



AMERICAN  
CONSTITUTION  
SOCIETY FOR  
LAW AND POLICY

**HILL BRIEFING**

**“CONGRESS AS SURGE PROTECTOR?  
ESCALATION IN IRAQ, THE CONGRESS  
AND THE CONSTITUTION”**

**SPEAKERS:**

**NEIL J. KINKOPF, PROFESSOR OF LAW, GEORGIA STATE  
UNIVERSITY COLLEGE OF LAW; FORMER SPECIAL  
ASSISTANT, DEPARTMENT OF JUSTICE’S OFFICE OF LEGAL  
COUNSEL FROM 1993-1997**

**DAVID B. RIVKIN, JR., BAKER HOSTETLER LLP;  
FORMER DEPUTY DIRECTOR OF THE OFFICE OF THE LEGAL  
POLICY IN THE U.S. DEPARTMENT OF JUSTICE AND  
ASSOCIATE COUNSEL TO THE PRESIDENT IN THE REAGAN  
AND THE GEORGE W. BUSH ADMINISTRATIONS.**

**CHRISTOPHER H. SCHROEDER, CHARLES S. MURPHY  
PROFESSOR OF LAW AND PUBLIC POLICY STUDIES, DUKE  
UNIVERSITY SCHOOL OF LAW; FORMER ASSISTANT  
ATTORNEY GENERAL IN THE OFFICE OF LEGAL COUNSEL;  
FORMER CHIEF COUNSEL TO THE SENATE JUDICIARY  
COMMITTEE**

**BETH NOLAN, PARTNER, CROWELL & MORING LLP; FORMER  
COUNSEL TO THE PRESIDENT FROM 1999-2001**

The following is a partial transcript of the American Constitution Society for Law and Policy’s Hill briefing on congressional powers in wartime held January 19<sup>th</sup>, 2007 at the Russell Senate Office Building.

MR. RIVKIN: Um, on the chemical weapons stuff. The question is...trying to tease out of me whether or not Congress can, or whether or not the President can ignore the chemical weapons convention and use chemical weapons and violate...in this war. And also whether or not there could be some hot pursuit in the context of self-defense in spite congressional --

[question continues]

MR. RIVKIN: On the chemical weapons: If we have -- well, we don't have chemical weapons in our operational inventory to the best of my knowledge. I mean, we destroyed all the stocks. When we destroy them all, can Congress take them out of stock? Well, first of all, the treaty can be renounced by the president. That's kind of axiomatic of constitutional law. I'm not aware of any...of any statutory -- let me put it this way: If Congress tried to pass... so forget, forget the treaty part. The treaty could be renounced tomorrow. [question continues] Well, the President, if he likes, can terminate the treaty. I don't think many folks would disagree with me.

[question continues]

MR. RIVKIN: All right, all right. Let's assume that you have a domestically binding law that prevents the President from using some force element that otherwise exists. Can he disregard that in the context of combat? The answer is yes. Yes. Thank you again, by the way.

The treaty...Look, under your logic, if Congress passes a law tomorrow saying we think there's too much collateral damage from using...particular types of projectiles, and God know that there's not much of the world that like that we're using depleted uranium rounds. We cannot put in a law that says "do not use depleted uranium rounds." If you don't like it, get it out of the U.S. force structure by not appropriating funds for its maintenance.

As to the hot pursuit stuff, look: this is truly impossible to answer in the abstract. You have some interesting analogs in Cambodia. You have an al-Qaeda outfit that's popping in and out of Syria and attacking US forces in Iraq. Of course the President can order U.S. troops to go in there and clean it out. But, it's a matter of international law even if there was a congressional ban on using...wait that was the US position, the executive branch's position on Cambodia. Now, we may disagree that despite all the bans on the introduction of combat troops and everything, if there was a direct attack originating on US forces from Cambodian territory, that just might justify cleaning out the sanctuary.

MR. SCHROEDER: Do you think we could invade Russia if you thought that they were supporting the Iraqis, the Shiites?

MR. RIVKIN: No, no. I'm talking about battlefield, immediate, ongoing attack on...

MR. SCHROEDER: But your theory is boundless. Your theory simply lets the President do whatever he or she wants to do with all the military might that Congress has placed at his disposal, without any constraint.

Notice what's being said here: Congress cannot place any restriction on anything that's available to the President. The President has the most massive armed forces in the world. And therefore, theoretically, he or she can do anything he or she wants...without any congressional...even a resolution of the use of force that's limited would not restrict the president, because under your theory, the president has the authority to initiate combat without an authorization and to use all of the forces that Congress has put at his disposal -- with no restraints. It's really quite breathtaking.

[laughter]

MR. RIVKIN: Some restraints, sure. Congress under my view can, through use of appropriations...[or] bold amendment type language in a particular country, and that does bind the president except in the situation the gentleman mentions in the hypothetical, except if it's an immediate attack. Now, if Congress wants to ensure some neocons do not instigate a war with Iran, they can say: "no US forces of any kind (ground or whatever) can be used against Iran." And that binds the President 99% of the time, unless we're still in Iraq and somebody runs from across the border and shoots. Very narrow example.

As to the other stuff, look: Congress gives the President in the absence of peacetime, a formidable military machine. If a president wants to start a war with another country, believing he is exercising in the parameter of self-defense, [and] Congress thinks he's crazy, and there's a strong consensus of this, Congress can impeach the President. Also, if a majority of the Cabinet believes he or she is physically unfit or mentally disabled. So there are--look: the Constitution is not to mean to make things easier for politicians. Either in the executive branch or the Congress. If you are willing to pay the political price. If you think the other branch is doing something that is absolutely crazy, you can stop it. You just have to do it in certain, very dramatic ways.

MR. SCHROEDER: I'm actually concerned about saving American lies without having to impeach the President. The structure of the Constitution that you have advanced is stunning to me. That the idea could be that once forces are made available, the President (who might after all be wrong about a decision that he or she made) cannot be constrained by the other branch of government that's elected by the American people -

MR. RIVKIN: Can be constrained, but only in certain ways --

MR. SCHROEDER: Well, you say "certain ways," but then we talk about them, and the ways you say -- You said a moment ago...it would be micromanaging to say the President can't use armor. It would be micromanaging to say the President can't use chemical weapons if they're in the arsenal. So, you say there's restraint, but when

pressed, I don't think there is restraint under your theory, except turning off the spigot entirely.

MS. NOLAN: We're going to have to stop. We have passed our time limit. Your views are fairly well understood now. But I want to thank the three of you for, really, an excellent discussion. And thank you all for coming.