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CAN APPROPRIATION RIDERS SPEED OUR EXIT FROM IRAQ?

BY CHARLES TIEFER *

I. INTRODUCTION

If the President loses centrist American political support for continuing the war in Iraq, members of Congress might employ their most legally potent, yet controversial, tool to speed our exit, or at least to change policy. Namely, they can attach conditions—typically in the form of provisions added to the war funding and Iraq aid appropriations, known as “riders” because of how they “ride” on the underlying bill—pushing the military ground combat operations toward an earlier exit.¹

Congress enacts an appropriation bill for funding the continuation of the Iraq war at least once every year and also enacts funding bills for military training, reconstruction, and other aid for the government of Iraq.² Congressional procedure allows proponents of policy changes to offer riders for these funding bills. Sponsors started pushing certain riders in 2003 to convert Iraq reconstruction aid³ into World Bank loans instead of grants,⁴ in spring 2005 to forbid torture or inhuman treatment of detainees,⁵ and in

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¹ For general treatments of the subject, see WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE (1994); STEPHEN DYCUS, ET AL., NATIONAL SECURITY LAW (3d ed. 2002); LOUIS FISHER, PRESIDENTIAL WAR POWER (2d ed. 2004); THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS (2d ed. 1993); MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY (1990); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996) (all documenting and analyzing the historic relationship between the executive and legislative branches in the context of war-making powers).

² The Open Society publishes Iraq’s budget online. Iraq Revenue Watch, Monitoring Iraq Reconstruction Funds, Contracts, Oil, <http://www.iraqrevenuewatch.org> (last visited March 22, 2006). For a prediction of the large future expenses for training Iraqi security forces, see Rick Maze, *War Costs May Surpass \$500 Billion, Report Warns*, ARMY TIMES, Oct. 24, 2005, at 11.

³ Aid began at the time of occupation. See generally, James Thuo Gathii, *Foreign and Other Economic Rights Upon Conquest and Under Occupation: Iraq in Comparative and Historical Perspective*, 25 U. PA. J. INT’L ECON. L. 491 (2004); John Yoo, *Iraq Reconstruction and the Law of Occupation*, 11 U.C. DAVIS J. INT’L L. & POL’Y 7 (2004) (treating generally the legal situation of occupied Iraq).

⁴ CHARLES TIEFER, VEERING RIGHT 210–23 (2004).

⁵ Eric Lichtblau, *Congress Adopts Restriction on Treatment of Detainees*, N.Y. TIMES, May 11, 2005, at A16. This provision is discussed in Part IV.A.1, *infra*. For general background, see, for example, Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

summer 2005 for troop withdrawals from Iraq.⁶ The Iraq-policy riders of 2003 and 2005 did not pass, and only the “McCain Amendment” rider about detainee treatment did.⁷ Nevertheless, these early efforts highlighted that this was one procedural way in which a portion of the majority party in Congress, representing districts and states insistent upon a different Iraq policy, could join with the minority party on moderate proposals that affect wartime policy.⁸ Even a congressional majority party leadership supporting the President, although able to fend off most other efforts to change Iraq policies legislatively, may not be able to prevent the offering and passage of Iraq appropriation riders.⁹

To illustrate its points concretely, this Article explores the issues surrounding Iraq riders using three examples, each of which raises a different kind of dispute. The hypothetical riders consist of two war funding riders, regarding withdrawal and policy respectively, and an aid rider regarding Iraqi governance. The focus of this Article is not the undoubtedly interesting policy and political issues raised by such riders, but rather the constitutional debate over the powers of the Congress and the President. During and after congressional consideration of such riders, the riders’ proponents will base Congress’ right to affect wartime policy via appropriation riders upon the plenary nature,¹⁰ venerable history,¹¹ and contemporary significance¹² of Congress’ power of the purse.¹³ Conversely, the riders’ opponents will raise, in addition to policy and political contentions, a classic¹⁴ and contemporary¹⁵

⁶ 151 CONG. REC. H4767–68 (daily ed. June 16, 2005) (section (a) of the Pelosi Amendment).

⁷ Detainee Treatment Act of 2005, Pub. L. 109–148, § 801, 119 Stat. 2739, 2744 (2005).

⁸ See, e.g., Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678 (2005) (examining the procedures and practices of Congress).

⁹ See, e.g., CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 987 (1989) (discussing the abortion and other limitation riders that threatened to take control of the House floor in the early 1980s).

¹⁰ Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758 (1989) (discussing the constitutionality of legislative control over foreign affairs in the context of the Iran-Contra affair); Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN. L. REV. 1 (1975) (suggesting a constitutional basis for strengthening Congress’ powers in the context of Vietnam); Raoul Berger, *War-Making Power of the President*, 121 U. PA. L. REV. 29, 78–79 (1972) (same).

¹¹ See, e.g., Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035 (1986) (discussing Congress’ historical and constitutional authority to authorize private forces to fight on behalf of the United States).

¹² FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (2d ed. 1989) (discussing congressional and executive war-making from the founding through Vietnam).

¹³ Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988) (describing the contours of Congress’ power of the purse).

¹⁴ Robert H. Bork, *Erosion of the President’s Power in Foreign Affairs*, 68 WASH. U. L.Q. 693 (1990) (suggesting that executive war-making power faced an increasing threat of legislative intrusion); J. Gregory Sidak, *The President’s Power of the Purse*, 1989 DUKE L.J. 1162 (discussing the limits of congressional appropriations and the extent of executive spending power).

¹⁵ John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) (analyzing modern war powers from an originalist perspective).

argument of maximal presidential war powers¹⁶ that disputes the legitimacy of changing policy through riders. They will argue¹⁷ from the President's own textual authority as Commander in Chief in an authorized, legal war¹⁸ and will cite past presidential pronouncements.¹⁹ They will also invoke the more general "executive power" clause.²⁰ The Justice Department adumbrated such arguments in 2006 in a legal memorandum supporting the President's wartime power to authorize warrantless eavesdropping of communications to the United States, although that eavesdropping would be proscribed by the Foreign Intelligence Surveillance Act.²¹

While even supporters of presidential power would concede that Congress could plainly and simply cut off funds for the war²²—that is, stop funding and thereby require a total and abrupt (if funds run out rapidly) withdrawal—Congress will be loath to take that step. Conditions, by contrast with cutoffs, impose measured schedules and relatively nuanced policy changes rather than totally and abruptly stopping the funding. The President's supporters would treat Congress' use of conditions, not cutoffs, as a reversion to what they would deem President-doubting, congressional-micromanaging syndromes after the Vietnam War and Iran-Contra, assertedly²³ out of place²⁴ in

¹⁶ See, e.g., Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath*, 92 MICH. L. REV. 1364 (1994) (examining limits on congressional war-making power and executive authority to override Congress); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991) (outlining the contextual factors that merit a congressional declaration of war, in the context of the Gulf War).

¹⁷ See, e.g., John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639 (2002) (offering textual support for a flexible view of the President's war-making powers as an alternative to a "pro-Congress" position).

¹⁸ By "legal war" I mean (sufficient) authorization by Congress. The interesting question of the war's status in international law is a separate matter. See, e.g., Mahmoud Hmoud, *The Use of Force Against Iraq: Occupation and Security Council Resolution 1483*, 36 CORN. INT'L L.J. 435 (2004) (rejecting the United States arguments for the legality of the war); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173 (2004) (finding the justification of the United States attack on Iraq in terms of Security Council resolutions dating back to the invasion of Kuwait unpersuasive); Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J.L. & PUB. POL'Y 765 (2004) (justifying the attack on Iraq as consistent with the United Nations Charter and international law); A. Mark Weisburd, *The War in Iraq and the Dilemma of Controlling the International Use of Force*, 39 TEX. INT'L L.J. 521, 522 (2004) (arguing attack on Iraq was a violation of United Nations Charter).

¹⁹ Executive pronouncements are collected in Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 488 (2002). Although many of those statements occurred in contexts in which they did not justify a challenged executive intervention, some did. See, e.g., U.S. DEP'T OF STATE, OFFICE OF THE LEGAL ADVISER, *THE LEGALITY OF U.S. PARTICIPATION IN THE DEFENSE OF VIETNAM*, 112 CONG. REC. 5504 (1966).

²⁰ Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (making a constitutional case for a strong unitary executive); Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review Essay of John Hart Ely's War and Responsibility*, 34 VA. J. INT'L L. 903 (1994) (offering historical support for broad deference to the President in matters considered executive).

²¹ U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>.

²² Even strong believers in Presidential power would let Congress prevent or stop an intervention by denying it funding. John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1704 (2000).

²³ But see David Abramowitz, *The President, the Congress and the Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43

the post-9/11 world.²⁵ In addition, presidential supporters would counter Congress' authority to place terms on appropriations by citing both case law²⁶ and commentary²⁷ about the "unconstitutional conditions"²⁸ doctrine.²⁹

The next Part of this Article begins with general background³⁰ and consideration of the presidential and congressional positions in constitutional debates and actions regarding Iraq war riders. The Article moves from English and colonial history to the most important congressional actions in the recent past. In particular, the Article discusses congressional actions regarding the Vietnam War³¹ in the 1970s³² and the conflict³³ over the Boland Amendments³⁴

HARV. INT'L L.J. 71 (2002) (discussing how actual compromise on the September 14, 2001 resolution moderated presidential power).

²⁴ See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005) (implicitly responding to the Vietnam syndrome by finding the post-9/11 congressional resolution a wide-open blank check for presidential use of force); Delahunty & Yoo, *supra* note 19 at 491-92 (rejecting the view, much accepted after the Vietnam War, that only Congress can authorize war).

²⁵ Vice President Dick Cheney has been a major voice in arguing against congressional restriction of presidential war powers, and has naturally urged this in the post-9/11 period. Bob Woodward, *Cheney Upholds Power of the Presidency: Vice President Praises Bush as Strong, Decisive Leader Who Has Helped Restore Office*, WASH. POST, Jan. 20, 2005, at A07.

²⁶ *United States v. Lovett*, 328 U.S. 303, 307 (1946) (demonstrating counsel's unsuccessful defense of the challenged provision as an exercise of Congress' appropriation power); *United States v. Klein*, 80 U.S. 128, 133-34 (1872) (challenged proviso was in appropriation).

²⁷ Executive branch supporters apply the term to appropriation limitations that assertedly infringe on the President's constitutional authority. H. Jefferson Powell, *The President's Authority Over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 551-54 (1999); William H. Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government*, 25 YALE L.J. 599, 612 (1916).

²⁸ "A series of attorney general opinions, and the concept of unconstitutional conditions, refute the notion that the appropriations power can be a valid basis for broad congressional claims of absolute plenary authority." John Norton Moore, *Do We Have An Imperial Congress?*, 43 U. MIAMI L. REV. 139, 145-46 (1988) (footnotes omitted).

²⁹ The common and accepted application of the unconstitutional conditions doctrine concerns individuals' entitlement to receive government benefits without having to accept the condition of surrendering their constitutional rights. Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989); Albert J. Rosenthal, *Conditional Federal Spending & the Constitution*, 39 STAN. L. REV. 1103, 1120-23 (1987) (considering the unconstitutional conditions doctrine as covering a broad range of privilege recipients, public and private); John D. French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 236-239 (1961).

³⁰ Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771 (1968) (comparing congressional and presidential war-making powers in the context of Vietnam).

³¹ John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877 (1990) (discussing the constitutionality of the war in Indochina in retrospect).

³² John H. Ely, *The American War in Indochina, Part II: The Unconstitutionality of the War They Didn't Tell Us About*, 42 STAN. L. REV. 1093 (1990) (further discussion of the constitutionality of the war in Indochina).

³³ Even before the Contra issues, in 1979-84, I served as assistant Senate legal counsel and had the opportunity informally to assist the Senate Foreign Relations Committee when it made the key decisions about authorizing the Lebanon intervention of 1983 that became the Multinational Force in Lebanon Resolution, Pub. L. No. 98-1119, 97 Stat. 805 (1983). See CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY* 123-24 (1994); Note, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1425 n.199 (1984).

³⁴ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990) (highlighting the ways in which the breakdown in the distribution of constitutional authority led to the Iran-Contra crisis).

during the Iran-Contra controversy in the mid-1980s,³⁵ which, among others,³⁶ I was privileged to see³⁷ during my time inside Congress.³⁸

Further illumination as to war powers has continued since then,³⁹ in the course of the military interventions of the administrations⁴⁰ of President George H. W. Bush⁴¹ and President Clinton⁴² from the mid-1990s⁴³ to the 1999 bombing campaign⁴⁴ in Kosovo and Serbia.⁴⁵ As for conditions on aid to allied governments facing insurgencies, the Central American aid provisions of the 1980s provide some key insights.⁴⁶

³⁵ G. Hr. Wolohojian, Note, *The Boland Amendments and Foreign Affairs Deference*, 88 COLUM. L. REV. 1534 (1988) (arguing in the context of Iran-Contra that judicial deference to the executive on matters of foreign affairs should not apply to statutory interpretation).

³⁶ As Solicitor of the House of Representatives from 1984–95, I personally represented the House of Representatives in a number of constitutional cases on national security. See, e.g., *Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 13 (1989) (vacating ruling striking down as unconstitutional a classified information provision in an appropriation bill), *on remand*, 732 F. Supp. 13 (D.D.C. 1990). For a previous article drawing on my role as congressional counsel, see Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto?* in *FIRST USE OF NUCLEAR WEAPONS UNDER THE CONSTITUTION, WHO DECIDES?* (Peter Raven-Hansen ed., 1987), *reprinted in* FRANCK & GLENNON, *supra* note 1, at 728–32.

³⁷ As Special Deputy Chief Counsel on the House Iran-Contra Committee, I co-authored the chapter in the committee report on the Boland Amendments. *Report of the Congressional Committees Investigating the Iran-Contra Affair*, S. REP. NO. 216, H.R. REP. NO. 100–433 (1987). For a previous discussion drawing on that service, see George W. Van Cleve & Charles Tiefer, *Navigating the Shoals of Use Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair*, 55 MO. L. REV. 43 (1990).

³⁸ I filed the amicus brief for the House Leadership Group. *Am. Foreign Serv. Ass'n v. Garfinkel*, 109 S. Ct. 1693 (1989). The brief addressed the constitutionality of the appropriation rider in that case, while also arguing the mootness issue that the Court accepted. The issues were nicely treated in Michael Glennon, *Publish and Perish: Congress's Effort to Snip Snapp, Before and AFSA*, 20 MICH. J. INT'L L. 163 (1989).

³⁹ See Michael D. Ramsey, *Presidential Declarations of War*, 37 U.C. DAVIS L. REV. 321 (2003) (providing a survey of how modern presidential announcements of commitment of U.S. forces have amounted to—in definition and function—formal declarations of war).

⁴⁰ For a strong criticism of presidential claims to war powers culminating in criticisms of both the Bush and Clinton administrations' positions, see Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000).

⁴¹ CHARLES TIEFER, *THE SEMI-SOVEREIGN PRESIDENCY* (1994), *supra* note 33, at 119–36 (especially Chapter 6, *The Persian Gulf War Authorization*).

⁴² Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 125, 131–41 (2000) (providing an overview of the contributions of the Clinton administration to the war powers debate).

⁴³ Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 9–16 (1999).

⁴⁴ Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1154–55 (2001) (arguing that the Kosovo bombing campaign revealed a constitutional inadequacy of the War Powers Resolution in relation to such controversies).

⁴⁵ Charles Tiefer, *Adjustable Sovereignty: Contemporary Congressional-Executive Controversies About International Organizations*, 35 TEX. INT'L L.J. 239, 255–57 (2000) (noting that Kosovo and Serbia bombing campaign fits other aspects of congressional-executive controversies).

⁴⁶ See generally Jeffrey A. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE. J. INT'L L. 69 (1988) (analyzing congressional conditions on aid to Central American nations facing insurgencies in the 1980s such as El Salvador; the significance for conditions on aid to Iraq as it faces its insurgency is discussed in Part IV.B.2, *infra* 63–69).

The next Parts turn to the specific arguments about three particular rider types.⁴⁷ Part III turns to the single most important Iraq rider type, the “withdrawal” rider. A “withdrawal” rider would provide funding only if there is a plan under implementation for withdrawing American ground combat forces by a set deadline. This involves the ultimate issues of reducing American war involvement from full to limited. Such a rider finds its analogies in the time and scope limits of the Vietnam War,⁴⁸ and in the Supreme Court cases upholding congressional power to define wars as limited.⁴⁹

Other arguments about war funding riders receive separate consideration in Part IV. A bipartisan majority in Congress may also use riders to change policy⁵⁰ regarding particular aspects of the war. The main example used here is a rider reducing the combat exposure of reservists⁵¹ to preserve the reserve and National Guard system with its important responsibilities in both foreign and (as Hurricane Katrina reminded us) domestic affairs.⁵² Supporters of presidential power may resist such a rider.⁵³ While no example will perfectly predict the legal and political questions that may arise, analysis of any war policy example shows how such issues vary from those that the Supreme Court has resolved in past⁵⁴ or current conflicts,⁵⁵

⁴⁷ See Neal Devins, *Through the Looking Glass; What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 325–26 (1994) (discussing abortion riders); Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 CATH. U. L. REV. 51, 67–81 (1979).

⁴⁸ See, e.g., William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972) (concluding that the President acted illegally after the repeal of the Tonkin Resolution).

⁴⁹ *Little v. Barreme*, 6 U.S. 169 (1804) (holding that a captain of a vessel follows instructions from the President at his peril and that if those instructions are not strictly warranted by law he will be legally liable for the consequences); *Talbot v. Seeman*, 5 U.S. 1, 7, 15, 31 (1801) (discussing Congress’ legislating and how it controls the law of salvage); *Bas v. Tingy*, 4 U.S. 37 (1800) (discussing Congress’ powers to make and limit wars).

⁵⁰ Classic studies of policy riders are Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456 (1987) (arguing that the appropriations process is not the appropriate place for substantive policymaking); Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CON. L.Q. 457 (1992) (addressing possible separation of powers limits on the use of riders); Archie Parnell, *Congressional Interference in Agency Enforcement: The IRS Experience*, 89 YALE L.J. 1360 (1980) (discussing appropriations limitations affecting the IRS’s ability to enforce the tax code).

⁵¹ Andy P. Fernandez, *The Need for the Expansion of Military Reservists’ Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859 (2002) (concerning reservist-employee rights); John F. Romano, *State Militias and the United States: Changed Responsibilities for a New Era*, 56 A.F. L. REV. 233 (2005) (discussing how the evolving role of state militias and the National Guard has led to a contradiction with the original intent of the framers). See generally Gen. Accounting Office, Nat’l Sec. and Int’l Affairs Div., *Force Structure: Army Is Integrating Active and Reserve Combat Forces, But Challenges Remain*, GAO/NSIAD 00-162 (2000) (discussing continuing efforts to integrate active reserves and combat forces).

⁵² Gil Grantmore, *The Phages of American Law*, 36 U.C. DAVIS L. REV. 455, 463–65 (2003); see generally *Perpich v. Dep’t of Def.*, 496 U.S. 334 (1990) (affirming congressional power of the purse).

⁵³ See, e.g., Theodore B. Olson, *Tex Lezar Memorial Lecture*, 9 TEX. REV. L. & POL. 1 (2004) (arguing that the commander-in-chief power is not subject to judicial review).

⁵⁴ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 662 (1952) (rejecting Truman’s claim to have power to take control of factories without congressional authorization).

such as those raised in *Hamdi*⁵⁶ and *Rasul*.⁵⁷ A useful set of criteria may be applied to assess such provisions, to determine their intrusiveness into command itself, their generality, and the substantiality of their link to funding.

Congress may add to the aid appropriations conditions to be met by the Iraq government. The use of riders would reflect differing views between an American public, which places the highest priority on speeding the troops' exit from Iraq, and an Iraqi government that represents particular constituencies, particularly the majority Shiites, in Iraq's conflict.⁵⁸ The particular example chosen consists of Congress providing, say, a quarter of appropriated aid funding only upon certification by our government that Baghdad has made progress toward an elevated role for the disaffected Sunni minority that is the insurgency's base.⁵⁹

Congress has a history of placing legislative conditions on appropriated aid, including aid to regimes allied with us against active or potential insurgencies, such as El Salvador⁶⁰ and Guatemala,⁶¹ and on aid to insurgents themselves, such as the Boland Amendments' imposition of terms on direct or indirect aid⁶² to the Nicaraguan Contras.⁶³ Executive supporters

⁵⁵ *Rasul v. Bush*, 542 U.S. 466 (2004) (reversing and remanding a case to grant jurisdiction to "enemy combatants" to file a writ of habeas corpus); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (concerning the status of an "enemy combatants"); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (concluding that the President does not have authority to violate treaties when Congress has Article I powers to supersede the treaty); Stephen I. Vladeck, Note, *The Detention Power*, 22 YALE L. & POL'Y REV. 153 (2004) (arguing that an inherent executive power does not exist); Stephen I. Vladeck, Comment, *A Small Problem of Precedent: 18 U.S.C. sec. 4001(A) and the Detention of U.S. Citizen "Enemy Combatants,"* 112 YALE L.J. 961 (2003) (arguing that detention of U.S. citizens as "enemy combatants" without charge is illegal).

⁵⁶ *Hamdi*, 542 U.S. 507 (concerning a United States citizen's right to contest his detention as enemy combatant).

⁵⁷ *Rasul*, 542 U.S. 466 (concerning the right of those detained at Guantanamo in connection with hostilities to contest detention by habeas corpus).

⁵⁸ For example, before the war, no one could predict confidently that in the first real election, which took place in January 2005, there would be strong Shiite and Kurdish participation but much less Sunni participation.

⁵⁹ To properly bring the debated issues to the forefront, two assumptions are made about the scale of change in Iraqi policy toward the disaffected Sunni minority. On the one hand, it is assumed that the American public has lost patience to such an extent as to fuel passage of a provision demanding very major change in Iraq policy. On the other hand, it is assumed that the amount of change demanded is more than what is agreeable either to the Iraqi government, concerned about its Shiite and Kurdish support, or to the President, concerned about using aid as a weapon against our wartime ally. These assumptions lead to the question of whether Congress' power to act by way of such a rider can constitutionally overcome the President's power to decline to implement such a rider.

⁶⁰ James W. Moeller, *Human Rights and United States Security Assistance: El Salvador and the Case for Country-Specific Legislation*, 24 HARV. INT'L L.J. 75 (1983) (discussing the effectiveness and drawbacks of congressional implementation of human rights funding restrictions).

⁶¹ Tanya Broder & Bernard D. Lambek, *Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation*, 13 YALE J. INT'L L. 111 (1988) (discussing the failures of legislation limiting military aid to Guatemala).

⁶² J. Graham Noyes, Comment, *Cutting the President Off From Tin Cup Diplomacy*, 24 U.C. DAVIS L. REV. 841 (1991) (arguing against an inherent executive authority to fund foreign policy initiatives); Alex Whiting, Note, *Controlling Tin Cup Diplomacy*, 99 YALE L.J. 2043 (1990) (arguing that Congress has the power to limit quid pro quo arrangements as well as direct funding to executive foreign policy initiatives).

⁶³ See, e.g., Whiting, *supra* note 62, at 2044-49 (1990) (concerning practice with respect to aiding the Contras).

may contend that such a rider interferes with the President's power of diplomacy,⁶⁴ which is particularly strong in wartime.⁶⁵

Though each of the above-mentioned riders should be deemed constitutional as it goes through the tortuous enactment process, if such provisions actually reach enactment, the President would have new options for asserting his power in opposition to them. Part V⁶⁶ applies recent history about presidential signing statements that purport to brush aside provisions like these,⁶⁷ and presidential interpretation and implementation of such provisions that greatly minimize them.⁶⁸ The President adumbrated such a step by his signing statement on the McCain Amendment regarding detainee treatment.⁶⁹ Anticipation of the President's attempts to avoid being bound by riders may inspire legislators to craft provisions that close loopholes and include standards and watchdog elements.

This Article's conclusion discusses why congressional efforts to be involved in war policy, even with all its frustrations and limitations, are, nevertheless, important to democracy. Congress can both authorize a limited war and redefine its limits, and can do so through conditions in funding appropriation.

II. BACKGROUND TO CONSTITUTIONAL DEBATES ON IRAQ WAR APPROPRIATION PROVISIONS

A. Original Intent

Textually, and as a matter of original intent, Congress has plenary power over war appropriations, which presumably includes the power to give directions on the use of those funds.⁷⁰ Article I of the U.S. Constitution spells out Congress' appropriations power far more powerfully than most of Congress' other powers. Article I, section 8, clause 12 provides "That the Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Article I, section 9, clause 7 provides that "No Money shall be drawn

⁶⁴ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

⁶⁵ *Id.* at 320 ("[H]e, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war.").

⁶⁶ Christopher A. Ford, *War Powers as We Live Them: Congressional Executive Bargaining Under the Shadow of the War Powers Resolution*, 11 J.L. & POL. 609 (1995).

⁶⁷ See generally Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Executive Abuse*, 63 B.U. L. REV. 59 (1983) (discussing when, in general, a President can trump a provision in this way); Christine E. Burgess, Note, *When May a President Refuse to Enforce the Law?*, 72 TEX. L. REV. 631 (1994) (same).

⁶⁸ See David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 34-35 (1994) (noting that conditions are part of consent to spending the funding, but analyzing the issue of so-called "extraneous" conditions).

⁶⁹ Statement on Signing H.R. 2863, The Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1917, 1919 (Dec. 30, 2005).

⁷⁰ See *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424-27 (1990) (finding extensive power of Congress over appropriations, in a case concerning spending for former military personnel).

from the Treasury, but in Consequence of Appropriations made by Law.”⁷¹ On the other hand, Article II, section 2, clause 1, provides that “The President shall be Commander in Chief of the Army and Navy of the United States” And, Article II, section 1, clause 1, begins with “The executive Power shall be vested in a President of the United States of America.”

In terms of original intent, both the wording of the text and the documents of the Framers’ era invoke strong elements of English and colonial traditions of vesting the power of the purse in the legislature, particularly as to the terms of war funding. The historic conflict between the Stuart monarchs and the House of Commons that led to these clauses specifically concerned the legislative right to decide the terms and conditions for spending revenue upon war.⁷² The English Bill of Rights memorialized the Commons’ victory and prefigured the U.S. Constitution in declaring that “levying money for or to the use of the Crowne by pretence of prerogative without grant of Parlyament for longer time or in other manner then the same is or shall be granted is illegal.”⁷³ And, “[t]he raising or keeping a standing army within the kingdome in time of peace unlesse it be with consent of parlyament, is against law.”⁷⁴

Meanwhile, the same era laid the foundation for the modest original intent of the Commander in Chief clause. In 1641, Parliament brought on the English Civil War by conferring control of the standing army on the Earl of Essex, who was under parliamentary authority, rather than leaving it with Charles I.⁷⁵ After the Restoration, Parliament maintained its control of the purse over troop deployments. A 1678 act required that the funds granted be used to disband the forces stationed in Flanders.⁷⁶ Parliament let the King regain supreme command. In the 1700s, supreme command shifted from the King to the Cabinet.⁷⁷ However, in no way did the return of supreme command to the King confine or dilute Parliament’s established power to control the limits of war by placing conditions upon the revenues needed for war.

In *The Federalist*, Alexander Hamilton gave his famous explanation of the limited authority of the Commander in Chief. Whereas in England the monarchy had the power to declare war, under the Constitution the Congress would have that power:

The President is to be Commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great Britain,

⁷¹ See *id.* at 424 (discussing section 9, clause 7).

⁷² Gerhard Casper, *Appropriations of Power*, 13 U. ARK. LITTLE ROCK L. REV. 1, 3–5 (1990).

⁷³ Francis L. Coolidge Jr. & Joel David Sharrow, Note, *The War-Making Powers: The Intentions of the Framers in the Light of Parliamentary History*, 50 B.U. L. REV. 5, 8 (1970) (quoting 1 W. & M. sess. 2, c. w. (1688)) (spelling in original). Note the nuances in the phrase “for longer time or in other manner,” which bar the executive from taking a legislative authorization and stripping off the attached riders. Although the provision speaks about the legislative revenue-raising action, of course it included spending as well.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.*

⁷⁶ GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 1, at 287.

⁷⁷ Coolidge & Sharrow, *supra* note 73, at 10.

but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war, and to the *raising*, and *regulating* of fleets and armies; all which, by the Constitution under consideration, would appertain to the Legislature.⁷⁸

The Framers seem to have intended the commander-in-chief clause to avoid the excesses of the Continental Congress, which, during the Revolutionary War, had meddled in such “supreme command and direction of the military and naval forces.”⁷⁹ When even the executive-minded Hamilton assured that Congress’ powers would include “the raising and regulating of fleets and armies,” nothing could have been further from the Framers’ minds than to undo the purse-string control achieved by Parliament over the Stuart monarchs more than a century earlier. So the relatively limited meaning of the commander-in-chief clause, as the Supreme Court has commented, is this: “As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”⁸⁰

It was difficult enough for the Framers to persuade the states in the late 1780s to place the powers to raise and spend revenue on the national government’s military beyond the states’ own control.⁸¹ Instead, the Framers put their trust in Congress’ use of the power of the purse to limit war and bring about policy changes and peace.⁸²

⁷⁸ THE FEDERALIST NO. 69, at 6 (Alexander Hamilton).

⁷⁹ *Id.* See generally RICHARD B. MORRIS, THE FORGING OF THE UNION, 1781–1789 (1987); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS (1979) (all discussing the forming of the Constitution).

⁸⁰ *Fleming v. Page*, 50 U.S. 603, 615 (1850).

⁸¹ In other contexts, executive supporters have argued that the Constitutional Convention reacted against the unrestrained state legislatures of the 1780s and took steps intended to curb Congress’ powers. However, in this context, there seems to be little or no sign that the Convention had a mind to vest power in the President to supersede terms limiting war spending.

On the contrary, the specific language about spending no money from the Treasury, except in consequence of appropriations made by law, came as a series of states put similar clauses in their own constitutions. The states did so because “at the same time states enhanced executive authority, they reinforced their legislatures’ hold on the state fisc, principally by proscribing the expenditure of funds except as directed by legislative enactment.” Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 63 (1998).

To vest the wartime revenue-raising and appropriating in the national government—without congressional representatives responsible to the people and the states deciding upon the conditions to attach to that funding, and instead to place unchecked power in the hands of a President remote from the states and somewhat suspected of monarchical potential—could never have been their intent. For a discussion of the period from the American Revolution to the Constitution, see Casper, *supra* note 72, at 6–8.

⁸² Rosen, *supra* note 81, at 72–74.

B. Practice before World War II

The more promising arguments by executive supporters look to the history of actions by strong Presidents, particularly President Lincoln, and those in office during the Cold War, notably Presidents Truman, Johnson, and Nixon.⁸³ However, the actual history does not support the notion that the executive's "commander-in-chief" power trumps congressional power of the purse. Under President Washington, the government found a balance between foreign relations and spending powers. To simplify, the President had his power, but the Congress, in its spending authority, had its own final power.⁸⁴ In that period, and thereafter, the House generally went along with funding what the President wanted in foreign affairs and war, just as Congress has continued to usually fund war and foreign policy without restrictive terms or conditions.⁸⁵

Wars came about, usually by freely made congressional decision, as with the War of 1812, the Spanish-American War, and World War I;⁸⁶ sometimes by foreign attack, as with World War II; and sometimes by executive decisions about committing troops to a locus of potential or actual conflict in which battle actually ensued, as with the Mexican War and the Korean War. However hostilities started, Congress had the power to use riders on military appropriations to decide policy. As with appropriations for treaty implementation, Congress typically used military appropriation riders in ways that both supported war efforts and kept faith with the rest of national security policymaking.

Before the Vietnam War, there was a history of Congress using, or threatening to use, its power to put terms on military wartime appropriations when suspicious about the President. Uncovering that history, however, takes some digging.⁸⁷ In the most historically famous example, during the Mexican War, the House twice passed a condition on an appropriation, known as the

⁸³ William B. Spong, Jr., Book Note, *War Powers of the President and Congress: Who Holds the Arrows and Olive Branch?*, 68 VA. L. REV. 1437, 1438 (1982) (reviewing book of the same title by W. Taylor Reveley (1981)).

⁸⁴ As to the Jay Treaty, the President (and the Senate) made an enormously important treaty with Great Britain, excluding the House from the ratification process, even though ratification of the treaty entailed the enactment of appropriations, requiring House approval, for implementation. At the time, in partisan terms, the Senate and Presidency were in the process of becoming bastions of the Federalist Party, and the House of the other party (later called "Democratic-Republican" and then "Democratic") led by Jefferson and Madison. That balance left it to the House to decide whether to go along with the Senate and the President to enact those appropriations, without any mechanism that could bind, compel, or bypass it to approve such appropriations. See Nobleman, *infra* note 93, at 148–49 (Jay Treaty). For the early history of appropriations, see Casper, *supra* note 72, at 9–21.

⁸⁵ Rosen makes a useful comparison, as he researched the history, between congressional power in the 1790s and congressional power two centuries later: "The position taken by the House of Representatives in April 1796 [about not being obliged to fund the Jay Treaty] has prevailed. This is exemplified today by Congress' continuing refusal to appropriate the money needed to satisfy dues assessed against the United States under the United Nations Charter, although the United States is bound by treaty to pay the dues." Rosen, *supra* note 81, at 128 (footnotes omitted).

⁸⁶ Some would say that the commencement by Germany of unrestricted submarine warfare amounted to the same kind of foreign attack as Pearl Harbor, and similarly forced Congress' hand.

⁸⁷ See, e.g., HENKIN, *supra* note 1, at 380 n.29.

“Wilmot Proviso,” to bar slavery in territory to be acquired from Mexico.⁸⁸ Although the final appropriation law omitted the proviso, the House’s passage of that proviso signaled that the free states would block slavery in the territories while slave states were losing control of Congress. Historians view the proviso, and other House pronouncements about the Mexican War,⁸⁹ as key developments that spurred the slave states’ doubt about their future in Congress and ultimately led, just over a dozen years later, to their choice of secession.⁹⁰

The use of riders accelerated during the Civil War.⁹¹ Then, by the use of such riders on military appropriations, congressional influence predominated in Reconstruction; occupation armies implementing Reconstruction policies in the Southern states got their directions from such riders.⁹² Congressional influence continued to predominate effectively until the early twentieth century.⁹³

During President Theodore Roosevelt’s administration, Congress and the President wrestled for control of the expanded navy. In one notable instance, Congress conditioned appropriations on a minimum of eight percent of detachments aboard naval vessels being marines. Roosevelt’s Attorney General conceded the condition’s constitutionality, opining that “[C]ongress is the sole judge of how the Army or Navy shall be raised and of what it shall be composed,” and that Congress could condition “that such appropriation [for the marines] shall not be available unless the marine corps be employed in some designated way.”⁹⁴ Roosevelt found ways to stake out his claims to power without denying constitutional allocations of authority to Congress. In a famous incident, when Congress appropriated less funding than Roosevelt needed to send his “Great White Fleet” around the world, he declared he would

⁸⁸ Kristian D. Whitten, *The Fourteenth Amendment: Justice Bradley’s Twentieth Century Legacy*, 29 CUMB. L. REV. 143, 148 (1999).

⁸⁹ See HENKIN, *supra* note 1, at 381 n.33.

⁹⁰ See G. Randal Hornaday, Note, *The Forgotten Empire: Pre-Civil War Southern Imperialism*, 36 CONN. L. REV. 225, 253 (2003).

⁹¹ “The great volume of legislation required by the rebellion made this period prolific in riders.” Alexander Johnston, *RIDERS (in U.S. History)*, in III CYCLOPEDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES BY THE BEST AMERICAN AND EUROPEAN AUTHORS, 147.7 (John J. Lalor ed., 1899), available at <http://oll.libertyfund.org/ToC/0216-03.php> (a great source on this subject, virtually unavailable until the Internet).

⁹² See *id.* Johnston describes the whole period, rider by rider. The tone was set during the military occupation of the South immediately after the Civil War. It took the form of a full-scale clash between Congress and the President, with the Republican Congress setting policy through riders. President Andrew Johnson was impeached for breaching a key one of those riders; he escaped conviction in the Senate by a single vote. Johnston recites a fascinating account of how, from 1876 on, the fierce struggle over various riders for the army appropriation bills marked the end of Reconstruction. Briefer allusions to this occur in Henkin, *supra* note 1, at 380 n.29; Michael J. Gerhardt, *Ackermania: The Quest for a Common Law of Higher Lawmaking*, 40 WM. & MARY L. REV. 1731, 1763 (1999).

⁹³ Until Theodore Roosevelt, Congress, also using the Senate’s so-called “treaty veto” as well as congressional control of appropriations, set the bounds in military and overseas affairs. See generally Eli E. Nobleman, *Financial Aspects of Congressional Participation in Foreign Relations*, 289 ANNALS AM. ACAD. POL. & SOC. SCI. 145 (1951) (describing the Senate’s “treaty veto” and appropriations as dual means for congressional participation in foreign relations).

⁹⁴ 27 Op. Att’y Gen. 259, 260 (1909).

send it halfway,⁹⁵ obliging Congress to appropriate additional funds to bring it back.⁹⁶

Perhaps the most momentous war-related condition⁹⁷ of the twentieth century prior to the Cold War occurred in 1940. At a time when the public largely wished to avoid involvement in the European war, President Franklin Roosevelt had staked his ability to act on a distinction between steps he would take for preparedness and steps that would be taken for military intervention overseas, which he pledged to avoid. Roosevelt succeeded in getting the nation's first peacetime draft through Congress by the bare margin of a single vote in the House, only by accepting a famous condition that no draftees be stationed outside of the Western Hemisphere or the territories and possessions of the United States.⁹⁸ Roosevelt may not have completely abided by the condition, but his general acceptance of it expressed deference to Congress in its setting of limits on the use of the military.⁹⁹

C. Practice since World War II

After World War II, during the Cold War, Presidents Truman, Eisenhower, Kennedy, and Johnson, to varying extents, demonstrated that they would make their own unilateral decisions on commitments abroad and on use of force. The Korean War, the Cuban Missile Crisis, and the commitments that evolved into the Vietnam War, were primarily presidential rather than congressional decisions. Congress did not effectively curb presidential war initiation by resort to any of its powers, including appropriations conditions, until the 1970s.

Nonetheless, that did not mean the complete atrophy of congressional influence over foreign affairs via the appropriations power during the period from World War II to the Vietnam War. Rather, starting with the Marshall Plan and the Truman Doctrine, the United States made its great tool in winning and sustaining allies through the provision of foreign aid, both military and non-military. Establishing the foreign aid programs and deciding on their funding became a major congressional task and eventually a fertile field for congressional legislating and conditioning—something of a forerunner to the reconstruction aid for Iraq.

⁹⁵ Henry B. Gonzalez, *The Relinquishment of Co-Equality by Congress*, 29 HARV. J. ON LEGIS. 331, 336 (1992).

⁹⁶ Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1801 (1968).

⁹⁷ This particular condition was not an appropriation rider, but rather was placed on the authorization legislation for the draft. Technically, it could be dismissed for that reason as irrelevant to an analysis of appropriation riders. History, however, singled out this momentous legislation to serve as the vehicle for a condition restraining the President from making a controversial use of his draftees.

⁹⁸ Selective Training and Service Act, ch. 720, § 3(e), 54 Stat. 885, 886 (1940).

⁹⁹ Charles J. Cooper, Comment, *Symposium: A Constitutional Bicentennial Celebration of the Imperial Presidency*, 47 MD. L. REV. 84, 97 n.44 (1987). Former Assistant Attorney General Cooper, in a historically learned essay, notes that Roosevelt sent troops to Greenland and Iceland despite the latter being outside the Western Hemisphere. *Id.* This was indeed a violation of the letter of the condition, but was not seen at the time as a serious violation of its spirit, as the Iceland occupation kept near the balance of defensive preparations rather than interventionist action.

The later part of the Vietnam War marked a historic turning point, with Congress seeking to regain control of war action via appropriations riders. This Article will discuss below the specifics of the Vietnam War's appropriation scope limits and fund cutoffs. Speaking broadly, a congressional backlash started in the early 1970s against what the nation saw as the "imperial presidency" of the Cold War.¹⁰⁰ Sharp policy disputes were often resolved by votes on appropriation riders. For example, the next area for potential covert armed intervention abroad after the fall of Vietnam turned out to be Angola. Congress, however, enacted the Clark Amendment—a condition on appropriations—to preclude such intervention in Angola.¹⁰¹

Particularly in the late 1970s, the procedurally-minded observer could see that Congress enacted appropriations riders partly because members of Congress' minority party could thereby raise issues despite opposition by the majority party's agenda-controlling leadership.¹⁰² For example, Senator Jesse Helms (R-N.C.), and kindred conservative House Republicans could raise foreign policy issues by appropriation riders in the late 1970s, notwithstanding the opposition of the Democratic President (Carter) and Democratic Senate, House, and committee leaderships.¹⁰³

President Reagan's controversial military initiatives—his overt aid for El Salvador against its insurgency, and his covert aid for the Contra rebels against Nicaragua—naturally elicited resort to Congress' power of the purse. This Article will discuss below the specifics of the Contra-related Boland Amendments. Again, the resort to riders also reflected procedural considerations. When the divided Congress was unable to enact other forms of legislation about subjects like the Contras, appropriation riders could get through. The riders succeeded partly because the President affirmatively needed the House's votes for appropriations for aid, such as aid to El Salvador and "humanitarian" aid to the Contras. Another reason for the riders' success was that necessary appropriations for other purposes, such as continuing resolutions, had to go through, even when they contained a rider disliked by the White House.¹⁰⁴

¹⁰⁰ See generally ARTHUR SCHLESINGER, *THE IMPERIAL PRESIDENCY* (4th ed. 1974) (analyzing the growth in powers of the presidency, particularly as to war and foreign affairs, and its acceleration during the Cold War).

¹⁰¹ Clark Amendment, Pub. L. No. 94-329, § 404, 90 Stat. 729, 757-58 (1976), amended by International Security and Development Cooperation Act, Pub. L. No. 96-533, tit. 1, § 118(a)-(d), 94 Stat. 3141 (1980). For a detailed account of the provision's passage, particularly its roots in the Ford Administration's diminished credibility about such interventions, see Franck & Weisband, *infra* note 130, at 51-55.

¹⁰² Congressional committees will not report free-standing bills on this subject to the floor, and even hypothesizing a proposed provision could reach a conference committee, there it would die. In contrast to the House, in the Senate proponents of a proposition advancing criteria for troop withdrawal may offer it as a non-germane amendment on a bill that the House has, or will, adopt, so that the Senate proposition makes it to conference. However, the floor leadership in both chambers may choose the conference delegations so that the proposition gets watered down or dropped before a conference report comes back to the two chambers.

¹⁰³ See, e.g., CHARLES WHALEN, *THE HOUSE AND FOREIGN POLICY: THE IRONY OF CONGRESSIONAL REFORM 92-95* (1981).

¹⁰⁴ In 1981-86, the majority party in the Senate was the President's party. Thus the President and his Senate leadership, could block most avenues for legislating, such as independent ("free-standing") bills to put Boland-like restrictions into permanent law. But, the President and the Senate leadership could not block appropriation riders, at least not completely.

Although there were no momentous war appropriation conditions during the term of President George H. W. Bush, there was an important development of significance in how Presidents could respond to appropriations. President Bush continued and expanded President Reagan's formalized use of a hitherto insignificant gesture, the "signing statement." President Bush used signing statements extensively for expressing disagreement with, among other types of provisions, defense spending terms, which he said "might be construed to impinge on the President's authority as Commander in Chief and as the head of the executive branch."¹⁰⁵ His signing statements announced that he would treat these provisions as diluted in some way—for example, as merely expressing a congressional aspiration—when Congress had actually worded the provision in strong mandatory language. The use of a signing statement as a potential response to an Iraq war term will be discussed later.

During the Clinton presidency, congressional struggle with the President over obedience to appropriation controls was in relative remission. In response to the ill-fated course of the American intervention in Somalia, Congress put in place the Byrd¹⁰⁶ and Kempthorne¹⁰⁷ Amendments, which required American troops to leave that country by a 1994 deadline and not to return unless Congress specifically granted approval. The new Republican congressional majority after 1994 conducted disputes with President Clinton by proposals such as appropriation conditions forbidding American forces from taking part in multilateral peacekeeping under United Nations command. Although the Clinton Justice Department issued a lengthy opinion of much interest purporting to reject such a condition as unconstitutional,¹⁰⁸ in reality President Clinton went to great lengths to demonstrate clearly that he would put American troops deployed to Bosnia under an American general and a NATO structure, not under the objected-to U.N. command.¹⁰⁹

As for the very real presidential military actions,¹¹⁰ President Clinton committed troops to Bosnia in 1995 and led NATO's bombing campaign against Milosevic's Serbia in the Kosovo conflict in 1999. In both instances Congress, after significant debate, neither expressly authorized nor expressly disapproved, by legislation or by appropriation conditions, these military

¹⁰⁵ Statement on Signing the National Defense Authorization Act for Fiscal Year 1991, 2 PUB. PAPERS 1766–67 (Nov. 5, 1990).

¹⁰⁶ See Ford, *supra* note 66, at 686–88.

¹⁰⁷ Rosen, *supra* note 81, at 11 n.53.

¹⁰⁸ *Placing of United States Armed Forces Under United Nations Operational or Tactical Control*, 20 Op. Off. Legal Counsel 182 (1996).

¹⁰⁹ The word "NATO" appeared ten times in President Clinton's address about the commitment (not counting the additional multiple mentions of European allies), while "United Nations" appeared only once. The only mention of the U.N. was that "American troops will take their orders from the American general who commands NATO [U]nlike the U.N. forces, they will have the authority to respond immediately" President William J. Clinton, *If We're Not There, NATO Will Not Be . . . Peace Will Collapse*, WASH. POST., Nov. 28, 1995, at A8 (text of President's address). President Clinton twice noted the command structure for American forces: that they were under the command of an American general and would take their orders from the American general. *Id.*

¹¹⁰ As to Haiti, see Marian Nash, *Contemporary Practice of the United States Relating to Internat'l Law*, 89 AM. J. INT'L L. 96, 101–02 (1995); Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L. J. 777, 824–27 (1995).

actions and commitments in the former Yugoslavia.¹¹¹ In a tense and delicate way, in the 1990s neither the President nor Congress gave up ground; rather, there was something of an armed truce in the war powers dispute.

President George W. Bush, in his first term, sought and received two express congressional authorizations for the use of force. One came three days after the 9/11 terrorist attack. Notwithstanding the expansive claims made for that September 14 resolution,¹¹² its drafting clearly reflects a compromise over his loose initial proposal with the leadership of the then majority Democratic Senate.¹¹³ The more cautiously drafted compromise version adopted by Congress no longer authorized hostilities with countries having no share in 9/11; that is, it specifically avoided authorizing hostilities with the particular country known to be out of favor with some of the President's advisers—Iraq.¹¹⁴ The other authorization concerned Iraq,¹¹⁵ and came on the eve of the 2002 midterm election. It conditioned force against Iraq upon fresh steps in the international arena,¹¹⁶ and President Bush used it to invade Iraq the following spring without a fresh resolution, or majority support for one, from the Security Council.¹¹⁷ Of course, President Bush took many steps to mobilize his war powers.¹¹⁸ Still, in war powers terms, those two express congressional resolutions of 2001 and 2002 meant that President Bush had, relative to other Presidents like Nixon, respected the separation of powers in terms of obtaining congressional authorization for war.

III. RIDER FOR WITHDRAWAL FROM A FULLY AUTHORIZED WAR?

A. Basic Argument

The most important appropriation rider type would direct a process or sequence of withdrawing American ground units from combat in Iraq. This would involve more than mere policymaking, but raises the ultimate question of ramping down war involvement itself. Just as the initial authorization for use of force makes the commitment of armed forces to war, a congressional direction for phased withdrawal implicates the reduction of military commitment. This is the case even assuming the rider allows such limited

¹¹¹ For this period, see Charles Tiefer, *War Decisions in the Late 1990s by Partial Congressional Declaration*, 36 SAN DIEGO L. REV. 1, 9–16 (1999); and Charles Tiefer, *Adjustable Sovereignty: Contemporary Congressional-Executive Controversies About International Organizations*, 35 TEX. INT'L L.J. 239, 255–57 (2000).

¹¹² Bradley & Goldsmith, *supra* note 24, at 2054–55 (discussing resolution passed by Congress on September 14, 2001 and signed by President Bush on September 18, 2001).

¹¹³ See generally Abramowitz, *supra* note 23 (outlining the legal and political issues raised in the passing of this resolution and the manner in which members of Congress reached a compromise on the resolution's text).

¹¹⁴ For the loose original White House proposal printed in the Congressional Record by Senator Robert Byrd (D-W.Va.), see 147 CONG. REC. S9950–S9952 (daily ed. Oct. 1, 2001).

¹¹⁵ See Ramsey, *supra* note 39, at 332–34.

¹¹⁶ For analysis of the ignored language in the Iraq resolution, see JOHN W. DEAN, *WORSE THAN WATERGATE* (2004).

¹¹⁷ The international sequence is treated in Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 177 (2004).

¹¹⁸ Nancy Kassop, *The War Power and its Limits*, 33 PRESIDENTIAL STUD. Q. 509 (2003) (describing the sequence and basis on which President Bush invaded Iraq).

forms of continued commitment as some remaining ground commitment, American advisers, special forces units, air and naval forces, intelligence and logistics to continue to support Baghdad against any ongoing insurgency in Iraq. The change from a substantial American commitment, in terms of large numbers of American ground forces with large American casualties, to a reduced involvement with fewer American casualties, downshifts American involvement in the war.

A rider that House Democratic Leader Nancy Pelosi drafted in June 2005 for the FY 2006 defense appropriations fell into this category. The Pelosi Amendment would have required the President to set forth criteria for when it would be “appropriate to begin the withdrawal of United States Armed Forces from Iraq.”¹¹⁹ The criteria it sought included “assessing the capabilities and readiness of Iraqi security forces,” and “the milestones and timetable for achieving”¹²⁰ the goals for such forces, an estimate of the total number of Iraqi personnel needed to perform the duties of current U.S. forces, the level of U.S. advisors needed to support Iraqi forces, and the political milestones for Iraq.¹²¹

The Pelosi Amendment sponsors could not phrase the amendment within the narrow strictures for a “limitation” amendment.¹²² A limitation amendment to an appropriation bill is in order—without needing any waiver of the House and Senate floor rules against adding legislative amendments to an appropriation—because it complies with a number of strictures, such as not involving any exercise of discretion by an executive official. It is all but impossible to write limitation riders that carry out delicate and complex policies while satisfying the requirements for a limitation amendment. Quite possibly, the best versions of each of the types of war and aid funding riders could not be written as limitation riders.

However, even though war and aid funding riders may not meet the strict tests for limitation amendments, they may qualify to be made readily in order for offering on an appropriation bill. They may well apply to the specific funds (typically single-year funds) in the bill, and otherwise satisfy the requirements to be considered “germane.” For example, consider an amendment to an appropriation bill funding the war stating that “none of the funds in this law may be used for military activity in Iraq unless the President is implementing a plan to reduce American ground forces in Iraq to a level below 80,000 by 18 months after this law’s date of enactment.” Such an amendment would not satisfy the full requirements for a limitation amendment because of the degree of discretion it gives the President, but would be considered germane to the bill. In the House such amendments procedurally require a waiver provision on the special rule to be in order for consideration. That special rule is a resolution reported by the House Rules Committee that

¹¹⁹ Pelosi Amendment, sec. (a), 151 CONG. REC. H4580 (daily ed. June 16, 2005).

¹²⁰ *Id.* sec. (b)(1).

¹²¹ *Id.* secs. (b)(2)–(4).

¹²² For example, the most famous rider in recent decades is the Hyde Amendment, which prohibits spending Medicaid funds on abortions. It could not be written to include an exception for the health and life of the mother because such an exception would preclude it from being a limitation amendment. Tiefer, *supra* note 9, at 986. Instead, it is typically adopted on the House floor with no such exception, but with a promise by its sponsors (which is kept) that such an exception will be added in conference. *Id.* at 987.

sets the procedure for consideration of the bill. An amendment that is technically legislation on an appropriation, and hence subject to a point of order, becomes in order by dint of the provision in the special rule waiving the point of order.

That was true of the Pelosi Amendment.¹²³ When the majority leadership of the House refused to provide such a waiver, supporters of the Pelosi Amendment attempted the procedural steps to obtain the waiver and to make the amendment in order.¹²⁴ They were narrowly defeated in a vote; some majority members joined with the minority party, almost succeeding in putting together the requisite strength to move the amendment.¹²⁵ The existence of this channel for putting a war funding rider before the House constitutes a major respect in which the democratic process encompasses decisionmaking in the course of an ongoing war. If the public wants to know how it can assert its democratic prerogatives during an unpopular war, the answer includes pressing representatives in Congress to make a war funding rider in order and, then, to approve it.

A brief debate occurred regarding the Pelosi Amendment, but the discussion was too truncated for significant airing of either policy or constitutional questions. Still, the offering of the amendment echoed the early stages of the proposed amendments during the Vietnam War.¹²⁶ It demonstrated the existence of a large body of members willing to stake out the position favoring, albeit without a definite deadline, a phased process of withdrawal of the troops. There is every reason to expect that future shifts in public opinion about the Iraq war would bring sufficient bipartisan strength to make a rider in order and to pass it. Down the road, if the gap increased between public disenchantment with the war and presidential unwillingness to conduct a process of withdrawal, a stronger amendment could mandate, and succeed as the means for enacting, a drawdown schedule with definite deadlines.

Besides the policy issues a withdrawal rider might trigger, either in Congress, in the press, or elsewhere, such a rider also raises debated constitutional issues. Supporters of congressional authority would cite the English and colonial origins, the expressed Framers' intent, and the long history of Congress' plenary power of the purse with regard to military spending. In functional and structural terms, they could point out that the public in an American-style democracy must have a way to limit their funding of a war with unacceptable costs and losses. For those who say that a congressional power to impose such terms would deny support to the troops, the answer has always been that full funding support for the troops would

¹²³ 151 CONG. REC. H4569, H4570 (daily ed. June 16, 2005) (statement of Democratic Leader Pelosi).

¹²⁴ *Id.* This requires defeating the motion for the previous question on the version of the special rule reported by the Rules Committee. If the previous question is defeated, supporters of the Pelosi Amendment could amend the special rule to add a waiver of the rule against legislation on an appropriation, and then adopt the rule as amended. The Pelosi Amendment would then be in order.

¹²⁵ *Id.*

¹²⁶ Long before the successful amendments were enacted, the McGovern-Hatfield Amendment was proposed and defeated. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 29 (1993).

continue until their withdrawal. Troops do not want to fight a war where their nation no longer feels they should be sacrificed. The best way to support troops may be to withdraw them from combat when they have done what they can.

The precedents of greatest relevance consist of the scope limits and cutoff provisions during the latter part of the Vietnam War. By 1971, Congress had repealed the original congressional authorization for the war, the 1964 Tonkin Gulf Resolution¹²⁷ and began to pass provisions recommending withdrawal of American troops. Nevertheless, President Nixon widened the war by using American forces in ground incursions and bombing of Cambodia and Laos. Notwithstanding the memorable early justification for this by then Assistant Attorney General William H. Rehnquist,¹²⁸ such expansion of the war triggered strong congressional reactions. This included appropriation conditions in 1971–73, and later, an appropriation cutoff for combat support after August 15, 1973, with a series of famous proposed and enacted amendments known by the names of their sponsors: Cooper-Church, Mansfield, Fulbright, and Eagleton.¹²⁹ When President Nixon avoided the cutoffs by transferring appropriation funds, he aroused the proponents of floor amendments. During the enactment of subsequent appropriation bills, these proponents essentially defeated the efforts of the Armed Services Committee and House floor leadership to forestall them and succeeded in imposing strict and comprehensive appropriation cutoffs. These ultimately precluded President Ford from recommitting American forces to prop up South Vietnam against its final collapse.¹³⁰

These various Vietnam War provisions evoked much war powers debate, at the time and subsequently. President Nixon gave different rationales at different times for controversial combat action, particularly the bombing of Cambodia, which might have been undertaken for offensive strategic reasons of achieving victories in that country, or for defensive reasons of forestalling attacks from sanctuaries there on American forces in South Vietnam. As a result, part of the debate over the legislated prohibitions, such as limits on operations outside Vietnam, concerned the diverse impacts of those limits on variously-rationalized combat operations.¹³¹ It remained particularly open to debate whether Congress would cut off the use of defense appropriations for such bombing when the President expressed their purpose as being to protect our withdrawing ground troops.¹³² More importantly, though, the course of action demonstrated that Congress could condition appropriations to preclude the continuation of American large-scale combat intervention. However, this demonstration of congressional power regarded the Vietnam War, where there

¹²⁷ See Van Alstyne, *supra* note 48, at 20–21.

¹²⁸ William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628 (1970) (printing then-Assistant Attorney General Rehnquist's justification of President Nixon's military operations in neutral Cambodia and Laos, on grounds such as the President's legal authority to protect the troops even from the enemy units in neutral countries).

¹²⁹ See WORMUTH & FIRMAGE, *supra* note 12, at 105.

¹³⁰ THOMAS M. FRANCK & EDWARD WEISBAND, FOREIGN POLICY BY CONGRESS 13–33 (1979).

¹³¹ ELY, *supra* note 126, at 34–46.

¹³² See BANKS & RAVEN-HANSEN, *supra* note 1, at 156.

were doubts about whether the broad conflict, as it had evolved, had ever really been fully authorized. Accordingly, the Vietnam War precedents raise the question of whether riders could limit a fully authorized and funded war, the question next addressed.

B. Riders Limiting a Fully Authorized and Funded War

1. Applying the Vietnam War Precedents

On the frequently arising question of the President's authority to commit armed forces to hostilities without specific congressional authorization, presidential supporters have had many occasions to express their views.¹³³ In contrast, the record is less developed on the issue of presidential power to continue a war in the face of limiting provisions on appropriations once hostilities are long underway, apart from the debate over the Vietnam War provisions. The Vietnam War riders are the single overridingly strong example of congressional funding limitations on an ongoing war. Those riders plainly validated that Congress could impose limiting terms to bring American involvement in a war to an end, regardless of whether the President agreed.

Still, reliance by proponents of Iraq war riders solely upon the Vietnam War as precedent would likely evoke a strong reaction from presidential power enthusiasts. Such enthusiasts know that they must address the comparison between the Iraq War and the Vietnam War and will probably continue to feel comfortable making their stand in terms of politically persuasive distinctions between the wars. They describe the Iraq War as a commitment on behalf of a democracy to replace the toppled regime of Saddam Hussein, against an insurgency having the tactics and loud backing of the terrorists of 9/11. This contrasts with the Vietnam War, in which there was relatively little emphasis on South Vietnam becoming a democracy, and in which the insurgency, albeit Communist, was not linked to terrorists who had inflicted thousands of casualties within the United States. If there is support for the United States in the Iraqi population, and there is no clear alternative for Iraq short of anarchy, victory seems obtainable in the Iraq War; the Vietnam War had no such obtainable end (especially in hindsight).

Many items go into the mix of comparing a 1960s anti-Communist war with 50,000 American deaths with the present war against a Middle Eastern insurgency with a few thousand American deaths. Some observers would focus on the similarities, others would focus on the differences. As to the constitutional issue, it is important that analysis of the validity of the Iraq riders not be reduced to whether Iraq is "like" Vietnam. The Vietnam War did not establish some kind of narrow legal exception that gives Congress its constitutional power of the purse only in a conflict with high enough casualties and low enough probability of victory. Rather, the Vietnam War riders illustrate that Congress has the constitutional power of the purse to reduce the scope of a war commitment. The interesting argument concerns whether there

¹³³ See, e.g., Yoo, *supra* note 17 (responding to Professor Michael Ramsey's pro-Congress view of the war powers debate, based on a textual and structural theory of a flexible approach to war powers); Sidak, *supra* note 14 (arguing that the Appropriations Clause has at times been improperly invoked by Congress in order to limit the funds available to the President).

was some legal reason that appropriation riders in the Iraq War would not be a valid use of that power.

The best legal ground for presidential supporters to make a case distinguishing Iraq war funding riders from Vietnam riders rests upon a legal difference between the wars, namely, the full authorization the President obtained to initiate the commitment to the Iraq war, or alternatively, something unique about the post-9/11 world.¹³⁴ The President in the fully authorized and funded Iraq war arguably has more legal authority than did President Nixon in the legally unauthorized wars in Cambodia and Laos in the 1970s, which followed an initial Vietnam commitment pursuant to the flawed Tonkin Gulf Resolution. For that matter, President Truman committed American troops to the Korean War without asking for express congressional ratification and then seized domestic steel mills to promote the war effort without congressional authorization. Thus, he had less legal backing in war powers law than President Bush has for the Iraq conflict.¹³⁵ Congress had not voted expressly for either President Truman's Korean War actions or for President Nixon's military operations in Cambodia and Laos. In contrast, Congress voted expressly on the 2002 authorization of force in Iraq. Even if Congress subsequently decides to put riders on its Iraq funding bills, it had provided full funding of the war prior to those riders and was continuing to provide funding while passing those riders.

The argument that appropriation riders have less power to scale back a declared or otherwise explicitly authorized war like Iraq improves when employed as part of two strategies discussed below: (1) emphasis on the congressionally authorized mission in Iraq; and (2) interpreting riders in order to brush aside and minimize them. To support these strategies, the President needs to advance significant legal and constitutional arguments, rather than relying on the practical differences between Iraq and Vietnam. The President relies on the congressional authorization concerning Iraq, formally granted in 2002 and not repealed or amended, as part of his source of authority. This authorization provides a constitutional distinction from the Vietnam War. The President also argues that the post-9/11 world is legally different with respect to the President's powers.¹³⁶

Critics of the Iraq war may question the clarity of the 2002 authorization as applied years later, recalling the difference between the anticipated short-term hostilities with Saddam Hussein's regime and the

¹³⁴ For example, to justify warrantless eavesdropping of communications with the United States, the Justice Department devoted section II of its memorandum to the congressional enactment of the September 14, 2001 full authorization of war against Al Qaeda and its allies. U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (Jan. 19, 2006), <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>, at 10.

¹³⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 676–80 (1952).

¹³⁶ Proponents of strong presidential powers took an opportunity soon after 9/11 to argue that the President's powers to deal with the situation were broad. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL COUNSEL, THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO CONDUCT MILITARY OPERATIONS AGAINST TERRORISTS AND THE NATIONS SUPPORTING THEM, <http://www.usdoj.gov/olc/warpowers925.htm> (last visited Mar. 7, 2006).

unanticipated, drawn-out counter-insurgency that has ensued.¹³⁷ This line of criticism, disputing the initial basis for war authorization, may or may not matter politically, but it is separate from the question¹³⁸ of the current legal validity of the authorization.¹³⁹

2. The Unconstitutional Conditions Argument

Far more important than questioning the initial authorization of the Iraq war in 2002 is, taking that authorization and subsequent full funding as a given, analyzing how that affects terms placed as riders in the funding to ramp down the war. The strong challenge by presidential power proponents to withdrawal terms is that they invalidly attempt to make the Commander in Chief do something contrary to his constitutional authority in a fully funded, fully authorized war. Presidential proponents argue that Congress is trying to take back a power constitutionally vested in the President by virtue of the initial authorization and the continued funding. Such withdrawal terms, they argue, are *unconstitutional conditions*.¹⁴⁰

Executive supporters on the Iran-Contra committee used the “unconstitutional conditions” argument about the Boland Amendments¹⁴¹ and cited case law to extend the doctrine to the executive branch.¹⁴² The Clinton Administration relied on the “unconstitutional conditions” phrase when it opined that the President could reject a condition on national security funding and yet still spend the funds,¹⁴³ an approach that would be summarized, in the blunt language of politics, as “say no, but keep the dough.”¹⁴⁴ In a relatively recent signing statement, President Bush used a similar rationale regarding a provision apparently responding to an earlier Iraq-related use of

¹³⁷ Other challenges include: (1) The justifications expressed by the Administration about the asserted existence of stockpiles of weapons of mass destruction; and (2) the Administration’s decision to proceed, despite non-fulfillment of the 2002 congressional authorization’s pre-condition of another attempt to gain international support via the Security Council. The case as to conditions in the 2002 authorization is made in JOHN W. DEAN, *WORSE THAN WATERGATE* (2004).

¹³⁸ See generally Ely, *supra* note 32 (rigorously distinguishing between the war within Vietnam itself, which received authorization, however improperly obtained, in the Tonkin Gulf Resolution, and the wars in Cambodia and Laos, which lacked such formal authorization).

¹³⁹ The Vietnam War is nearly unmatched in its degree of subterfuge and veiling of the extent and duration of ground troop commitment. It was effectively commenced when President Lyndon Johnson obtained congressional authorization via the Tonkin Gulf Resolution. Even the methods by which President Tyler initiated the Mexican-American War of 1846–48, or the questionable basis of the start of the Spanish-American War of 1898, show that the standard of the past has been low in this regard.

¹⁴⁰ See *supra* note 28, at 145–46.

¹⁴¹ H.R. REP. NO. 100–433 100th CONG., S. REP. NO. 100–216 100th CONG., at 476–77 (1987).

¹⁴² They invoked case law in the domestic context that has indicated that an appropriation condition precluding the Department of Justice from performing constitutional functions, such as with respect to busing remedies in school integration cases, would be an unconstitutional condition. *Id.* at 479 n.23 (citing *Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980)).

¹⁴³ The Sufficiency of the President’s Certification Under the Mexican Debt Disclosure Act, 20 Op. Off. Legal Counsel 673 (1996); Powell, *supra* note 27, at 551–54 & n.122.

¹⁴⁴ “Say no, but keep the dough” is a blunt way of saying that the essence of an official’s consent to an appropriation condition consists of his eagerness, even knowing the condition, to spend the funding. See Engdahl, *supra* note 68, at 67–70.

appropriations.¹⁴⁵ President Bush's signing statement asserted that the notice requirement of a funding bill concerning new military installations abroad¹⁴⁶ might violate "his constitutional grants of executive power as Commander in Chief."¹⁴⁷ President Bush kept the funds, yet treated the term as in effect unconstitutional.

Similarly, faced with a Vietnam-like cut-off or troop-withdrawal amendment, the President or his supporters could presumably argue that the clear Iraq war authorization, as well as the continued funding, allow and indeed require him to make his own decisions about whether to disengage his forces and remove them from the theater of war. In other words, these other authoritative congressional actions about Iraq put the Commander in Chief in a position not subject to Vietnam-like conditions riding along on the appropriations. Presidential supporters urge that our armed forces have been in Iraq since 2003, as Congress authorized, to establish a secure, viable democracy in the place of the former regime of Saddam Hussein. Furthermore, the enemy has special characteristics of the post-9/11 world and therefore the President must choose the core parts of the congressional authorization and appropriation laws—the parts that authorize and fund the effort—over the less essential part that contains the withdrawal term.

3. The Significance of Congressional Decisions on Limited War

Much of the real tactical use of the "unconstitutional conditions" argument involves its role after enactment when the President can use it to justify brushing off or minimizing the conditions without seeming to be in outright defiance. This part of the analysis will be discussed below concerning presidential undermining of legislation during implementation after enactment.

At this point, the question concerns Congress' power to place limits on how far or long the Commander in Chief may go in conducting a fully authorized war. There does not appear to be any executive statement about whether the Congress has power to enact new limits by way of riders during wartime that supporters of presidential power could cite.¹⁴⁸ One particular argument for the Commander in Chief does indicate his possible position, even though it concerns presidential power in the absence of a particular operative appropriation rider. During the Vietnam War, when President Nixon's armed incursions into Cambodia required legal justification, then-Assistant Attorney

¹⁴⁵ President Bush improperly moved funds around, violating the required notice to congressional appropriators, for building installations as part of Iraq war preparations in 2002. BOB WOODWARD, *PLAN OF ATTACK 137* (2004).

¹⁴⁶ The FY 2005 military construction appropriation included codification of a stricter notice requirement for new military installations abroad.

¹⁴⁷ Statement on Signing the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, 40 WEEKLY COMP. PRES. DOC. 2385–86 (2004).

¹⁴⁸ See generally Powell, *supra* note 27 (citing previous executive opinions about unconstitutional conditions on appropriations, although none concern the paramount question of limiting the campaigns in a war). Powell's article cites, as the leading opinion about how the commander-in-chief power trumps appropriation conditions, Power to Detail Officers of the Engineer Corps., 28 Op. Att'y Gen. 270 (1910) (regarding detailing officers to act as experts for an Interior Department advisory board, notwithstanding a general condition in the appropriations against details to bodies not expressly authorized by law).

General William Rehnquist, among others, made the case. President Nixon “has an obligation as Commander-in-Chief to take what steps he deems necessary to assure the safety of American Armed Forces in the field.”¹⁴⁹ The rationale for Cambodia operations was that enemy sanctuaries across the Cambodian border posed an increasing threat to the safety of U.S. forces as well as to the program underway in South Vietnam.¹⁵⁰ A president could argue that the kind of commander-in-chief obligations that gave President Nixon authority in Cambodia and Laos could today override an Iraq appropriation rider.

Similarly, the President could say that an Iraq rider leading to a specified withdrawal schedule would undermine the military effort that Congress authorized and funded. A schedule for withdrawal might give insurgents a greater chance of victory over the Iraqi government and put our own troops—who Congress fully authorized and funded to be there—in greater danger. Presidential power proponents could say that such a rider infringes the Commander in Chief’s responsibility and prerogatives.

As a political matter, an appropriation provision of any rigor would only get enacted once the public feels sure that American forces are safer being withdrawn, even though the President claims that the withdrawal itself exposes them to peril.

The constitutional issue turns on legal considerations of authority. Its answer comes from the constitutional concept of Congress’ power to decide whether only a limited war will be authorized. The Framers understood well “the differences between ‘perfect’ and ‘imperfect’ war, or between ‘general’ and ‘limited’ war.”¹⁵¹ In granting Congress the constitutional power “to declare war,” the Framers handed Congress the instrument by which to choose which level of war to declare. By “level of war,” I mean the characteristics that define the war’s scope in broad terms of time, space, and nature: its duration, such as a termination or withdrawal process; its geographic scope, such as the decision of whether neighboring neutral countries are off-limits; and the nature of the war in other respects, such as whether it consists of just naval (or, today, naval-air) forces or also involves ground combat forces.

The first American war with another nation after the end of the Revolutionary War is of great illumination regarding the Framers’ intent. The undeclared naval war or “Quasi-War” with France of 1798 occurred barely a decade after the Constitutional Convention. That conflict received congressional authorization as a limited war. Congress limited it to a naval war and defined the areas in which captures of enemy vessels were permitted.¹⁵² The Marshall Court passed upon several famous cases involving ships captured as prizes during that war.¹⁵³ It thereby set forth an eloquent jurisprudence from

¹⁴⁹ Rehnquist, *supra* note 128, at 638.

¹⁵⁰ See generally BANKS & RAVEN-HANSEN, *supra* note 1 (discussing enemy sanctuaries established across the Cambodian border).

¹⁵¹ Bradley & Goldsmith, *supra* note 24, at 2059.

¹⁵² See WORMUTH & FIRMAGE, *supra* note 12, at 60–63.

¹⁵³ See, e.g., *Little v. Barreme*, 6 U.S. 169 (1804) (holding that a captain of a vessel follows instructions from the President at his peril and that if those instructions are not strictly warranted by law he will be legally liable for the consequences); *Talbot v. Seeman*, 5 U.S. 1, 7,

the Framers' era regarding limited war in general and Congress' ability to define a war's characteristics as to geographic scope and nature.

This was no obscure encounter with some petty or backward opponent. France in 1798 was one of the world's great powers; it had been our most important ally in the Revolutionary War, and the issue of war with France in the years after its own revolution aroused the most intense partisan feelings. Moreover, the congressional limitations on the naval war were part of a broader pattern. Congress had created an army prior to the war but felt alarmed at its expense. It debated at length the approach to scaling back the army—a debate in which John Marshall himself played a key part. Marshall argued the issue with every indication that he in particular, and Congress in general, could judge the advisability of a military buildup or stand-down without trespassing on presidential prerogatives.¹⁵⁴

The Framers' concretely expressed concepts of a limited war with a major opponent unmistakably contemplated that the President would carry out his role as wartime Commander in Chief within overall limits defined by the directions of Congress. When Congress authorizes a limited conflict—meaning a conflict within limits of space, time, and goals—the Framers did not contemplate that the President could challenge Congress as improperly interfering with his commander-in-chief prerogatives. Nothing could be further from the treatment of the quasi-war with France. Congress set the limits; the President had to obey. The President could not argue that the commencement of war gave him the power to cast off limits set by Congress and to have the nation in a conflict of a greater scope than Congress authorized.

Rather, the President proceeds within the limits set for the war as any commander would. He is the highest commander, the one who commands the entirety of the military, and this supremacy of his command cannot be unconstitutionally interfered with; but he is still commander of a war waged at a level defined by the nation through Congress. The action of setting limits for the war is deemed not to supplant or interfere with how any commander, including the Commander in Chief, directs his forces within the set parameters of the limited war.

During our memory, as in the Framers' time, Congress has authorized limited wars. In 1983, it authorized the President's use of the armed forces in Lebanon to perform certain functions, primarily peacekeeping, with an eighteen-month limitation, an important precedent as the first such act of Congress authorizing the use of force since the end of the Vietnam War.¹⁵⁵ In 1993, Congress authorized the President's use of the armed forces in Somalia for the very limited purpose of the protection of U.S. personnel and bases, with an approximately five-month limitation.¹⁵⁶ Again, this was an important precedent, continuing the pattern of congressional authorization for the Persian

15, 31 (1801) (discussing Congress' legislating and how it controls the law of salvage); *Bas v. Tingy*, 4 U.S. 37 (1800) (discussing Congress' powers to make and limit wars).

¹⁵⁴ ALBERT BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 476–80 (1919).

¹⁵⁵ Multinational Force in Lebanon Resolution, Pub. L. No. 98–1119, 97 Stat. 805 (1983).

¹⁵⁶ Department of Defense Appropriations Act of 1994, Pub. L. No. 103–139, § 8151, 107 Stat. 1418, 1475–77 (1993); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103–160, § 1512, 107 Stat. 1547 (1994).

Gulf War in 1991. Via these actions, Congress revived its authorizing function after the doubts, confrontations, and defiance surrounding the Vietnam War and the War Powers Resolution. As even Professors Bradley and Goldsmith, presidential power supporters, conclude from this and from a broader historic review: “This survey of authorizations to use force shows that Congress has authorized the President to use force in many different situations, with varying resources, an array of goals, and a number of different restrictions.”¹⁵⁷

4. Limiting Provisions in the Midst of Wars

There is one remaining argument for presidential power supporters: Even recognizing that Congress may define limits at the outset of wars, as it did in 1798, it cannot impose them as funding terms during the combat. Actually, Congress did redefine the limits of the 1798 war, expanding those limits as it proceeded, but, nevertheless, the argument remains important to examine. The argument could be that, in the Iraq context, in 2002 Congress could have set limits in authorizing the conflict—on its scope or duration—but instead Congress made a definite and defining choice when it authorized the conflict without imposing limits.

The argument would emphasize that Congress could but has not completely stopped funding of the war by a cutoff.¹⁵⁸ Hence, as long as Congress continues to fund a war started without limits defined at the outset, the President may use the means placed at his disposal by that funding as he sees fit to prosecute a war. In other words, when he deems himself forced to decide whether to follow the original 2002–03 mission or to let his command function be interfered with by later conditions on appropriations, he may choose to honor the original authorization rather than the mid-course or “real time”¹⁵⁹ dictation of limits.

However, this view clashes with the understanding from the Framers’ time to the present of the constitutionally intended function of periodic legislative funding as the channel for public action, not just at the beginning of wars, but in their midst as well. It was no aberration when, during the Vietnam War, Congress reacted against the Cambodia and Laos incursions by exercising its power of the purse and adjusting the extent of ground war combat.

From the English and colonial models, the Framers spoke of the power of the purse not as a matter of unsupervised unconditional flows of war funding, but as an ongoing means of parliamentary control.¹⁶⁰ The Framers’

¹⁵⁷ Bradley & Goldsmith, *supra* note 24, at 2077.

¹⁵⁸ See Louis Fisher, *Congressional Checks on Military Initiatives*, 109 POL. SCI. Q. 739, 756–58 (1994–95) (discussing the efficacy of statutory cutoffs).

¹⁵⁹ The phrase “real time” is from BANKS & RAVEN HANSEN, *supra* note 1, at 155 & n.165.

¹⁶⁰ In the limited naval war with France, an initial congressional authorization to fight armed vessels on the high seas was succeeded by a later authorization to intercept vessels sailing to French ports. Such a subsequent or “real time” change in the limits on war was taken as plainly valid. The new limits were binding on presidential orders, and since President Adams had issued an order authorizing broader action than permitted by the congressional statute, it was held to be unlawful. *Little v. Barreme*, 6 U.S. at 179.

desire for such ongoing control was epitomized by the constitutional provision that appropriations for the army could never be for longer than two years. The colonial-era wars of France and England in North America and the Revolutionary War had schooled the Framers in the problems of long wars and continuing legislative responsibility.¹⁶¹ Neither text nor background suggests the Framers envisaged the congressional limit-defining role to only occur at the outset and never after hostilities commenced. The most important military occupation in our history, the post-Civil War occupation of the former Confederacy, was repeatedly adjusted and ultimately ended by the debate over military appropriation riders.¹⁶² Even in the period since the Vietnam War, both the Lebanon (1983) and Somalia (1993) time limits came in legislation after the initial commitment, without Presidents Reagan or Clinton arguing the unconstitutionality of such post-commencement limits. In sum, Congress has full authority to set terms of withdrawal by war-funding riders, whether a war has debatable initial authorization, like the Vietnam War combat in Cambodia and Laos, or clear initial authorization, like Iraq. Congress can define the limits of a limited war and can do so by the terms in the funding appropriation.

There also seems to be no special reason that the characteristics of the post-9/11 world would reduce Congress' authority to place limits on the scope of combat in Iraq. These characteristics, such as the irregular nature of enemy forces and their ability to infiltrate and to strike domestically, may have significance for some of the legal questions involving the President's power. However, in terms of the distribution of the power to decide the scope of funding and of combat in Iraq, the Iraq war is being conducted under regular congressional authorization and funding. U.S. forces conduct combat in Iraq predominantly by use of the regularly authorized and funded military services, rather than by the less overtly authorized and funded special arrangements for covert operations by intelligence agencies. Neither the conduct of the war nor its costs are being kept secret from the U.S. and foreign publics. Congress can, and does, openly debate the continuing commitment of men and materiel to that conflict. Congress can, and does, openly decide the pros and cons of committing men and materiel to Iraq rather than deploying them elsewhere or preserving them. Presidents may try to persuade Congress to defer to them in any conflict, be it the 1983 landing in Lebanon, the Vietnam War, or the Iraq War, on the basis of the nature of the enemy, their possession of superior intelligence, the necessity of continuing to engage the enemy without regard to setbacks, and so forth. But if Congress votes otherwise, there is no principled basis on which the President can usurp Congress' power of the purse, and expend the nation's resources, in Iraq differently than in past wars, if the nation, through Congress, decides to limit the scope of what it will authorize and fund.

¹⁶¹ As has been previously discussed, the Revolutionary War demonstrated that Congress should leave the direction of combat operations to the Commander in Chief, not that Congress should give up the decisions on funding and, with these, on the scope of the war.

¹⁶² See Lalor, *supra* note 91, at III.47.

IV. DEFENSE POLICY AND IRAQ GOVERNANCE PROVISIONS

A. War Policy Terms, Such as a Limit on Reservists' Combat Exposure

1. War Policy

A different type of argument about war funding riders would arise if Congress were to establish policy regarding American forces that, while important, did not limit the war in the same way as a decision from the outset on limited war or, later, on withdrawal of forces. In other words, let us put aside the reasoning just relied upon for Congress using its power of the purse to define the limits of a war in time, space, and nature. Taking as a given that a war in Iraq will continue with some level of ground combat for a period of time, may Congress make policy concerning how some of the military during that war is used, or would that amount to meddling unconstitutionally with the President's command prerogatives?¹⁶³

The enactment of a particular rider shows that policy riders are, in fact, coming. In 2004 and 2005 the press reported abuses of detainees in Iraq, particularly at Abu Ghraib, as well as elsewhere, such as in Afghanistan and Guantanamo Bay. On this subject, the majority party leadership in Congress confined hearings to a minimum and allowed no vehicles for floor votes on curative legislation. However, when the emergency supplemental appropriation that funds the Iraq war came to the House floor in spring 2005, the proponents of legislative action, led by Rep. Ed Markey (D-Mass.) offered an appropriation rider.¹⁶⁴ This swiftly achieved enactment¹⁶⁵ is found in section 1031 of that appropriation.¹⁶⁶ As the press quoted the Administration's spokesman, "[i]f the Congress wants to use the appropriation process to dictate government action, that's within their power, and the Department of Justice did not oppose it."¹⁶⁷ A sweeping provision, the "McCain Amendment" rider about detainee treatment, further addressed the issue at the end of 2005.¹⁶⁸

A concrete example will help flesh out the considerations regarding a policy rider that significantly affects what the President can do with some of

¹⁶³ See Lieutenant Colonel Bennet N. Hollander, *The President and Congress—Operational Control of the Armed Forces*, 27 MIL. L. REV. 49, 73 (1965) (arguing that operational control of the military is exclusively for the Commander in Chief).

¹⁶⁴ The Markey rider was adopted via the Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005, H.R. 1268, 109th Cong., 1st Sess., at 151 CONG. REC. H1518 (daily ed. March 16, 2005). Rep. Markey had offered the amendment to several bills, and his best exposition of the amendment was when it was offered to the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, H.R. 2862, 109th Cong., 1st Sess., at 151 CONG. REC. H4580 (daily ed. June 16, 2005).

¹⁶⁵ The appropriation received a vote of 420 to 2 on the House floor. Dana Priest, *CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges*, WASH. POST, Mar. 17, 2005, at A1.

¹⁶⁶ Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No. 109–13, §1031, 119 Stat. 231, 256.

¹⁶⁷ Lichtblau, *supra* note 5, at A16 (quoting Department of Justice spokesman Kevin Malden).

¹⁶⁸ Detainee Treatment Act of 2005, Pub. L. No. 109–48, §§ 1001–1006, 119 Stat. 2739, 2744 (2005).

the troops under his command. For instance, Congress may worry about the expanded and extended combat exposure of military reservists in Iraq and the risk thereby posed to the viability of the reserve system.¹⁶⁹ It may view the high level of reservists' combat exposure and losses as threatening both to destroy the existing reserve system so that it no longer backs up the regular military and to reduce unsustainably the ability of the reserve system to recruit and train for future foreign and domestic duties.¹⁷⁰ A provision limiting the combat exposure of reservists in Iraq might be good policy to avoid gravely impairing the functioning of the reserve system.¹⁷¹ On the other hand, skeptics might say if the President does not choose such a step on his own, because he, among other reasons, considers it likely to set back the war effort in Iraq, then it would be bad policy.

Let us assume that the public comes to support this particular policy (or whatever policy becomes the basis of a rider) so strongly that Congress enacts it, even though the President does not support it. For balance, let us not assume that professional military opinion on the question strongly condemns either the Congress or the President on this issue. The military recognizes the danger that Congress sees in the overuse of the reserves, yet understands the President's dilemma in trying to carry on an unpopular operation without enlarging the size of the regular Army.¹⁷²

Congressional supporters of such a rider would argue that Congress may put terms in its funding, even as to the use of different forces in an authorized and funded war, to preserve national defense capacities and interests that transcend Iraq—in this example, to maintain the imperiled reserve system's viability. In a general way, they might draw strength from the 2004 Supreme Court decisions about detainees in *Rasul v. Bush*,¹⁷³ and *Hamdi v. Rumsfeld*,¹⁷⁴ in which the Court rejected extravagant claims about the extent

¹⁶⁹ See generally Lt. Cmdr. W. Kent Davis, *Innovative Readiness Training Under 10 U.S.C. § 2012: Understanding the Congressional Model for Civil-Military Projects*, ARMY LAW, July 2001, at 21; Andy P. Fernandez, *The Need for the Expansion of Military Reservists' Rights in Furtherance of the Total Force Policy: A Comparison of the USERRA and ADA*, 14 ST. THOMAS L. REV. 859 (2002); GENERAL ACCOUNTING OFFICE, *FORCE STRUCTURE—ARMY IS INTEGRATING ACTING AND RESERVE COMBAT FORCES, BUT CHALLENGES REMAIN*, GAO/NSIAD 00-162 (2000).

¹⁷⁰ Such concerns are common, and have influenced the military's own planning. "[T]he nation's community of formerly part-time soldiers [has] been badly strained by lengthy deployments to Iraq and Afghanistan." Bradley Graham & Josh White, *Army to Use Fewer National Guard Troops in Iraq*, WASH. POST, July 1, 2005, at A17.

¹⁷¹ See Daniel Glick, *Changing of the Guard: Feeling Betrayed in Iraq, Part-Time U.S. Soldiers May Mutiny at the Polls*, HARPER'S MAG., Aug. 1, 2004, at 69.

¹⁷² For an example of the debate in this context, the Administration advanced a budget proposal to reduce the authorized strength of the National Guard from 350,000 to 330,000. A strong political reaction, emphasizing the heavy and perhaps unsustainable burden of the National Guard's continuing deployment to Iraq, forced the Administration to drop the proposal. But critics, including Republican governors, continued to note that the Administration was not providing the resources to sustain that Iraq commitment. See Robert Pear, *Bush Policies Are Weakening National Guard, Governors Say*, N.Y. TIMES, Feb. 27, 2006, at A10.

¹⁷³ 542 U.S. 466 (2004).

¹⁷⁴ 542 U.S. 507 (2004).

to which the Commander in Chief could function beyond express support in the laws.¹⁷⁵

But, this is not a provision about which the President has no counter-arguments. Unlike President Truman seizing steel mills during the Korean War without congressional authority, this concerns the Commander in Chief in his function of commanding forces in the theater of war. Namely, executive supporters may dispute Congress' right, by such a rider, to make policy that would assuredly interfere with the Commander in Chief's decisions on what use to make of the forces under his command.

2. Criteria for Valid Wartime Policy Terms for the Military

Neither the Framers' intent nor subsequent elaboration has defined precisely the characteristics of valid provisions dealing with military affairs. Let us name three of the President's strongest concerns expressed in executive branch legal pronouncements seeking to raise the commander-in-chief authority to resist congressional provisions: intrusiveness as to the monopoly of command itself; generality of measures, so as not to wrest authority over the disposition of particular forces; and a threshold of funding impact, so that Congress does not use its appropriations power as leverage to control operational affairs.¹⁷⁶

First, broadly speaking, the President's strongest concerns lie with intrusiveness into his monopoly of command itself. Aspects of this monopoly include the choice of subordinate commanders, the arrangements for orders and discipline, the responsiveness of subordinates and units to such orders and discipline, and the manner in which subordinates make strategic and tactical recommendations and carry out the decisions on such matters.¹⁷⁷

In this central area of the monopoly of command itself, a chief issue in the 1990s, which brings out the complexity of analysis in this context, concerned whether Congress could bar President Clinton from putting American forces under foreign (particularly United Nations) command. Politically, the issue concerned the effort by the Republican Congress to depict cooperation by President Clinton with United Nations peacekeeping forces as an encroachment on American sovereignty.¹⁷⁸

The Office of Legal Counsel of the Justice Department provided an uncompromising opinion that a provision in a House bill to rule out such a foreign command arrangement would infringe the commander-in-chief

¹⁷⁵ *But see* *Loving v. United States*, 517 U.S. 748, 767–68 (1996) (accepting commander-in-chief power in discipline context).

¹⁷⁶ No individual executive branch pronouncement sets forth a list of factors like this. Rather, there is a tendency to provide sweeping assertions of the scope of the commander-in-chief power. An examination of the contexts in which those assertions are made, as discussed below for each of these factors, suggests these are the key ones.

¹⁷⁷ Examples of cases and instances about these can be found in Hartzman, *infra* note 183, at 69.

¹⁷⁸ The issue is placed in context, along with others, in Tiefer, *supra* note 45, at 239.

clause.¹⁷⁹ That opinion quoted many of the available scraps of significant guidance about the commander-in-chief clause. The Supreme Court said in 1850 that “[a]s commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual”¹⁸⁰ In 1895, the Court said that the clause “vest[s] in the president the supreme command over all the military forces—such supreme and undivided command as would be necessary to the prosecution of a successful war.”¹⁸¹

In the opinion, the Office of Legal Counsel wrote, “the President may determine that the purposes of a particular U.N. operation in which U.S. Armed Forces participate would be best served if those forces were placed under the operational or tactical control of an agent of the U.N. . . .” As such, they determined that Congress may not, by appropriations condition or otherwise, “prevent the President from acting on such a military judgment concerning the choice of the commanders under whom the U.S. forces engaged in the mission are to serve.”¹⁸²

Yet, even on this core concern of command itself, the Bar Association of the City of New York extensively canvassed the law and history and came to a more neutral outcome. It concluded that such a provision would be most unwise, yet not unconstitutional, because of the concurrent nature of Congress’ powers to make rules for the military.¹⁸³ This conclusion is particularly striking because the provision in question dealt with the essence of the clause, namely, with command itself. In this sense, if we search for the qualities that distinguish some provisions from others, this provision has a high degree of “intrusiveness” inasmuch as it affects command directly and significantly.

That there was room for debate owes to a second quality, not typically isolated, yet crucial in many of the commander-in-chief arguments: the extent of generality in the congressional constraint, in the sense of addressing the general overall structure and relations of the components of the armed forces without getting into any specific mission for any particular component.¹⁸⁴ For all the intrusiveness and dubious wisdom of the “no U.N. command” rider, the rider did not direct itself toward a particular operation or mission. It laid down a general rule regarding command structuring. In that regard, it complied with the constitutional provision that Congress shall make the rules for the military. For example, Congress has guided the United States military through several

¹⁷⁹ Placing of United States Armed Forces Under United Nations Operational or Tactical Control, 20 Op. Off. Legal Counsel 182 (1996).

¹⁸⁰ *Fleming v. Page*, 50 U.S. 603, 9 How. 603, 615 (1850).

¹⁸¹ *United States v. Sweeny*, 157 U.S. 281, 284 (1895).

¹⁸² Office of Legal Counsel, *supra* note 179, at 185–86. The opinion also brings in a discussion of the President’s foreign policy powers and how this provision may interfere with them.

¹⁸³ Richard Hartzman, The Comm. on Mil. Affairs and Justice of the Ass’n of the Bar of the City of New York, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress’s Power to Restrict the President’s Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 105–07 (1999) (explaining why Congress’ rulemaking power has primacy over the President’s command power in a context where the powers are concurrent).

¹⁸⁴ Fisher, *supra* note 10, at 763 (pointing to appropriation restrictions that, without contest, prohibited where U.S. forces could operate).

successive waves of reforms since World War II to centralize and clarify its command structure.¹⁸⁵ No one has questioned the constitutionality of Congress undertaking such far-reaching command reorganization because the rules laid down in these laws make up in generality for their seeming trespasses on the command turf of the Commander in Chief.

Some kinds of quite general riders could operate very intrusively. For example, many in Congress were critical at various times of Secretary of Defense Donald Rumsfeld, notably in connection with the Abu Ghraib scandal regarding detainee abuse. A rider phrased in nonspecific terms that transferred military authority over detainees in the war zone to another Cabinet-level post, such as the director of national intelligence, might superficially seem general in nature. Yet, in context, such a provision would seem distinctly intrusive to the Administration, aimed as it would be at congressional transfer of command responsibility from a more controversial to a less controversial figure. The President would be expected to prevail in branding such a provision as an invasion of his prerogatives as Commander in Chief. Thus, generality is a factor in the justification of appropriation provisions, but it takes more than mere superficial generality to make a valid rider.

A third quality for appropriations terms concerns the extent to which Congress uses a spending impact under a *de minimis* threshold to invade an executive prerogative. Proponents of presidential power have used the example that Congress cannot use its plenary power over appropriations to condition the President's use of pens and paper upon what kind of pardons he signs with them.¹⁸⁶ A similar question about conditions upon *de minimis* spending arises when Congress uses its control over the appropriation of salaries for State Department or Central Intelligence Agency officials to condition their conduct of foreign and intelligence affairs.¹⁸⁷ The same type of issue would arise if Congress became so disenchanted with particular high officials in the Department of Defense working on a large project as to prohibit the use of any military appropriations for communicating with them. In contrast, a provision prohibiting expenditures on that large project itself would certainly pass muster, insofar as it not only purported to condition the spending of money, but did, in fact, act upon the spending of significant appropriated funding.

These criteria of intrusiveness, generality, and threshold spending impact can be applied to a potential provision about exposure of reservists to combat. The President's supporters might well argue that taking away his ability to order reserve units into the positions of full combat exposure intrudes somewhat on his command powers. However, it is one thing for Congress to say who can and cannot command certain kinds of units, but quite another for it simply to say that certain uses are inappropriate for certain kinds of units, whoever might command them. The provision at issue does not have as a

¹⁸⁵ Congress' strictures in this regard culminated in the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (1986), undoubtedly the boldest command reorganizing of the era. A good discussion is Peter M. Murphy & William M. Koenig, *Whither Goldwater-Nichols?*, 43 NAVAL L. REV. 183 (1996).

¹⁸⁶ See, e.g., Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1250 (2003).

¹⁸⁷ Nobleman, *supra* note 93, at 154-57.

direct aim or mode of operation the displacing of presidential command. That is, the command of the reserves is not taken away from the President and given to someone else, nor are the reserves released from presidential discipline. Rather, while certain uses of the reserves are ended, for all the authorized uses, the President remains the Commander in Chief.

The real intrusiveness question concerns whether the provision interferes with the conduct of campaigns and decisions on strategic and tactical disposition of forces.¹⁸⁸ A proponent of presidential power might say that while Congress can simply terminate funding for some kinds of units (such as reservists), having funded them, it cannot speak to their uses. Yet by pulling reservists out of combat, Congress has stayed at a level of generality about the availability of certain forces, without usurping from the Commander in Chief the strategic and tactical decisions to be made in using such forces.¹⁸⁹

A 1909 Attorney General opinion, mentioned in Part III, approved as constitutional a congressional provision that eight percent of detachments aboard naval vessels consist of marines.¹⁹⁰ A similar provision in the 1990s precluded the U.S. military from engaging in construction activities (absent explicit statutory authority)—a large hindrance after U.S. military intervention in Haiti.¹⁹¹ Like the 1909 provisions, this one adopts a completely general rule about the use of a kind of unit, without getting into strategic or tactical decisions of the President and his subordinates.¹⁹² In seeking to preserve the

¹⁸⁸ Presidential power proponents would cite the broad dicta in opinions such as *Training of British Flying Students in the United States*, 40 Op. Att’y Gen. 58, 61 (1941) (“[T]he President’s responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations . . .”). While there are a number of opinions with similar broad dicta, none seem to actually come to grips with questions of the boundary between commander-in-chief authority regarding the conduct of wars, and congressional authority to make general rules regarding substantial military resources.

¹⁸⁹ Professor William Van Alstyne made an apt distinction between the propriety of Congress prescribing the uses to be made of the military, and the impropriety of Congress dictating minutely the President’s strategy and tactics:

Congress . . . also has a distinct enumerated power to provide for armies and navies, and to prescribe the uses to be made for them. There is nothing inconsistent between this proposition and another one, which arises from a combined reading of the declaration of war clause and the President’s power as Commander-in-Chief. This is the proposition that under those circumstances in which Congress has affirmatively embraced a commitment to belligerent activities overseas on a sustained basis, it may not presume to dictate the minute strategy and tactics of the President’s conduct of the authorized enterprise.

Symposium, *The President’s Powers as Commander-in-Chief Versus Congress’ War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 46 (1988).

¹⁹⁰ 27 Op. Att’y Gen. 259, 260 (1909). It is curious that the attorney general the following year gave President Taft an opinion with a different tone about the relative powers of President and Congress, as discussed in Part III.B.3.

¹⁹¹ Rosen, *supra* note 81, at 147.

¹⁹² Another issue, the right of the press to certain kinds of arrangements for covering the war, has previously brought out this kind of analysis distinguishing the President’s realm of strategy and tactics from more general wartime military matters. Rana Jazayerli, Note, *War and the First Amendment: A Call for Legislation to Protect a Press’ Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT’L L. 131, 165 (1997); Keven P. Kenealey, Comment, *The Persian Gulf War and the Press: Is There a Constitutional Right of Access to Military Operations?*, 87 NW. U. L. REV. 287 (1992). To have the reserves reinforce or not reinforce a particular front would get closer to presidential strategy prerogatives. But in this provision, they

reserve system, Congress deals with an invaluable resource upon which it allocates a large part of its military spending. When it uses appropriations limitations to make policy about that system, it is making a very substantial decision about raising and spending taxpayer funds as the vehicle for that policy. In contrast to the criticism when Congress imposes conditions on *de minimis* expenditures, such as imposing pardoning or diplomatic conditions on salaries or office supplies, Congress has every right to use substantial expenditures for this part of the military system as an occasion for making policy.

This particular policy issue takes the constitutional analysis an extra step, because the issue of handling the reserves happens to be one that the Framers gave unusually extensive attention.¹⁹³ The Constitution makes considerable textual references to the "Militia," today the National Guard reservists of the individual states. In fact, the commander-in-chief clause itself¹⁹⁴ says "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."¹⁹⁵ Article I, section 8, clauses 15 and 16, give Congress the power:

To provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.¹⁹⁶

These provisions suggest that Congress does have reason to make policy on such matters, even in wartime. Listing the congressional powers with respect to the militia in Article I, Section 8 is not meant to resolve the boundaries between the President and Congress, but only to clarify the additional powers of Congress vis-à-vis the states with respect to their state militias, a matter that might otherwise be ambiguous and difficult to resolve in

are treated distinctly in the nature of a vital human resource removed from an unfit use that will destroy them, but otherwise not earmarked for or against any particular strategy in the war.

¹⁹³ The argument for the proponents of presidential power would be that the Framers might allow Congress to feel deeply and specially invested in nursing along a militia (or reserves) system through "organizing" and "arming" it, but if the President's decision to send the militia into types of combat that ought to belong to the regular army put in jeopardy that precious investment, the Framers gave no sign of considering that to be Congress' concern.

¹⁹⁴ There, the Framers carefully eliminated any distinction between the nature of presidential command over the regular army and navy, and the nature of presidential command over the militia once called up. So, presidential supporters might say that lowering the combat exposure of reservists did not differ from doing so for some portion of the army or navy, and, hence, interfered with the unity of command characteristic of the Commander in Chief.

¹⁹⁵ U.S. CONST. art. II, § 2, cl. 1.

¹⁹⁶ Presidential power proponents would note that these precisely delineated powers of organizing and arming (Congress') and even training (states') come to an end at the boundary of combat operations.

a system of dual sovereignty.¹⁹⁷ The Framers' attention to Congress' authority over, and investment in, the reservists shows their expectation that Congress would make rules for them, such as the provision under discussion, without constituting an affront to the role of the Commander in Chief.

As the Committee of the New York City Bar said in discussing legislative provisions about potential United Nations command, Congress' powers to make regulations for the military often operate concurrently with the President's command powers. In this instance, Congress has a long-term policymaking role in keeping the reserve system viable, including recruitment, training, benefits during and after service, and the effect of high levels of combat casualties on all of these components. Congress has long acted together with the career military in increasing the dependence of the regular military on reserve units, to handle potential simultaneous involvements without having to maintain an outsized, unsupportable regular military. Congress has the responsibility to make policy with these goals in mind, considering not just this war and this administration's tenure, but future wars during future administrations. Therefore, this rider would be constitutional.

Still, this analysis has treated only congressional involvement with the policy decisions of the U.S. government. Quite distinct legal considerations come into play when the Congress desires to affect the policy of another government, in this case the government of Iraq. We now turn to this topic.

B. Terms on Aid as to Iraqi Governance¹⁹⁸

Different considerations arise with regard to military training and reconstruction and other aid to the Iraqi government. Congress has made decisions, including terms, regarding foreign aid, usually, but not invariably, without running into constitutional disputes. However, Congress could test its limits by using riders to make policy on issues deeply involved with presidential wartime relations with our Baghdad ally. To ground the analysis in the concrete, Congress could put terms on its military training and reconstruction aid requiring governance concessions by the government of Iraq to the disaffected Sunni minority. Presidential power proponents might dispute such terms as unconstitutionally intruding upon the President's foreign affairs prerogatives.

1. Background of Foreign Aid

The background concerning foreign aid starts with aid during ("Lend-Lease") and after ("Marshall Plan") World War II, and during the Korean War, reflecting the close connection between war and aid to allies.¹⁹⁹ Congress enacted the original template of the modern worldwide assistance program in the Foreign Assistance Act of 1961, which gave the President a variety of

¹⁹⁷ See *Perpich v. Dep't of Defense*, 496 U.S. 334 (1990) (holding that Congress has the right under Article I to order members of the National Guard to train outside the United States).

¹⁹⁸ Iraq's finances can be followed at Iraq Revenue Watch, *supra* note 2.

¹⁹⁹ Meyer, *supra* note 46, at 71-72 & n.15.

independent spending powers and waiver authorities.²⁰⁰ An uproar resulted from Congress' discovery during the latter part of the Vietnam War that President Nixon had conducted a secret war in Cambodia, partly through the use of special powers over aid to the Sihanouk regime.²⁰¹ Amidst the initial suggestions by presidential power proponents that the President had a constitutional foreign affairs power over the use of foreign aid,²⁰² Congress tightened up aid control in the 1970s, particularly as to human rights.²⁰³

In the 1980s, the relevant issues concerned aid to Central America. President Reagan viewed aid to the Central American countries as part of the effort to combat insurgencies characterized as a component of Nicaraguan destabilization. Congress reacted against human rights abuses in El Salvador and Guatemala, such as extensive death squads and the covered-up rape and murder of six American nuns by an army unit, by country-specific conditions requiring sometimes detailed presidential certifications of progress.²⁰⁴ The executive-congressional struggle came down, on one side, to presidential willingness to make certifications concerning improvements in human rights that observers considered highly at odds with the truth. On the other side, Congress supplemented its certification requirements with mechanisms such as short-term aid disbursements coupled with timely presidential reporting and creation of independent commissions to monitor and report on events.²⁰⁵

By the mid-1980s, the particular issue had become aid to the presidentially backed Contras fighting the Nicaraguan regime. Congress enacted a series of laws, the Boland Amendments, taking advantage (as discussed in Part I)²⁰⁶ of the available procedure of the appropriations rider to impose various kinds of prohibitions on American aid to the Contras. Then the Iran-Contra scandal burst. Congressional hearings revealed that the White House had secretly supervised worldwide solicitation efforts, nicknamed "tin cup diplomacy," to persuade regimes that it courted, many with zero intrinsic interest in Central America, to give aid to the Contras. During the tin cup diplomacy period,²⁰⁷ the Administration had not made any open constitutional argument against the Boland Amendments. After the scandal broke, presidential power proponents argued about the flawed nature of the amendments—their changing nature and their inapplicability to White House solicitations.²⁰⁸ Most relevantly, these proponents argued the

²⁰⁰ Pub. L. No. 87-195, 75 Stat. 424 (codified in scattered sections of 22 U.S.C.).

²⁰¹ Meyer, *supra* note 46, at 76.

²⁰² See generally Don Wallace, Jr., *The President's Exclusive Foreign Affairs Powers Over Foreign Aid: Part I*, 1970 DUKE L.J. 293 (1970) (disputing that Congress can interfere in the diplomacy that occurs as part of the distribution of foreign aid).

²⁰³ Meyer, *supra* note 46, at 76-82.

²⁰⁴ *Id.* at 100.

²⁰⁵ *Id.* at 82, 100.

²⁰⁶ Franck & Weisband, *supra* note 130, at 13-33.

²⁰⁷ For background on tin cup diplomacy, see generally Whiting, *supra* note 63.

²⁰⁸ Connie Ferguson Bryan, Note, *Limiting the Use of Funds Appropriated for Executive Functions: Is the 1984 Boland Amendment Constitutional?*, 13 OKLA. CITY U. L. REV. 569, 602 (1988).

unconstitutionality of the amendments' impact on the President's conduct of foreign affairs.²⁰⁹

The arguments continued, in a different form, into the administration of President George H. W. Bush. As Vice President, Bush had played a part in the solicitations of aid for the Contras. While Congress sought to enact provisions nailing down an express prohibition against solicitations, President Bush fought these by veto.

As the argument evolved, President Bush fought to draw this line. He conceded that Congress could prohibit quid pro quo arrangements, in which the executive branch offered aid to third-party countries in return for their making contributions to the Contras or similar diplomatic causes. However, he opposed Congress' efforts to prohibit executive solicitations, in which third-party countries were asked to contribute to such Administration causes without an express promise of aid to them as a quid pro quo. This specific issue of tin cup diplomacy will not recur in Iraq, but it does suggest where presidential power proponents might fight to draw the line.

In their most wide-ranging form, the aid-related arguments during the Reagan and Bush administrations drew on the general presidential constitutional power over foreign affairs. Reciting this familiar argument at length is not necessary, for so little of it has to do with congressional appropriations. Even for appropriations, the precedents cited by presidential power proponents usually deal with the easier case for the executive when Congress puts foreign affairs conditions on its appropriations for the State Department or for officials' salaries.²¹⁰ While this holds some intrinsic interest, it does not relate to the situation presented in Iraq, where Congress does not merely provide the facilitating appropriations for the functioning of American officials, but, more importantly, provides massive appropriations of reconstruction and other aid for that country.

Controversies over the terms of aid that continued during the Clinton and Bush administrations further fill in this picture, often with very different political contexts from those of the 1980s Central America. On one occasion, it was the Democratic administration of President Clinton making highly dubious certifications, such as decisions about Mexico's drug enforcement.²¹¹ On another major issue, Congress had long imposed an anti-abortion term on international family planning assistance. President Clinton sought to reverse his predecessor's policy and to relax the basis for providing such aid, but he could not overcome Congress' repeatedly imposed policy terms, however much they interfered with his foreign policy.²¹²

Conversely, President George W. Bush subsequently sought to reverse the Clinton policy, and to restore the earlier policy of the previous President Bush, in this regard, which was to tighten up the basis for providing such aid.

²⁰⁹*Id.*²¹⁰For background on these conditions, see Nobleman, *supra* note 93.²¹¹Mark A. Chinen, *Presidential Certifications in U.S. Foreign Policy Legislation*, 31 N.Y.U. J. INT'L L. & POL. 217, 240-42 (1999).²¹²Tobey E. Goldfarb, Comment, *Abstinence Breeds Contempt: Why the U.S. Policy on Foreign Assistance for Family Planning is Cause for Concern*, 33 CAL W. INT'L L.J. 345, 351 (2003).

This obliged him to deal with the “Kemp-Kasten” amendment, which would only bar aid to China upon specific findings of aid being used for a forbidden coercive abortion policy.²¹³ Once again, as with the 1980s aid to Central America, a President dealt with aid requirements as he wished by making a determination that observers found incredible, which is important to recall in anticipating the implementation of any congressional aid riders.²¹⁴

2. Application to Iraqi Aid

A major debate about terms on aid occurred in late 2003, relatively early in the Iraq counter-insurgency, but when doubts had already arisen about the President’s course.²¹⁵ President Bush sought from Congress a massive appropriation of \$18.4 billion for Iraq reconstruction aid, expected to last for several years. A strong bipartisan congressional coalition would have made half of the package into a loan administered through the World Bank. The Senate voted 51 to 47 to impose the requirement, producing front-page headlines that “Senate Defies Bush on Iraq Assistance,”²¹⁶ and the Senate conference committee delegation included a majority who had voted for it.²¹⁷ That Senate action reflected a powerful public mood when faced with the scale of aid, which spanned the ideological spectrum. There never was any hint of a constitutional objection to the term. Rather, it was dropped in conference when two of the Senate conferees absented themselves and voted by proxy to reverse their earlier support, a surprising reversal that apparently resulted from personal lobbying by the President.²¹⁸

The scale of the 2003 aid appropriation meant that while President Bush would annually call for military training aid, he would not need to seek another appropriation for reconstruction aid for several years. Still, the President would call for additional aid for one purpose or another, and interim legislation might contain provisions about the aid. Another detail about the 2003 aid appropriation’s enactment showed why proponents of presidential power could be expected to object to some terms. When President Bush signed the 2003 aid act into law, his statement did, in fact, single out a provision for a constitutionally based objection, namely, the provision creating an inspector general. The passage in his signing statement with the objection read:

²¹³ Melissa Upreti, *The Impact of the “Global Gag Rule” on Women’s Reproductive Health Worldwide*, 24 WOMEN’S RTS. L. REP. 191, 197 (2003).

²¹⁴ Kaci Bishop, Comment, *Politics Before Policy: The Bush Administration, International Family Planning, and Foreign Policy*, 29 N.C. J. INT’L L. & COM. REG. 521, 533–39 (2004).

²¹⁵ For an elaboration of the early doubts, see Henry H. Perritt, Jr., *Iraq and the Future of United States Foreign Policy: Failures of Legitimacy*, 31 SYRACUSE J. INT’L L. & COM. 149 (2004).

²¹⁶ Jonathan Weisman, *Senate Defies Bush on Iraq Assistance*, WASH. POST, Oct. 17, 2003, at A1.

²¹⁷ Tiefer, *supra* note 4, at 211.

²¹⁸ *Id.*

Title III of the Act creates an Inspector General (IG)²¹⁹. . . . Title III shall be construed in a manner consistent with *the President's constitutional authorities to conduct the Nation's foreign affairs*, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces. The [Coalition Provisional Authority] IG shall refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counterintelligence matters, ongoing criminal investigations by other administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitute a serious threat to national security.²²⁰

By this statement, President Bush put limits on the oversight of the Iraq reconstruction aid by the inspector general office chartered by a congressional rider.²²¹

This record about past foreign aid issues indicates that future proposed terms regarding reconstruction and other aid for Iraq might well produce a debate along the following lines. This example concerns terms to condition a large portion of aid upon governance concessions towards Iraq's disaffected Sunni minority. That Sunni minority, which held sway during Saddam Hussein's regime, forms the base of the insurgency. For purposes of analysis, assume that the American public, and hence a bipartisan majority in Congress, becomes convinced that the insurgency will not be sufficiently pacified to permit a withdrawal of American forces unless Baghdad is pressured to make substantial governance concessions to the Sunnis. Assume further that the President balks at threatening to cut off the aid funding to the regime in Baghdad, absent such concessions to the Sunnis, particularly if Congress purports to empower independent watchdogs to make sure the pressure is really applied.²²² This Article addresses the constitutional issue of whether Congress has the authority to place tough foreign aid conditions on war funding.

²¹⁹ The statement read "an Inspector General (IG) for the CPA." The CPA, or Coalition Provisional Authority, transferred sovereignty to the Government of Iraq, and administration of the aid then went to the State Department. A special inspector general's office for the aid was created in the State Department.

²²⁰ Statement on Signing H.R. 3289, the Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, 39 WEEKLY COMP. PRES. DOC. 1549 (Nov. 6, 2003).

²²¹ Presidential issues about the independence of inspectors general are treated in Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Executive Abuse*, 63 B.U. L. REV. 59 (1983).

²²² Background on the reasons why a change in governance for the Sunnis might become an option of interest to the public and Congress for speeding our exit from Iraq can be found in Peter W. Galbraith, *Iraq: Bush's Islamic Republic*, N.Y. REV. BOOKS, Aug. 11, 2005; Peter W. Galbraith, *Iraq: The Bungled Transition*, N.Y. REV. BOOKS, Sept. 23, 2004, at 70; Peter W. Galbraith, *How to Get Out of Iraq*, N.Y. REV. BOOKS, May 13, 2004; Public International Law & Policy Group, *Establishing a Stable Democratic Constitutional Structure in Iraq: Some Basic Considerations*, 39 NEW ENG. L. REV. 53, 67-70 (2004).

On the one hand, Congress would likely face no constitutional hurdle in proposing terms that earmark the aid funding so that a specific portion of it went to the disaffected Sunni minority. Nor would Congress likely face much difficulty in creating reporting requirements, such as asking the President for reports on the progress of the regime in Iraq toward changing the governance of the Sunni minority. However, earmarking and reporting do not go as far as the public and Congress may demand. The impact of earmarking funding for Sunni areas may be blunted due to lack of security during wartime and other circumstances that limit how much or how fast aid can be furnished in Sunni areas. Bland Administration reporting alone will not change the governance of the Sunnis. So, Congress may be inclined to vote for stronger medicine.

On the other hand, presidential power proponents may well dispute the validity of provisions heavily intruding upon the President's constitutionally granted foreign affairs discretion regarding treatment of a wartime ally.²²³ If the requisite findings must be made, not by the executive branch, but by the Government Accounting Office (GAO), a legislative branch agency, such proponents would find aid conditions constitutionally unacceptable. It still would not be acceptable if the findings were made by an inspector general within the executive branch who has some statutory degree of independence from the President's direct control. It is a much closer question whether such provisions would be deemed constitutionally objectionable by presidential proponents if, on the one hand, Congress let the executive branch itself make the findings, but, on the other hand, Congress (as it did with some Central American aid in the 1980s) created an independent advisory commission to report on these matters.²²⁴

The foregoing analysis suggests its own resolution. In non-war contexts, Congress has had a virtually free hand in imposing conditions on aid. Presidents have dealt with this as President Bush dealt with the Kemp-Kasten provision about family planning aid—by making determinations that observers find incredible.²²⁵

In contrast with non-war contexts, in wartime Congress arguably does not have quite so free a hand in imposing conditions on aid. But Congress also does not lack authority merely because of presidential positions of the past. In the 1970s, Congress regained control of aid to Southeast Asia after discovering President Nixon's uses of aid to Cambodia.²²⁶ In the 1980s, Congress regained control of financing of insurgencies by means of conditional aid, the Boland Amendments, and the Iran-Contra investigation.²²⁷ Earmarking alone will not reach the important aspects of Iraqi governance, which Congress may wish to

²²³ That is, they may dispute provisions conditioning increments of aid upon findings about bringing Sunnis into the government, altering governmental arrangements to suit the Sunnis, giving them enhanced local autonomy, or other specific steps amounting to conditions about changed governance rather than just about earmarking aid.

²²⁴ For a discussion of the analogous controversy over 1980s Central American aid conditions, see Amy S. Griffin, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U. L. REV. 163 (1983).

²²⁵ That is, President Bush eschewed defeating the provision on the basis of some hypothetical constitutional basis, but handled it by policy arguments in the Congress and by post-enactment implementation in ways that achieved the outcome he desired.

²²⁶ Franck & Weisband, *supra* note 130.

²²⁷ Meyer, *supra* note 46, at 87.

cure or at least to address by means of aid terms. The inspector general and the GAO's exposures of large-scale contracting abuses in Iraq suggest the continued need to have such entities examine compliance with terms. Carried to its ultimate limit, the presidential power proponents' notion of a unitary executive would mean that the task of critically assessing what Baghdad does with our aid falls to the same officials tasked with making the Iraq situation look as favorable as possible. Accordingly, this rider would be constitutional.

Some might imagine that the canvassing of these various types of Iraq appropriation riders brings to a close the analysis of what will happen upon their enactment. Before the 1980s that might have been true. However, in more recent years, Presidents have found a new and different context for dealing with provisions like appropriation riders, namely, the use of post-enactment tactics such as pronouncements undermining such provisions in presidential signing statements. It is this context to which the analysis now turns.

V. AFTER ENACTMENT: PRESIDENTIAL UNDERMINING

A. Presidential Undermining

1. Why the President May Choose Not to Defy and Not to Comply

This article has repeatedly attributed the debate about the constitutionality of war and aid funding terms to presidential power proponents rather than the President himself. For tactical reasons, the President may only imply his constitutional position during congressional consideration of provisions, rather than lock himself into an express and clear stance. Presidents may not want to make a commitment to veto any bill carrying the provision, particularly since its most likely vehicle would be a major defense spending bill. Presidents may care more about other aspects of such a defense spending bill, including its overall size, its allocations to key accounts, and the timing of its passage. Conditions about the conduct of wars may raise important problems without Presidents choosing to use their strongest weapons such as veto threats, because Presidents reserve their strongest weapons for fights over war appropriations' size, allocation, and timing.

Such presidential prioritizing of issues may be, but need not be, a betrayal of constitutional ideals or otherwise deeply objectionable. The most honored wartime Presidents have sometimes put the most important issues of national commitment legislation first, and handled their objections to lesser issues such as constraints included as riders later. To take a particularly respected example mentioned earlier, in 1940 President Roosevelt obtained passage of the bill authorizing the first peacetime draft only by including a condition against using draftees outside the Western Hemisphere, and even then only with the margin of one single vote in the House.²²⁸ Had President Roosevelt made a constitutional issue about that condition, he would have lost the bill, leading to a very great setback for American preparedness for World War II. President Roosevelt's subsequent military occupation of Iceland, which is outside the Western Hemisphere, is cited by presidential power proponents

²²⁸ See *supra* text accompanying note 98.

to support their argument that a President may sign a bill and later deal with its asserted infringements of his constitutional powers.

In a different but related vein, is a decision made by President George H. W. Bush at a critical moment in the January 1991 congressional consideration of a resolution to authorize the Gulf War. The President's more anti-congressional advisers, notably Secretary of Defense Cheney, urged him at that critical juncture to rely upon his own unilateral constitutional war-making power. Instead, the President asked Congress not merely for its support for him to exercise unilateral presidential power, but also for its authorization based on Congress' own powers, as expressed clearly in the presidentially endorsed language of the Gulf War Resolution. This deference to Congress' legislative responsibility both established a major precedent confirming presidential responsibility to respect Congress' powers and enabled President Bush to win the Senate vote with bipartisan support and to lead successfully a united nation in a broadly supported war. Like Roosevelt in the 1940s, Bush in 1991 proved himself a superior wartime President because he did not insist on the Presidency's supremacy regarding all decisions about war.

So, the President may not lock himself in by a veto threat, nor actually veto the bill carrying the Iraq rider. These two polar alternatives less interesting analytically than a third, which deserves the closest study.

First, the President may starkly and avowedly defy the rider. A few times in history, Presidents have famously done so. As previously mentioned, when Congress halved the appropriation President Theodore Roosevelt had requested for a Navy fleet to sail around the world, he is said to have responded that he would have the fleet sail halfway around the world and leave it up to Congress if they wanted to bring it back.²²⁹ But, defiance has its disadvantages. Any Iraq provision which has enough strength to get through both houses of Congress against the resistance of the President and of his party, which controls the agenda in both houses, presumably has public opinion clearly behind it. Defying such a provision would be defying the public.

Moreover, a voting majority in Congress, with clear public support behind it, has ways of retaliating. In 1973, President Nixon defied a Vietnam War funding cutoff and continued bombing by using funding legerdemain to get around the provision. Congress responded by placing similar provisions on each of a host of bills it considered.²³⁰ Whatever the congressional response, if the President outright defies an Iraq funding provision, Congress' ability to place similar provisions on other bills means his defiance will lock him into repeatedly fighting an issue on which, politically, he has previously lost.

Second, the President may comply with the rider, even as far as to mollify congressional critics. For all the steps President Franklin Roosevelt took in 1940-41 regarding World War II, he did not intervene in the war, which would have brought a colossal clash with Congress. Instead, he brought Congress along with him by seeking legislation on preparedness and Lend-

²²⁹ See *supra* text accompanying notes 95-96.

²³⁰ Franck & Weisband, *supra* note 130, at 17-21.

Lease.²³¹ He kept enough good faith with Congress that it tolerated his form of naval conflict with Germany in the North Atlantic and his oil embargo against Japan in the Pacific.

Compliance now with an Iraq rider would have similar benefits in keeping a restive Congress on board with aspects of the Iraq effort that are not resolved by the rider itself. Moreover, compliance avoids the consequences of secret defiance, once it is no longer secret. Both President Nixon with his secret bombing war in Laos, and President Reagan with his secret support of the Contra war, elicited a storm of adverse reaction when their secrets came out.

The President, however, has powerful bases not to concede the full measure of what congressional critics seek in an Iraq rider, as long as he can avoid the pitfalls of either secret or stark defiance. Being Commander in Chief and chief of national diplomacy has constitutional significance both in the theoretical and, just as importantly, in the practical sense. That is, the President has more than merely his theoretical arguments for respecting his role as Commander in Chief and diplomatic leader. In addition, the President has enormous scope, by use of his practical powers in these roles, to shape what follows from an Iraq rider. This can be accomplished by interpretation and by the choice of the implementation approach. Currently, the President has at his disposal tremendous institutional machinery, since he not only controls all of the executive branch, but also has the support of the majority party in Congress. President Reagan did not have this, particularly in 1987–88 when both houses were Democratic; even President Roosevelt in a sense did not have this in 1941, when a conservative coalition had control of much of the committee machinery in Congress. The President need not concede an Iraq rider's full import so long as he can find a way to mobilize his strength.

2. The Signing Statement

Post-enactment, the President may display several unexpected legal tools for handling war and aid funding terms to which he objects. Congressional provision sponsors must anticipate not merely a reiteration of the pre-enactment arguments, but the use of those arguments by the machinery now to be discussed, as a basis for limited compliance with the appropriation terms.

The pivotal post-enactment step has become the presidential signing statement.²³² Before the 1980s, what Presidents said or wrote while signing a bill had no more formal significance than any other presidential speech or issuance. President Reagan began to issue such signing statements

²³¹ By urging preparedness as a means of national defense, he brought Congress along with him on a draft army and on spending for military installations and equipment. Similarly, by urging the providing of Lend-Lease arms resupplies to Great Britain and, after mid-1941, to the Soviet Union, he brought Congress along with bolstering the countries that were currently resisting Nazi aggression and that would be the United States' future allies once war began. His approaches reduced the resistance from the substantial portion of the public and Congress that wanted to bolster the country's position against future war while not wanting to get involved in the war prematurely at all.

²³² Kristy L. Carroll, *Whose Statute is it Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 477 (1997).

systematically, as a new mechanism for proclaiming positions and, if possible, establishing them as having some authority.²³³ His successor, President George H. W. Bush, wished to reassert presidential authority after the Iran-Contra scandal had reduced his position's authority, particularly vis-à-vis a refractory Congress taking active lawmaking and oversight steps against executive abuses. Just as Congress saw the passage of defense spending bills as an occasion to implement riders dealing with such abuses, the President saw passage of such bills as occasions for signing statements that would proclaim his constitutional ability to trump those riders.²³⁴ President Clinton made a partly muted resort to such riders,²³⁵ and President George W. Bush picked up where his father had left off. President W. Bush issued more than one hundred signing statements by 2006, greatly expanding upon the scope and character of such statements issued by prior Presidents.²³⁶

A type of signing statement that might also be called a "brushing-off statement" proclaims a presidential constitutional prerogative as the basis for a path combining the surface appearance of respect for the legislation with the reality of little or no change in direction. Such a brushing-off statement notes a provision in the bill that assertedly transgressed the commander-in-chief or foreign affairs powers, and summarizes the general nature of the presidential objection.²³⁷ Then, the statement announces that the President will interpret the provision in light of his constitutional powers. It may stop there. Or, alternatively, it may take a provision intended as a broad or definite prohibition and announce that in light of the constitutional objection, the President will treat it as narrow or merely advisory.²³⁸

Part of what a signing statement accomplishes for the President is to seize the initiative. Enactment of bills with offending provisions may constitute defeats for Presidents in the legislative forum. Evidently, their arguments, legal and otherwise, did not win sufficient adherents or, because the President did not care enough about the issue, may well have received little expenditure of political capital. By the time of signing, the point has long passed when the President could have the provision excised or changed. The President then lets his legal counsel, who is the statement's author, take the image of his authority in dealing with the provision, without the President ever having to expend any

²³³ Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 212 (1988).

²³⁴ Tiefer, *The Semi-Sovereign President*, *supra* note 33, at 44.

²³⁵ See Walter Dellinger, *Memorandum for Bernard N. Nussbaum, Counsel to the President*, 48 ARK. L. REV. 333 (1995) (approving signing statements as a vehicle for presidential pronouncements, but disapproving them as a means for making legislative history).

²³⁶ Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2006, at 11.

²³⁷ Carroll, *supra* note 232, at 493 n.102 (citing statement by President Reagan that found a provision prohibiting aid to the Contras to conflict with the President's foreign affairs powers).

²³⁸ See, e.g., Statement on Signing H.R. 2673, The Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of Dec. 30, 2005, Pub. L. No. 109-148, 2005 U.S.C.A.N. ("Many provisions of the CAA are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces The executive branch shall construe as advisory the provisions of the CAA that purport to: (1) direct or burden the Executive's conduct of foreign relations").

actual political capital with arguments, promises, or threats to legislators or other significant political figures.

Moreover, by interpreting away the offending aspects of the provision, the President's lawyers get to pronounce a narrowed version of it without having to persuade anyone to agree. This permits a President to declare something more vague and less hard-edged than outright defiance (a highly controversial approach),²³⁹ yet avoids the accusation that the ensuing narrow treatment of the provision is furtive or covert. Meanwhile, executive civilian or military officials who might naturally obey the manifestly broad and mandatory intent of the law now have a seemingly authoritative direction from on high to veer off with a very different notion that all but suspends the law.

The overwhelming majority of brushing-off statements went completely without public or congressional attention. Often, they concerned minor provisions or obscure issues. Or, they did not garner much attention because the stated objections did not signal any serious confrontation with Congress. Observers may have no serious concern about the signing statement, knowing that something like it occurred on a similar bill the year before.²⁴⁰ Presidents George H. W. Bush and George W. Bush only occasionally used signing statements to stake out positions on national security of real significance. An important example was President Bush's signing statement accompanying the McCain Amendment on detainee treatment.²⁴¹

However, faced with an Iraq war rider, a President may find great value in a brushing-off statement as the start of pursuing a course largely unaffected by supposedly mandatory congressional directions in a rider. In signaling his approach via a signing statement, the President would not reawaken echoes of Iran-Contra or of President Nixon's secret bombing of Laos, for he would not be creating distance between his stance and the relevant legal authority through self-discrediting subterfuge or mendacity. Instead, he would publicly and overtly shrug off the rider's mandatory force by resorting to a facially proper executive power and would use official and open channels to proclaim that his own will trumps that of any officials (e.g., the Joint Chiefs of Staff) who might otherwise believe their duty consists in following the legislation.

It deserves note that this presidential evasion of statutory war restraints may be, but need not always be, a betrayal of constitutional ideals or otherwise deeply objectionable. The most honored wartime Presidents have sometimes significantly stretched such restraints. To take a particularly celebrated

²³⁹ For a discussion of the issue of presidential outright refusal to comply with an appropriation restriction, see Peter Raven-Hansen & William Banks, *From Vietnam to Desert Shield: The Commander in Chief's Spending Power*, 81 IOWA L. REV. 79, 117-26 (1995).

²⁴⁰ For example, intelligence authorization laws carry a classified annex which contains the specific subtotals for particular spending subjects, since those numbers are classified. Presidents developed a habit of putting in their signing statements that the classified annex lacked the force of law, since they took the position that a Congress that did not carry out the full and open procedures of enactment for the classified annex had not, in fact, enacted it. The objection lacked any practical weight because neither Presidents nor their supporters wanted the subtotals voted upon openly like other legislation.

²⁴¹ Statement on Signing H.R. 2863, The Department of Defense Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of Dec. 30, 2005, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. 550.

example, in 1940 President Roosevelt traded fifty World War I destroyers with Britain in return for long-term base leases.²⁴² At a time when the Navy was desperately struggling to resolve its shortfall in ships to meet the sudden preparedness emergency, a statute precluded him from turning over those destroyers unless they were declared surplus. It strained statutory language to declare the fifty destroyers surplus and thus available for transfer to Britain. President Roosevelt's persuasion of Congress eventually proved to be an esteemed balancing act rather than a disservice to the law.²⁴³ In a different vein, President Clinton arranged the commitment of peacekeeping troops to Bosnia in 1996 by convincing Congress that they would be there for just a single year.²⁴⁴ A decade later, American troops remain there. In context, the whole operation is generally seen as a success, even considering the stretch involved in calling it a one-year commitment. Presidential strain on statutory war restraints can be vindicated partly by the President's overall honesty and deference to Congress, and partly by the practical success of his policies abroad.

3. Interpretive Tactics

After starting with a brushing-off statement, the President may then seek concrete interpretation-guided courses of action. These approaches yield little to Congress in the making of war and aid policy. They may be called "minimizing interpretations," although they can reduce the legislation to the extent that the enacted law is a bare shadow of its intent.

Concrete examples from each of the categories previously discussed help here. Suppose the President faces a supplemental appropriation bill of war and aid funding for Iraq with three riders attached by a bipartisan majority of Congress over the resistance of presidential supporters. One rider states that none of the funds shall be spent on the war unless the Defense Department develops and implements a plan for withdrawal of regular ground combat forces from Iraq as speedily as described conditions permit in a maximum of two years. A second rider states that none of the funds shall be available for funding units of reservists in Iraq unless they are assigned or reassigned so as to minimize their combat exposure within six months. The third rider states that a quarter of the military training or reconstruction aid in the bill shall not be available unless the Secretary of State certifies that the government of Iraq has made substantial progress in satisfying the objections of the legitimate Sunni leadership to the existing government in Baghdad.

In a signing statement, the President would set forth his objections, given his commander-in-chief and foreign affairs powers, to these provisions

²⁴² Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 CAL. L. REV. 671, 741 (1998).

²⁴³ This is partly because history judges presidential actions, perhaps unfairly, from what eventuates. Once the Japanese attack on Pearl Harbor in December 1941 forced the United States into war, divisions in the public and Congress between interventionists and isolationists were forgotten, and FDR's pushing the envelope on what he could do in anticipation of war was, in retrospect, honored on all sides.

²⁴⁴ David G. Delaney, *American War in the 1990s*, 26 FLETCHER F. WORLD AFF. 261, 264 (2002) (reviewing DAVID HALBERSTAM, *WAR IN A TIME OF PEACE: BUSH, CLINTON, AND THE GENERALS* (2001)).

and warn of their impact on troop safety. The statement would impose interpretations upon them consistent with the aforementioned objections and declare the imperative of treating them as non-mandatory. Gradually thereafter, the President would make known those minimizing interpretations.

As for the troop withdrawal rider, the President's withdrawal schedule would go no further for the next year and a half than it had before. He might then state a hope that conditions would allow withdrawal of the combat units in the last quarter of the two-year period, although if conditions did not permit this, he would not be obliged to implement the withdrawal. By the end of the rider's withdrawal schedule, the President would still have a high number of troops committed, and would be implementing his own policies with minimal regard for the rider.

In response to the rider regarding reservists, the President would announce that reserve units should not be used as assault spearheads on insurgent strongholds except under unique circumstances. Additionally, commanders should contemplate reducing the use of reservists in operations expected to have high casualties, subject to all other tactical considerations. The President would also indicate that implementation of the new legislation should produce virtually no change in their existing pattern of deployments, in which reservists suffer casualties in their hazardous duties (apart from assault spearheads or high-casualty operations).

The President would respond to the Sunni conditional aid rider by instructing the Secretary of State to certify the Sunni role in governance based on Baghdad's reply to a formal inquiry. In other words, the Secretary of State would take Baghdad's word on the subject upon which the rider specifically intended her not to rely. The Secretary's certification decision would discount the seemingly significant communications by Sunni leaders themselves, regardless of whether these occurred directly, through indirect channels, or through the media.

Working through these concrete examples brings out how the resolution of war powers issues consists, at this stage, of much more than an analysis of texts and contexts. Once Congress has actually moved proposals all the way through to enactment, and the resolution of the issues involves the interaction of the executive and legislative branches, the war powers debate concerns the dynamic institutional and political interactive processes. This has been the theme of some of the best contemporary analyses of war powers issues.²⁴⁵

What happens after brush-off statements and minimizing interpretations depends on the extent to which the institutional operations of the House and Senate either serve to shield the executive branch against criticism, pressure, and political consequences, or, alternatively, serve to reinforce such attacks. These issues are reflected in the different constellations of presidential-congressional interaction at three different stages of the Vietnam War. At the first stage, in 1964, President Johnson faced an institutionally supportive Congress. Not only did his own party hold majorities in the Senate and House with party-leader support, but the committee leaders

²⁴⁵ See, e.g., Ford, *supra* note 66, at 613 (discussing how war powers issues exist in "an ongoing process of decisionmaking").

supported him as well. His gross deceptions and deviousness in securing the Tonkin Gulf Resolution, which afforded him wide open authorization to escalate the war, occurred without any institutional challenge.

By 1966, President Johnson still had floor majorities and party leader support, but he had lost the protection of the key committee leader, Chairman William Fulbright of the Senate Foreign Relations Committee. Fulbright held tough, televised oversight hearings about the Johnson Administration's empty assurances of victory. This did not bring the war to an end, but it did lead in two directions: toward an increase in congressional capacity to secure compliance with its legislative directions about the Vietnam War, and toward the elaboration of overarching principles that led to the dramatic 1970s legislation reasserting Congress' role in many aspects of national security and foreign relations. Still, the President had many cards to play, such as invoking the Food and Foraging Act,²⁴⁶ which allowed the Defense Department to incur obligations without appropriations under some²⁴⁷ circumstances.²⁴⁸

By 1974, President Nixon not only faced floor majorities of the other party, he faced an institutional apparatus, from committees to member organizations, capable of sustained legislative and oversight effort. After initial war funding cutoff provisions,²⁴⁹ he attempted a version of the minimizing interpretation.²⁵⁰ The institutional apparatus Congress had assembled against the war directed oversight, criticism, and additional provisions upon the executive position and overcame it.

The Vietnam War comparisons suggest why the current President will be drawn to respond to Iraq war riders with dismissive statements and minimizing interpretations. His party has a majority in both houses of Congress. Moreover, the centralizing forces operating in that party since 1995 make it unlikely that strong majority leaders of full committees will emerge in opposition in the way Chairman Fulbright did in 1966. Rather, since the committee leaders support the President and oppose the position of those pushing Iraq war riders on the floor, the committee leaders will use their position to shield the executive branch against criticism, pressure, and political consequences. They will arrange hearings in which the Administration has the best opportunity to make its case. They will not use subpoena powers or similar tools to uncover information that the Administration does not want to make public, such as problems with the war or procurement scandals. Passage of war spending bills would continue to be structured so as to involve the least

²⁴⁶ 41 U.S.C. § 11 (1996).

²⁴⁷ An early opinion by the Attorney General took a narrow view. Support of the Army, 15 Op. Atty. Gen. 209 (1877).

²⁴⁸ For a broader view of the uses of the act, see Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Atty. Gen. 293 (1981).

²⁴⁹ "President Nixon signed a 1971 military authorization bill, but objected to a provision in it (the Mansfield Amendment, which set a final date for the withdrawal of U.S. Forces from Indochina) as being 'without binding force or effect.'" Dellinger, *supra* note 235, at 345 (quoting Richard Nixon, PUB. PAPERS 1114 (1972)).

²⁵⁰ His Defense Department continued the bombing war by transferring appropriations from one account to another, and relied upon the position that the transferred appropriations were not covered by the cutoff provisions. This was even given a fancy, albeit bogus, doctrinal label by the State Department's legal adviser—the notion that these cutoffs could not serve as "conditions subsequent."

exposure to renewals of unwelcome floor amendments. Presidential interpretation of the riders would receive formal and informal approbation, obscuring their legal implausibility.

This institutional congressional assistance provides a wartime President the ability to fend off powerful pressures to change policy. However, acting on this ability may be deeply objectionable or even be a betrayal of constitutional ideals. To take another noted example, in 1950 during the Korean War, when President Truman cashiered popular General Douglas MacArthur, the General initially appeared capable of pressuring the Administration into a more bellicose stance.²⁵¹ The congressional committee leaders of the same party as the President channeled MacArthur into closed hearings, leading to the recognition of how his strategy could potentially lead to World War III. The MacArthur bandwagon was effectively defused. Thus, institutions of Congress can serve wondrously varied purposes.

B. Counters to Presidential Undermining

It may seem completely beyond the reasonable scope of discussion to begin detailing possible counters now, so far in advance of any actual presidential efforts to undermine appropriation riders; but advance discussion is sensible for multiple reasons. First, although some of the steps or arguments previously discussed may not be familiar to the public, they are familiar to knowledgeable figures in the executive and legislative branches. The government runs on appropriations: their annual consideration takes up a fair fraction of the attention Congress gives to enacted laws, and both supporters and critics of Iraq policy, who deal with congressional affairs, understand the significance of the appropriations process for funding war and aid to affect policy.

Second, anticipation of the various steps impacts the earliest actions, such as the initial drafting and debate on proposed riders. Proposal drafters must strike a balance between language that will gain the broadest public support and win over key members of the majority party and language that will be least susceptible to being brushed off and minimized. Proposal opponents will criticize both the basic thrust of the provisions and the aspects that either help accomplish passage or deal with undermining them. For example, during the mid-1980s, the Boland Amendments governing aid to the Nicaraguan Contras went through a number of versions, often reflecting the new Administration's political positions, such as the push to allow "humanitarian aid."²⁵² Yet once the Iran-Contra scandal broke, defenders of the Administration cited the changing nature of the Boland Amendments as making them too complex and shifting to obey, even though the changes were largely made at Administration request. Notwithstanding the highly

²⁵¹ General MacArthur appeared capable of directing strong national discontent with the Truman Administration into a strategy of escalation toward war with China, including the use of nuclear weapons. This alarmed even hawkish senators.

²⁵² Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 861-65 (1994).

sophisticated White House-centered group running the Iran-Contra operation, this proved a useful defense.

There are various methods by which proponents of Iraq war riders can counter presidential undermining: by including standards, loophole-closing requirements, and watchdogs in the provision. First, to the extent congressional provisions have concrete standards, Presidents have less room to minimize their effect. A withdrawal provision that includes dates for some levels of withdrawal, such as completion in no more than two years, will withstand presidential minimizing better than a provision with no such dates. A policy provision with specifics about reducing reservist combat exposure, such as excluding reservists from the kinds of operations that exceed a specific level of casualties in the previous year, will withstand presidential minimizing better than a provision with no such specifics. This is particularly true of terms on aid that require changes in Iraqi governance. A provision with specifics about increasing the Sunni role in governance, such as reserving shares in certain posts for Sunnis, will withstand presidential minimizing better than a provision with no such specifics. So, provision drafters anticipating post-enactment presidential minimizing will include specifics about what they wish, and endure the inevitable criticisms that such detailed provisions constitute "micromanaging," out of awareness that by doing so they have a greater chance of affecting policy.

Second, provisions can include language imposing informational requirements and closing loopholes, including those apparent either before the process starts or after successive rounds of appropriation riders. For example, the incessant criticism by presidential power proponents that these provisions endanger the troops²⁵³ will pressure some of the proposal-drafters either to include the safety of the troops as a factor or to let the President waive the provisions in the interest of national security when that has little effect on the criticism. No one in Congress does, or could, fail to support the safety of the troops. However, expressing that as a factor or, worse, as a basis for complete waiver of the provision, opens the door for recapitulating how President Nixon temporarily evaded constraints on expanding the Vietnam War. President Nixon used arguments about the need to protect the troops from enemy sanctuaries in Cambodia in order to sustain operations that were not actually intended to promote troop safety, but in reality advanced the same policies of conducting a wider war that the public and Congress had rejected. In the same way, a President could rationalize operations in Iraq as intended to deal with dangerous enemy sanctuaries when they, similarly, were primarily designed to sustain a wider war that the public and Congress rejected. It may take a round of presidential loophole-use before provisions are enacted to close them.

Similarly, provisions can include informational requirements.²⁵⁴ The key to implementation of congressionally-mandated policies consists of obligating the President to inform Congress about the actual performance of those policies. This matters most when, as now, the majority party is that of the

²⁵³ Recall how the Nixon Administration used this argument. Rehnquist, *supra* note 128, at 638.

²⁵⁴ As to those informing powers in this context, see GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 1, at 295-313.

President, because the chairs of the committees of jurisdiction are unlikely to employ their ordinary nonstatutory powers to watch over the performance of riders that they opposed.

Those with a practical view of the art of enacting provisions may scoff at the notion of excess specifics and loophole-closing. They will point to the daunting problems of enactment. The President and the majority floor and committee leadership in both chambers will oppose such provisions, making every step in their progress a siege. There is no gainsaying this problem.²⁵⁵ It suffices to recognize the difficult but necessary balance between shepherding to passage a provision with inevitable compromises, and trying to keep it robust enough to actually change policy.

Third, the provisions may include watchdogs. In the early 1980s, President Reagan effectively nullified aid restrictions for countries like El Salvador and Guatemala that required certifications of human rights improvements, by certifying to whatever the law required without regard to the facts running counter to this certification. The partial solution in later rounds of legislating consisted of having a watchdog body—in the Central American case, a commission that provided independent fact-finding about human rights. In terms of military withdrawal and policy conditions, creating express roles for GAO scrutiny would help.²⁵⁶ Despite the criticism this draws from presidential proponents, if the Administration certifies to implausible positions, but the law gives the GAO a scrutinizing role that brings out truth, the press coverage and congressional and public reaction will differ markedly from what occurs without such a GAO role.

A concrete example from an Iraq aid rider highlights this point. When President Bush persuaded Congress in 2003 to vote \$18.2 billion in aid for Iraq, some riders, albeit not the most important ones, went through. Notably, the law created a special inspector general for the Coalition Provisional Authority. By a clever interpretation, the Administration managed to end this after a year.²⁵⁷ Still, before that point it conducted a good deal of inspecting and issued a number of critical reports that received press attention. So, putting provisions for watchdogs in riders matters. Although they make it harder for Congress to establish limits in Iraq that function effectively, the President's powers to brush off or interpret away war and aid riders can be overcome by a combination of good drafting and oversight.

²⁵⁵ Prying loose majority party members from their persuasive President and leadership becomes the highest priority. Simplicity in expressing the public's goal in the provision becomes vital. Every word in the proposed provision that makes it more of an affront to the President and draws more criticism as straitjacketing the conduct of the war becomes a vulnerability during those sieges and an obstacle to prying loose those majority party members.

²⁵⁶ The GAO has long had a lead role in watching over the performance of appropriation terms and conditions. For example, during Iran-Contra the GAO ferreted out efforts by the Reagan Administration to circumvent the restrictions on Defense Department activity by such subterfuges as describing military construction activity as "temporary" work during field exercises.

²⁵⁷ When the CPA transferred sovereignty to the new government of Iraq, the Administration took the view that although the function performed by the special inspector general would continue, it would abolish the specific post and move the operation into the State Department. Thus, the able special inspector general came home.

VI. CONCLUSION

Some may wonder whether the difficult process of enacting appropriation riders intended to speed our exit from Iraq is worth the effort. We have seen that the proponents of strong presidential power will have elaborate lines of constitutional argument to support their viewpoint. They will distinguish away analogies from the legislation of the Vietnam War and the Iran-Contra scandal and associate their legal position with great wartime Presidents like Lincoln and Franklin Roosevelt. Even if an appropriation rider crosses the finish line and becomes law, the President may resist by brushing it off or minimizing it. Seemingly, only disappointment and defeat lie in store for appropriation rider supporters.

For most, the answer will consist of the policy substance of the provision—that it offers hope of shortening a war they fear will otherwise continue without end. Because this Article deals with constitutional processes, it focuses on a different value upheld by the process of debate in consideration and implementation of such riders. Far more than the public realizes, this is not just how politics occurs, this is how our democracy decides about war, and this is how our democracy has, over the centuries as well as in recent years, taken form. During the struggle of Parliament with the Stuart monarchs, of the colonies with their royal governors, and in the Constitutional Convention, a recurring object shaped our democracy. It consisted of developing and maintaining the process for the people, through their legislature, to decide both on making war and on bringing it to an end. The struggles over riders and conditions from Reconstruction to the onset of World War II showed that neither the President nor Congress had a monopoly on wisdom about military policy, and that a democratically acceptable policy could only take form by the clash of arguments over riders attached to appropriations and legislation. The end of the Vietnam War and the exposure of the Iran-Contra scandal, both involving the enactment and implementation of riders, not only salvaged our national policies, but strengthened democracy by subjecting those policies to the public's wishes expressed in the rider process.

In sum, Congress has full authority to set terms of withdrawal through the use of war funding riders, whether a war has debatable initial authorization, like the Vietnam War combat in Cambodia and Laos, or clear initial authorization, like the war in Iraq. Congress can define the limits of a limited war and can do so by the terms in the funding appropriation.

We would not be in Iraq if intervention had lacked public support in 2002–03. And, constitutionally, we need neither stay longer nor employ a different policy than what the public wants. If the American public has a will to employ riders to speed our exit, the resulting healthy exercise of democracy will furnish the way.