L. No. 88-408, 78 Stat. 384 (“Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.”).

168. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055 (terminating the Gulf of Tonkin Resolution). President Nixon signed the act into law, along with the termination of the resolution. But he did not acknowledge that the termination had any effect on the continued persecution of the war. For a comprehensive discussion of continued military funding for the Vietnam War after the rescission of the Gulf of Tonkin Resolution, see ELSEA ET AL., *supra* note 27, at 20–26; and AMY BELASCO ET AL., CONG. RESEARCH SERV., RL 33803, CONGRESSIONAL RESTRICTIONS ON U.S. MILITARY OPERATIONS IN VIETNAM, CAMBODIA, LAOS, SOMALIA, AND KOSOVO: FUNDING AND NON-FUNDING APPROACHES (2007).

U.S. troops from Indochina “at the earliest practicable date.”¹⁶⁹ Neither statute had much practical effect. Since Congress had not set a fixed date for withdrawal, President Nixon was free to keep American troops on the ground—which he did. He also expanded the military campaign into Cambodia—a move that was not expressly prohibited by either statute.¹⁷⁰

Congress responded with the power of the purse.¹⁷¹ It attached the Cooper-Church Amendment to the Foreign Military Sales Act,¹⁷² ending funding for ground troops in Cambodia and Laos, banning air operations over Cambodia, and ending U.S. support for Vietnamese forces outside South Vietnam. Nixon countered with a veto threat—which was partially effective. The Cooper-Church Amendment was stripped from the bill, but a weakened form of the initiative was signed by the president as a free-standing measure.¹⁷³ This act focused exclusively on the ground war in Cambodia, denying further funds “to finance the introduction of ground combat troops into Cambodia . . . [i]n line with the expressed intention of the President.”¹⁷⁴

The president kept his side of the deal. While congressional debate was taking place, Nixon withdrew ground forces from Cambodia and never reintroduced them. But he did continue the aerial bombing campaign, which was not covered by the revised version of the Cooper-Church Amendment. The lesson of this episode, then, is not that funding cut-offs by Congress are ineffective, but that Congress is fighting an uphill battle—in the form of a threatened presidential veto—when it seeks to impose such limits.¹⁷⁵

169. Act of Nov. 17, 1971, Pub. L. 92-156, § 601(a), 85 Stat. 423, 430 (1971).

170. When asked to enjoin the president’s continued use of military force, the courts refused to get involved, citing the political question doctrine and Congress’s continued appropriation of funds to support the war. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973) (declining to enjoin Nixon’s bombing campaign in Cambodia because Congress continued to appropriate money for the war and because it was a nonjusticiable political question whether the bombing campaign would wind down hostilities as the Mansfield Amendment called for).

171. See Act of Sept. 26, 1972, Pub. L. No. 92-436, § 601, 86 Stat. 734, 737-38; Act of Nov. 17, 1971, Pub. L. No. 92-156, § 501, 85 Stat. 423, 427; Act of Oct. 7, 1970, Pub. L. No. 91-441, § 502, 84 Stat. 905, 910. As a result, the courts repeatedly cited Congress’s continued appropriations in refusing to intervene to stop military action despite the withdrawal of the Gulf of Tonkin Resolution. See *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971) (“In other words, there was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive, even in the absence of the Gulf of Tonkin Resolution.”); *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971) (“The framers’ intent to vest the war power in Congress is in no way defeated by permitting an inference of authorization from legislative action furnishing the manpower and materials of war for the protracted military operation in Southeast Asia.”); *Massachusetts v. Laird*, 451 F.2d 26, 34 (1st Cir. 1971) (finding that the Constitution had not been breached when the president acted with the support of Congress, including through the appropriation of billions of dollars to support ongoing combat operations); see also *Berk v. Laird*, 317 F. Supp. 715, 727-28 (E.D.N.Y. 1970) (decided prior to repeal of Gulf of Tonkin Resolution, but recognizing continued appropriation of funds as authorization of conflict’s continuation).

172. Foreign Military Sales Act, H.R. 15628.

173. Special Foreign Assistance Act of 1971, Pub. L. 91-652, § 7(a), 84 Stat. 1942, 1943. In section two of the act, Congress appropriated hundreds of millions of dollars “for additional military assistance” in Cambodia and the Republic of Korea. *Id.* § 2.

174. *Id.* § 7(a).

175. See *AMY BELASCO ET AL.*, *supra* note 168, at 2.

Congress followed up on this limited victory with another. Six months after the United States signed the Paris Peace Accords setting out the terms of a ceasefire in Vietnam, Congress got into the act with a funding cut-off. The accords provided for the withdrawal of U.S. troops within sixty days.¹⁷⁶ Once the troops were withdrawn, Congress insured against another outbreak of the war through a sweeping funding ban.¹⁷⁷ But by that time, the move was largely expressive: given widespread popular opposition in 1973, there was very little chance for a presidential reassertion of war-making power.¹⁷⁸

The Vietnam experience is decidedly mixed. But it nonetheless offers hope for the effective reconstruction of the power of the purse in the twenty-first century. Given the tremendous war momentum built up during the Johnson and Nixon years, it was going to be tough for Congress to use its powers to rein in the president. The fact that it managed to do so—even in a limited fashion—suggests that Congress can muster the political will to use funding cut-offs to impose effective limits on presidential war-making. It also suggests that the president recognizes the legitimacy of Congress's constitutional role. At no point did Nixon suggest that he would refuse to obey a funding cut-off. Congress faces an uphill battle—but not an unwinnable one.

Nevertheless, the story certainly does illustrate the importance of the historical transformation we have outlined. Understandably enough, Congress found it irresponsible to deprive the troops in the field of the resources they needed to defend themselves in battle. And when Congress tried to cut off funds through legislation, a presidential veto threat was generally—if not invariably—enough to force war critics to back down. Congress in the

176. Agreement on Ending the War and Restoring Peace in Vietnam, U.S.-Viet., June 13, 1973, 24 U.S.T. 1 (entered into force Jan. 27, 1973). Leading the negotiations for the United States was Secretary of State Henry Kissinger, who shared the 1973 Nobel Peace Prize for his efforts.

177. The legislation prohibited funding to “support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam . . .” Second Supplemental Appropriations Act, 1973, Pub. L. 93-50, § 307, 87 Stat. 99, 129. Congress repeated these funding restrictions in the Continuing Appropriations Act for fiscal year 1974. *See* Act of July 1, 1973, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973) (“Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.”). And in December 1974, Congress passed the Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, which set a personnel ceiling of 4,000 Americans in South Vietnam 6 months after enactment and 3,000 Americans within one year. *Id.* § 38 (F)(1).

178. Though it is not directly relevant to the central question at issue in this Article—that is, how to keep limited wars limited in scope—it is worth noting that 1973 also saw the enactment of the War Powers Resolution, Pub. L. No. 93-148, § 2, 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. §§ 1541–48 (2006)). Congress aimed in the resolution to reassert control over the decision to engage in military action. Both the constitutionality and effectiveness of the resolution has been the subject of significant debate. The Congressional Research Service sounded a pessimistic note in 2007: “[s]ince its enactment in 1973, there is no specific instance when the Congress has successfully utilized the War Powers Resolution to compel the withdrawal of U.S. military forces from foreign deployments against the President’s will.” RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RS 20775, CONGRESSIONAL USE OF FUNDING CUTOFFS SINCE 1970 INVOLVING U.S. MILITARY FORCES AND OVERSEAS DEPLOYMENTS 3 (2007).

Vietnam era had to overcome hurdles that were unimaginable to Congress in the Founding Era.

2. *Iran-Contra*

The next great struggle displayed a very different pattern: Congress found it relatively easy to act decisively, but the White House refused to accept the authority of its statutory commands.¹⁷⁹ The result was the Iran-Contra scandal.

In contrast to Vietnam, Congress never gave President Reagan a blank check for military support of the Contras, the rebel forces in Nicaragua fighting its leftist government. This made it politically easier for Congress to impose an increasingly stringent set of funding limitations, culminating in a comprehensive ban in 1984.¹⁸⁰

179. There were other—much less important—exercises of limitation during this period. In 1976, Congress put restrictions in the Defense Department Appropriations Act that prohibited the use of funds for activities involving Angola. Department of Defense Appropriation Act, 1976 Pub. L. No. 94-212, 90 Stat. 153, 165–66 (providing that no funds “appropriated in this Act may be used for any activities involving Angola,” in response to public debate at the time over whether the United States should supply assistance to paramilitary forces in Angola); *see also* International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757–58 (“Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose . . . of promoting, or augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola . . .”). Both Pub. L. No. 94-212 and Pub. L. No. 94-329 were signed on the same day. ELSEA ET AL., *supra* note 27, at 30. Almost ten years later, Congress placed similar restrictions on appropriations to prohibit support for paramilitary operations in Nicaragua. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 8066, 98 Stat. 1837, 1935–37 (providing that during fiscal year 1985 “no funds available to . . . the Department of Defense, or any other agency or entity of the United States involved in intelligence activities” may be expended for supporting paramilitary operations in Nicaragua).

180. The first prohibited the Department of Defense and the CIA from using funds to support any military or paramilitary group whose purpose was to overthrow the government of Nicaragua. The relevant provision read, “None of the funds provided in this Act may be used by the Central Intelligence Agency or the Department of Defense to furnish military equipment, military training or advice, or other support for military activities . . . for the purpose of overthrowing the Government of Nicaragua or provoking a military exchange between Nicaragua and Honduras.” Act of Dec. 21, 1982, Pub. L. No. 97-377, § 793, 96 Stat. 1833, 1865. But the amendment allowed support for Contra efforts to intercept Sandinista arms shipments—a loophole that proved controversial. Raven-Hansen & Banks, *supra* note 121, at 857–58 (citing SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR: WITH SUPPLEMENTAL, MINORITY, AND ADDITIONAL VIEWS, S. REP. NO. 216-100 & H.R. REP. NO. 433-100, at 396–97 & n.23, 408 n.15 (1987)). In response to the controversy, Congress passed a new, more restrictive, amendment limiting funding for the Contras to \$24 million from *any* funding source. The provision read:

During fiscal year 1984, not more than \$24,000,000 of the funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.

Intelligence Authorization Act for Fiscal Year 1984, Pub. L. No. 98-215, § 108, 97 Stat. 1473, 1475 (1983). Subsequent amendments put in place a series of limitations on U.S. support for the Contras. Act of Oct. 3, 1984, Pub. L. No. 98-441, § 106(c), 98 Stat. 1699, 1700–01; § 8066, 98 Stat. 1837, 1935–36; International Security and Development Cooperation Act of 1985 (ISDCA), Pub. L. No. 99-83, § 722(g), 99 Stat. 190, 254–55.

The White House responded with covert evasions. Oliver North developed a “fallback plan” to sell arms to Iran in exchange for U.S. hostages held by a group closely associated with the Iranian regime.¹⁸¹ Once the swap occurred, North superintended the diversion of several million dollars from the arms sales to the Contras.¹⁸²

Once these facts came to light in 1987, the public and congressional reaction was swift and harsh. The public hearings held by Congress ranked as the top news story of the year.¹⁸³ Press accounts emphasized violations of both reporting requirements and of the congressional funding cut-off.¹⁸⁴ Public condemnation was overwhelming and near-universal.¹⁸⁵

From our perspective, the key feature of the episode was its emphatic reaffirmation of Congress’s power over military spending. The fund cut-off was accepted as legitimate and nonnegotiable from the start. Even administration officials who wished to evade the statute recognized its constitutional legitimacy. This is why they went to such complex financial contortions to evade its effect. And once these secret evasions were uncovered, the overwhelming reaction of Congress, the public, and the press reaffirmed the essential principle: Congress has the power to cut off funds for military action and any effort to evade its control—no matter how creative—is unconstitutional.

3. Somalia and Kosovo

The Clinton years did relatively little to elaborate these basic principles—in large part because there were no serious wars that put them to the test. While President Clinton did use military force, these were short-lived

181. Memorandum from John M. Poindexter, Nat’l Sec. Adviser, to President Reagan (Jan. 17, 1986), available at [http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB210/15-Reagan%20Finding%201-17-86%20\(IC%2002181\).pdf](http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB210/15-Reagan%20Finding%201-17-86%20(IC%2002181).pdf).

182. PRESIDENT’S SPECIAL REVIEW Bd., THE TOWER COMMISSION REPORT 1–6, 13–19, 22–42, 44–68, 70, 72–74, 77, 79–86 (1987), available at <http://www.presidency.ucsb.edu/PS157/assignment%20files%20public/TOWER%20EXCERPTS.htm>.

183. Associated Press, *Iran-Contra Hearings Beat Out Stock Crash*, MIAMI HERALD, Dec. 29 1987, at 6A.

184. See, e.g., Morton H. Halperin, Op-Ed, *Tighten the Law on Covert Operations*, N.Y. TIMES, Dec. 31, 1986, at A19.

185. Commentaries almost universally condemned the administration’s apparent willingness to flout Congress. A *New York Times* editorial quipped that Oliver North and John Poindexter proved you can “ruin an illustrious career with good intentions, bad judgment and contempt for the Congress.” James Reston, Op-Ed, *Private Behavior, Public Responsibility*, N.Y. TIMES, Dec. 25, 1987, at A27. A congressional report concluded that the Contra aid effort did indeed violate Congress’s funding cut-offs and “that the independent financing of a government program in circumvention of an appropriations bar was unconstitutional.” Peter M. Shane, *Presidents, Pardons, and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL’Y REV. 361, 367 (1993) (citing SENATE SELECT COMM. ON SECRET MILITARY ASSISTANCE TO IRAN AND THE NICARAGUAN OPPOSITION & HOUSE SELECT COMM. TO INVESTIGATE COVERT ARMS TRANSACTIONS WITH IRAN, REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR (1987) [hereinafter IRAN-CONTRA REPORT]). It declared, “[T]he President can spend funds on a program only if he can convince Congress to appropriate the money.” Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343, 1344 (1988) (quoting IRAN-CONTRA REPORT, *supra*).

affairs—we have called them momentary interventions—rather than the more sustained engagements at the center of our analysis. During these brief episodes, Congress did invoke its power of the purse. Sometimes, the president went along with Congress's funding cut-offs without much resistance—the intervention in Somalia between 1992 and 1994 is exemplary.¹⁸⁶ When two black hawk helicopters were shot down during the infamous Battle of Mogadishu, Congress responded quickly. Within weeks, it passed a defense appropriations act that imposed time limits and limited purposes on the Somalia operation.¹⁸⁷ These decisive steps undoubtedly reinforced the larger public reaction against the Somalia adventure. Clinton responded by refraining from a veto threat, and removed most of the forces well before the congressional deadline.¹⁸⁸

But on other occasions, Clinton did threaten to veto congressional cut-offs—notably during his seventy-seven-day unilateral bombing campaign in Kosovo.¹⁸⁹ But these skirmishes soon came to an end and it would be wrong to overemphasize their long-term significance.

186. In August 1992, President George H.W. Bush began Operation Provide Relief to address a large and growing humanitarian crisis in Somalia. A few months later, the U.N. Security Council authorized the U.S.-led intervention, permitting peacekeeping forces to “use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.” S.C. Res. 794, ¶ 10, U.N. Doc. S/RES/794, at 3 (Dec. 3, 1992).

187. It was limited to “[t]he protection of United States personnel and bases.” Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8151(7)(b), 107 Stat. 1418, 1476 (1993). It was also limited to the following:

The provision of assistance in securing open lines of communication for the free flow of supplies and relief operations through the provision of . . . United States military logistical support services to United Nations forces; and . . . United States combat forces in a security role and as an interim force protection supplement to United Nations units.

Id. § 8151(b)(2) (approving funds for sending U.S. combat forces to play “a security role” in Somalia alongside the United Nations, but providing that “funds appropriated, or otherwise made available, in this or any other Act [o]f the Department of Defense may be obligated for expenses incurred only through March 31, 1994, for the operations of United States Armed Forces in Somalia”); *see also* Department of Defense Appropriations Act, 1995, Pub. L. No. 103-335, § 8135, 108 Stat. 2599, 2653–54 (1994) (“None of the Funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994.”).

188. A similar story of uncertain success played out only a year later. In 1994, Congress used conditions placed within a Defense Department appropriations bill in an effort to limit the purpose and duration of U.S. military operations this time in Rwanda. tit. IX, 108 Stat. 2599, 2659–60. Military action was authorized by the U.N. Security Council. S.C. Res. 929, ¶ 2, U.N. Doc. S/RES/929, at 2 (June 22, 1994). Congress stipulated that “any change in the United States mission in Rwanda from one of strict refugee relief to security, peace-enforcing, or nation-building or any other substantive role shall not be implemented without the further approval of the Congress.” tit. IX, 108 Stat. at 2659–60 (appropriating \$300 million for an “Emergency Relief Fund” in Rwanda). It also placed a time limit on the duration of U.S. military operations, specifying that “no funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.” *Id.* President Clinton never challenged the restrictions and U.S. troops were withdrawn after a short period.

189. He began the aerial bombing campaign in Yugoslavia in 1999 without first seeking approval from Congress. *See* GRIMMETT, *supra* note 178, at 4. Half-a-dozen bills denying appropriations for the Kosovo operation were proposed in Congress. *See id.* All were subject to veto threats by the president, and all failed to pass before the seventy-seven-day campaign ended. *See id.*

The next big test would come with September 11th, and the president's conduct of war in Iraq and Afghanistan.

4. Iraq and Afghanistan

As we have seen, Congress now grants the Defense Department vast sums under very broad categories, giving the president immense discretion to reallocate funds from one activity to another. This permitted President Bush to seize fiscal control at the very outset of the wars in Afghanistan and Iraq. He could finance the initial invasions out of general funds, without seeking any special appropriations for the use of military force.¹⁹⁰

But it was a second technique that permitted the administration to sustain its fiscal advantage over the longer run. As Figure 2 shows, its use of supplemental "emergency" appropriations was utterly unprecedented.¹⁹¹ Although the wars in Korea and Vietnam relied on supplementals during the early years,¹⁹² funding was folded into regular appropriations within a short period.¹⁹³

H.R. 1569, 106th Cong. (1999) (passing in the House 249–180 but failing in the Senate) (prohibiting funds appropriated to DOD from being used to deploy "ground elements" in Yugoslavia); H.R. Con. Res. 82, 106th Cong. (1999) (failing in the House 139–290) (directing the president to remove U.S. armed forces from positions connected to hostilities in Yugoslavia); H.R. 1664, 106th Cong. (1999) (failing in the House 117–301) (prohibiting expenditures of funds in the appropriations bills to implement any plan to use U.S. ground forces in Yugoslavia except in a time of war).

190. AMY BELASCO, CONG. RESEARCH SERV., RL 33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11, at 6, 9, 11 (2009), available at <http://openers.com/document/RI33110/>. This report extensively documents the costs of the Iraq and Afghanistan wars, *id.*, notes that "Congress does not, however, appropriate funds to DOD by individual operation" but instead "to cover particular types of expenses," *id.* at 6, and states the following:

Funding for Iraq has risen sharply from initial funding to deploy troops starting in the fall of 2002 (presumably drawn from DOD's regular appropriations since supplemental funds were not available) to \$53 billion in the invasion year of 2003, about \$131 billion for FY2007, \$141 billion for FY2008, \$95 billion in FY2009 as troop levels decline from surge levels, and \$65 billion in the FY2010 request as the withdrawal proceeds.

Id. at 17.

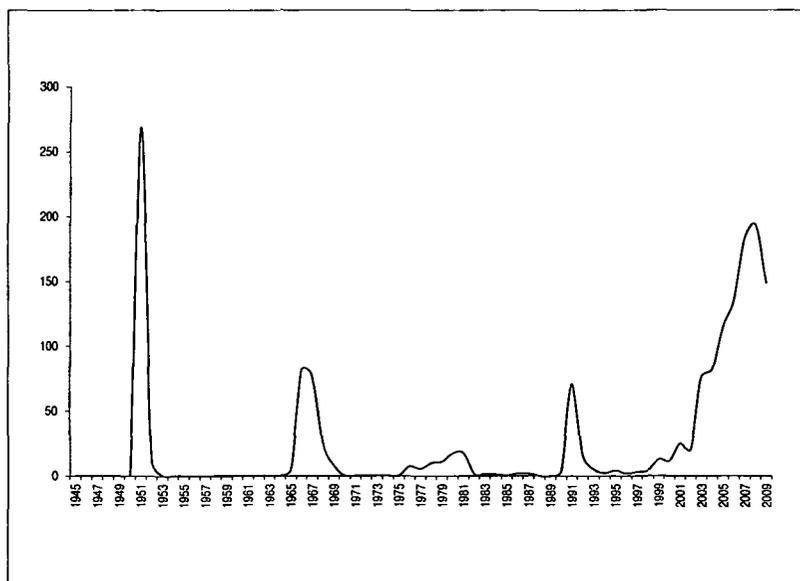
191. This is true going back at least to World War II. World War II, the Korean War, and the Vietnam War were all initially funded through supplemental appropriations, but the supplemental appropriations were soon folded into regular appropriations bills. STEPHEN DAGGETT, CONG. RESEARCH SERV., RS 22455, MILITARY OPERATIONS: PRECEDENTS FOR FUNDING CONTINGENCY OPERATIONS IN REGULAR OR IN SUPPLEMENTAL APPROPRIATIONS BILLS 1–3 (2006) [hereinafter DAGGETT, MILITARY OPERATIONS]; DAGGETT, BUDGETING FOR WARS, *supra* note 125.

192. Supplemental funding for the war in Korea lasted two years, with \$32.8 billion in 1951 and \$1.4 billion in 1952 (both in then-year dollars). DAGGETT, MILITARY OPERATIONS, *supra* note 191, at 3 tbl.1. Supplemental funding for the war in Vietnam was sporadic and only comprised a significant portion of the total spending in two years: 1966 (\$12.3 out of \$14.9 billion then-year dollars) and 1967 (\$12.2 out of \$17.7 billion then-year dollars). *Id.* at 5 tbl.2. The operations in the Persian Gulf in 1990 to 1991 and the military interventions in Somalia, Southwest Asia, Haiti, Bosnia, and Kosovo in the early 1990s were significantly funded through supplemental appropriations, though only for a brief period. *Id.* at 6. Funding for the Kosovo war, which lasted for a longer period, was quickly folded into regular defense appropriations. *Id.* at 6.

193. DAGGETT, MILITARY OPERATIONS, *supra* note 191, at 3–6 ("[I]n the case of Vietnam, the Johnson Administration asked for emergency supplementals at the onset of the war, but also requested funds in regular appropriations bills as soon as those bills were on the congressional

Contrast the use of supplemental funding in Iraq and Afghanistan. It marks another decisive transformation of the constitutional playing field. After financing the initial invasions through already appropriated funds, President Bush transformed the “emergency” appropriation into a powerful weapon for wresting fiscal control from Congress. In Iraq, for example, his \$76 billion supplemental in 2003 increased every year to a peak of \$194 billion in 2008, before dropping to \$149 billion in 2009 as troops gradually began to withdraw.¹⁹⁴ While President Obama pledged to end this practice on the campaign trail, he made a U-turn after coming into office; just as he is operating on the basis of the Bush-era executive agreements with Iraq, he is also normalizing Bush’s intensive use of emergency funding.

FIGURE 2
SUPPLEMENTAL FUNDING FOR THE USE OF MILITARY FORCE,
1950–2009, IN BILLIONS (INFLATION-ADJUSTED
FY2009 U.S. DOLLARS)¹⁹⁵



agenda, even though troop levels were in flux and the duration of the conflict was not foreseen.”); DAGGETT, *BUDGETING FOR WARS*, *supra* note 125, at 2.

194. *Resourcing the National Defense Strategy: Implications of Long-Term Defense Budget Trends: Hearing Before the H. Comm. on Armed Servs.*, 111th Cong. 25 tbl.A-1 (2009) [hereinafter *Resourcing Hearing*] (statement of Stephen Daggett, Specialist in Def. Policy and Budgets, Congressional Research Serv.), available at http://armedservices.house.gov/pdfs/FC111809/Daggett_Testimony111809.pdf.

195. See DAGGETT, *MILITARY OPERATIONS*, *supra* 191, at 3–5 (providing data on supplemental funding from 1950 to 1975); *Resourcing Hearing*, *supra* note 194, at 24 tbl.A-1 (providing data on supplemental funding from 1976 to 2009). All data are in 2009 dollars (conversion performed using Consumer Price Index Conversion Factors for 2009 dollars).

This normalization of “emergency” has had extensive and pernicious effects. Most obviously, it allows the president to obscure the overall cost of war by pushing it “off-budget.”¹⁹⁶ This public relations point, however, masks deeper institutional pathologies.

For starters, the “emergency” label enables the president to evade the longer-term, and more disciplined, reviews characteristic of the standard budgetary process. Under congressional rules, “emergency” requests bypass the authorizing committees, like the Senate Armed Services Committee, and go directly to the House and Senate Appropriations Committees. As the Iraq Study Group pointed out, these committees are then “pressured by the need to act quickly so that troops in the field do not run out of funds.”¹⁹⁷ The result is a spending bill that “passes Congress with perfunctory review.”¹⁹⁸

This end-run not only undermines thoughtful and disciplined congressional deliberation; it is an invitation to blatant forms of political blackmail. These emotional appeals were on display when President Bush began his sustained political campaign to transform the Iraqi war into an unlimited conflict. A critical moment came three days after President Bush and Prime Minister Maliki signed the Declaration of Principles that would ultimately allow the president to break free of congressional war limitations. The administration suddenly announced that the immediate injection of funds was necessary to provide soldiers in the field with such basics as “bullets and body armor.”¹⁹⁹ Against this background, members of Congress had little choice but to vote “yes” within three weeks.²⁰⁰ With funds running out again in June 2008, Congress again approved another “emergency” appropriation²⁰¹—allowing Bush to continue negotiating his unconstitutional

196. See THOMAS L. HUNGERFORD, CONG. RESEARCH SERV., RL 33134, SUPPLEMENTAL APPROPRIATIONS: TRENDS AND BUDGETARY IMPACTS SINCE 1981 (2005).

197. JAMES A. BAKER, III & LEE H. HAMILTON ET AL., THE IRAQ STUDY GROUP REPORT 91 (Authorized ed., Vintage Books 2006).

198. *Id.*

199. Bush, *supra* note 126 (“The [funding] bill provides for basic needs, like bullets and body armor, protection against [improvised explosive devices], and Mine-Resistant Ambush-Protected vehicles. It also funds training missions, vital embassy programs, improvements in . . . Iraqi security forces, and intelligence operations that protect our troops.”); see, e.g., Perino, *supra* note 126 (“We have nearly 200,000 troops in combat in Iraq and Afghanistan and they are relying on this Congress to send them the funding they need to complete their mission.”).

200. The vote was 272 to 142 in the House and 70 to 25 in the Senate. Emergency Supplemental Appropriations Act for Defense, 2008, Pub. L. No. 110-161, 121 Stat. 2455 (2007). This was the first appropriation granted after the November 2007 announcement of the Declaration of Principles and was passed by Congress on December 26, 2007. The Department of Defense Appropriations Act for fiscal year 2008 had been passed just a couple of weeks before the Declaration of Principles was announced, on November 13, 2007. See Department of Defense Appropriations Act, 2008, Pub. L. No. 110-116, 121 Stat. 1295 (2007) (including \$12.2 billion in funding for the Department of Defense).

201. Supplemental Appropriation Act, 2008, Pub. L. No. 110-252, 122 Stat. 2323 (passed June 30, 2008 and providing \$160.2 billion for the Department of Defense, including \$92 billion to cover the remainder of the cost of the war in Iraq in FY2008 plus a \$67 billion bridge fund that was expected to cover war costs through July 2009). See AMY BELASCO, *supra* note 190, at 47 (stating that the appropriations made in June were expected to last until July 2009).

agreements with Maliki with confidence that his critics could not cut off military funding until after he had left the White House.

With money running low again, President Obama continued down the same path. Within months of taking office, he pushed for \$106 billion in “emergency” appropriations to “provide for the safety of our troops and the American people,” in Iraq and Afghanistan for another year.²⁰² The prospect of an easy victory encouraged him to use Bush’s precedent as the basis for his own Iraq strategy. It also enabled him to escalate the war in Afghanistan without fear of significant fiscal pushback by Congress.

In further normalizing the “emergency” approach, the new president did indulge in a bit of public hand-wringing. Recalling his campaign promise, he pledged to submit future funding requests through the regular appropriations system.²⁰³ But these brave words were soon forgotten when money began to run out again in 2010: with political opposition to the Afghan war on the rise, the political advantages of another emergency appropriation were too tempting to ignore.²⁰⁴ Once again, Obama acquiesced in a deeply problematic innovation by his predecessor, and thereby enhanced its standing as a bipartisan precedent for future presidents.

This recent history stacks the deck further against the responsible use of the power of the purse. Worse yet, these “emergency” bills often include lots of other items that have nothing to do with the war. Since they are destined for expedited treatment, they provide a tempting vehicle for funding pork-barrel projects of interest to particular members of Congress.²⁰⁵ This will

202. Presidential Statement on Signing the Supplemental Appropriations Act, 2009, DAILY COMP. PRES. DOC. (June 24, 2009), available at <http://www.gpoaccess.gov/presdocs/2009/DCPD-200900501.htm>.

203. In a February 2009 address to a joint session of Congress, President Obama promised:

[B]ecause we’re also suffering from a deficit of trust, I am committed to restoring a sense of honesty and accountability to our budget. That is why this budget looks ahead 10 years and accounts for spending that was left out under the old rules—and for the first time, that includes the full cost of fighting in Iraq and Afghanistan.

President Barack Obama, Delivery Address to Joint Session of Congress (Feb. 24, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/).

204. This was initially dismissed by the White House as an anomaly. While House spokesperson Robert Gibbs declared, “This will be the last supplemental for Iraq and Afghanistan.” Mary Beth Sheridan & Scott Wilson, *More Funds Sought for Iraq and Afghanistan*, WASH. POST, Apr. 10, 2009, at A04. But on July 27, 2010, yet another supplemental appropriations bill, including \$37 billion for the continuation of the war in Afghanistan, was passed by the House and went on to the president for his signature. Nicholas D. Kristof, *1 Soldier or 20 Schools?*, N.Y. TIMES, July 28, 2010, at 29.

205. Emergency supplementals are not subject to the same restrictions on earmarking that apply to regular appropriations bills. The Senate Appropriations Committee has pledged, so long as Senator Inouye is chairman of the committee at least, to cap earmarks for non-project based account at 1 percent of discretionary spending for the year. Press Release, U.S. Senate Comm. on Appropriations, Senate Appropriations Committee Policy on Earmarks (Mar. 11, 2010). The committee requires that earmarks be submitted thirty days prior to mark-up, “ensuring adequate time for all requests to be reviewed by the public.” *Id.* The House Appropriations Committee also has put in place new rules on earmarks in appropriation bills. U.S. HOUSE OF REPRESENTATIVES COMM. ON APPROPRIATIONS, FACT SHEET: RECENT HISTORY OF EARMARK REFORM (2010), available at

allow future administrations to pacify potential war critics by supporting their special-interest amendments to the emergency package.²⁰⁶ The normalization of emergency funding, then, not only misleads the public and eliminates the participation of key committees; it can even deflect the attention of Congress entirely from the question of war and peace to the pork-barrel priorities of individual members. A positive vote for continuing the next war may merely signify the successful conclusion of a feeding frenzy, supported by the executive branch.

In elaborating this bill of particulars against emergency funding, we are building on many incisive criticisms offered by congressional insiders over the years.²⁰⁷ Our point here is holistic: while each criticism is significant, together they add up to a further shift in the institutional balance between the president and Congress.

We have come a long way from the Founding Era, when the president was obliged to gain fine-grained funding from Congress before he could engage in significant military action. Nowadays, Congress is playing

http://appropriations.house.gov/images/stories/pdf/2010_Earmark_Reforms_Fact_Sheet-3.10.2010.pdf. None of these rules apply to emergency funding, however. This has led to more abundant earmarking in emergency funding bills than in regular appropriations bills.

206. Recent supplemental appropriations have included, for example, a half-million dollars to fund a program to study wind energy in the Dakotas and \$55 million for a wastewater treatment plant in Mississippi. William Matthews, *Shadow Budget: Why Congress complains about, but won't end, supplemental appropriations*, ARMED FORCES J., Apr. 2006, at 10, available at <http://www.afj.com/2006/04/1813765/>.

207. Senator John McCain, for example, noted that emergency supplemental funding now "includes a number of provisions that do not constitute 'emergency spending,'" and should be limited to "fund our country's urgent and unanticipated needs." 151 CONG. REC. 6848 (2005). McCain pointed out that the 2005 "Emergency Supplemental Appropriations Act" contained many items that are not true "emergency spending." For example, this bill contained "\$2.4 million to the Forest Service to repair damage to national forest lands" and "\$23 million to the Capitol Police for the construction of an 'offsite delivery facility.'" *Id.* at 6849. Democratic Senator Jack Reed made a similar point, arguing that the army is using supplemental appropriations to cover "steady state" costs such as fixing "war-damaged equipment." Matthews, *supra* note 206. According to Reed, "'We know these costs are already accrued. . . . We know we can't avoid fixing this equipment. . . . It begs the question, why don't we put this, these numbers at least, into the budget?'" *Id.* Representative Joel Hefley asked and answered essentially the same question: "'Couldn't most of this be anticipated and shouldn't most of this be in the normal budget? . . . The only reason it makes a difference, I suppose, is we scrutinize the regular budget much more closely than we do the supplemental.'" Amy Klamper, *Subcommittee voices dismay over Defense supplemental spending*, CONGRESS DAILY, Mar. 4, 2005, available at <http://www.govexec.com/dailyfed/0305/030405cdam2.htm>. Representative Hefley, who chaired the House Armed Services Readiness Subcommittee in 2005, "noted that the Army included \$5 billion for so-called 'modularity' equipment in the president's \$82 billion fiscal 2005 supplemental spending request, including \$216 million in military construction money to support the Army's transformation initiative.'" *Id.* Both expenses, he suggested, did not belong in a supplemental emergency bill. *Id.* The Congressional Research Service agrees:

DOD's recent [emergency supplemental] requests have also gone beyond traditional definition of immediate "incremental costs," including some programs with more indirect or longer-term connections to ongoing war operations such as equipping standardized units in the Army and Marine Corps, upgrading equipment as part of reset, buying pre-positioned equipment, and increasing the size of the Army and Marine Corps.

Hearing on the Growing Cost of the Iraq War Before the H. Comm. on the Budget, 110th Cong. (2007) (statement of Amy Belasco, Specialist, U.S., Def. Policy and Budget, Congressional Research Serv.).

catch-up. The president can generally start a war with already appropriated funds, and then start bludgeoning Congress with an endless series of “emergency” appropriations.

These steamrolling tactics will not always work. Congress has occasionally stood up to the president in the relatively recent past, and it may well rise to the occasion in the future. Perhaps some future act of resistance will involve the outright rejection of an emergency funding request. But congressional resistance will likely take a more cautious form. Under this scenario, Congress would reluctantly pass the president’s emergency request, and then pass another bill cutting off funds at some future date—say a year or so—to allow the troops to get out of harm’s way. While this maneuver would effectively insulate Congress from charges that it is “endangering the troops in the field,” it comes at a heavy institutional price: the funding cut-off would require two-thirds support in both houses to overcome a presidential veto.

Our aim, in short, has been to place the ongoing normalization of “emergency” budgeting into larger constitutional perspective. While it only required the majority vote of a single house to deny the president the money he needed to start a war during the Founding period, it now takes two-thirds of both houses to cut off a war even after it has begun.

The pendulum has swung a long way, but Congress has the power to push it back—if not to the Founding starting-point, to a more balanced constitutional equilibrium.

IV. NEW RULES FOR LIMITED WAR

A distinctive pattern emerges from the modern experience. The constitutional legitimacy of funding cut-offs was ringingly reaffirmed in the aftermath of Iran-Contra. But the real-world deployment of the power of the purse has been a different matter. Congress has not been entirely passive.²⁰⁸ As Part III showed, it has repeatedly used the purse to discipline presidential unilateralism. But the deployment of this weapon has grown more erratic and unpredictable—largely because the appropriations process is increasingly stacked in the president’s favor. This dynamic has only accelerated with the normalization of “emergency” appropriations over the past decade.

If Congress is to reclaim its authority over limited war, it must transform the erratic use of funding cut-offs into a predictable system that will deter future presidents from repeating the bait-and-switch techniques perfected during the Iraq war. This is the aim of our proposed “Rules for Limited War.” They allow the House and Senate to make a credible commitment to cut off funds for wars that exceed congressional limits—and thereby deter the president from unilateral acts of escalation. Even better, the rules will

208. Recent work in political science supports a similar view. See WILLIAM G. HOWELL & JON C. PEVEHOUSE, *WHILE DANGERS GATHER* (2007) and KRINER, *supra* note 115, which also suggests that the Iraqi experience may well represent a decisive turning point in presidential–Congressional relations. But note that Howell and Pevehouse published their book before the latest episode of bait-and-switch in Iraq displayed the escalating power of the presidency in its dealings with Congress.

typically have this deterrent effect without the need for Congress to pull the cut-off switch—saving the nation from the melodrama precipitated by the actual termination of funds.

The new rules will work proactively through a three-stage process. The rules first require all new authorizations for the use of force to state clearly whether they contemplate an open-ended conflict or a limited war. In the absence of a clear statement, the rules will create a presumption for limited war; they will presume a two-year sunset unless the House or Senate specifies a different time period. Second, the rules permit the House or Senate to reauthorize the war for another period before the expiration date arrives. If the two houses fail to take affirmative action, the third and final stage kicks into operation: the rules prohibit all further appropriations for the conflict once the time limit has elapsed, with the exception of a one-year appropriation of funds for the orderly withdrawal of troops and other forces from the battle zone. During this withdrawal period, the president remains free to try to convince Congress and the public that a more extended war is in the national interest. But there is only one way for him to press onward: he must gain the explicit consent of both houses to another military authorization, which once again will be governed by a two-year sunset unless Congress provides otherwise. In the meantime, withdrawal must proceed in a responsible fashion.

Congress has ample authority to take these steps. The Constitution gives each house the power to “determine the Rules of its Proceedings.”²⁰⁹ Because the Constitution grants the House and Senate the sole authority to make their rules, each chamber can act without the threat of a presidential veto. And because the two chambers each determine their rules independently, either the Senate or the House can take the lead. If one chamber reasserts its constitutional power, the question of limited war will be placed on the table—though there are added deterrence effects when both join together. Our proposal thus represents the most politically feasible way for Congress to reassert effective power.

Passing the new rules will not be easy. It will require a sober determination by members of the House or Senate to learn the lessons of the recent past and assure themselves, and the American people, that they will prevent future presidents from transforming limited conflicts into unlimited wars. But at the very least, our proposal makes it clear that it is up to the House and Senate, and nobody else, to reassert their centrality in an age of limited wars. In this case at least, Harry Truman was wrong: the buck does not stop in the Oval Office. It stops with the House and Senate.

A. The Proposal: An Elaboration

The modern budgetary system breaks the funding process into two stages.²¹⁰ Congress first enacts authorizing legislation, which provides the

209. U.S. CONST. art. I, § 5, cl. 2.

210. This account of the relationship between the appropriations and authorization processes draws on BILL HENIFF JR., CONG. RESEARCH SERV., RS 20371, OVERVIEW OF THE

legal basis for the program. It then appropriates money on a regular basis.²¹¹ Most federal programs—and all decisions to go to war—must pass through the two hoops of authorization and appropriation before a dollar is spent.²¹² The rules bar “unauthorized appropriations”²¹³—that is, appropriations for

AUTHORIZATION-APPROPRIATIONS PROCESS 1–2 (2006), available at <http://www.rules.house.gov/archives/rs20371.pdf> and SCHICK, *supra* note 133, at 191–274. According to Schick, the two-staged process was adapted from the British parliament and has been part of the lawmaking process from the country’s founding forward. For more on the modern authorization and appropriation process, see SANDY STREETER, CONG. RESEARCH SERV., 97-684, THE CONGRESSIONAL APPROPRIATIONS PROCESS: AN INTRODUCTION 1 (2008), available at http://assets.opencrs.com/rpts/97-684_20081202.pdf (“Congress has also established an authorization-appropriation process that provides for two separate types of measures—authorization bills and appropriation bills. These measures perform different functions and are to be considered in sequence. First, authorization bills establish, continue, or modify agencies or programs. Second, appropriations measures may provide funding for the agencies and programs previously authorized.”).

211. Congress is not required to appropriate funds for this purpose. It may choose not to appropriate funds for an authorized program. Some would add a third stage to these two—the budget process. During the budget process, allocations are made across different programs and agencies. See generally JAMES V. SATURNO, CONG. RESEARCH SERV., THE CONGRESSIONAL BUDGET PROCESS: A BRIEF OVERVIEW 3–4 (2004), available at <http://fpc.state.gov/documents/organization/34649.pdf>. Under section 302(c) of the Budget Act, no appropriations bill can be considered until subcommittee allocations have been made in the budgeting process. See BILL HENIFF JR., CONG. RESEARCH SERV., 98-815, BUDGET RESOLUTION ENFORCEMENT 2 (2006), available at <http://www.rules.house.gov/archives/98-815.pdf>. Moreover, under section 302(f), no appropriation bill may be considered that exceeds its subcommittee allocation. The emergency supplemental appropriations that have been used thus far to fund the Iraq war have been passed “off budget” and therefore have avoided this budgeting stage of the process. President Obama has announced an intention to put future war funding into the regular budgeting process. In announcing President Obama’s request for ongoing funding, White House Press Secretary Robert Gibbs acknowledged that President Obama had been critical of President Bush’s use of supplemental appropriations to pay for the Iraq war, promising, “This will be the last supplemental for Iraq and Afghanistan.” Mary Beth Sheridan & Scott Wilson, *More Funds Sought for Iraq and Afghanistan*, WASH. POST, Apr. 10, 2009, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/09/AR2009040904299.html>.

212. The House and Senate rules, together with the Congressional Budget Act of 1974, create the framework for congressional consideration of budget and fiscal policy. The line between the authorization and appropriation stages of the legislative process is governed by House and Senate rules that were first created in 1837 (for the House) and 1850 (for the Senate) to fill the gap left by the Constitution. There are two central reasons that the House and Senate both adopted rules in the early 1800s separating the authorization and appropriation processes. The first was captured by John Quincy Adams’s exhortation in 1835 that appropriations bills “be stripped of everything but the appropriations” to avoid the delays that had begun to plague appropriation bills due to disagreements over the legislative matters contained within them. CHARLES W. JOHNSON, PARLIAMENTARIAN OF THE HOUSE, 108TH CONG., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 97 (2003), available at <http://www.gpo.gov/fdsys/pkg/GPO-HPRACTICE-108/pdf/GPO-HPRACTICE-108-5.pdf> (citing 4 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 3578 (1907)). A second reason for the restriction is the mirror image of the first: in addition to slowing the appropriations process, the urgent need to fund ongoing agencies might encourage Congress to enact poorly considered legislation in appropriations bills. SCHICK, *supra* note 133, at 193–94 (“Nineteenth-century debates in the House and Senate indicate two reasons for separating authorizations and appropriations. One was a concern that conflict over legislation would impede the flow of funds to federal agencies. The other was that the urgency of funding ongoing agencies would impel Congress to enact ill-considered legislation in appropriations bills.”).

213. SCHICK, *supra* note 133, at 191. House Rule XXI provides that “[a]n appropriation may not be reported in a general appropriation bill . . . for an expenditure not previously authorized by law.” H. COMM. ON RULES, RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED ELEVENTH CONGRESS 34 (2010), available at <http://www.rules.house.gov/ruleprec/111th.pdf>. It also provides that “[a] provision changing existing law may not be reported in a general appropriation bill”

any purpose that has not already been authorized by Congress. Our proposal builds on this principle and provides a system for enforcing it.

The new rules require Congress to define the duration of the military engagement permitted by any authorization of the use of military force. The choice of expiration date is entirely up to the House and Senate—it could be a year, or two, or ten. Or Congress can authorize an open-ended commitment, so long as it does so explicitly. If the authorization is silent, a two-year period will be presumed.

The two-year proviso operates as a default rule of a kind familiar in the law of contracts—providing a clear reversion point unless the parties make their contrary intentions clear.²¹⁴ It echoes the express terms of Article I, which forbids Congress from “support[ing] Armies” with any “Appropriation of money . . . for a longer Term than two Years.”²¹⁵ Our selection of a two-year default is thus motivated by a Founding principle: other things equal, it is appropriate for Congress to reassess the nation’s fundamental military commitments after each biennial election.

But other things may not be equal. While it made sense to make this principle into a binding rule in 1787, we are living in a different world: America is a dominant world power, not a minor player on the European fringe, and Congress may have sound geopolitical reasons for specifying a longer (or shorter) term for a limited war. The default rule provides the needed flexibility without abandoning the more fundamental point: most wars are fought for limited objectives that require reappraisal from time to time. Given this fact, the new rules force Congress to frame the terms of its initial war commitment self-consciously after an open and focused public debate. This initial termination point can, of course, be extended if Congress passes a new reauthorization before the period has expired—and as before,

Id. Senate Rule XVI provides that the “Committee on Appropriations shall not report an appropriation bill . . . proposing new or general legislation.” S. COMM. ON RULES & ADMIN., APPROPRIATIONS AND AMENDMENTS TO GENERAL APPROPRIATIONS BILLS (2010), available at <http://rules.senate.gov/public/index.cfm?p=RuleXVI>. It also bars appropriations that are not “made to carry out the provisions of an existing law. . . .” *Id.*

214. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87–91 (1989) (arguing for a set of default rules for contract interpretation that would incentivize transactors to reveal their preferences).

215. U.S. CONST. art. I, § 8, cl. 12. The two-year rule is rooted in a deep Anglo American suspicion of standing armies. Once such forces were established, they would make it too easy for politicians to practice tyranny and launch unnecessary wars. But despite these anxieties, the convention also recognized that a standing army would sometimes be critical for national security. See generally RICHARD KOHN, *THE CONSTITUTION AND NATIONAL SECURITY: THE INTENT OF THE FRAMERS, IN THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 61 (Richard Kohn ed. 1992). So it split the difference, and authorized a standing army so long as each new Congress agreed that funding was really necessary. See AKHIL AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 115–16 (2005). Two centuries onward, Americans have learned to live with standing armies, and this modern consensus has shaped our understanding of the living constitution. Nobody looks at the Constitution’s sunset clause as a source of principles that might inspire the ongoing renewal of our tradition. Indeed, most constitutional experts have not given the two-year limit a moment’s thought, consigning it to the junk heap of history. Professor Amar’s (brief) discussion is a notable exception.

this new bill will be subject to a two-year default unless it specifies some other term explicitly.

To back up these time limits, the House and Senate will require another set of rules. These enforcement provisions prohibit all further war appropriations, except for a one-year fund for winding down the mission. The ban would include all appropriations that extend the engagement beyond the withdrawal period—whether in a regular or “emergency” appropriations bill. If the president wants to continue the war, he can do so only by obtaining a new authorization—in which Congress can consider the merits of further fighting without the emotional blackmail involved in an endless series of “emergency” funding measures.

Our basic framework requires fine tuning to take into account the different procedural traditions of the House and the Senate. But before attending to these important institutional details, we step back and consider the big picture. What will the proposal actually accomplish? How does it affect presidential and congressional incentives in planning and controlling the course of future conflicts?

B. The Proposal in Action: An Assessment

We will analyze our proposal at the three different stages of its operation. The Rules for Limited War will first change incentives for the president and Congress during the run-up to a substantial conflict—call this Period One. We then turn to Period Two, assessing the operation of the new balance of power during the period of authorized combat. Period Three confronts the rules’ operation during the one-year period of withdrawal after the limited-war authorization has expired. The institutional dynamics during each of these stages create distinctive strategic incentives for the president and Congress. Our period-by-period analysis aims for a balanced assessment of the risks and advantages promised by the new regime.

But it is also important to move beyond the stage-by-stage analysis to gain a more dynamic view of the entire process: the prospect of a decisive fund cut-off at Period Three profoundly shapes the likely responses of the president and Congress at Periods One and Two in ways that redeem fundamental constitutional values. At present, the system encourages the president to play the game of bait-and-switch—selling the war as highly limited at Period One, confident that he will be able to avoid serious sanctions if he expands the war at Periods Two and Three. By contrast, the new rules create a credible threat of a funding cut-off at Period Three if the president extends the war beyond its original limits without first seeking Congress’s consent. That threat creates incentives for the president to engage in a more honest and open dialogue with Congress at Periods One and Two.

We emphasize throughout the overriding importance of a credible commitment by Congress to cut off funds at Period Three if it hopes to reassume its rightful power and responsibility at earlier stages in the war-making process. This frames the challenge for the concluding section—which provides a more fine-grained discussion of the distinctive traditions of the

House and Senate, and the different ways they permit each chamber to commit itself to the new rules.

1. *Period One: Authorizing the Conflict*

This is hardly the first time that Congress has tried to reclaim its war-making powers. The War Powers Resolution, passed over President Nixon's veto in 1973, provides the most notable modern precedent. Under the resolution, Congress grants the president unilateral authority to use military force for sixty days; but if he fails to gain Congress's authorization during this period, the resolution requires him to withdraw forces within the next thirty days. This resolution has generated an enormous literature over the past forty years, dominating contemporary reflections on the congressional role in modern war making.²¹⁶

As a consequence, it is important to emphasize that we are not dealing with the same old problem. The War Powers Resolution sought to mark out the boundary between momentary military incursions and significant combat operations—giving the president unilateral power in momentary incursions, and requiring him to go to Congress for anything more ambitious. In contrast, we are trying to distinguish between the varieties of significant engagement—between limited wars like Iraq and totalizing conflicts like World War II.

This means that our analysis does not depend on the willingness of future presidents to obey the strict deadlines set out by the War Powers Resolution. Suppose, for example, the president ignores the sixty-day deadline and refuses to ask Congress's permission as he takes an extra fifty days to wrap up a quick victory in some Grenada-style incursion. Our new framework would not come into play. Rather, we are centrally concerned with more ambitious undertakings—Iraq, not Grenada—which nevertheless fall far short of the total wars of the twentieth century.²¹⁷

In our paradigm case, the president recognizes that the war may well last for a couple of years—or even longer—and that he may not triumph before experiencing serious setbacks in the field. In such cases, we will likely not need the War Powers Resolution to force the president to get Congress's approval at an early stage in the conflict. He will have an overwhelming political interest to seek that approval.

Limited war is a risky business. If the president takes sole responsibility for the conflict, he can expect Congress to start attacking him at the first

216. See *supra* note 9.

217. Of increasing importance—but not a focus of this Article—are questions about when the president must seek congressional authorization for limited military engagements and when he need not. The so-called “war on terror” and the growing use of covert military operations by the administration authorized under secret executive orders are of questionable constitutional legitimacy. The use of unmanned drones to drop munitions on suspected terrorists and their supporters in Yemen, for example, has not been publicly approved by Congress—rather it has likely been authorized by executive order. See Scott Shane et. al, *Secret Assault on Terrorism Widens on Two Continents*, N.Y. TIMES, Aug. 14, 2010, at A1.

sign of serious difficulty. But if Congress is on board early, the president has bought some vital political insurance: once Congress takes ownership of the conflict, it cannot easily abandon the president at the first signs of serious military resistance. It will take a lot longer before the House and Senate leadership can extricate themselves from their share of overall responsibility. From the president's point of view, congressional authorization of a significant conflict represents a crucial form of "political insurance" against risk.

This point cashes itself out in dollars and cents. Since modern military budgets give the president a lot of discretion in spending funds, he may well finance a short-term operation without seeking additional appropriations from Congress. But he cannot fund longer-term engagements like Iraq or Afghanistan merely by shifting money from one budgetary category to another. Once Congress provides an initial authorization, the president may confidently rely on a steady stream of "emergency" appropriations to bludgeon the House and Senate into providing ongoing support. But if he defies Congress by acting unilaterally from the very beginning, he will be on the political defensive if the war goes badly. With public opinion turning against the conflict, there is a serious risk that Congress will indeed take a fund cut-off seriously—just as it has on similar occasions in the past.²¹⁸ While Congress's use of its ultimate weapon has been erratic, it would be foolish for the president to discount the risk to zero.

Given the political dangers of unilateral action, the president will continue to go to Congress for an early authorization for significant conflicts like Iraq and Afghanistan. Our new framework limits the amount of political insurance he can buy with the initial congressional authorization, since it makes it harder for him to transform it into an open-ended commitment. Nevertheless, it does allow him to obtain a two-year insurance policy even if he cannot secure an explicit grant of a more extended term. And two years is a lot better than going it alone and reaping a political whirlwind at the first misadventure.

But the new rules will not only encourage the president to go to Congress for the initial authorization. Once he gets there, he will engage Congress and the nation in a more candid conversation over the likely dimensions of the anticipated military commitment. As our Iraq case study suggests, the present setup makes it all-too-easy for the president to conduct a bait-and-switch operation. In contrast, the new rules encourage a different dialogue. It will no longer be in the president's interest to minimize risks. He will avoid too dark an account, since this might lead Congress to vote down the authorization. But he will also avoid an overly rosy view—for this will lead Congress to authorize a short time period and increase the risk that he will be forced to return for a reauthorization of the limited war at an unpropitious moment. If he wants to buy more political insurance, he must ask Congress and the country to prepare themselves for a three- or four-year

218. Cf. *supra* notes 190–207 and accompanying text.

engagement and explain why this lengthy commitment is worth its likely cost in blood and treasure.

The prospect of a more realistic dialogue with Congress will also have positive effects on executive deliberations over whether to go to war in the first place. Top policymakers will be more open to expert assessments of risks if they believe that they will have to return to Congress when its initial authorization proves too short to finish the job. And if bottom-up reports are very pessimistic, this might prompt the president to ask himself whether the limited war is worth fighting in the first place.

This pressure toward more candid exchange—within the executive branch, and between the president and Congress and the American people—is one of the most promising features of the new constitutional regime. Call it “deliberation-forcing.” We will trace its prospects as the limited war moves into its later phases.

2. Period Two: The Period of Authorization

Our proposal builds on the lessons of the recent past. In dealing with Iraq, Congress was already trying to build limitations into its war authorization. Like most past efforts, the 2002 resolution pursued a qualitative approach. It specified at Period One the triggering events that would terminate the conflict at Period Two. It did so by authorizing the war to continue until the “threat posed by Iraq” was eliminated or all “relevant United Nations Security Council resolutions regarding Iraq” had expired.

This strategy has appeal, since it invites Congress to frame limited-war aims in common sense terms. Nevertheless, our case study shows its dangers: qualitative formulations permit disingenuous reinterpretation by an administration bent on escalating the war beyond initial understandings. The threat posed *by* Iraq was eliminated once the Hussein government was displaced by authorities friendly to the United States. But this did not stop the administration from claiming that the clause also justified war against any and all threats *in* Iraq, even those arising after the pro-American authorities had assumed control of the country.²¹⁹

This presidentialist style of aggressive reinterpretation is not the unique hallmark of the Bush Administration. It is a characteristic tendency of executive branch lawyering during the modern period.²²⁰ There is every reason to expect the president’s lawyers to adopt similarly creative interpretive approaches to future qualitative limitations. The more legal fog they generate, the easier it will be to engage in bait-and-switch, with the president relying

219. At a congressional hearing, Ambassador David Satterfield appeared for the executive branch and argued that “[t]his administration has defined and stated quite clearly what we believe to be threats to United States national interests, the interests of our friends and allies in the region and around the world by elements present in Iraq and indeed by the situation in Iraq as a whole.” *Declaration and Principles: Future U.S. Commitments to Iraq*, *supra* note 93, at 24 (statement of David Satterfield, Senior Advisor & Coordinator for Iraq, Dep’t of State).

220. See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–118 (2010).

on their legal analysis to deny that he is escalating the war far beyond the express terms of the initial war authorization.

This is the reason why the new rules rely on a quantitative approach to limited war. Our proposed two-year default rule authorizes the president to make war for 730 days. Even the most creative lawyers will have a hard time wriggling their way out of the default time limit, or any other time period that Congress selects to replace it. Although qualitative restrictions on war aims can play a useful supplementary role, only quantitative restrictions have the hard-edged clarity essential for effectively constraining presidential bait-and-switch—a central design objective for the system as a whole.

The bright-line character of our approach generates a predictable criticism: while quantitative limitations may effectively restrict the president, don't they also encourage the enemy? Isn't Congress telling our enemies that they can beat us so long as they continue fighting for the number of years specified in its limited-war authorization?

The short answer is "no." The sunset clause is not a surrender date but an exercise in deliberation-forcing, requiring the president to return to Congress for another round of democratic decision on the proper limits of limited war. In response to a request for reauthorization, Congress is entirely free to extend the war for another term. Indeed, the result of collective deliberation may well demonstrate to the enemy the enduring character of America's commitment—and in a fashion that they will find more convincing than the presidential evasions characteristic of bait-and-switch operations.

Even if this point is conceded, our not-so-hypothetical critic may come up with another, more nuanced, complaint: she may insist that Congress's selection of a particular expiration date—say, January 1, 2016—will serve as a reference point for enemy strategists, encouraging them to plan a spectacular series of attacks aimed to demoralize public opinion on New Year's Day. Why hand this strategic opportunity to the enemy on a silver platter?

Once again, this critique mistakes the nature of our proposal: the president is perfectly free to submit his request for reauthorization long before the expiration date, and thereby destabilize the enemy's military plans. The new rules establish a deadline, not a target. And there is every reason to expect the president to act well before the deadline. He is perfectly aware that a last-minute request can be undermined by an unanticipated enemy offensive. This gives him a strong incentive to choose an earlier moment when the war is going relatively well, since this will make it much easier to gain a substantial war-extension from Congress. If the president holds off his request to the final weeks, this strategic move itself suggests his suspicion that the American people no longer support a sustained war effort.

The objection also ignores the impact that other deadlines have on the politics of war. Most obviously, the American system of fixed elections alerts all enemies of the great importance of every other November in redefining war policies. In contrast to the new rules, the U.S. election schedule *does* provide a target date for enemy strategists—if they can demoralize voters just before the November polling date, this may well have a serious

impact. And yet the rigid electoral calendar has not seriously impaired past war efforts—provided that the American people remained convinced of their necessity. All things considered, then, the new rules will not provide enemies with a significant strategic advantage beyond those already afforded by our fixed election calendar.

At the same time, our proposal will provide a much-needed boost to Congress in its ongoing dealings with the president. The proposal is therefore power-enhancing. To illustrate, consider a brief hypothetical variation on our Iraq case study. Begin by recalling some basic facts: as popular support for the war waned during 2008,²²¹ President Bush and Prime Minister Maliki finally agreed to extend the war for three more years.²²² During their lengthy negotiations, President Bush completely cut Congress out of the loop, even refusing to provide leading members with copies of the negotiating draft documents.²²³ Worse yet, he utterly ignored the demands of then-Senators Obama and Clinton to submit the agreement to Congress for its approval.²²⁴

Under the new rules, no president could afford to treat Congress with such contempt. After all, he will be obliged to gain reauthorization within the foreseeable future, and it would be foolish to antagonize the congressional leadership by locking them out of key negotiations. It makes much more strategic sense to co-opt key senators and representatives by keeping them abreast of the negotiations, and then to submit the president's agreement for congressional approval. Since he will no longer be in a position to delay congressional reckoning forever, the president is far more likely to use the new agreement to launch a broader public campaign for a war extension:

My fellow Americans, I am proud to report that, with the cooperation of congressional leaders, I have worked out a three-year plan for withdrawing American troops from country X. I now call upon Congress to approve this agreement, and to reauthorize the war for the three year period we need to bring the conflict responsibly to a close.

Maybe we are too optimistic. Suppose that the future president takes President Bush as his role model, and insists on cutting Congress out of any role during his negotiations with country X. Nevertheless, the new rules will check his unilateralist ambitions. X's leaders will soon learn of the Rules for Limited War from their own advisors and react accordingly:

Whatever the American president may tell you, he will have to return to Congress for reauthorization within so many months. So he really cannot

221. Support for the war had fallen from a high of 72 percent in March of 2003 to a low of 38 percent in February 2008. See Pew Research Ctr. for the People and the Press, *Public Attitudes Toward the War in Iraq: 2003–2008*, PEW RES. CENTER (Mar. 19, 2008), <http://pewresearch.org/pubs/770/iraq-war-five-year-anniversary>.

222. See Agreement Between the United States of America and the Republic of Iraq On the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during their Temporary Presence in Iraq, *supra* note 90.

223. See Ackerman & Hathaway, *Bush's Final Illusion*, *supra* note 82.

224. See *supra* Section II.C.

commit his country to anything beyond that period. Worse yet, if you sign on to his agreement, you will be alienating potential supporters in Congress by backing the president's efforts to cut the American legislature out of the system. Does this really make sense?

To sum up: The operation of the rules during Period Two generates negligible risks but promises two very large constitutional gains: enhancing the power of Congress and forcing greater deliberation. These two features are analytically independent of one another. Presidents will tend to collaborate with Congress even if the reauthorization debate turns out to be a shouting match. And in the unlikely event that the president cuts the House and Senate out of key decisions, Congress may still succeed in catalyzing a broad-ranging public debate over the war.

Nevertheless, power-enhancing and deliberation-forcing will typically reinforce one another. The president's need to win future roll-call votes will induce him to reach out to congressional leaders beforehand. And once members of Congress have greater access and influence, they will be in a better position to lead a more informed debate on the presidential requests for reauthorization.

There is no need to exaggerate. We do not suppose that the new rules will make Congress the president's equal in determining the future of limited war. For starters, the president will try to time his reauthorization request for a propitious moment, when his case for continuing the war will resonate most persuasively with the general public. And he will have lots of bargaining advantages in the wheeling and dealing that invariably accompanies a crucial congressional vote—reminding fence-sitters of past presidential favors and promising them future benefits if they give him their support at a critical turning point.

We do not aim to oust the president from a central position in defining war objectives. The new rules simply respond to escalating institutional transformations that threaten to push Congress onto the periphery. Our overriding aim is reestablish Congress's traditional constitutional role by restoring its effective use of the power of the purse. If the new regime is successful, it will simply require the president to regularly renew democratic support for his war policies in an age of limited war. If, despite his strategic advantages, he can't gain congressional support, this is a decisive sign that the war has lost the support required in a constitutional democracy.

3. Period Three: The Period of Withdrawal

Now comes the hard part: how to force withdrawal if and when the president does lose the confidence of Congress and the nation?

Our aim is to preempt the bait-and-switch scenario on display in Iraq. By funding ongoing combat through emergency money bills, Bush successfully redefined the key political question: if senators and representatives voted against "emergency" funds, they would be abandoning the troops in

the field without “bullets and body armor.”²²⁵ This charge proved politically overwhelming and Congress predictably authorized the “emergency” funds. At that point, Congress’s only option was to enact a measure that would cut off funds over a longer time period. But the White House could be counted on to veto this measure and return with yet another “emergency” appropriation when the money was beginning to run out once again.

The new rules cut this cycle short by authorizing a one-year fund for a responsible withdrawal from the battlefield, and barring all further appropriations—emergency or otherwise. During the withdrawal period, the president remains free to try to convince Congress and the public that a more extended war is in the national interest. This means that as representatives and senators confront the critical reauthorization votes during Period Two, they can assure their constituents that the troops will have ample resources to protect themselves as the war winds down. Instead of fending off charges that they are endangering American troops, they can focus their attention, and that of the general public, on the basic question: under what conditions, if any, does a continuing commitment to the conflict make sense?

That’s what *you* think, we can hear skeptics respond. Can’t the president just come up with a new strategy to defeat these new rules?

After losing his reauthorization vote at Period Two, suppose the president misuses the withdrawal appropriation granted by Congress. Suppose he refuses to develop a responsible strategy of disengagement and instead makes a desperate effort to redeem his war by ordering a concerted attack. As the money runs out, he returns to Congress with a request for yet another emergency appropriation:

I know the rules forbid it, but there is something more important involved here: the lives of America’s fighting men and women. So it’s up to you, my good representatives and senators, to figure out some way to suspend the new rules and send more money to provide America’s finest with the support they need and deserve.

In short, say the skeptics, our new system merely defers the emergency appropriations strategy, but does not remove its sting.

A first response: Our skeptical critics are embracing an indefensible form of cynicism in constructing their damning hypothetical. They overlook the heavy price in political legitimacy that the president will pay in playing such a desperate endgame strategy. As he orders U.S. forces onto the offensive in country X, his act of defiance of Congress will generate a rippling series of political difficulties in the United States. His blatant breach of the law and its unmistakable mandate to remove troops within a year will make it much easier for opponents to mobilize the public against him—and Congress will be the beneficiary of the resulting decline in his popular standing.

Even in these highly partisan times, members of Congress may well be willing to reach across the aisle in defense of the constitutional prerogatives

225. See *supra* note 126.

of the House and Senate against the president's frontal assault. The prospect of such a bipartisan coalition may well be enough to give the president pause: once Republicans and Democrats begin a joint action campaign against him, the bipartisan dynamic can lead the coalition to attack other key items on his agenda—imposing political costs along a broader front.

We have also structured our initiative to maximize the political dangers of presidential defiance. To illustrate, recall that the proposed rules for Period Three do not preclude the president from launching an aggressive military action under any and all conditions. They simply require withdrawal so long as he cannot convince Congress to reauthorize the use of force. If the president misappropriates the withdrawal money instead of seeking a new authorization, there can only be one reason for taking the low road: he knows that he could never win a vote in support of further escalation.

This means that the president's opponents will not appear to be defeatist or unappealingly technocratic when they condemn him for misappropriating public funds in violation of the Constitution. They can portray his defiance of Congress as a profoundly antidemocratic, as well as unconstitutional, act. This message can only serve to mobilize more of the public in defense of Congress in its face-off with president.

If the congressional coalition does begin to gain the upper hand, the president is always free to engage in a strategic retreat. To limit political damage, he may choose to reverse course and formally submit a reauthorization request to Congress. But if he takes this turn, he will be making his request under the worst possible political conditions: his about-face will be viewed as a confession of political weakness, encouraging his opponents to consolidate their victory by repudiating the president's last-minute reauthorization request in a formal roll-call vote.

These risks should be enough to deter almost all presidents from going down the path of defiance in the first place. While we place most of our reliance on these political dynamics, we also propose a series of formal measures to diminish the risk of defiance further. In considering the president's final appropriation request, Congress should require him to provide a broad withdrawal plan and then insist on receiving quarterly compliance reports.²²⁶ While this will serve to keep Congress informed, it will also focus the attention of the president's military advisers on formulating a responsible withdrawal strategy, making it harder to divert their energies into the simultaneous preparation of an aggressive campaign.

The new rules should also take care to define the meaning of "withdrawal" with some care. Once again, we urge the elaboration of quantitative criteria. For example, after the year is over, the Pentagon should be barred from using any funds to support air or naval attacks within the (former) combat zone. Zero means zero. Because air and naval support is crucial in modern land warfare, this quantitative control will have a big impact.

226. Of course, much of the planning, and the quarterly reports, should be confidential to prevent their exploitation by the enemy in the field.

The rules should take a similar approach to limiting the number of ground troops in the battle zone at the end of the withdrawal period. Otherwise congressional control can be defeated by creative relabeling. At the end of the year, tens of thousands of combat troops may remain on the ground. But the president may claim compliance by characterizing them as simply engaged in “military training” of allied forces. To counter this predictable gambit, the rules should ban further budgetary expenditures for any and all military personnel that exceed a minimal number. If the president wants to engage in a more ambitious post-war military engagement, he must go back to Congress and gain explicit approval.

We invite our readers to add to this list, but with realistic expectations. No set of institutional and formal mechanisms can guarantee perfect compliance. All they can do is raise the costs of evasion to a very high level. A sufficiently willful president may press forward and misuse the withdrawal fund to escalate the war, and then try to blackmail Congress when the money runs out. Impeachment is the only remedy for lawlessness on this grand scale. We will be content if the new rules make the cost of defiance prohibitive enough to deter defiance that does not amount to blatant lawlessness.

4. Political Dynamics over Time

As long as the costs of defiance seem very high at Period Three, they will have a profound impact on the balance of power between the president and Congress long before they reach the withdrawal phase of the operation. The endgame will loom large as early as Period One. Since the president has reason to believe that a bait-and-switch will be very costly later on, he will have strong incentives to be more realistic about the war’s potential costs at Period One—as we have seen, greater candor at this stage may allow him to persuade Congress to extend the term of initial authorization beyond the two-year default rule and thereby buy more political insurance at the outset of the venture. Similarly, the high costs of later defiance will encourage him to cooperate with Congress during Period Two, soliciting its advice in negotiations with countries in the battle zone and seeking its approval for any important agreements he reaches with the affected governments. In short, the costs of defiance play a central role in generating the deliberation-forcing and power-enhancing dynamics that provide the great constitutional advantages of the reform.

A dynamic view also offers a glimpse of yet another positive prospect. During Periods One and Two, a host of senior advisors will have counseled the president to buy political insurance by cooperating with Congress, precisely to avoid the showdown threatened by the new rules at Period Three. Once the phase for withdrawal finally arrives, it will be awkward, to say the least, for all of these advisors to change their tune and urge defiance once the war has lost the support of Congress and the American people. We suggest, in short, that there is a potential “virtuous cycle” at work here: the president’s advisors, having warned about Period Three at Periods One and Two, advise compliance when the moment of truth finally arises; this, in

turn, will create a precedent that will render the rules even more credible the next time around. Over time, the constitutional role of Congress will be ever more secure in the conduct of limited war in the twenty-first century.

In contrast, Congress will be condemning itself to irrelevancy if it allows the escalating transformation of the appropriations process to proceed apace. While future presidential escalations may provoke widespread popular opposition, it will become increasingly difficult for congressional majorities to assert democratic control through the power of the purse. The new rules offer Congress a way to confront twenty-first-century realities and reclaim the power of the purse to promote ongoing democratic deliberation over the conduct of limited war.

C. Strategies of Credible Commitment

As the wars in Iraq and Afghanistan wind down, there is no better time for Congress to recognize that it is at a constitutional crossroads. The next few years will provide an opportunity for collective reflection on the conduct of these wars: instead of engaging in recriminations over past mistakes, it is far more profitable to take institutional measures that will prevent their recurrence. A window of opportunity is opening. If Congress does not take advantage of this moment to reclaim the power of the purse, its chances of rebalancing the separation of powers may well diminish over time.

The Constitution strips away the normal excuses for inaction. The House and the Senate each have the power to “determine the Rules of its Proceedings”²²⁷ without seeking the agreement of the other chamber, and without fear of presidential veto. But of course, the bare constitutional text is not enough to assure decisive action. Nor is wise political leadership. The House and Senate must also exercise institutional creativity to maximize the effectiveness of the new system.

Credibility of commitment is crucial. The entire point of the new rules is to convert the abstract threat of a funding cut-off into a systematic sanction which the president must regularly confront long before it is actually exercised. To put the point within our framework: as the president engages in his decision making during Periods One and Two, the president must have reason to believe that the House or Senate will actually enforce its rules at Period Three. Otherwise he will continue to play bait-and-switch.

It is a mistake to demand absolute certainty. Politics is never certain; there is always some chance that the House or Senate will reverse course and repudiate the new rules even after they have come into force—perhaps because the president’s party has a strong majority and chooses to spend its political capital to liberate the White House from further congressional supervision. The challenge is to generate a sufficiently credible commitment so that sitting presidents will take the new rules very seriously.

From this perspective, the proposed plan provides as much certainty as is reasonable to expect. A good deal of political effort will be required to

227. U.S. CONST. art. I, § 5, cl. 2.

establish the new Rules for Limited War—with many congressional leaders committing their time and energy to the innovation. This will create a great deal of political momentum during the first generation of reform—with established leaders reluctant to go back on one of their prouder achievements.

What is more, even if the president is planning to launch a new war, he does not need to launch a frontal assault on the rules to get what he really wants: a strong authorization for the use of force. Why, then, should he spend the extra political capital required to repudiate the rules—especially when congressional leaders of both parties will be extremely reluctant to cede power back to the presidency?

To maximize the credibility of their commitment, the House and Senate should coordinate their activities. If both chambers adopt the new rules, the political prospect of a virtually simultaneous reversal seems even less likely—so long as one house stands by the rules, the president must take the new regime seriously and recognize that an endless round of “emergency” appropriations no longer provides a feasible approach. As we shall see, two-house coordination has worked impressively in the past, through the device of concurrent resolutions. Before considering how the House and Senate can use this coordinating mechanism to consolidate the new rule system, it is best to consider each chamber separately, and the particular problems the House or Senate will predictably encounter in rendering its individual rule commitments credible.

1. *The House*

On first approach, the House looks like the obvious place to begin the reform campaign. In contrast to the Senate, it enacts a new set of rules when it meets for its first January session after election day.²²⁸ Of course, these “new” rules borrow heavily from those that governed the preceding House—but formally speaking, changes can be adopted by a simple majority vote. No less important, minorities have very little capacity to use obstructionist tactics to delay or deflect the majority will. If the leadership of the majority party is convinced of the need for new Rules for Limited War, there is no significant barrier to their enactment on opening day.²²⁹

228. MILDRED AMER, CONG. RESEARCH SERV., RL 30725, *THE FIRST DAY OF A NEW CONGRESS: A GUIDE TO PROCEEDINGS ON THE HOUSE FLOOR* 7 (2006).

229. There are multiple ways in which points of order are disposed of. In some cases, they are by the presiding officer. We recommend that the point of order be disposed of instead through the whole legislative body in which they are made. As a CRS report points out:

Under Rule XVI, for example, the question of whether an amendment to an appropriations bill is germane is usually submitted to the Senate to decide by majority vote. Also, by precedent, if a Senator makes the point of order that the question pending before the Senate is unconstitutional, the Senate must decide that question by majority vote.

VALERIE HEITSHUSEN, CONG. RESEARCH SERV., 98-306 GOV, *POINTS OF ORDER, RULINGS, AND APPEALS IN THE SENATE* 2 (2006). Alternatively, the initial decision could be made by the presiding officer and that decision subject to appeal to the full House. *Id.* For more on points of order, see also JAMES V. SATURNO, CONG. RESEARCH SERV., 97-865, *POINTS OF ORDER IN THE CONGRESSIONAL BUDGET PROCESS* 4 (2009).

But appearances are deceiving. The top-down system that makes passage of the rules relatively smooth on opening day can also undermine the credibility of the House's commitment later in the session. The problem is straightforward: while it is relatively easy for the leadership to pass the rules, it is also easy for it to waive their application in concrete cases. The key player is the Rules Committee. Over the course of the twentieth century, it has gained the power to issue "special rules" to guide the House's consideration of particular matters. These rules supersede the standing rules of the House for a specific measure.²³⁰ Special rules are frequently used to waive points of order, and are often employed to overcome the prohibition on unauthorized appropriations.²³¹ Unless steps are taken to rein in the committee, its power to issue special rules can damage credibility. When, for example, the president's advisors look at the shiny new rule restricting the House to a single one-year appropriation at Period Three, they will be well aware that the committee might undercut this provision by issuing a special rule sending additional emergency appropriations to the floor. This possibility will undermine the extent to which future presidents will take the cut-off threat seriously at Periods One and Two, weakening the integrity of the entire system.

This is a serious, but not a fatal, problem. At worst, it means that the rules lose some of their deterrence value during Periods One and Two to the extent the president believes that his party will continue to control the House during Period Three. But politics is a risky matter, and every president recognizes that his opponents may gain control of the House at the time the one-year "wind-up" rule kicks in. Under this scenario, the Rules Committee is much less likely to bend the rules to allow the president to escape the congressional deadline.²³² Even if the president's party retains control, the Rules Committee might still refuse to cooperate in undermining Congress's authority. So even at worst, the "special rules" jurisdiction of the Rules Committee will weaken, but not destroy, the credibility of the House's commitment. In dealing with the problem of limited war at Periods One and Two, the president will continue to take the new rules seriously—if not as seriously as he would if the rules were less easily evaded.

This potential loss of credibility could be addressed through further exercise in institutional redesign. Most obviously, the House could enact an express provision denying the Rules Committee the authority to create special rules to the limited war procedures. Such an initiative, to be sure, would encounter initial resistance from the current members of the Rules Committee—who will bridle at the abridgment of their powers. But their show of resistance might usefully generate a broader debate on the ultimate

230. MEGAN SUZANNE LYNCH, CONG. RESEARCH SERV., 98-433, SPECIAL RULES AND WAIVERS OF HOUSE RULES 1 (2008).

231. A special rule is a "House resolution intended to regulate floor consideration of a specific legislative measure named in the resolution." LYNCH, *supra* note 230, at 1; *see also* Max Reynolds, Note, *The Impact of Congressional Rules on Appropriations Law*, 12 J.L. & POLITICS 481, 499-515 (1996).

232. *See* LEVINSON & PILDES, *supra* note 120, at 2324.

issue: Which is more important—the traditional prerogatives of the Rules Committee or the traditional prerogatives of Congress to control a president intent on transforming limited into unlimited wars?

It would be a sad day for the country if the House reached the wrong answer.²³³ But even if the Rules Committee managed to preserve its traditional privileges, this would only reduce, not eliminate, the credibility of the House commitment. Passing the new rules, even without tying the hands of the Rules Committee, would remain a very valuable first step in recalibrating the constitutional balance.

2. *The Senate*

The Senate presents a different picture: it is harder to get the new rules enacted, but once they are on the books, it will be much harder to create special exceptions.

Begin at the enactment stage: since only one-third of its seats are up for election every two years, the Senate has traditionally understood itself as a continuing body. As a consequence, it does not follow the House example of placing its rules before the chamber for majority approval on opening day. Instead, the Senate rules that prevailed during the previous session simply carry over to the new one, without any act of express approval by the new majority. The current rules, moreover, make amendment difficult. They require a two-thirds majority for any change,²³⁴ which means that the new provisions on limited war would require a broad bipartisan coalition. While this is by no means impossible, it is obviously harder to achieve than the simple majority in the House.

But present arrangements are not fixed in stone. Traditional understandings have been increasingly under attack. The reform critique has centered on the filibuster. The current rules famously permit forty-one Senators to bring most legislation to a halt, and the two-thirds amendment requirement makes change extremely difficult. To overcome this obstacle, reformers have developed a range of arguments claiming that the Senate, like the House, has the constitutional authority to change its rules on opening day by a simple majority vote.²³⁵ These arguments have gained a good deal of headway over the past half century—with Vice Presidents Richard Nixon, Hubert Humphrey, and Nelson Rockefeller endorsing them during their terms as Senate president. In the latter case, Rockefeller's ruling opened the door to a majority vote on opening day which led the Senate to change the filibuster

233. After all, it only takes a simple majority for the House to reauthorize the war for another period—which would be far easier for the president to accomplish than it would be to gain a supermajority for suspension.

234. “[I]nvoing cloture on a measure or motion to amend the Senate’s rules requires the votes of two-thirds of the Senators present and voting, or 67 votes if all 100 Senators vote.” CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., 98-425 GOV, INVOKING CLOTURE IN THE SENATE 2 (2007).

235. See, e.g., Bruce Ackerman, *How Biden Could Fix the Senate*, AM. PROSPECT (Mar. 15, 2010), http://www.prospect.org/cs/articles?article=how_biden_could_fix_the_senate.

rule—reducing the super-majority needed for cloture from two-thirds to the current three-fifths.²³⁶ With the filibuster once again the object of fierce political assault, the time is ripe for another effort by a simple majority to weaken the supermajority requirement even further. If this proves successful, it will open the door for further rule revisions—increasing the chances for enacting new Rules for Limited War.

If and when the new rules are enacted, they will gain instant credibility. There is no analogue to the Rules Committee in the Senate, with the power to issue special rules. The Senate can place limitations on consideration of bills and waive points of order, but these require unanimous consent.²³⁷ The alternative is to amend the rules themselves—which requires a two-thirds majority.²³⁸ Both require a far higher threshold than the president needs to obtain a war reauthorization under the rules—which means that he can't expect to convince the Senate to suspend the rules during Period Three if he loses his appeal for an extension of the war effort at Period Two. So far as the Senate is concerned, the big problem is to get the rules passed, not to get them enforced.

3. A Third Way: Concurrent Resolution

We have begun by discussing the classic ways in which the House and Senate “determine the rules of [their] proceedings.” But institutional creativity has taken a new form over recent decades. Both houses have moved jointly to coordinate rule changes by enacting them simultaneously through the use of a concurrent resolution. This technique increases the credibility of congressional commitment—since to reverse the reform, political forces in both houses must be in favor of presidential unilateralism at the same time.

But the device has further advantages as well. First, a concurrent resolution only requires passage by a simple majority of each house—permitting the Senate to join without the supermajority vote needed for a formal rules change (though, of course, a filibuster by forty-one senators remains an obstacle). Second, unlike a rule, a concurrent resolution may not be waived by the House Rules Committee through a special rule.²³⁹ And third, it is

236. *Id.*

237. Unanimous consent agreements can “limit debate time, structure the amendment process, and waive points of order against specific provisions or amendments.” JUDY SCHNEIDER, CONG. RESEARCH SERV., RL 30945, HOUSE AND SENATE RULES OF PROCEDURE: A COMPARISON 4–5 (2008); WALTER J. OLESZEK, CONG. RESEARCH SERV., 98-225 GOV, UNANIMOUS CONSENT AGREEMENTS IN THE SENATE 2 (2001). This isn't a viable option so long as a single senator stands by the new Rules for Limited War.

238. DAVIS, *supra* note 234, at 1. Senate Rule XVI, which prohibits amendments that add nongermane substantive provisions to appropriations legislation, SCHNEIDER, *supra* note 237, at 10, can be suspended with a two-thirds vote, *id.* at 5. Other ways of evading the force of the rules are even more onerous.

239. In the Senate, there are no “special rules.” In the House, “special rules” allow “exceptions from one or more provisions of the standing rules,” but not concurrent resolutions or statutes. See Lynch, *supra* note 230.

veto-proof—as opposed to a “joint resolution,” it does not require the president’s approval to go into effect.²⁴⁰

Little wonder, then, that it has provided a vehicle for important rule changes in the recent past, which can serve as precedents for an initiative on limited war. This was the path initially taken for the Pay-As-You-Go (“PAYGO”) rules, requiring offsets for any measure that increases spending or reduces revenues.²⁴¹ A point of order may prevent the consideration of legislation that violates the rule²⁴² unless it is waived by a vote of sixty senators.²⁴³

This precedent is particularly apt, since our proposed initiative also involves an effort to impose greater responsibility on the power of the purse. Just as PAYGO responds to the undisciplined spending that threatens fiscal integrity, our new rules respond to the undisciplined “emergency” requests for funds that threaten Congress’s power to rein in presidential bait-and-switches in waging limited war.

4. *A Fourth Way: The Byrd Rule Precedent*

Finally, there is the statutory approach. Putting the rules on the statute books will provide instant credibility. But doing so risks a presidential veto. Presidential enhancement of war-making prerogatives has been a bipartisan project throughout the modern period.²⁴⁴ So far, President Obama is no exception.

Nevertheless, it is not too much to hope that he will take the lead in a constitutional reassessment—or at least decide to accept a congressional recalibration of checks and balances. In this case, the enactment of the Byrd Rule will provide a useful precedent, since it was enacted into law as a statute, and not as Senate rule (as is commonly assumed).²⁴⁵ Like our proposals for limited war, it imposes special constraints on appropriations—in this case, the process through which the Senate operates under the

240. Of course, because it is not subject to presentment to the president, a concurrent resolution does not have the force of law. It instead has legal force equivalent to the House and Senate Rules.

241. H.R. Con. Res. 64, 103d Cong. (1993). Most of the subsequent revisions were also included in budget resolutions, which were also concurrent resolutions. For a lengthy discussion of the full legislative history of the Senate PAYGO rule, see BILL HENIFF JR., CONG. RESEARCH SERV., RL 31943, BUDGET ENFORCEMENT PROCEDURES: SENATE PAY-AS-YOU-GO (PAYGO) RULE (2010).

242. HENIFF, *supra* note 241. The Senate PAYGO rule was first enacted through a budget resolution. *Id.* It was then modified and extended several times in subsequent budget resolutions and once in a simple resolution. *Id.* By contrast, the House PAYGO rule was adopted as part of the opening rules package for the 110th Congress in Rules XXI, clause 10. *Id.*

243. ROBERT KEITH & BILL HENIFF JR., CONG. RESEARCH SERV., RL 32835, PAYGO RULES FOR BUDGET ENFORCEMENT IN THE HOUSE AND SENATE 6 (2005).

244. See generally ACKERMAN, *supra* note 220.

245. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99–272, 100 Stat. 82. For a detailed legislative history of the Byrd Rule, WILLIAM G. DAUSTER, BUDGET PROCESS LAW ANNOTATED: INCLUDING THE CONGRESSIONAL BUDGET ACT, GRAMM-RUDMAN-HOLLINGS, THE BUDGET ENFORCEMENT ACT OF 1990, EXECUTIVE ORDER 12857, AND RELATED BUDGET-PROCESS LEGISLATION (1993).

“reconciliation” process which generates a final budgetary compromise with the House. Since filibusters are expressly barred in budgetary reconciliation, the Byrd Rule prohibits the Senate from considering “extraneous matter” that does not involve appropriations. Otherwise, senators would add their favorite substantive measures in an effort to avoid the filibuster. From our perspective, the key feature of the Byrd Rule is that, like our proposed initiative, it is enforced by a point of order, which may only be waived by a supermajority.²⁴⁶

Depending on the state of public opinion, the congressional leadership might invoke the Byrd Rule as an example in a new campaign to constrain the appropriations process through a statutory initiative. Following this precedent, the Rules for Limited War would appear as a provision in some future Budget Reconciliation Act.²⁴⁷ Since these statutes are exempt from normal filibuster rules, a provision containing our new rules will be far easier to pass. While it would then be presented to the president for signature, it would be a small part of a budget package. Our larger point, of course, is that this statutory option represents only one of four paths open to the House and Senate for establishing the credibility of their new rules.

There is nothing stopping Congress from reclaiming a key role in the future conduct of limited war. Our proposed rules transform the erratic and occasional threat of a funding cut-off into a sanction that will systematically deter presidential bait-and-switch. It is framed in a way that will minimize the chances of presidential evasion. And it can be enacted in a binding fashion by the House or Senate (or both) without the need for presidential approval.

CONCLUSION: A WINDOW OF OPPORTUNITY?

Only one question remains: will the public and Congress commit the nation anew to the constitutional system of checks and balances in the twenty-first century?

We do not know. Our aim is to start a conversation, not predict its ultimate outcome. We are clear on only two things.

First, we stand at a constitutional crossroad. The precedents established by the Bush Administration in Iraq, if consolidated further by the Obama Administration, will smooth the path for future presidents to transform limited wars into open-ended conflicts with ever-greater facility.

246. If the point of order is sustained, the offending title, provision, or amendment is deemed stricken unless there is a three-fifths majority vote to waive the rule. See ROBERT KEITH, CONG. RESEARCH SERV., RL 30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE’S “BYRD RULE” 5 (2008). The Byrd Rule originally consisted of two components—a provision in a statute and a Senate resolution. *Id.* at 2. After several modifications, it was revised and made permanent in section 313 of the Congressional Budget Act of 1974. *Id.* at 2. It is currently codified at 2 U.S.C. § 644(e). *Id.* at 4.

247. The amendment would of course be subject to the germaneness requirement of the Byrd Rule, but since it has obvious budgetary effects, this is not a serious obstacle.

Second, as the current conflicts come to a close, the American people will have a unique opportunity to reflect on their recent experiences. There will be many ways to squander this opportunity. We may witness an orgy of political recrimination. Or we may grimly refuse to think through the implications of our traumatic ventures in Iraq and Afghanistan—engaging in a collective act of amnesia as we turn to the challenges of the future.

This Article has tried to define a third way. Under this more hopeful scenario, Americans actually learn something from the mistakes of the past and Congress tries to redeem Founding principles of checks and balances by looking at the realities of 2011 and giving real-world significance to these traditional principles.

In making this effort, we have tried to distance ourselves from debates over the wisdom of our military interventions in Iraq and Afghanistan. Americans will predictably disagree about the merits of these wars—and those we will fight in the future. So far as we are concerned, the Constitution is valuable precisely because it provides a framework for deliberating on such disagreements. Our point is that the constitutional framework is itself changing in highly consequential ways. The Founding generation believed that the limits of the war effort should be reached through an ongoing democratic dialogue between Congress and the president, and it provided Congress with powerful tools to sustain its role in the unfolding process of institutional give-and-take. But these tools have disintegrated over time, and without self-conscious adaptation to changing institutional realities, this Founding inheritance will continue to decay over the course of the twenty-first century.

The coming decade, in short, provides us with a precious opportunity for collective reflection and reform. Will we be equal to this challenge?

