

JOHN KERRY AS COMMANDER-IN-CHIEF: WAR POWERS IN A KERRY ADMINISTRATION

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Not since the Vietnam era has the United States entered a presidential election year with the United States at such a heightened state of war. The ongoing combat in Iraq, the continued military efforts against the Taliban and Al-Qaeda supporters in Afghanistan, and the multiple covert operations deployed around the world to defeat terrorism are all indications of the “militarization” of American foreign policy, both now and in the foreseeable future. Whoever is elected in November 2004 will face these continued security challenges, as well the strategic threats from North Korea, Iran, and elsewhere. Clearly, the individual who assumes the position of commander in chief for the next four years will face critical decisions in protecting the United States.

After nearly one full term with George W. Bush as commander in chief, his views on constitutional war powers have been expressed on numerous occasions. Despite the array of scholars who point to Congress’s constitutionally protected war powers, President Bush, like his post World War II predecessors, has exercised and claimed wide military authority as commander in chief. Many observers have raised concerns about the ostensible growth in the president’s asserted powers while conducting the war

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on terrorism, as well with Bush's essentially unilateral claims of military authority in the months prior to Operation Iraqi Freedom.²

Unlike many previous presidential elections, in the 2004 election cycle, foreign policy issues have been at the forefront of the American policy agenda. The Democratic party's nominee for president, Senator John Kerry (D-Mass.) has nearly twenty years experience in the United States Congress, and has interacted with four commanders in chief. These presidents have conducted multiple and varied military operations. During his tenure in the Senate, Kerry has a long record on war powers, which potentially provides some insight on how he might interact with Congress on military matters if elected president. This paper provides a broad examination of Kerry's views on war powers, including analysis of his positions on Congress's war powers during the Vietnam War (including the War Powers Resolution), his reactions to Presidents Ronald Reagan and George H.W. Bush's military strikes abroad, his views on President Bill Clinton's multiple military actions, and Kerry's positions on war powers with George W. Bush as commander in chief. The findings suggest that his rhetorical support for Congress's constitutional war powers has often not matched his de facto backing of unilateral military actions by the president. If elected president, it is unlikely that Kerry's relationship with Congress would be markedly different from President Bush's, and thus it seems probable that the United States will continue the practice of a "strong" [if not omnipotent] commander in chief vis-à-vis the Congress.

² Nancy Kassop, "The War Power and Its Limits," *Presidential Studies Quarterly* 33, 3 (2003): 509-529; G. Calvin Mackenzie, "Old Wars, New Wars, and the American Presidency," in George C. Edwards III and Philip John Davies eds. *New Challenges for*

Vietnam and the War Powers Resolution

John Kerry first gained national attention as an articulate and outspoken critic of the United States military presence in Vietnam. As a decorated veteran, Kerry became a vocal opponent to the war.³ In 1971, Kerry was invited to testify at a meeting of the Senate Foreign Relations committee, chaired at the time by Senator J. William Fulbright (D-Ark.). In his recorded testimony and in an appeal to end American participation in the war, Kerry advanced a number of basic constitutional principles on war powers. He noted:

We are asking here in Washington for some action, action from the Congress of the United States of America which has the power to raise and maintain armies, and which by the Constitution also has the power to declare war.⁴

In the statement, Kerry clearly referenced Congress's explicit war powers, and called for Congress to exercise those powers.

This statement squares with the Constitution, which endowed Congress with a host of military powers, including the power to provide for the common defense; To grant letters of Marque and Reprisals; To raise and support Armies; To provide and maintain a Navy; and To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.⁵ In James Madison's notes on the Constitutional Convention, Madison added that it was understood by the founding fathers that the president would have unilateral authority only to "repel sudden attacks"

the American Presidency (New York: Pearson-Longman, 2004); Donald R. Wolfensberger, "The Return of the Imperial Presidency?" *Wilson Quarterly* (Spring, 2002): 36-41.

³ Kerry earned the Silver Star, the Bronze Star, and was awarded three Purple Hearts for his military activities in Vietnam.

⁴ United States Senate, Committee on Foreign Relations, "Legislative Proposals Relating to the War in Southeast Asia," (April 22, 1971).

⁵ U.S. Constitution, Article I, Section 8.

against the United States.⁶ A president was enabled to defend the United States, but otherwise needed congressional approval before initiating military action. Such views were similarly expressed as the founders reached out to the states when the ratification process was underway, and later was affirmed in early U.S. Supreme Court decisions.⁷ Thus, when Kerry appealed to the Senate Foreign Relations Committee in 1971, his petition reached back to the earliest constitutional principles on Congress's war powers.

During the cold war, however, many Americans rallied behind presidents in their military actions against communism. The Congress responded by granting wide discretionary military authority to the commander in chief in order to defeat communism, or simply deferred to presidential military endeavors when fighting communism. Presidents began to assert essentially unilateral powers as commander in chief, much greater than was witnessed in the 19th and first half of the 20th centuries.⁸

U.S. Supreme Court decisions in the 20th century, most notably, *United States v. Curtiss-Wright* (1936), also contributed to this growth in foreign policy powers for the president. In writing the Court's majority opinion, Justice George Sutherland maintained that the president is the "sole organ of the federal government in the field of international relations." He added that the president had "plenary and exclusive" powers in the area of foreign policy.⁹ Although the decision has been widely criticized in the years that followed, American courts have nonetheless often referenced this decision

⁶ James Madison, *Notes of Debates in the Federal Convention of 1787* (1966; reprint New York: W.W. Norton, 1987): 476.

⁷ See Charles A. Lofgren, "War-Making Under the Constitution: The Original Understanding," *Yale Law Journal* 81 (1972) and David Gray Adler, "The Constitution and Presidential Warmaking: The Enduring Debate," *Political Science Quarterly* 103, 1 (1988): 1-36.

⁸ The best historical account on Congress's war powers during the 19th century can be found in Francis D. Wormuth and Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law 2nd ed.* (Urbana, IL: University of Illinois Press, 1989).

⁹ *United States v. Curtiss-Wright*, 299 U.S. 304 (1936).

when justifying presidential leadership in foreign policy.¹⁰ In light of these judicial trends and the cold war norm of deferring to the president, Kerry's views on war powers were somewhat unorthodox for the era. However, his references to Congress's war powers in 1971 were constitutionally well-grounded.

Another indication of Kerry's rhetorical backing of Congress's war powers is his long-standing support of the War Powers Resolution (WPR), which was passed in 1973, over Richard M. Nixon's veto during the Vietnam War. Through this resolution, the Congress attempted to reassert Congress's war powers. In stating its purpose, the WPR notes:

To fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Force into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances...¹¹

Among the requirements placed upon the president, the resolution demands that

"The President in every possible circumstance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such conditions."¹²

Although many critics have noted its legitimate flaws, including Congress's unwillingness to exercise the WPR and all presidents' refusal to accept the resolution's

¹⁰ Arthur M. Schlesinger, Jr. *The Imperial Presidency* (Boston: Houghton Mifflin Company, 1973): 100-104; Louis Fisher, *Presidential War Power* (Lawrence, KS: University Press of Kansas, 1995): 57-61; David Gray Adler, "Court, Constitution, and Foreign Affairs," in David Gray Adler, ed. *The Constitution and the Conduct of American Foreign Policy* (Lawrence, KS: University Press of Kansas, 1996): 45.

¹¹ P.L. 93-148, Sec. 2.(a).

¹² *Ibid* at Sec. 3.

constitutionality, its intent was to restore a balance between Congress and the president over use-of-force decisions.¹³ Congress did not want to experience again anything similar to Vietnam, when many felt that the presidency had become imperial and beyond checking.¹⁴

Although less is recorded about Kerry's specific views on the WPR at the time of its passage, during his Senate career he has frequently recalled his support for the resolution. In 1986, upon the death of former Senator Jacob Javits (D-N.Y.), who was the WPR's principal author, Kerry specifically lauded Javits' "intellectual and substantive contribution to the issues of war and peace..." and for "playing a constructive and positive role on issues of war and peace."¹⁵ In 1990, he also stated, "I am a strong supporter and advocate of the War Powers Resolution."¹⁶ Kerry expressed similar views on the WPR in 1994.¹⁷ Thus, on a number of occasions, unlike other members of Congress who have openly opposed the WPR, Kerry has consistently stated his adamant support for the Resolution.¹⁸ From this perspective, one may conclude that Kerry has been a vigorous champion of Congress's constitutional war powers and the WPR. Much of the evidence, however, suggests otherwise.

¹³ For critical views on the War Powers Resolution, see Timothy S. Boylan and Glenn A. Phelps, "The War Powers Resolution: A Rationale for Congressional Inaction," *Parameters* 31, 1 (2001): 109-124; David Gray Adler and Louis Fisher, "The War Powers Resolution: Time to Say Goodbye," *Political Science Quarterly* 113, 1 (1998): 1-20; Michael J. Glennon, "Too Far Apart: The War Powers Resolution," *University of Miami Law Review* 50, 17 (1995): 17-31; Edward Keynes, "The War Powers Resolution: A Bad Idea Whose Time Has Come and Gone," *The University of Toledo Law Review* 23 (1992): 343-362; Robert A. Katzman, "War Powers: Toward a New Accommodation," in Thomas A. Mann ed. *A Question of Balance: The President, the Congress, and Foreign Policy* (Washington, D.C. Brookings Institution, 1990): 35-69.

¹⁴ The hypocrisy of Congress's own view that it could do nothing to reign in the president is well documented in John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (Princeton: Princeton University Press, 1993).

¹⁵ Congressional Record (March 18, 1986): 5130.

¹⁶ Congressional Record (October 2, 1990): S 14332.

¹⁷ Congressional Record (September 14, 1994): 24616.

¹⁸ For more on Congress's opposition to the WPR, see Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress and War Powers* (Nashville, TN: Vanderbilt University Press, 2002).

Ronald Reagan and George H.W. Bush Military Actions

During John Kerry's time as a U.S. Senator, both Presidents Ronald Reagan and George H.W. Bush carried out a number of military actions in which Congress had limited, if any input on use-of-force decisions for the United States. Kerry was elected as the junior Senator for Massachusetts in 1984. As a Senator, President Reagan was the first commander in chief he was required to check and balance.

Prior to Kerry's election in 1983, President Reagan deployed American troops in cooperation with a number of Caribbean states to Grenada. The troop number reached approximately 8,000. The invasion was triggered by the assassination of Grenadine leader Maurice Bishop, who had achieved power through a coup d'état in 1979. Bishop had been friendly with Cuba and the Soviet Union, but the rebel challenger, Bernard Coard, expressed much more sympathetic views toward the communist allies, as well as anti-American rhetoric. The American troop deployment also matched closely with the Reagan's administration's desire to "roll back" communism. Moreover, when the invasion occurred, Reagan officials also maintained that American medical students attending St. George's Medical College were threatened by Coard's rebellion, although considerable doubt has been expressed regarding how threatened the students really were during the rebellion.¹⁹

According to key Reagan administration officials, Congress had no role in the decision to use force. Former Secretary of State George Shultz wrote that the Reagan

¹⁹ David P. Forsythe, *The Politics of International Law: U.S. Foreign Policy Reconsidered* (Boulder, CO: Lynne Rienner Publishers, 1990): 63-88.

foreign policy principals made the decision to strike, upon which Shultz then asked his staff to call congressional leaders to the White House to inform them of the forthcoming military action.²⁰ As noted above, the degree to which Grenada represented an emergency and national security threat to the United States has been doubted by analysts. Moreover, 18 Americans were killed in the operation, and thus by definition U.S. troops faced hostilities as implied by the WPR. Key congressional leaders were notified about the forthcoming strike, but the decision to use force was made prior to any actual meeting with Congress, which represents a clear violation of the WPR, and from a constitutional perspective, involved no “balancing” role from Congress.²¹ Although Kerry was not in office at the time, in 1993 he noted his support for President Reagan’s military action in Grenada.²² Kerry’s support for Reagan is striking considering such an egregious violation of the WPR, when coupled with Kerry’s previously stated views on the WPR and Congress’s war powers.

In 1986, in the first major military action by an American president in Kerry’s first Senate term, the Reagan administration conducted air strikes on Libyan leader Muammar Qaddafi. According to Reagan, the Libyan government was directly responsible for a terrorist strike on a German dance club frequented by American servicemen and women. One U.S. soldier and sixty other Americans were wounded in the terrorist attack, as well as over 100 Germans.²³

²⁰ George P. Shultz, *Turmoil and Triumph: My Years as Secretary of State* (New York: Charles Scribner’s Sons, 1993): 334-5.

²¹ Michael Rubner, “The Reagan Administration, the 1973 War Powers Resolution, and the Invasion of Grenada,” *Political Science Quarterly* 100 (1985-1986): 627-647.

²² *Congressional Record*, (October 7, 1993): 23933.

²³ Ronald Reagan, “Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate of the United States on the United States Air Strike Against Libya,” *Public Papers of the Presidents* (April 6, 1986): 478.

As with Grenada, Congress had no decision-making role in the strikes. Members of Congress who received prior notification of the forthcoming strikes admitted that they had no voice in the military decision and that they had no real ability to shape the actual decision. Reagan administration officials notified Congressional leaders three hours before the actual military strikes on Qaddafi.²⁴ At the time, Senator Kerry, like most members of Congress, expressed no constitutional qualms with President Reagan's actions in the *Congressional Record*. Ironically, the strikes on Qaddafi came less than one month after Kerry had lauded Senator Javits' career and the WPR.

As with the strikes on Grenada and Libya, Kerry also supported President George H. W. Bush in 1989 when Bush used 10,000 American troops to capture Panamanian leader Manuel Noriega in "Operation Just Cause." Following the pattern established by Reagan, Bush informed congressional leaders of the forthcoming strikes only a few hours in advance. Four years later, in 1993, Kerry noted that "we made the right decision when we went into Grenada and into Panama, even though we knew casualties were a possibility."²⁵ In effect, Kerry again supported a decision by the president, which relegated Congress to a non-player in the actual decision to strike—even though he ostensibly understood that American hostilities were expected.²⁶

With the war on drugs high on the political agenda in the first year of the Bush administration, before the American invasion of Panama, Kerry also pushed President Bush to think more broadly about multilateral means to fight the war on drugs. In doing

²⁴ Pat Towell, "After the Raid on Libya, New Questions on the Hill," *Congressional Quarterly Weekly* (April 19, 1986): 839.

²⁵ *Congressional Record*, (October 7, 1993): 23933.

²⁶ Kerry had voted for a "Sense of the Senate" resolution on October 5, 1989, which encouraged President Bush to restore the constitutional government in Panama, but such a resolution is not equivalent to a declaration of war, and does not have legally binding status. See *Congressional Record* (October 5, 1989): S 12690.

so, Kerry encouraged Bush to consider the creation of a multilateral drug strike-force, which would work in partnership with Caribbean states.²⁷ Kerry was not specific in how the strike-force would operate, and what the United States' role in such an organization would be. Whatever its makeup, however, it is difficult to envision a substantive role for Congress when military decisions would be required. Such an organization would ostensibly be involved in air and maritime patrols and would require expeditious decisions from its participants. Although many Americans supported the United States' efforts to address the growing drug problem, Kerry's proposal would have led to additional empowerment of the executive branch in military matters.

When Congress was faced with the decision to go to war to liberate Kuwait from Saddam Hussein's military occupation in 1991, Kerry voted against the use of force. When casting his vote, Kerry spoke about the need for Congress to stand up and oppose this military action.²⁸ By taking this position, Kerry exercised his constitutional powers to check the president, and through his opposition clearly cannot be accused of complete deference to the president. In the hours that followed the ensuing military strikes, however, Kerry quickly rallied behind President Bush, noting that we should "support the troops," and that the troops should "not have the rug pulled out underneath them, that they not somehow wind up with second guessing which then puts them at greater peril."²⁹ It is certainly admirable that Kerry openly backed American forces in combat and wished no harm on them during this moment of crisis. At the same time, his statements imply that it would no longer be right to challenge the president's decision,

²⁷ *Congressional Record* (September 6, 1989): 19572-3.

²⁸ *Congressional Record* (January 12, 1991): 1011.

²⁹ *Congressional Record* (January 17, 1991): 1829.

and that any “checking” of the president would be inappropriate during the actual combat. Such views were not held by Senators Fulbright and Javits, nor by Kerry nearly twenty years before when he testified in front of the Senate Foreign Relations Committee, and when he specifically noted Congress’s war powers in 1971.

In addition, upon the American military victory against Iraq in 1991, approximately two months after the initial strikes, Kerry stated on the Senate floor that he *had* voted to support military action against Iraq if necessary on August 2, 1990. Kerry emphasized that Democrats and the Republicans, who voted against the use of force in January 1991, had “immediately rallied around the country and troops and gave full support to our military effort.”³⁰ Kerry’s statement again suggests that his constitutionally protected right to check the president was not going to extend to a time period when American troops were in combat. No “balancing” would take place during war.

In sum, in his first eight years in the United States Senate, serving alongside two presidents who conducted a host of military actions, Kerry generally supported the practice of having a strong commander in chief, who essentially went unchecked by the Congress. The one exception was his vote in 1991 against Operation Desert Storm. Otherwise, Kerry supported both presidents and their broadly perceived military powers in situations when the United States faced no imminent threat and U.S. troops were engaged in combat. Kerry’s record on the War Powers Resolution, like most members of Congress, represents almost a complete abdication to the commander in chief. Moreover, it should be noted that Kerry did not try to distinguish between “war” and

³⁰ *Congressional Record* (March 13, 1991): 5925.

military operations short of war, which some members of Congress have used to justify their deference to the commander in chief. The operations in Grenada and Panama were not “limited” strikes, and involved thousands of U.S. ground troops, who engaged in combat and experienced casualties. While the operations were different from Iraq in 1991, a semantical debate over whether these operations were actually “war” misleads from the central point, that Congress was not involved in the combat decisions, which Kerry supported.

Bill Clinton’s Military Actions

Bill Clinton used force in a number of military operations during his presidency. Kerry did not always go to the Senate floor with opinions on the constitutionality of Clinton’s actions, but from Kerry’s recorded responses a clear trend in his views can be established. In each case of Clinton’s military operations, Kerry supported military action. In some cases, despite his previous support for the War Powers Resolution, Kerry took steps to ensure that Clinton would not be checked by the Congress prior to forthcoming military action.

In October 1993, after President Clinton’s first major military crisis in Somalia, a number of Senate Republicans, led by Senator Don Nickles (R-Ok.), proposed an amendment to require Congressional approval prior to American troop involvement in U.N. sponsored operations. While the partisan rhetoric appeared high at the time, Nickles’ proposal squared with the legislative history of the United Nations Participation Act in 1945, which maintained that U.S. troops could not participate in U.N. sponsored

military operations without congressional approval.³¹ Kerry responded to these GOP efforts by defending presidential freedom of action in a manner that provided wide discretion to the president. He noted:

When you look hard at the Nickles amendment, it is clear that it does not deal with the problem before us, but it is probably unconstitutional on its face, since it purports to take away the power of the Commander in Chief as a commander in chief who has the right to order troops to fight in certain ways at certain times with certain people.³²

Although Kerry had previously noted his support for Congress's war powers, based upon this statement it is difficult to determine under what conditions Congress could limit presidential military ambitions.

Similarly, Kerry went to great lengths to protect President Clinton prior to the deployment of 10,000 American troops to Haiti to restore President Jean Bertrand Aristide to power. Although the deployment was conducted after a negotiated settlement, it seemed reasonable to conclude at the time that American troops would potentially face "hostilities" as specified by the WPR. American troops stepped onto Haitian soil armed and ready for combat, even though it was clear that Clinton was not acting to "repel a sudden attack" against the United States. Prior to the deployment, many Senate Republicans favored a vote on President Clinton's authority to use troops abroad in this operation, but senior Democrats, led by Majority Leader George Mitchell

³¹ Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act," *American Journal of International Law* 89 (1995): 26-27; Michael J. Glennon, "The Constitution and Chapter VII of the United Nations Charter," *American Journal of International Law* 85 (1991): 74-88; Matthew D. Berger, "Implementing a United Nations Security Council Resolution: The President's Power to Use Force with the Authorization of Congress," *Hastings International and Comparative Law Review* 15 (1991): 83-109; and

(D-Me.) prohibited a vote from occurring.³³ In siding with the senior Democrats, Kerry stated, "I would prefer to have a vote. It is consistent with everything I have ever said since I fought in Vietnam." Yet, Kerry also defended Clinton's authority to deploy the troops, noting that the president sometimes faces "the lonely decision" as commander in chief, and that "there are times when the buck stops at the desk of the President of the United States who has to make a decision."³⁴

Again, it is difficult to reconcile Kerry's previously stated views and ostensible support for the WPR and Congress's war powers with his justification for such wide powers for the commander in chief. In President Clinton's military actions through NATO in Bosnia and Kosovo, Kerry similarly backed the president and the use of force.³⁵ In each case, Congress took no binding decision on military action against the president prior to the strikes, even though it was clear to most observers that military action was forthcoming in the immediate days prior to the strike.

On Clinton's multiple military strikes against Iraq, it is difficult to find a more ardent supporter of military action against Saddam Hussein and presidential war powers than Kerry. In September 1996, when President Clinton employed 43 cruise missiles on Iraq in response to Hussein's strikes against Iranian-backed Kurdish resistance forces in northern Iraq, no member of Congress was consulted prior to the strike.³⁶ Kerry expressed no constitutional qualms or concerns about violations of the WPR, and rather

Michael J. Glennon, "United States Mutual Security Treaties: The Commitment Myth," *Columbia Journal of of Transnational Law* 24 (1986): 530-532.

³² *Congressional Record* (October 19, 1993): 25243

³³ Hendrickson, *The Clinton Wars*, 67.

³⁴ *Congressional Record* (September 14, 1994): 24615-6.

³⁵ *Congressional Record* (February 9, 1994): 1780; *Congressional Record* (March 23, 1999): S3110.

³⁶ *Congressional Record* (September 5, 1996): H 10095; Adrienne Flynn, "GOP Senators Displeased at Being in the Dark on Iraq," *Arizona Republic* (September 6, 1996): A13.

argued, "President Clinton's response to Saddam's latest challenge was the right one—decisive, measured, and carefully calculated to take the strategic advantage away from Saddam."³⁷ In February 1998, when Clinton faced another crisis over Iraqi compliance with the United Nations Weapons Inspectors, Kerry suggested that he was ready to use ground troops if necessary, and also noted that a strategic bombing would not likely be sufficient to deal with Saddam since it would not remove the root cause of the compliance problem.³⁸ Kerry also raised no constitutional objections to Operation Desert Fox, the four-day military operation against Hussein in December 1998, nor did he challenge the president's authority to use force against Iraq for violations of the American-imposed no-fly zones over northern and southern Iraq. Approximately 130 different strikes were conducted after Operation Desert Fox. Although President Clinton as well as many members of Congress claimed that Congress had actually authorized such military action in 1991, these claims suggest a rather broad interpretation of Congress's vote in 1991.³⁹

Kerry's choices and public positions on war powers on many of Clinton's military actions were like most members of Congress, who rarely questioned Clinton's proclaimed authority to use force.⁴⁰ What makes Kerry stand out among members of Congress, however, is the degree to which he defended Clinton's perceived powers as commander in chief, especially in Clinton's military operations conducted with U.N. approval. It is difficult to reconcile such views, however, with Kerry's previously stated

³⁷ *Congressional Record*, (September 5, 1996): S9937.

³⁸ *ABC This Week* (February 22, 1998), transcript number 98022203-j12.

³⁹ See Louis Fisher, "Military Action Against Iraq," *Presidential Studies Quarterly* 28, 4 (1998).

⁴⁰ Hendrickson, *The Clinton Wars*, especially chapter seven.

support for the WPR and his other comments suggesting the importance of congressional war powers.

George W. Bush's Military Actions

George W. Bush's two major military endeavors since taking office have been in Afghanistan and Iraq. In both cases, Congress was closely involved in writing the resolution language that authorized the eventual military action. Kerry's largest decision-making role during the Bush administration occurred after September 11, 2001, when Bush turned to Congress to seek its approval for military action to defeat terrorism.

When S.J.Res 23 came to the Senate floor on September 14, 2001, it was clear that negotiations and compromise had taken place between the White House and Congress. Senator Robert Byrd (D-W.Va.) noted that the president had initially requested unlimited spending powers in conducting the global war on terrorism: the Congress did not allow this executive request.⁴¹ Senator Levin (D-Mi.) added that the key negotiators had demanded that some reference be made to the War Powers Resolution, which was included in the final resolution.⁴² Bush officials also initially sought military authority to strike pre-emptively against terrorists, which Congress opposed. Instead, congressional negotiators permitted the president to "prevent" acts of terrorism.⁴³ In this respect, Congress clearly played some checking role toward the president, and Senator Kerry was a key participant in this process. The Congress

⁴¹ *Congressional Record* (September 14, 2001): S9424.

⁴² *Congressional Record* (September 14, 2001): S9416.

⁴³ *Congressional Record* (September 14, 2001): S9423.

turned back requests that would have grossly expanded presidential powers, and in some respect, reigned in the president.

At the same time, a legitimate argument can be made that a great deal of deference exists within the resolution itself. The key part of S.J. Res 23 reads:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such organizations or persons.⁴⁴

Such language permits extremely wide decision-making authority and military freedom in fighting the war on terrorism. Yet Senator Kerry noted about the resolution:

“...it does not give the President a blanket approval to take military action against others under the guise of fighting international terrorism. It is not an open-ended authorization to use force in circumstances beyond those we face today.”⁴⁵

Despite Kerry’s ostensibly genuine views on his interpretation of the resolution, it is difficult to see how Congress had actually limited the president, and what role, if any, Congress would play in the conduct of the war to come.⁴⁶

Moreover, additional evidence suggests that when the resolution was being negotiated, Senate Democrats broke from the House Democrats, who were demanding greater oversight, intelligence sharing and consultation before military action would have been allowed. Differences still remained between the White House and the Democratic negotiators on September 13 when both sides parted. Yet, the following day, Senate

⁴⁴ Public Law 107-40.

⁴⁵ *Congressional Record* (September 14, 2001): S9417.

Majority Leader Tom Daschle (D-S.D.) allowed the resolution to move forward in its current form to the Senate floor, where it passed unanimously. Clearly, the Senate favored a less involved role for the Congress in fighting terrorists.⁴⁷

In short, while it is accurate to say that Congress played some checking role against the president initially, it also is fair to conclude that the Congress granted extremely wide discretion to the commander in chief in determining the conduct of the war on terrorism. Kerry was involved in the resolution language, and in this respect, must again be credited with granting wide authority to the commander in chief.

On Iraq, unlike nearly all previous military actions conducted during his Senate tenure, Kerry played an instrumental role in calling for Bush to gain congressional authorization prior to the actual use of force. In an op-ed article in the *New York Times*, Kerry wrote that Bush “must seek advice and approval from Congress” before moving forward with military action on Saddam Hussein.⁴⁸ Despite Bush’s claims in August 2002 of his existing authority to take military action against Iraq, the administration responded to Kerry and others’ requests to seek congressional approval. In this respect, Kerry and others effectively and publicly asserted their congressional war powers, which Bush eventually respected.

When the “Joint Resolution to Authorize Use of Military Force Against Iraq” eventually reached the Senate floor, which the Senate approved in a vote of 77-33, Kerry provided extensive remarks on the resolution. He noted that the Congress had amended the president’s originally proposed language, which included the request to

⁴⁶ See Nancy Kassop, “The War Power and Its Limit.”

⁴⁷ David Abramowitz, “The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism,” *Harvard International Law Journal* 43, 1 (2002): 71-81.

use military force across the Persian Gulf, but instead limited a military strike to Iraq. Kerry also noted that he had not voted for “regime change,” but only to exercise military options in order to force Hussein to comply with the weapons inspectors. He also noted that Congress had won a victory by requesting that the president attempt to work through the United Nations, rather than moving forward without regard for the United Nations. Unlike Kerry’s previous comments on American military action, however, he noted that “we will hold them [the administration] accountable for the means by which we do this...It is through constant questioning we will stay the course...”⁴⁹ Once presidents initiate military operations, Kerry has tended to support the commander in chief regardless of his initial position taken, which is why this statement in 2002 stands out over the course of his career.

As it did after September 11, 2001, Congress had clearly checked the president, and reigned in the more wide-sweeping claims of presidential authority. Kerry was among the most public in calling for the president to gain congressional approval prior to the war, and he and others helped to steer an outline for American foreign policy prior to military action. At the same time, the resolution still granted wide authority to the commander in chief in determining whether or not force will be used. Section 3 (a) reads, “The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate...”⁵⁰ Some analysts make a legitimate

⁴⁸ John Kerry, “We Still Have a Choice on Iraq,” *New York Times* (September 6, 2002).

⁴⁹ *Congressional Record*, (October 9, 2002): S10175.

⁵⁰ House Joint Resolution 114 (October 11, 2002).

argument when noting that Congress abdicated its war powers to the president in this resolution, leaving it to the *commander in chief* to make the final decision on war.⁵¹

Senator Kerry later argued that he had been misled by the Bush administration, and that the resolution he voted for was not the policy that President Bush eventually adopted. Yet up until the war began, Kerry expressed no constitutional qualms with the president's authority, and did not join 12 members of the House of Representatives who filed suit against President Bush and Secretary of Defense Donald Rumsfeld in the U.S. District Court for the District of Massachusetts (ironically, Kerry's home state) for ignoring Congress' war powers authority *prior to* the actual combat began in Operation Iraqi Freedom.⁵²

Thus, on Iraq, Kerry's record is again mixed on the issue of war powers. He and others members of Congress were fierce defenders of congressional war powers when the Bush administration attempted to move toward military action in the summer of 2002 without congressional approval. He also suggested, seemingly for the first time, that he would hold the president accountable *during* war if necessary, which is a view that he last articulated at length in 1971. In this respect, Kerry played a very public balancing role on war powers prior to Operation Iraqi Freedom. Yet he also voted for a resolution that gave quite wide military discretion to the commander in chief, and was not among those who presented legal challenges on the president's authority to go to war.

⁵¹ Louis Fisher, "Deciding on War Against Iraq: Institutional Failures," *Political Science Quarterly* 118, 3 (2003): 389-410.

⁵² The Court dismissed the case on grounds that the question posed by the plaintiffs was a "political question" and thus not appropriate for consideration. See John Doe I et al., Plaintiffs, v. President George W. Bush and Secretary of Defense Donald H. Rumsfeld. United States District Court for the District of Massachusetts (February 27, 2003).

Conclusion

Over the course of his career in politics, John Kerry has established himself as both an outspoken supporter of congressional war powers, as well as a defender of unilateral presidential military action. Kerry has frequently and explicitly noted his support for the War Powers Resolution, and the important checking responsibility that Congress was granted by the Constitution. Most notably, Kerry exercised his war powers by voting against military action in Iraq in 1991, and later argued quite aggressively that President George W. Bush needed congressional approval before military strikes on Iraq. It also cannot be neglected that Kerry first gained national prominence by appearing before Congress in 1971, in requesting congressional action to end the American military presence in Vietnam.

At the same time, Kerry also defended presidents when they used force abroad and rendered Congress a bystander in the decision-making process. Whether it was the strikes on Grenada, the invasion of Panama, or Clinton's multiple strikes on Iraq, Congress had essentially no role in the decision to use force. Kerry never expressed any constitutional qualms with these military actions. Kerry has been an especially strong proponent of presidential military action through multilateral organizations, despite the legislative history that protected Congress's war powers authority. Moreover, despite his appearance before the Senate Foreign Relations Committee in 1971 during the Vietnam War, and through his comments prior to Iraqi Freedom about his intent to question the president as necessary, Kerry has otherwise rallied behind the president during war, essentially suggesting the inappropriateness of congressional opposition when American troops are in combat.

As commander in chief, it seems likely that Kerry would fall in line with all previous post World War II presidents, who have claimed essentially unlimited powers in military matters. He has made many statements suggesting wide authority for the president as commander in chief. While Kerry has spoken often about the principle of Congress's war powers and the legislature's necessary checking responsibilities, most of his record favors a commander in chief who exercises wide military powers, especially when the United States operates with multilateral endorsement.

At the same time, Kerry would have to take some additional measures to show respect for the War Powers Resolution, since he has so often noted his support of it. Kerry would be quite unique in this respect, in that all presidents since 1973 have publicly opposed the WPR. Given his recent public challenge to President Bush's authority to wage war in Iraq, as President, Kerry would also be open to challenge as commander in chief, given the discrepant positions he has taken on the issue of war powers during his Senate career.