



SENATE REPUBLICAN

POLICY COMMITTEE

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S.J. Res. 9 in Action

Senate Micromanagement of the War in Iraq Will Not Bring Victory

Executive Summary

- Democrats have proposed S. J. Res. 9, a resolution to 1) constrain the use of force in Iraq to certain Congressionally pre-approved ends, and 2) provide a date certain for the withdrawal of U.S. forces from Iraq.
- S. J. Res. 9 places constraints on the President's direction of the use of force in a way that is anathema to our Constitutional system.
- It micromanages the conduct of the Iraq campaign from the floor of the United States Senate, as it provides that Congress, rather than the Commander-in-Chief, would be determining how force is to be directed.
 - Force in Iraq could only be directed to certain Congressionally pre-approved ends.
- Even though the Commander-in-Chief power is committed by the text of the Constitution to the President exclusively and without exception, S. J. Res. 9 inserts 535 commanders-in-chief into the conduct of military operations in Iraq.
- The resolution does purport to leave behind a "limited" number of U.S. troops to conduct counter-terrorist activities in Iraq, but it is unclear whether the language of the resolution would actually allow the United States to execute effective counter-terrorist operations.
- As a matter of policy, even the Iraq Study Group specifically considered and rejected setting a timetable for withdrawal from Iraq.
 - A recently published National Intelligence Estimate assessed how a precipitous U.S. withdrawal from Iraq directly threatens the United States homeland, as al Qaeda would use parts of the country as a safe haven to plan increased attacks in and outside of Iraq.
- In the near-term, the Senate will likely turn to the President's request for supplemental funding to conduct the war in Iraq. It is at this time that it would be Constitutionally appropriate for the Democrats to effectuate a policy preference to end the U.S. involvement in Iraq.

Introduction

Democrats have proposed S. J. Res. 9, a resolution to constrain the use of force in Iraq to certain Congressionally pre-approved ends, and provide a date certain for the withdrawal of U.S. forces from Iraq. According to Minority Leader McConnell, this is the 17th Democratic proposal on the topic of Iraq. S. J. Res. 9 places constraints on the President's direction of the use of force in a way that is anathema to our Constitutional system, and even the Iraq Study Group specifically considered and rejected setting a timetable for withdrawal from Iraq.

Constraining the Military Mission and Imposing a Withdrawal Timetable

S. J. Res. 9, the so-called United States Policy in Iraq Resolution of 2007, is directed to two primary ends, both of which directly hinder the war effort in Iraq. First, it attempts to micromanage the conduct of the Iraq campaign from the floor of the United States Senate. Second, it sets a date certain for the withdrawal of U.S. troops from Iraq. The resolution is, by Senator McConnell's count, the 17th Democratic proposal on the topic.¹

The operative clauses of the resolution are directed at the "prompt commencement" of a withdrawal of U.S. forces from Iraq. The resolution provides that the withdrawal shall begin not later than 120 days after the date of enactment, with the goal of withdrawing all U.S. combat forces from Iraq by March 31, 2008. It does provide an exception to the withdrawal, however, that a "limited" number of troops may remain to:

1. protect U.S. and coalition personnel and infrastructure,
2. train and equip Iraqi forces, and
3. conduct targeted counter-terrorism operations.

The resolution provides that "the President shall promptly transition the mission of United States forces in Iraq to [these] limited purposes."

Changing the Mission by Mischaracterizing the 2002 Authorization

The preamble of S. J. Res. 9 attempts to justify these new restrictions by asserting that circumstances referred to in the 2002 Authorization for Use of Military Force Against Iraq "have changed substantially." This mischaracterizes the mission arising out of the 2002 use of force resolution. The Democrats assert that the 2002 authorization gave the president the "power to destroy Iraq's weapons of mass destruction and, if necessary, to depose Saddam Hussein." They then build off this assertion to claim that the 2002 authorization is no longer relevant because "the weapons of mass destruction were not there [and] Saddam Hussein is no longer there."²

In actuality, the use of force resolution is in no way conditioned on those caveats, and, in fact, provides quite expansive discretion to the President in the use of that force. By its terms,

¹ 153 Cong Rec. S2879 (daily ed. March 8, 2007) (statement of Senator McConnell).

² Joseph R. Biden, Jr., "Congress Should Repeal Its Authorization To Use Force In Iraq," *Boston Globe* (Feb. 27, 2007).

the resolution authorizes the President “to use the Armed Forces of the United States *as he determines to be necessary and appropriate* in order to (1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.”³

In this regard, the U.S. military employs force in Iraq to defend the national security of the United States as the President deems necessary, and it is not restricted to very specific missions regarding Saddam Hussein or weapons of mass destruction. Thus, the mission under the current authorization recognizes that it is the President as Commander-in-Chief who should direct the use of force in Iraq.

War Requires One Commander-in-Chief, Not Many

Despite Democratic protestations to the contrary,⁴ S. J. Res. 9 micromanages the war in Iraq from the floor of the United States Senate. Simply put, Congress, rather than the Commander-in-Chief, would be determining how force is to be directed. The current authorization is that force is to be directed as the President, as the Commander-in-Chief, “determines to be necessary and appropriate.” Democrats now seek to change the mission to require commanders in the field to determine if a certain use of force is directed to one of the ends Congress has enumerated.

This effort to direct the use of force to certain Congressionally pre-approved ends is practically the definition of micromanagement, and is almost certainly anathema to the Constitutional system created by the Framers. S. J. Res. 9 would vest 535 Members of Congress with the Commander-in-Chief power, instead of recognizing that the Commander-in-Chief power is committed by the text of the Constitution to the President exclusively and without exception.

The Framers vested command of military operations in ONE Commander-in-Chief.

Congressional micromanagement of the war does not bode well for military success. The Framers knew that success in war required energy, secrecy, speed, and dispatch. These are qualities that by their nature inhere in a single person, which is why the Framers vested the decisions necessary to conducting a war exclusively in the President as Commander-in-Chief, rather than a multitudinous Congress.⁵ The Framers vested the power of Commander-in-Chief in a single person with “the supreme command and direction of the military and naval forces, as first General and Admiral.”⁶

³ Authorization for Use of Military Force Against Iraq Resolution of 2002, § 3(a), Pub. L. No. 107-243, 116 Stat. 1497 (emphasis added).

⁴ Joseph R. Biden, Jr., “Congress Should Repeal Its Authorization To Use Force In Iraq,” *Boston Globe* (Feb. 27, 2007) (asserting that “repealing and replacing the 2002 authorization is not micromanagement from Washington”).

⁵ See Federalist 70 (“Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”).

⁶ Federalist 69.

It is also why the Framers specifically guarded against and warned of Congressional micromanagement of combat operations. As James Madison's notes from the Constitutional Convention demonstrate, the Framers amended the original drafts of the Constitution, which had granted Congress the power to "make war," to the power to "declare war," specifically because "'make' war might be understood to 'conduct' it which was an Executive function."⁷ The Supreme Court has confirmed this understanding, as it has denied Congress the power of legislation that "interferes with the command of the forces and the conduct of campaigns [because] that power and duty belong to the President as Commander-in-Chief."⁸

Timetable for Withdrawal STILL Endangers National Security

In addition to being offensive to our Constitutional system, S. J. Res. 9 sets a date certain for the withdrawal of U.S. forces from Iraq, and directs that the withdrawal begin in 120 days. First, even the Iraq Study Group "rejected the immediate withdrawal of our troops,"⁹ and opposed "set[ting] timetables or deadlines for withdrawal."¹⁰ By analogy, Senator Biden, in supporting the intervention in Bosnia, cautioned against the dangers of setting "an artificial deadline" for the withdrawal of troops because that "would turn our troops into lame ducks as a given date approaches."¹¹ That rationale is at least as compelling in Iraq as it was in Bosnia.

By demanding the withdrawal of U.S. forces from Iraq according to a timetable rather than conditions on the ground, S. J. Res. 9 ignores how U.S. forces, by their presence in Iraq, "remain an essential stabilizing element in Iraq," as a recently published National Intelligence Estimate ("NIE") concludes.¹² Their presence has the effect of preventing the collapse of Iraq, which, as Robert Kagan of the Carnegie Endowment for International Peace notes, would "not be the end of our problems but the beginning of a new and much bigger set of problems."¹³ The National Intelligence Estimate provides greater fidelity to that set of problems and confirms precisely what would be the consequences of that withdrawal:

- al Qaeda would attempt to use Anbar province to plan further attacks outside of Iraq;
- neighboring countries would consider actively intervening in Iraq; and
- sectarian violence would significantly increase, accompanied by massive civilian casualties and displacement.

The NIE notes how a precipitous U.S. withdrawal from Iraq directly and immediately threatens the United States homeland. It assessed that "AQI [al Qaeda in Iraq] would attempt to use parts of the country—particularly al-Anbar province—to plan increased attacks in and outside of Iraq." For example, Lieutenant General Michael Maples, the Director of the Defense

⁷ 2 The Records of the Federal Convention of 1787, p. 319 (Max Farrand ed., 1911).

⁸ *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

⁹ Iraq Study Group, Final Report p. 73.

¹⁰ Iraq Study Group, Final Report p. 67.

¹¹ Joseph R. Biden, *Bosnia: Why the United States Should Finish the Job*, SAIS Review, Vol. 18, no. 2, p. 1 (Summer/Fall 1998).

¹² National Intelligence Council, *Prospects for Iraq's Stability: A Challenging Road Ahead*, National Intelligence Estimate (Jan. 2007).

¹³ Robert Kagan, "Grand Delusion," *Wash Post* B7 (Jan. 28, 2007).

Intelligence Agency, recently stated that “documents captured in a raid on an al-Qaida in Iraq (AQI) safehouse in Iraq revealed AQI was planning terrorist operations *in the U.S.*”¹⁴

This analysis demonstrates that it is certain that the enemy in Iraq will not stop targeting the United States were the United States to set a date certain for the withdrawal of its forces from Iraq. It is simply folly to believe that terrorists using Iraq as a safe haven would cease efforts to attack the U.S. homeland if the U.S. troops were to be withdrawn from Iraq. Moreover, to plot their attacks, it would seem that the terrorists would simply orchestrate their strategy around the date set for withdrawal. Robert Kagan noted how many critics of the war “seem to believe it is a problem that can be made to go away, [on the rationale that] once American forces depart, Iraq will no longer be our problem.”¹⁵ He concluded that “this is a delusion,” and the evidence bears this out.

The Democratic response.

In response, Democrats may first claim that S. J. Res. 9 is not the precipitous withdrawal the Iraq Study Group rejected. The plain language of S. J. Res. 9, however, mandates that the withdrawal begin in 120 days.

They may then emphasize that they purport to leave behind a force to conduct counter-terrorist activities in Iraq. It is unclear whether the language of the resolution would actually allow the United States to execute effective counter-terrorist operations. First, the resolution, by its terms, directs that only a “limited” number of troops may remain behind for this purpose.

Second, and more importantly, a continuous on-the-ground presence is essential to the success of counter-terrorism operations. As Fred Kagan of the Carnegie Endowment for International Peace has explained, a local population comes to trust a counter-insurgent force that is continuously present in the area, rather than one that disengages from populated areas. As the counter-insurgent forces continue to gain the trust of the local population, the local population comes to provide invaluable intelligence to the counter-insurgent forces.¹⁶ S. J. Res. 9, on the other hand, seems like it would preclude this continuous on-the-ground presence, which is the force posture essential to successful counter-terrorist operations.

Appropriations: the Appropriate Method of Congressional Action

The Framers clearly did not leave Congress without a role in this area, as they contemplated the role of the Congress in war-making powers, and it was their consistent understanding that Congress’s chief institutional check on executive war powers was the power

¹⁴ Lieutenant General Michael Maples, Prepared Testimony of the Director of the Defense Intelligence Agency before the Senate Select Committee on Intelligence hearing on current and projected national security threats to the United States (The Annual Worldwide Threat Hearing), p. 8, Jan. 11, 2007 (emphasis added).

¹⁵ Robert Kagan, “Grand Delusion,” *Wash Post* B7 (Jan. 28, 2007).

¹⁶ Frederick W. Kagan, *Choosing Victory – A Plan for Success in Iraq*, p. 22, available at http://www.aei.org/docLib/20070105_ChoosingVictoryFINALcc.pdf.

of the purse.¹⁷ Even before the power of the purse comes into play, the Congress actually has to first raise and support an army over which the President is to be Commander-in-Chief.¹⁸ But of more relevance to this issue, as Professor John Yoo notes, “the appropriations power . . . give[s] Congress a sufficient check on presidential warmaking. . . . [T]he great expense in conducting war requires the president to seek supplemental appropriations from Congress. In the course of approving these measures, Congress can consider fully the merits of war, and it can easily forestall hostilities simply by refusing to appropriate a single dollar.”¹⁹

For over four years now, Congress has appropriated funds to the President to conduct the war in Iraq. This Congressional act of continued appropriations in support of a military mission has the effect of continually ratifying the President’s use of force in Iraq. Courts have consistently held that continued Congressional appropriations in support of a military engagement can be read to show Congress’s implied ratification of Presidential action.²⁰

In the near-term, the Senate will likely turn to the President’s request for supplemental funding to conduct the war in Iraq. It is at this time that it would be Constitutionally appropriate for the Democrats to effectuate their apparent willingness to end the U.S. involvement in Iraq. As Professor Robert F. Turner has noted in Congressional testimony, if the Senate really had the political will to end the war in Iraq, “the Constitution effectively vests Congress with the constitutional power to end a war. . . . By refusing new appropriations and rejecting requests for new troops and supplies, Congress can virtually assure that American military forces and/or allies who rely upon our assurances will be defeated and our enemies will prevail on the battlefield.”²¹

Current Democratic posture.

The Senate Democratic leadership seems content to call for a change of course in Iraq rhetorically without taking actual steps to withdraw U.S. forces from there. Most notably, the Majority Leader has not brought to the floor any legislative vehicle that would cut off funds for the President’s use in Iraq.

The appropriations power is the main power the Framers provided to Congress to check the President’s power as Commander-in-Chief. We should not mistake a lack of political will to execute that power with Constitutional impotence. Congress is clearly far from powerless in this area, and the appropriate medium by which it would express its opposition to a Presidential initiative in this area would be either to cut off funding for U.S. operations in Iraq immediately, or refuse to pass new appropriations once the current appropriations expire.²²

¹⁷ John Yoo, *The Powers of War and Peace*, p. 104 (Univ. of Chicago Press 2005).

¹⁸ U.S. Const. art. I, § 8.

¹⁹ John Yoo, *The Powers of War and Peace*, p. 22 (Univ. of Chicago Press 2005).

²⁰ *E.g.*, *Drinan v. Nixon*, 364 F. Supp. 854 (D. Mass. 1973). *See also* Randolph D. Moss, Memorandum of the Assistant Attorney General of the Office of Legal Counsel to the Attorney General, Dec. 19, 2000, *available at* <http://www.usdoj.gov/olc/final.htm> (advising President Clinton that emergency supplemental appropriations for military operations in Kosovo constituted authorization for continuing hostilities there).

²¹ Robert F. Turner, Prepared Testimony before the Judiciary Committee hearing regarding Exercising Congress’s Constitutional Power to End a War, Jan. 30, 2007.

²² David Rivkin and Lee Casey, “What Congress Can (And Can’t) Do on Iraq,” *Wash. Post* A19 (Jan. 16, 2007).

Conclusion

S. J. Res. 9 is the quintessential micromanagement of combat operations that the Framers specifically guarded against and warned of. The Constitution is clear on this point, as the Commander-in-Chief power is committed by the text of the Constitution to the President exclusively and without exception. Despite Democratic protestations to the contrary, S. J. Res. 9 does nothing more than insert 535 commanders-in-chief into the conduct of military operations in Iraq.