

ARTICLES

CONGRESSIONAL WAR POWERS, THE COMMANDER IN CHIEF AND SENATOR JOHN MCCAIN

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I. INTRODUCTION

At its inception, the American Constitution was created under the principle of checks and balances such that no one branch of government would be able to take the country to war.¹ To check against a commander in chief who could potentially become too powerful, the Founding Fathers granted Congress the powers to declare war, to provide for the common defense, to provide and maintain a Navy, and to raise and support Armies, among other military powers.² In his notes from the Constitutional Convention, James Madison recorded the understanding that the president could act unilaterally to “repel sudden attacks,” but otherwise congressional approval was needed to use American military force abroad.³

Although exceptions exist, the exercise of congressional war powers during the first 150 years of the republic was a common feature of the congressional-executive interplay; presidents tended to respect congressional war powers and rarely made the case for unimpeded authority as commander in chief.⁴ However, with the conclusion of the Second World War and the Cold War’s onset, the commander in chief began to consistently make the case for unilateral powers in conducting

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¹ JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 476 (W.W. Norton & Co. 1987).

² U.S. CONST., art. 1, § 8.

³ MADISON, *supra* note 1.

⁴ FRANCIS D. WORMUTH & EDWIN B. FIRMEGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW (2d ed. 1989).

military action abroad, and Congress often deferred to the president.⁵ Even though Congress also went to considerable lengths to protect its congressional war powers authority upon joining the United Nations and the North Atlantic Treaty Organization, such understandings were often neglected or simply not exercised by Congress; without congressional approval presidents used multilateral endorsements to justify their military actions abroad without congressional approval.⁶ In an effort to reassert its war powers, Congress passed the War Powers Resolution in 1973, but it too has been viewed by many as ineffective, and by others as an unconstitutional legislative tool to rein in the commander in chief.⁷

During the presidency of George W. Bush, former Deputy Assistant Attorney General John Yoo vigorously defended rather wide perceptions of power for the commander in chief.⁸ In addition, many other analysts have provided legal and constitutional perspectives of Bush's detention of perceived enemies of the United States,⁹ the administration's asserted claims of executive privilege vis-à-vis congressional requests on military matters,¹⁰ and the administration's wire-tapping procedures.¹¹ More generally, considerable research continues to examine the constitutional war powers of the Congress and president when entering war in the modern age.¹²

Very little constitutional assessment, however, has been devoted to individual members' view on congressional war powers, and rather has

⁵ JOHN HART ELY, *WAR AND RESPONSIBILITY* (Princeton Univ. Press 1993); LOUIS FISHER, *PRESIDENTIAL WAR POWER* (Univ. Press of Kansas 2d ed. 2004); RYAN C. HENDRICKSON, *THE CLINTON WARS* (Vanderbilt Univ. Press 2002).

⁶ Matthew D. Berger, *Implementing a United Nations Security Council Resolution: The President's Power to Use Force Without the Authorization of Congress*, 15 HASTINGS INT'L & COMP. L. REV. 83 (1991); Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931 (1999); Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509, 530–32 (1986); Michael J. Glennon, *The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74 (1991).

⁷ Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1 (1998); Michael J. Glennon, *Too Far Apart: The War Powers Resolution*, 50 U. MIAMI L. REV. 17 (1995); Michael J. Glennon, *The War Powers Resolution Ten Years Later: More Politics Than Law*, 78 AM. J. INT'L L. 571, 574–75 (1984); Edward Keynes, *The War Powers Resolution: A Bad Idea Whose Time Has Come and Gone*, 23 U. TOL. L. REV. 343 (1992); Mark L. Krotoski, *Essential Elements of Reform of the War Powers Resolution*, 29 SANTA CLARA L. REV. 607 (1989).

⁸ These views are more broadly articulated in JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (The Univ. of Chicago Press 2005).

⁹ Jay Alan Bauer, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review*, 57 ALA. L. REV. 1081 (2006); Katherine Flanagan-Hyde, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585 (2006).

¹⁰ Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power Over the Military: Rethinking The Relationship Between the Armed Forces, The President, and Congress*, 44 HOUS. L. REV. 553 (2007).

¹¹ Evan Tsen Lee, *The Legality of the NSA Wiretapping Program*, 12 TEX. J. C.L. & C.R. 1 (2006).

¹² J. Brian Atwood, *The War Powers Resolution in the Age of Terrorism*, 52 ST. LOUIS U. L.J. 57 (2007); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45 (2007).

focused on Congress's actions as an institution. Some research exists on Senator John Kerry's (D-Mass.) views on war powers and the War Powers Resolution,¹³ but otherwise very little analysis exists on specific members of Congress and their views toward congressional war powers. With the ascendancy of Senator John McCain (R-Ariz.) in the 2008 American presidential election, a ripe opportunity now exists for such an analysis. McCain was first elected to the House of Representatives in 1982, where he served until 1986, upon which he was elected to the United States Senate where he has remained since. McCain's stature has grown considerably over time. Whether he is elected to the presidency or remains in the United States Senate after 2008, he is sure to play a role in shaping the decision to use American force abroad after the presidential election. As is demonstrated below, McCain has often been at the forefront of the debate in the U.S. Senate on constitutional war powers issues. Thus, his views on congress and the president's war powers have considerable constitutional, legal, and political relevance in the immediate years to come.

Our analysis provides the first assessment of McCain's views on American military action abroad and the constitutionality of such conduct during his years in the Congress. Our analysis finds that McCain has often been a vigorous advocate of a strong commander in chief, and that he has rarely advocated for the exercise of Congress's war powers in a way that would limit the commander in chief's ability to use force abroad. During his time in the Congress, McCain has worked against nearly all efforts—in a non-partisan manner—to limit the commander in chief's asserted authority. McCain's perception of war powers then corresponds with how most American presidents have perceived their war powers since the Second World War, which is a president that is empowered, essentially in a unilateral way, to use force at their own discretion without congressional input and consultation. This analysis begins with an assessment of McCain's war powers views during the Reagan administration and continues to the present.

II. REAGAN'S MILITARY ACTIONS

McCain first entered the Congress in his successful run for a seat in the House of Representatives in the 1982 midterm elections, representing the 1st congressional district in Arizona. During the presidency of Ronald Reagan, there were a number of military actions conducted that provide useful perspectives, early in McCain's congressional career, on his views on the constitutionality of military action abroad. Although McCain's views on war powers are articulated more extensively during the administrations of Bill Clinton and George W. Bush, some early trends in his thinking are evident in his first years in Congress. These military actions and maneuvers include the 1982 deployment of U.S. armed forces to Lebanon in a multinational peacekeeping operation, the 1983 American military strikes on Grenada, Reagan's strikes on Libyan leader Muammar

¹³ Ryan C. Hendrickson, *John Kerry as Commander-in-Chief: War Powers in a Kerry Administration*, 7 J. MIL. & STRATEGIC STUD. 1, 1–22 (2004).

Qaddafi in 1986, and the American military protection of Kuwaiti oil tankers in 1987.

In the Reagan presidency, the first major war powers question for John McCain arose with the deployment of approximately 800 American armed forces to Beirut, Lebanon in August 1982. At the time of the initial deployment McCain was not yet a member of Congress. However, within his first year in office he had an opportunity to share his views on the War Powers Resolution and war powers more generally. In October 1983, Congress forwarded House Joint Resolution 364, which provided statutory authorization under the War Powers Resolution for continued U.S. participation in the multinational peacekeeping forces in Lebanon, although Congress placed an eighteen month time limit on the operation.¹⁴ While Reagan indicated that he supported congressional action to approve of the operation and worked to find a compromise with members of Congress who had grown increasingly concerned with the presence of American troops there,¹⁵ once passed Reagan stated his general opposition to any congressional mandate that limited his own perceived power as commander in chief.

In response to the Democratic-led challenges, McCain voted for the resolution to limit the operation to eighteen months and to invoke the War Powers Resolution, albeit in this revised form that still granted the president considerable leeway.¹⁶ Through this vote, McCain certainly demonstrated a degree of political independence and congressional assertiveness vis-à-vis the Commander in Chief of his own party, especially as a freshman member of the House of Representatives. At the same time, McCain's comments on his vote are noteworthy and an early indicator of his preference for a strong commander in chief:

[I]t is with great reluctance that I rise in opposition to this resolution. I am well known for my respect for the President of the United States and for supporting his policies. I do not believe the President should be restricted in fulfilling his constitutionally mandated responsibility of conducting our Nation's foreign policy. However, when called on to make a judgment, as I am by this legislation, I have a responsibility to my constituents to carefully evaluate the alternatives, using whatever resources are at my command.¹⁷

Thus, even though McCain voted for the resolution, he did so reluctantly and only when others in Congress raised the issue. McCain clearly had policy differences with the Reagan administration for its actions in Lebanon, but constitutionally expressed reservations in both taking a stand on the issue and in voting against the Commander in Chief.

¹⁴ 129 CONG. REC. 26118 (1983).

¹⁵ Donna Haynes Henry, Note, *The War Powers Resolution: A Tool for Balancing Power Through Negotiation*, 70 VA. L. REV. 1037, 1051 (1984). See also FISHER, PRESIDENTIAL WAR POWER, *supra* note 5, at 160-61.

¹⁶ 129 CONG. REC. 26118, *supra* note 14 (statement of Rep. McCain).

¹⁷ *Id.*

Another perspective on McCain's views on war powers was evident in the American military invasion of Grenada in 1983. In the aftermath of the deployment, McCain supported House Joint Resolution 402, which declared that the War Powers Resolution became operative on October 25, 1983—the initial day of the invasion—and that the President had sixty days to complete the military operation.¹⁸ The House's vote was not controversial, which was approved, 403 to 23.¹⁹ In this respect, McCain's vote fell in line with nearly all members of Congress, who were also likely reacting to the suicide bombing in Lebanon on October 23, 1983, which resulted in the death of 241 American soldiers.²⁰ In this case, McCain's vote to invoke the War Powers Resolution was not a reflection of being a maverick, but did indicate his willingness to limit the power of the commander in chief.

It is important to note, however, that according to former Secretary of State George Shultz's own memoirs, Congress had no role in the actual decision to use force in Grenada. The Reagan administration made its decision to use force and then informed members of Congress of the military strikes to come.²¹ On the House floor, McCain provided no comments on either the invasion or the decision making process that led to the invasion. Later in 1988 and 1998, McCain voiced his support for these strikes and implicitly for the decision making process that produced this military action.²² As will become clear in military operations that came later in his congressional career, McCain's willingness to invoke the War Powers Resolution in both Lebanon and Grenada was out of the norm for him. Moreover, it is important to highlight that McCain, with great reluctance, voted against the President on Lebanon, and followed along with nearly all members of Congress on the vote on Grenada. In short, these first two examples in 1983 provide little evidence of McCain's support for any meaningful role for congressional war powers prior to military action, and his statements in 1988 and 1998 indicate his backing for a commander in chief who acted without congressional input before using force abroad.

President Reagan also conducted military strikes in Libya in 1986 in response to Libyan terrorist actions in Germany, which killed one American, one German, and injured sixty other Americans.²³ The strikes were widely backed in the United States, although Congress again had no role in the actual decision to use force. Members of Congress were notified three hours prior to the strikes that military action was forthcoming.²⁴ The absence of consultation with Congress generated some congressional

¹⁸ 129 CONG. REC. 29994 (1983).

¹⁹ FISHER, PRESIDENTIAL WAR POWER, *supra* note 5, at 163.

²⁰ *Id.* at 162.

²¹ GEORGE P. SHULTZ, TURMOIL AND TRIUMPH: MY YEARS AS SECRETARY OF STATE, 334–35 (Charles Scribner's Sons 1993).

²² William Welch, *McCain Says Dukakis is Weak on Defense*, ASSOCIATED PRESS, Aug. 15, 1988; 144 CONG. REC. 1007 (1998) (statement of Sen. McCain).

²³ HENDRICKSON, THE CLINTON WARS, *supra* note 5, at 103–05.

²⁴ *Id.*

backlash and calls for greater adherence to the War Powers Resolution, but these efforts quickly died in both the House and Senate.²⁵

In the aftermath of the strikes, McCain recorded no statement on the House floor regarding the strikes or the decision making process that resulted in the military action. Two years later, however, on the opening night of the 1988 Republican National Convention in New Orleans, McCain criticized the Democratic Party's nominee, Michael Dukakis for opposing the bombings of Libya.²⁶ In doing so, McCain demonstrated his support for Reagan's military actions, and again, implicitly for the decision making process that led to the strikes. McCain vocally sided with a commander in chief who independently determined how and when military action was used abroad.

One additional set of military maneuvers that merits analysis was the various naval escort operations that took place in the Persian Gulf in 1987, when U.S. naval ships flagged and escorted Kuwaiti oil tankers in an effort to protect the tankers as they moved through the Gulf. McCain, who was now in the United States Senate, adamantly opposed any effort to trigger an invocation of the War Powers Resolution, as was being advocated by Senators John Warner (R-Va.) and Sam Nunn (D-Ga.).²⁷ In these debates, McCain noted that some of his colleagues had referred to the War Powers Act as the "retreat powers act."²⁸ With respect to Congress taking a policy stand before military action took place, McCain remarked: "peace in the world cannot be legislated by congressional restrictions on the President's defense powers."²⁹ Such comments go beyond his previous views on the powers of the commander in chief, as they suggest support of a president having considerable discretion in deciding how military force is used abroad. McCain later expounded on these views at much greater length prior to the 1994 deployment of American troops to Haiti and in the lead-up to the war in Iraq in 2002, but his criticism of the exercise of congressional war powers prior to military action is clearly evident in this case. In sum, McCain's views on congressional war powers during the Reagan administration indicate that he had considerable reservations in challenging the commander in chief, and raised no constitutional qualms with Reagan's decision making process on the use of force, which by all accounts involved minimal to no consultation with Congress. His criticism of the constitutionality of the War Powers Resolution also is clearly evident in 1987.

²⁵ *Id.* But see 132 CONG. REC. 7894-97 (1986) (statement of Sen. Dole, arguing that the president should be given *more* latitude in using force against terrorists).

²⁶ Welch, *supra* note 22.

²⁷ 133 CONG. REC. 27183 (1987) (statement of Sen. McCain).

²⁸ *Id.*

²⁹ *Id.* at 27184.

III. USES OF FORCE DURING THE GEORGE H.W. BUSH ADMINISTRATION

Much like the uses of force during the Reagan years, McCain continued to be a strong backer of presidential military action during the administration of George H.W. Bush. McCain did not speak extensively on the constitutionality of Bush's military actions, but his broader policy support for the President provides additional evidence of his views for an empowered commander in chief.

Bush's first major military action took place on December 20, 1989, when some fourteen thousand troops were deployed to Panama, primarily in an effort to capture and remove Panamanian leader, General Manuel Noriega. When the operation occurred, the congressional leadership was provided five hours of advance notification; members of Congress were not consulted according to the provisions of the War Powers Resolution, and in this regard the decision making process utilized was much like Reagan's prior to Grenada and the 1986 strikes on Qaddafi.³⁰

Congress was out of session when the invasion took place, which may partially explain the absence of any substantive discussion on the House or Senate floor regarding Bush's decision making process or the mission itself. Like most others, McCain did not immediately register a statement in the Congressional Record in response to the military action. However, in speaking a few months later about the general success of Bush's foreign policy choices and the need to continue with American foreign policy interests in advancing democracy in Latin American, McCain advocated for increased economic assistance to Panama.³¹ He also backed the need for successful democratic elections in the months that followed the invasion.³² More specifically, in later years McCain explicitly noted: "[w]e were correct to liberate Grenada and Panama, despite the loss of life that accompanied those conflicts."³³ Thus, McCain again raised no objections to the absence of a congressional role in the decision to use force, and in a number of instances expressed his broader support for the President's policies on Panama.

Much like the strikes on Panama, McCain actively supported an empowered commander in chief to conduct military operations in Iraq during the Persian Gulf War of 1991. In response to Saddam Hussein's decision to invade Kuwait on August 2, 1990, McCain was quick to demonstrate disdain for Hussein's actions. McCain also stated that the only way we can "protect our friends, ourselves, and our values against men like Saddam Hussein" is with "forceful action and military preparedness."³⁴ Once the war began, which McCain voted to support, he noted that the

³⁰ Eileen Burgin, *Congress, the War Powers Resolution, and the Invasion of Panama*, 25 POLITY 217 (1992).

³¹ 136 CONG. REC. 7020 (1990) (statement of Sen. McCain).

³² 135 CONG. REC. 8358 (1989).

³³ 144 CONG. REC. 1007, *supra* note 22.

³⁴ 136 CONG. REC. 21728 (1990) (statement of Sen. McCain).

United States was the only country that could successfully “check Saddam’s empire building” ambitions.³⁵

In 1999, when reflecting upon the debates in Congress that led up to the authorization to use force against Hussein in 1991, McCain indicated that Congress did a “model” job and had one of its “finest hours” in handling the situation that led up to the war.³⁶ At the same time, McCain played no role in objecting to the Bush administration’s views that congressional authorization for the forthcoming war was not necessary or required before military action took place.³⁷ President Bush and senior administration officials clearly expressed these views both prior to and after Congress decided to authorize military action.³⁸ In sum, McCain supported both of these military strikes, and raised no qualms with Bush’s constitutional assertions of an empowered commander in chief.

IV. USES OF FORCE DURING THE CLINTON ADMINISTRATION

During the Clinton administration, military action abroad was conducted in a number of different ways. Clinton engaged in major peacekeeping operations in previous war zones, conducted bombing campaigns in the Balkans, and oversaw aerial strikes on Hussein and Usama Bin Laden.³⁹ Among these different deployments and various military strikes, one of the most instructive discussions on McCain’s views on war powers and the Constitution took place in 1994 prior to President Clinton’s deployment of troops to Haiti in the same year.

As the Clinton administration moved closer toward military action against Haiti’s ruling junta, Senator Arlene Specter (R-Pa.) offered an amendment that called for the prohibition of an American troop deployment to Haiti without specific congressional authorization.⁴⁰ Specter included certain exceptions that permitted the president to act militarily if American citizens in Haiti needed immediate military protection, or if U.S. national security interests demanded immediate military action that precluded the opportunity to gain congressional authorization. Mostly, however, this amendment was aimed at restricting the president’s ability to act militarily in Haiti without congressional approval.

As chief opponent to this amendment, McCain provided an extended defense and articulation of his views on the Constitution and war powers. In response to the amendment, McCain first noted that he agreed with Specter, in that American troops should *not* be deployed to Haiti.⁴¹ Rather, McCain’s qualm with the amendment was on constitutional grounds: that Specter’s proposal “exceed[ed] the authority of the Congress of the United

³⁵ 137 CONG. REC. 1817 (1991) (statement of Sen. McCain).

³⁶ Interview with Senator John Sidney McCain III, “Remarks on Kosovo and NATO,” Center for Strategic and International Studies (Apr. 13, 1999).

³⁷ See FISHER, PRESIDENTIAL WAR POWER, *supra* note 5, at 169–74.

³⁸ *Id.*

³⁹ HENDRICKSON, THE CLINTON WARS, *supra* note 5.

⁴⁰ 140 CONG. REC. 19805 (1994).

⁴¹ *Id.* at 19807 (statement of Sen. McCain).

States.”⁴² McCain maintained that “it is impossible for legislative bodies to anticipate world events. That is why our Founding Fathers put those responsibilities, enormous responsibilities—the lives of American service men and women—within the authority of the President of the United States of America.”⁴³ As he has implied before but in this case explicitly argued, McCain advocated a vision of the commander in chief that has unilateral powers in determining when, where, and how American military force may be used abroad.

Within this discussion, McCain further elaborated, noting that during the Cold War,

[A]t no time during those years would I have contemplated prohibiting the President of the United States from military actions any place in the world....[T]he fact is that the President of the United States is given the responsibility, the most grave responsibility of sending into harms way our greatest national treasure, our young men and women.⁴⁴

Although McCain cited a number of circumstances when commanders in chief did act unilaterally in defending these views, his perspective of war powers is one that permits Congress no role in the initial decision to use military force abroad. McCain added that Congress does not have “the right to declare peace.”⁴⁵

In response to these ideas, Senator Specter later noted that McCain’s vision of presidential powers implied that Congress’s constitutional right to declare war is irrelevant according to this perspective—that the right to declare war has no constitutional bearing on McCain’s vision of how force may be used abroad.⁴⁶ McCain then noted that Congress does have “powers of the purse” to end an American military mission.⁴⁷ Yet, Specter was accurate in summarizing McCain’s unilateral vision of presidential war powers, which is that Congress cannot restrict the president prior to military action. Such a view contrasts strongly with the Founding Fathers’ vision and, at the least, permits no constitutional check or balance on the president before force is used abroad.

McCain took a similar position prior to the deployment of 20,000 U.S. armed forces to the NATO peacekeeping mission in Bosnia in 1995. This mission was being led by NATO, but did have approval from the United Nations Security Council. In leading the Senate’s discussion with Senate Majority leader Robert Dole (R-Kan.), McCain noted:

I agree with those senators who have said that they would not have undertaken the commitment made by the President of the United States to deploy American ground forces to Bosnia to implement the tenuous peace that now exists there. But that is no longer the central question of our deliberations this evening. The President did so commit and our

⁴² *Id.* at 19808 (statement of Sen. McCain).

⁴³ *Id.*

⁴⁴ *Id.* at 19809 (statement of Sen. McCain).

⁴⁵ *Id.*

⁴⁶ *Id.* at 19810 (statement of Sen. Specter).

⁴⁷ *Id.* (statement of Sen. McCain).

obligation now goes beyond expressing our disagreement with that decision. . . . Many of us did disagree[.] . . . [Y]et we all recognize that the President has the authority to make that decision.⁴⁸

Again, McCain maintained that the Congress had no real authority to prevent the commander in chief from taking this action despite his opposition to the actual policy; such a view certainly runs counter to the congressional agreements reached in 1945 and 1949 upon American entry in the United Nations and the North Atlantic Treaty Organization.⁴⁹

Another display of McCain's preference for a strong and unlimited president occurred during NATO's bombing campaign on Slobodan Milosevic's military and police forces in Yugoslavia in 1999. As the air strikes continued on into the sixth week with little sign of political or strategic progress for NATO, McCain led an effort in the Senate to provide Clinton the ability to use "all necessary force"—and by implication the use of American ground forces if the president desired—to defeat Milosevic.⁵⁰ In describing his efforts to encourage the President to use force more aggressively to help bring about a more expeditious victory, McCain noted: "I have said repeatedly that the President does not need this resolution to use all the force he deems necessary to achieve victory in Kosovo. I stand by that contention. And I have the good company of the Constitution behind me."⁵¹

At the time, President Clinton opposed the resolution, but McCain was critical of the Clinton administration's military approach, which explicitly banned the use of ground forces at the onset of the operation. McCain's proposal was defeated, but nonetheless provides another meaningful demonstration of the extent to which he felt that the commander in chief is permitted to use force abroad without prior congressional authorization.⁵² From McCain's perspective, presidents are free to initiate wars at their own discretion.

During the Clinton presidency, military strikes were also carried out against Iraq. The major bombing assaults, which occurred in 1993, 1996, and 1998, involved some notification of the forthcoming strikes with members of Congress prior to the actual military action, but fell well short of any level of meaningful consultation with the members of Congress.⁵³ In 1998, when a number of Senators raised concerns over the timing of the Clinton administration's strikes against Iraq, which came on the eve of the House impeachment hearings, McCain aggressively backed Clinton's military strikes, even though only a few members of Congress were notified in advance of the forthcoming military action.⁵⁴

⁴⁸ 141 CONG. REC. 36902–03 (1995) (statement of Sen. McCain).

⁴⁹ See generally sources cited *supra* note 6.

⁵⁰ See 145 CONG. REC. 8169 (1999) (statement of Sen. McCain).

⁵¹ *Id.*

⁵² *Id.* at 8169–70.

⁵³ HENDRICKSON, THE CLINTON WARS, *supra* note 5, at 142–57.

⁵⁴ See generally R.W. Apple, Jr., *On Two Fronts: The Overview; House to Debate Impeachment Today as U.S. Continues Air Assault on Iraq*, N.Y. TIMES, Dec. 18, 1998, at A1.

In 1996, McCain uncharacteristically raised some concerns with the decision making process prior to the strikes on Iraq. In this case, McCain voiced some concern over the Clinton administration's absence of consultation with Congress, and suggested the need for a more effective War Powers Resolution.⁵⁵ At this time, McCain was serving as an informal foreign policy advisor to Robert Dole's presidential campaign, and was rapidly becoming a lead GOP critic of the Clinton administration's foreign policy. McCain had been especially harsh in his criticism of the Clinton's policy toward Iraq, maintaining that American foreign policy had gone weak toward Hussein under Clinton and that the president should have acted sooner militarily, which perhaps gives some insight on McCain's willingness to advocate for congressional input prior to military action.⁵⁶

In 1999, in an interview at the Center for Strategic and International Studies, McCain also noted that the War Powers Resolution has been "routinely violated" across all administrations and that a need exists to "review and revise the War Powers Act so that it makes sense and we can abide by our own laws."⁵⁷ These two examples of concerns raised over violations of the War Powers Resolution are different from his earlier statements on the War Powers Resolution in the Reagan and Bush administrations when he raised no objections to violations of the War Powers Resolution. Moreover, McCain's call for a more effective War Powers Resolution contrasts quite sharply with his criticisms of the War Powers Resolution in 1987, and his views for an essentially independent commander in chief, which he championed in 1994 as his fellow Republican colleagues attempted to limit President Clinton prior to military action in Haiti.

In the other major military action during the Clinton presidency, the 1998 military strikes on alleged Al Qaeda posts in Afghanistan and Sudan, McCain again expressed his support for military action and raised no qualms with the decision making process prior to the strikes.⁵⁸ Prior to these strikes, Clinton administration officials did make some effort to consult key congressional leaders before the strikes took place and thus a case can be made that some aspects of the War Powers Resolution were more closely met than other previous military strikes abroad.⁵⁹ Nonetheless, McCain's support for this military action abroad falls in line with his long history of backing the commander in chief when the president determines that military action is necessary and appropriate. Thus, apart from McCain's aberrations in 1996 and 1999, he otherwise was a leading

⁵⁵ Adrienne Flynn, *GOP Senators Displeased at Being in the Dark on Iraq*, ARIZ. REPUBLIC, Sept. 6, 1996, at A13.

⁵⁶ See Adam Nagourney, *Raid on Iraq: The GOP; Muting His Criticism of Clinton, Dole Backs Troops in Iraq Raid*, N.Y. TIMES, Sept. 4, 1996, at A1. See also R.W. Apple, Jr., *Raid on Iraq: The Implications; What's Bad for Hussein Seems Good for Clinton*, N.Y. TIMES, Sept. 5, 1996, at A11.

⁵⁷ Interview with Senator John Sidney McCain III, *supra* note 36.

⁵⁸ See Steven Lee Meyers, *After the Attacks: The Overview; President Swears to Use 'All Tools' Against Terrorism*, N.Y. TIMES, Aug. 23, 1998, at A11.

⁵⁹ Ryan C. Hendrickson & Frédéric Gagnon, *The United States Versus Terrorism: Clinton, Bush, and Osama Bin Laden*, in CONTEMPORARY CASES IN U.S. FOREIGN POLICY: FROM TERRORISM TO TRADE (Ralph G. Carter ed., 2007).

voice in the Senate during the Clinton years for a strong commander in chief, and at times battled with his own political party on constitutional grounds to protect against congressional war powers assertions, which he deemed unconstitutional.

V. USES OF FORCE DURING THE PRESIDENCY OF GEORGE W. BUSH

The two major military operations during the presidency of George W. Bush that provide additional insight on McCain's views on war powers, and still remain in progress are in Afghanistan and Iraq. In both of the authorizations to use force in these operations, the Commander in Chief was granted wide discretionary powers in determining how and when to use military force. Much like his pattern established in previous American military actions, McCain was instrumental in defending these resolutions and fought against any limitations on the President's asserted war-making authority.

Three days after Al Qaeda's attacks on September 11, 2001, the Senate briefly discussed Senate Joint Resolution 23 (S.J. Res. 23). This resolution gave the president the authority to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁶⁰

Although Congress was able to slightly rein in Bush administration officials in the initial White House/congressional negotiations, as Bush officials called for unlimited spending authority and provided no reference to the War Powers Resolution in their first drafts of S.J. Res. 23,⁶¹ most analysts still concur that the resolution provided rather sweeping powers to the president in determining how the new global war on terrorism would be conducted.⁶² Much like McCain's previous views on war powers, the Senator again argued for a commander in chief with essentially unlimited powers in conducting the war. He noted:

To see this mission through, Congress should encourage the President to use all necessary means to overcome and destroy this enemy, in what will be a long and trying campaign for freedom. Under the Constitution, the President already possesses this authority, but it is enhanced, and our cause strengthened, by the support of the Congress. . . . Let us give our

⁶⁰ 147 CONG. REC. 17045 (2001).

⁶¹ See David Abramowitz, *The President, the Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71 (2002).

⁶² See Nancy Kassop, *The War Power and Its Limits*, 33 PRESIDENTIAL STUD. Q. 509 (2003). See generally Donald R. Wolfensberger, *The Return of the Imperial Presidency?*, 26 WILSON Q. 36 (2002).

Commander in Chief all necessary authority to put power behind our purpose[.]⁶³

Given that the resolution received unanimous support in the Senate, McCain was like all senators who were ready to support aggressive military action. What is different, however, is that McCain provided not only policy support for the forthcoming war, but also constitutional backing for a president with unlimited military powers. These views were different from Senator Joseph Biden (D-Del.), who argued that S.J. Res. 23 provided the appropriate limitations on the commander in chief.⁶⁴ Similarly, Senators Carl Levin (D-Mich.) and John Kerry (D-Mass.) also noted that the appropriate constitutional checks were in place against the president, and that Congress had carried out its war powers duties.⁶⁵ Although a case can be made that such views exaggerated the *de facto* “limits” placed on the commander in chief, it is still clear that these positions were much different from McCain’s, who maintained that this vote was useful politically, but was unnecessary on constitutional grounds.

In 2002, the “Joint Resolution to Authorize Use of Military Force Against Iraq,” (S.J. Res 45) received considerably more deliberation than S.J. Res 23, and again, McCain was one of the senators who helped assure its passage. During these debates, McCain expressed not only political support for a strike on Iraq, but also made extensive claims for presidential war powers by opposing any effort to limit or constrain the president.

In the debates over the possibility of military action against Iraq, Senator Robert Byrd (D-W.V.) proposed an amendment to place a time limit on the authorization for the use of force. The authorization would “terminate 12 months after the date of enactment of [the] joint resolution, except that the President may extend,” under certain conditions, the authorization.⁶⁶ In keeping with his long-held views on expansive presidential war powers authority, McCain opposed the resolution, noting that “to deprive the President 12 months from now of the authority we would grant him in this resolution would be an infringement on the authority of the Commander in Chief”⁶⁷

In these same debates, Senator Byrd also attempted to require that the president could only use force under certain conditions. Byrd maintained that only if there was “a clear threat of imminent, sudden, and direct attack upon the United States, its possessions or territories, or the Armed Forces of the United States,” the president would have the authority to use armed force.⁶⁸ McCain opposed this amendment as well and instead made the case for preemptive military action: “preventive action to target rogue regimes is not only imaginable but necessary. . . . The Byrd amendment would negate

⁶³ 147 CONG. REC. 17041 (2001) (statement of Sen. McCain).

⁶⁴ *Id.* at 17046–47 (statement of Sen. Biden).

⁶⁵ *Id.* at 17040, 17041 (statements of Sen. Levin & Sen. Kerry).

⁶⁶ 148 CONG. REC. 20377 (2002).

⁶⁷ *Id.* at 20379 (statement of Sen. McCain).

⁶⁸ *Id.* at 19697.

any Congressional resolution authorizing the President to use all means to protect America from the threat posed by Iraq.”⁶⁹

In opposing Byrd’s efforts, McCain further expounded:

[T]his amendment regarding the preservation of Congress’s constitutional authority is unnecessary. A portion of the amendment that would limit the authority of the President to wage war is arguably unconstitutional. The Congress can declare war, but it cannot dictate to the President how to wage war. No law passed by Congress could alter the constitutional separation of powers.⁷⁰

Additional insights on McCain’s views were evident when Senator Levin (D-Mich.) proposed his amendment—that the president would only have the power to use force against Iraq under a United Nations Security Council (“UNSC”) resolution that authorized all member nations the ability to use force to eliminate the threat of certain weapons.⁷¹ Levin’s purpose was to keep the president from acting unilaterally. The amendment also stated that if an UNSC resolution was not adopted, the president would need to convene Congress to again “consider promptly proposals relative to Iraq.”⁷²

In response, McCain predictably argued against this effort, noting “our country must [not] delegate our national security decisionmaking to the United Nations. . . . This body [i.e. the Senate] should allow the executive branch the leeway to conduct diplomacy at the U.N.—not try to micromanage it from the Senate floor.”⁷³

Thus, on Iraq, to a much greater extent than on Afghanistan, McCain pushed for the broadest possible powers of decision for the commander in chief. In doing so, McCain supported a resolution that permitted the president wide discretion in determining how and when military force would be used and removed Congress from its key constitutional duty in determining when force may be used abroad.⁷⁴

VI. CONCLUSION

The evidence presented in this analysis provides us with a number of conclusions regarding Senator John McCain’s views toward the Constitution, the commander in chief, and Congress’s constitutional war powers. These findings present strong evidence that McCain envisions a commander in chief with unlimited authority to conduct military operations abroad without Congress’s prior approval. Congress’s constitutional power to “declare war” is one that Congress may exercise if it so desires, but has

⁶⁹ *Id.* at 20393–94 (statement of Sen. McCain).

⁷⁰ *Id.* at 20394 (statement of Sen. McCain).

⁷¹ *Id.* at 19722.

⁷² *Id.*

⁷³ *Id.* at 20399–400 (statement of Sen. McCain).

⁷⁴ See generally Louis Fisher, *Deciding on War Against Iraq: Institutional Failures*, 118 POL. SCI. Q. 389 (2003).

little bearing on determining or limiting whether a president may or may not use force abroad; that decision rests solely with the president.

These findings are fairly robust, in that McCain has for the vast majority of military operations during his time in Congress been quite consistent in holding this position. Regardless of whether it has been a Republican or Democratic president, McCain has been nonpartisan in arguing for a commander in chief with virtually unlimited military powers. McCain voted to invoke the War Powers Resolution in 1983 for Lebanon, but in doing so explicitly said that he reluctantly was called upon by others to make a vote on the issue, and thus by implication would have rather not voted to restrict the president's deployment. Even in doing so, the Democratic-led proposal still granted the president eighteen months to complete the operation, so it is not as if McCain's backing of the Democrats' proposal was a radically assertive measure to limit the president. His other vote to invoke the War Powers Resolution for Grenada in 1983 was made with 402 other members of the House, and again should not be viewed as an example of McCain's backing of assertive congressional war powers. McCain's explicit concerns raised over violations of the War Powers Resolution came during the Clinton administration in 1996 and 1999, and otherwise do not square with his previous criticisms of the War Powers Resolution and his more extended formal arguments for a constitutionally limited congress prior to military action abroad.

In 1994, in making his case for essentially unlimited powers as commander in chief in his later years in the Senate, it is noteworthy that McCain fought against his fellow Republican senators to prevent their constitutional efforts to check President Clinton prior to the military operation in Haiti. Similarly, in 2002, McCain fought against any attempt to limit President Bush's interest in using force in Iraq. In doing so, McCain was often a lead voice in the Senate in making these arguments. Thus, across much of his congressional tenure, McCain has been a leading voice and has a strong record in arguing against Congress's ability to restrict the commander in chief.

McCain's views on war powers square quite closely with the views held by American presidents after the Second World War, who are loath to agree that Congress has any constitutional role prior to military operations abroad. Such perspectives, however, run in strong contrast to the notion of checks and balances in the American republic and permit a president to act independently from Congress in determining how and when military force is used. Whether McCain becomes the Commander in Chief or remains in the U.S. Senate, most of this evidence suggests that he will continue to aggressively advocate for a president with unlimited authority to use force at the executive branch's discretion.

