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## THE CONGRESS AS SURGE PROTECTOR

*By Neil Kinkopf*

Reports indicate that President Bush plans to respond to the deteriorating situation in Iraq by [substantially increasing the number of American troops deployed there](#). (BBC 1/2/07.) According to these reports, the President will call for the nation to make sacrifices in support of this “surge” in troop levels. The Constitution makes it quite clear that Congress may stop the President from imposing such sacrifices on the nation. This decision is one that rests with our democratic process and is vested originally in Congress.

The President’s plan to escalate the war in Iraq is opposed by the overwhelming majority of Americans; only 11%, according to a [recent CNN poll](#), believe we should send more troops to Iraq (CNN 12/18/06). These views are evidently shared by the President’s strongest supporters. Columnist Robert Novak’s survey of Senate Republicans shows that only 12 support escalation. (Washington Post 1/1/07) And among the military, which has been a staunch supporter of the President’s Iraq policies, now only 35% approve of the President’s handling of the war and only 38% support escalation according to the [annual poll conducted by The Military Times](#). (Army Times 12/29/06) Additionally, the Baker-Hamilton Commission makes emphatically clear that the President’s plan is in opposition to the only bipartisan consensus as to how to move forward in Iraq.

### **Congress Can Forbid the President from Escalating the Iraq War without Renewed Authorization**

Even if the President does not submit his plan for congressional approval, Congress is constitutionally empowered to require him to do so.

The Constitution grants Congress extensive war powers – so extensive, in fact, that Chief Justice John Marshall once wrote 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 ....” (*Talbot v. Seeman* (1801).) These powers include the power to declare war; grant letters of marque and reprisal; raise and support an army and navy; make rules for the government and regulation of the land and naval forces; provide for the calling forth of the militia; and to lay taxes and appropriate funds to provide for the common defense, with the proviso that no appropriation for such a purpose can be for

more than two years. The President is made the commander in chief and is authorized to appoint, with Senate confirmation, such military officers as Congress may by statute create.

This structure is an intentional departure from the British approach. The King was set up, in Blackstone's phrase, as the "generalissimo"; he was authorized to initiate and to prosecute war of any scope on his own authority. Under the U.S. Constitution, by contrast, it is Congress that has the power to initiate and regulate war, while the President is authorized to command the resulting war effort.

As Commander in Chief, the President's role is to prosecute the war that Congress has authorized. The President may not go beyond this authorization.

This understanding of the President's power as Commander in Chief is plain enough from the text of the Constitution itself. It has also been the consistent interpretation of the Courts. Chief Justice John Marshall set forth this interpretation in a series of cases arising from the naval war with France. Most notably, in *Little v. Barreme*, Chief Justice Marshall held that the President's war powers are defined by statute and may not exceed statutory limits.

In the naval war with France, Congress had authorized the U.S. navy to intercept vessels bound to, but not from, French ports. In *Little* a U.S. navy ship, acting pursuant to a presidential order to intercept ships bound to or from French ports, intercepted a commercial vessel suspected of coming from a French port. The Supreme Court ruled the action illegal because it went beyond the military force authorized by statute.

The Supreme Court has continued to adhere to this view of the war power. In *Youngstown Sheet & Tube Co. v. Sawyer* (the famous Steel Seizure case), the Supreme Court struck down President Truman's order that the nation's steel mills continue operating in order to keep the troops in the Korean War armed. Justice Jackson's famous concurring opinion (which the Supreme Court has since held to set forth the proper view of presidential power) emphasized that the Constitution does not set forth exclusive power, but overlapping or shared power. Where Congress and the President share power, as in the area of war power, the President is bound to comply with the statutes that Congress enacts.

Most recently, the Supreme Court has applied Justice Jackson's framework to resolve challenges to President Bush's assertions of commander-in-chief power. In both *Hamdi v. Rumsfeld* (2004) and *Hamdan v. Rumsfeld* (2006), the Supreme Court rejected the President's assertion of unilateral authority to conduct military operations (in those cases dealing specifically with the detention and treatment of enemy combatants), holding instead that the President must comply with applicable statutory limits as well as applicable international law.

The Supreme Court has been clear and unambiguous. When Congress, acting in the vast areas of overlapping power, tells the President "no," the President must comply. Thus,

Congress may limit the scope of the present Iraq War by either of two mechanisms. First, it may directly define limits on the scope of that war—and forbid the President from exceeding these limits—such as by imposing a ceiling on the number of troops assigned to that conflict. Second, it may achieve the same objective by enacting appropriations riders that limit the use of appropriated funds. Indeed, the reason that the Constitution limits military appropriations to two years is to prevent Congress from abdicating its responsibility to oversee ongoing military engagements.

### **The President Should Seek Congressional Assent for His New Iraq War Plans**

The Constitution’s drafters understood the immense national sacrifice that war entails. Moreover, they understood the advantages that would accrue to the President during times of war. For these reasons, the Constitution assigns Congress the power to initiate war and to define the parameters of military operations. The Constitution’s structure, then, clearly contemplates that important decisions regarding the scale of war are to be made not by the President alone, but through the democratic process. This is why the Constitution mandates Congress’s assent not only to the initiation of a war but to its size and scope.

To be sure, Congress has authorized the war in Iraq. As a legal matter, that authorization was drafted broadly enough to encompass the escalation that the President has in contemplation. Nevertheless, the Iraq War authorization was made on the basis of false premises that go directly to the President’s case for his planned troop surge.

- On behalf of the Bush Administration, Secretary Rumsfeld testified, against the advice of General Eric Shinseki, that the Iraq War could be successfully waged with troop levels at or below present number.
- Secretary Rumsfeld also said that the war would take “six days, six weeks. I doubt six months,” and that, quite the opposite of an insurrection, American and coalition forces would be greeted as liberators.
- Former Deputy Defense Secretary Paul Wolfowitz testified that the war would cost the nation very little, and that Iraq’s oil revenues would allow it to “finance its own reconstruction.”

The authorization for war in Iraq, then, was clearly premised on the Bush Administration’s representation that it would involve little or no sacrifice. For President Bush to now unilaterally decide that the nation should make extreme sacrifices pursuing a plan that lacks support of the Congress (including his own party), the military, and the American people is a bait-and-switch exercise. Such action would be contrary to the fundamental constitutional principles that demand public deliberation and assent before committing the nation’s people, treasury, and prestige to war on this new scale. (This is so even though such action would not technically violate any rule of constitutional law, due to Congress’s authorization of the Iraq War.)

Before embarking on any escalation, the President should seek the assent of Congress and the American people. If he will not, the American people should understand that Congress has the power to stop him.

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