

\*D \* R \* A \* F \* T \*

Brien Hallett  
Associate Professor  
Institute for Peace  
University of Hawai'i  
2424 Maile Way, #717  
Honolulu, HI 96822  
Tel: (808) 956-4236  
FAX: (808) 956-0950  
Cell: (808) 295-1648  
bhallett@hawaii.edu

### The Constitution and Iraq: "Advice and Consent"

What does the nation need in this moment of impasse? Does it need for the Congress and the President to continue indefinitely at loggerheads, working at cross purposes, the one trying to force the other to accept its policy for Iraq? Or, does the nation need for the Congress and the President to cooperate in articulating the way forward on Iraq, each contributing its best wisdom?

At the moment, the two branches are standing pat on their constitutional prerogatives: the President on his veto power, the Congress on its "power of the purse." Yet, the Constitution is a rich document. Is the "power of the purse" the only clause by which the Congress can influence, moderate, or restrain the President's Iraq policy? Might there be other clauses that could foster cooperation on this difficult issue? For example, what about the Senate's power to "advise and consent" (Art. II, 2)?

After all, is cooperation among the branches not the heart and soul of the Constitution? By separating the executive from the legislative and judicial functions, the Constitution not only shares out the vast work of government but, much more important, it encourages cooperation among the three branches, without demanding either servility or subordination of any one of them to the other.

To generate this executive-legislative cooperation, two things need to be done: First, one must make some sense of Iraq. But not just any sense. Rather, one must make sense of the situation there in such a way so as to illuminate Iraq in a manner that is amenable to congressional action. Second, in light of that illumination, one must activate Article II (2).

Tackling the first problem, one must realize that there are innumerable different ways to analyze the chaos in Iraq. Perhaps, the American military is in Iraq to wage a global war on terrorism. Or, perhaps, it is there to referee a Sunni-Shia religious war, or a civil war, a tribal war, or an ethnic war. Or maybe, it is there for a thousand other reasons.

Yet, whatever the value of these thousand different analyses may possess for presidential, military, or journalistic purposes, they are all exceptionally unhelpful to the Congress. For the Congress, the only useful analysis is an analysis that frames the situation in a manner that is amenable to legislative action.

The legislatively relevant analysis of the situation in Iraq is that it divides into two periods: The 2003 congressionally authorized use of the "United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677" and the congressionally unauthorized American occupation and military response to the insurgency thereafter. From a legislative perspective, what is most significant about the mounting chaos in Iraq since 2003 is not how, when, or why it has occurred. Rather, the most significant legislative fact is that the post-2003 occupation and use of the United States Armed Forces has never been formally and explicitly authorized by the Congress.

In light of this analysis, two legislative initiatives can be framed. The first is a joint resolution to bring the 2003 authorized use of the United States Armed Forces to a conclusion. This is essential so as to separate the past from the future and, thereby, to define clearly the relevant issue: Should the Congress authorize or refuse to authorize the continued occupation of Iraq and the use of the United States Armed Forces there going forward?

In this regard, President Bush declared the "end to major combat operations" on 1 May 2003 in his infamous "Mission Accomplished" speech aboard the USS Abraham Lincoln. The mission that had been accomplished at that point in time was the mission authorized by the Congress--to enforce Security Council Resolution 687 (1990).

Having accomplished that authorized mission, it is long past time for the Congress to acknowledge formally what President Bush acknowledged informally in his 1 May speech. To do this, the Congress should debate and pass a joint resolution that would look something like the following:

**Whereas the Congress of the United States of America had long recognized the illegitimate character of the brutal dictatorship of Saddam Hussein in multiple acts, namely, the Iraqi Breach of International Obligations of 1998 and the Iraq Liberation Act of 1998, and**

**Whereas the March 2003 use of the "United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677" had been authorized by the Congress in the Authorization for the Use of Military Force Against Iraq of 2002;**

**Now, therefore, be it resolved by the Senate and House of Representatives of the United States of America, in Congress Assembled,**

**That a Treaty of Peace be negotiated with the legitimate Government of the Republic of Iraq and submitted to the Senate of the United States of America for its advice and consent within 180 days of the date of the approval of this resolution.**

By tying up the tattered ends the authorized use of United States Armed Forces in 2003, a treaty of peace closes out that chapter and forces a fresh reevaluation of the next chapter. More pointedly though, it sets the stage for the Congress to refuse to authorize the continued occupation of Iraq and the use of United States Armed Forces there. It marks out clearly the two legislatively relevant periods--the congressionally authorized from the congressionally unauthorized use of United States Armed Forces--and brings the

first to a clear and unambiguous close, thereby leaving open whether or not to authorize the second. In a word, it disentangles the 2003 invasion from the subsequent occupation.

With this in mind, how then might the Congress authorize or refuse to authorize the post-2003 occupation and use of United States Armed Forces? What Constitutional powers are available that would promote cooperation, and discourage melodramatic conflict over the "power of the purse?"

Constitutionally, what is most salient about the subsequent unauthorized use of American military forces in Iraq is that the United States no longer has any grievances against the Government of Iraq. Consider the irony of the situation. The United States had both grievances against and an enemy in Saddam Hussein. Those grievances and that enemy were taken care of by the congressionally authorized use of United States Armed Forces in March 2003 and the establishment of a new, democratically elected, legitimate government. Since then, the United States has had no grievances against Iraq. Osama bin Laden is in Pakistan, not Iraq.

Nonetheless, American occupying forces are under daily attack. Critically though, they are not under attack because we have grievances against the Iraqi who are attacking us, but because the Iraqi who are attacking us have grievances--real or imagined--against us. We have no enemies, but others see us as one of their enemies, due to the congressionally unauthorized occupation of and use of United States Armed Forces in Iraq after the establishment of the new democratically elected Government of Iraq.

This one-sided enmity has important legislative consequences. It means that the Congress cannot use its power to declare war or--most important--to refuse to declare war to authorize or refuse to authorize the continued deployment of American forces in Iraq. Declare war against whom? For what reasons? Without an enemy and a *casus belli*, the Congress can neither declare war nor refuse to declare war. That legislative power is not an option in this case.

But, if the United States has no grievances against those who are attacking us, the Government of Prime Minister Nouri al-Maliki does, since it possesses both a constitutional and an international responsibility to maintain peace in Iraq. Hence, logically, should the Congress wish to authorize the further use of United States Armed Forces to assist the people and Government of Iraq in restoring peace and prosperity, the relationship between the two governments should be that of a bilateral military alliance: We, who have no enemies in the fight, desire to assist those who do have enemies. In this restricted sense, the situation in post-2003 Iraq parallels exactly the situation in Vietnam during the American war there.

Since World War II, alliances have been reached most frequently through executive agreements of one sort or another. Still, formal, Senate-ratified treaties of alliance are not unknown, as, for example, the bilateral mutual-security treaties between the United States and Japan or between the United States and South Korea. The legislative problem, then, is motivating President Bush to negotiate a formal treaty of alliance with the Maliki Government for submission to the Senate for its "advice and consent."

So motivated, a constitutionally pleasing cooperation would be re-established between the two branches of the Government: President Bush would be in a position to inform the Congress officially and formally not only of the commitments of the Government of Iraq but, equally important, of the levels and types of United States

Armed Forces to be deployed to Iraq going forward. Not incidentally, these are the two essential elements needed by the Congress in order to decide whether or not it should or should not authorize the continued use of United States Armed Forces in Iraq.

To be sure, the success of this cooperation would depend crucially upon President Bush cooperating by including key senators on his negotiating team. The failure to do so was the mistake that Woodrow Wilson made when he negotiated the Treaty of Versailles and the Covenant of the League of Nations after World War I. One would hope that President Bush would not repeated President Wilson's mistake.

To motivate President Bush to cooperate, the Congress should debate and pass a joint resolution that would look something like the following:

**Whereas the people and Government of the United States of America are desirous of assisting the people and Government of the Republic of Iraq in reestablishing peace and prosperity after the overthrow of the Saddam Hussein dictatorship, under which the people of Iraq suffered greatly;**

**Now, therefore, be it resolved by the Senate and House of Representatives of the United States of America, in Congress Assembled, That a Treaty of Alliance be negotiated with the legitimate Government of the Republic of Iraq and submitted to the Senate of the United States of America for its advice and consent within 180 days of the date of the approval of this resolution.**

Such a treaty of alliance would, first and foremost, give the Senate (if not the whole Congress) the opportunity to authorize explicitly and formally--or to refuse to authorize explicitly and formally--the continued use of United States Armed Forces in Iraq at mutually understood levels and types.

Should the Senate refuse to authorize the alliance, its decision would trump that of President Bush. Equally important, the budget allocations for Iraq would become simple and the binding withdrawal date would be sooner rather than later. Should the Senate authorize the alliance, the bilateral treaty would then fix the limits of American military assistance and involvement. In effect, the treaty of alliance would constitute a Senate authorized strategy for continued American military assistance to the people and Government of Iraq--if, that is, the advice of the Senate were to accept the treaty.

In conclusion, a joint resolution calling for the negotiation of a bilateral treaty of alliance with the new democratically elected Government of Iraq would be a legislative action as enumerated in the Constitution. Further, it would leave the actual negotiations up to the President, as is also stipulated in the Constitution. Supremely important though, the joint resolution would save both the President and the nation from the emotional roller coaster of the current political melodrama, as an uncertain Congress switches from one plot line to another, while all the time hoping for some unknown turn of events that will allow it to override the President's veto. A bilateral treaty of alliance would do this by creating an opportunity for the President to provide the Senate with the detailed plan it needs either to authorize explicitly continued American military assistance at mutually understood levels or to deny unambiguously such authority, which is the central issue in question.

Brien Hallett is an Associate Professor at the University of Hawai'i and author of "The Lost Art of Declaring War".

References:

Iraqi Breach Of International Obligations (Public Law 105-235; 112 Stat. 1538)  
8/14/1998

Iraq Liberation Act of 1998 (Public Law No: 105-338; 112 Stat. 3178) 10/31/1998

Authorization for the Use of Military Force Against Iraq (Public Law No: 107-243; 116 Stat. 1498) 10/16/2002

"IraqAlliance11Mar07-7.doc"