

State Powers to Restrict Federalization of the National Guard Under Congress' 2002 Authorization for Use of Military Force In Iraq: A Role for State Legislatures

By Benson Scotch¹

I. Introduction

This note examines the legal implications of legislation introduced in Vermont in 2008² *and similar bills and resolutions introduced or proposed in other states declaring that Congress' 2002 authorization for the war has expired and no longer supports the federalization of state National Guard units for service in Iraq.*

The campaign to promote the Vermont prototype elsewhere was organized and led by the Wisconsin-based Liberty Tree Foundation For a Democratic Revolution, with help from Cities for Progress, based in Washington, DC. That campaign is ongoing at this writing, under the flag of "Bring the Guard Home: It's the Law." Legislators and organizers in participating states have drafted their own versions of Vermont's bill, all with the same basic structure and purpose, with expected variations. (For example, Oregon's bill relates to the war in Afghanistan as well as the Iraq War.)

The author of this Note has helped with the drafting of a few

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² H.746, Vermont Legislature, 2008 (Adjourned Sess.)

—but far from all—of the bills introduced or proposed in these states. It is not the present goal to compare and critique the various iterations of these bills, but rather to focus on a prototype as a model that raises the principal legal issues shared in common by all of them. That prototype will be, fittingly if somewhat arbitrarily, the resolution (SJR 55) introduced in the New Jersey Senate by Sen. Loretta Weinberg, which is a later and in our view improved model of Vermont’s initial legislation. One improvement: The New Jersey resolution clarifies that governors do not have the power to call Guard members back from Iraq once they are federalized and deployed—a point considered ambiguous in Vermont’s H.746.³ *Though SJR 55 is our discussion model, we do not suggest that it has primacy over any other bill or resolution, and we will hereafter refer to the bills/resolutions collectively as “the National Guard Legislation.”*

II. Governing Concept of the National Guard Legislation

Though the legal principles governing war powers under the Constitution are complex and rife with open questions, the predicate for The National Guard legislation is strikingly simple: The 2002 Authorization for Use of Military Force (AUMF) in Iraq⁴ *was narrow and specific. It sought to protect the United States from the perceived threat posed by Iraq and to enforce UN Security Council Resolutions relating to Iraq:*

SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

³ Vermont journalist Susan Allen first raised this ambiguity in the bill after the press conference following the introduction of H.746 in January 2008. “Bring the Guard Home: It’s the Law” is still an apt title for the campaign, since the bills and resolutions implore the President to do just that, in addition to declaring that governors may resist federalization orders under the expired 2002 Iraq AUMF.

⁴ Public Law No: 107-243

(a) AUTHORIZATION.—The President is authorized 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.

The purposes of the 2002 AUMF have been accomplished (Iraq is not a threat to the United States), have proven to be unfounded (the existence of WMDs), or have lapsed (No relevant Security Council resolution remains to be enforced). The Iraq AUMF has therefore expired by its own terms, and other than the AUMF, there is no authority under the Constitution or the laws of the United States for the continued presence of National Guard members in Iraq, and indeed no authority for the use of force at all in Iraq. Yet the war goes on.

Why?

First—and most obviously—the President does not feel bound by the 2002 AUMF, maintaining that his powers as commander-in-chief trump the powers of the Congress to direct his conduct of the war, including the power to set conditions on the use of force.

Second, other than the power of the purse, Congress has no practical power to enforce its conditions. The federal courts have generally rejected attempts to enforce congressional mandates with respect to wars, even where a member of Congress asks a courts to enforce such a mandate.

And legislative attempts to set a timetable for the end of the war in funding legislation are subject to a presidential veto and an elusive veto override that must achieve a two-thirds majority

in both houses of Congress. Congress could in theory withhold funding for the war altogether, but that alternative has never been seriously considered by Congress.

Paradoxically perhaps, the states, which do not share direct war powers with the Congress and the President under the Constitution, may, in our view, question the federal call-up of their National Guards, not on the basis of objections to a particular use of military force or, in the case of 15-day training call-ups, the location, purpose, type, or schedule of such duty,⁵ but rather because a particular order is no longer valid and enforceable. And under federal law, except in certain cases where a President can call up the National Guard, which instances are not applicable here, without an authorization from Congress, units of a state National Guard may not be called into active service in the National Guard of the United States. Section 18 of the National Defense Act Amendments of 1933 makes clear that only when Congress acts, can Guard units be mobilized:

When Congress shall have declared a national emergency and shall have authorized the use of armed land forces of the United States for any purpose requiring the use of troops in excess of those of the Regular Army, the President may . . . order into the active military service of the United States, to serve therein for the period of the war or the emergency . . . any or all units and the members thereof of the National Guard of the United States.⁶

⁵*Perpich v. Department of Defense*, 496 U.S. 334 (1990) decided that Congress has barred states from refusing to comply with certain federalization orders on the basis of the location, purpose, type, or schedule of such duty. See 10 USC Sec. 12301(f).

⁶ And see 10 USC § 12301, which states in relevant part: "(a) In time of war or of national emergency *declared by Congress*, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter. . ." (Emphasis supplied.)

Thus, even if the President can continue a war that is no longer supported by congressional authority, and even if it is unlikely that a court would order the President to order the defederalization of units already federalized and deployed in Iraq,⁷ *if the President, under the same circumstances, orders additional* Guard units from the states, it is our view that without (1) valid and subsisting congressional authorization or (2) independent authority under federal law, that order may be declined.

A common question put to proponents of the Guard legislation is, “What is the authority of a state legislature to challenge a federalization order on the basis that the federal government is not following federal law?” That question in turn often leads to the further question, “If the bill becomes law, will it survive a court challenge?” These further questions are the focus of this Note: How should we evaluate a bill in an area of the law infrequently visited by the courts?

Courts generally decline to hear war powers cases—cases challenging the exercise of war powers, typically the initiation of the use of military force—because they raise what the courts call “political questions,” which the the judicial branch considers itself ill-equipped to handle. Courts would be unlikely to hear an action brought by a plaintiff, say, a Guard member, a legislator, or a governor, seeking a declaration that the 2002 AUMF is no longer in effect because its purposes have been achieved or are moot. Again: A political question.

Under the 1973 War Powers Act,⁸ Congress authorizes the

⁷ This situation creates *damnum absque injuria*, a loss without a legal injury. In law only a legal injury gives rise to a remedy. The bill’s authors surely prefer the maxim *Ubi jus ibi remedium*—there is no wrong without a remedy.

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P.L. 93-148. For a comprehensive but compact summary of the WPA, see

use of military force, even though the President as commander-in-chief controls the day-to-day decisions in the war zone. Since Congress deliberately established limited goals for military force in the 2002 AUMF, it is at least arguable that the fulfillment of those goals should bring the use of force to an end. Again, for reasons that the nonpartisan Congressional Research Service (CRS) has explained in a report to Congress,⁹ Congress has little practical power to end a war that it has authorized, even when the authorization is conditional or has expired. That lack of practical power in Congress is not rooted in the language of the AUMF. It is hard to argue that the stated purposes of the AUMF are unclear. And its implications are central to the National Guard legislation, which relies not on Congress or the courts, but on those powers of state governments over their National Guards remaining after more than a century of whittling away by Congress. At the end of the day, under the Supremacy Clause of the Constitution governors must follow federal mandates, which enjoy a presumption of validity. But pursuant to their oaths to uphold the law, governors also have the duty to read and examine orders federalizing their National Guards and to determine whether a call-up based on the 2002 AUMF is a lawful and valid order as of 2008.

Proponents of the National Guard legislation contend that the 2002 AUMF has expired based on a facial reading of its text. They argue that either the Congress must explicitly extend the mandate of the AUMF or the entire enterprise of the Iraq War or the President should bring it to a close in a prompt, secure, and reasonable manner. The states lack the power to do that, but they should exercise the power to question the federalization of their National Guards when presented with an order to do so that is not valid and effective, not because of objections to a

http://en.wikipedia.org/wiki/War_Powers_Act

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The Wikipedia citation in the previous footnote links to every relevant CRS report relating to the War Powers Act.

particular use of military force,¹⁰ but because the congressional authorization has by its clear terms expired.

II. The National Guard Legislation in Operation.

Though the language of bills and resolutions varies in states where they have been proposed or introduced, the core concept is very similar. The New Jersey resolution (SJR 55) is typical and states as follows:

1. The Governor and Legislature of the State of [Name of State] declare that the Congressional Authorization for Use of Military Force of October 16, 2002 has expired and no further authorization has issued, and therefore the President is urged to order the return of the [Name of state National Guard Unit serving in Iraq].

2. The Governor and Legislature resolve that the [State] National Guard shall hereafter be limited to service on behalf of the State of [Name], unless called into federal service pursuant to a declaration of war or a duly enacted and subsisting federal statute authorizing the use of military force.

Section 1 requests the defederalization of units of the State National Guard and their return to the home state as members of the National Guard of that state. The states do not have the power to defederalize the Guard once called into federal service, but it would be inconsistent—and curious—for the states to zealously defend their powers over state Guard members not yet

⁰⁰ It is important to distinguish the concept of an invalid *federalization order* from the concept that a *particular war* is unlawful under domestic or international law, as asserted by objectors to the war in Iraq on numerous grounds. The National Guard legislation here proposed encompasses only the former and not the latter concept, about which no opinion is ventured or implied.

federalized, based on an expired AUMF, and not even use their moral suasion to ask the President—any President—to look critically at the 2002 AUMF and do the same thing.

In his plans to draw down forces from Iraq President Obama may not wish to distinguish between Guard forces and other military units, nor is speculation about his policy priorities productive in our analysis. Section 1 emphasizes that “Follow the Law” is the core idea in this campaign—a concept that the new President, a legal scholar as well as the commander-in-chief, should welcome. In no event should he see this provision as hostile. He opposed the war and should have no quarrel with a campaign based on at least holding the erring Congress to its words. As Maryland’s Guard Home Campaign recently blogged: “The newly elected administration does not change the need for this legislation. There has never been a more important time than now to emphasize the rule of law as a moral and practical predicate to the use of military force.”

Section 2 is the heart of the National Guard legislation. Under this provision the State would decline to accept as valid a mobilization order issued under the 2002 AUMF. It is important to stress (we will elaborate in Part III) that the reason for the rejection of such order will not relate to the 2002 AUMF as adopted, which for purposes of the National Guard legislation proposed in this campaign is accepted to have been valid and constitutional when adopted. On the contrary, the reason is based squarely on what Congress said—sometimes called a facial reading—in that enactment and the conviction that what Congress said should control the President’s power to mobilize state National Guard units for service in Iraq.

It is not the purpose of this memorandum to predict the course of events after a state declines to follow a federalization order based on an AUMF that has expired, particularly since a President who opposed the war will be in office. The possibilities under the Bush administration were that the federal government

would (1) do nothing, (2) seek to enforce its order in federal court, (3) seek to curtail or eliminate federal financial support for the National Guard of the non-complying state, or (4) ignore the state's action and order federalization of the unit of the state National Guard in question directly, asserting the power under federal law to do so. The arrival of President Obama noted, these remain the federal options, and for purposes of our analysis we must consider the National Guard legislation in their context.

With reference to the second, third, and fourth possibilities it is important to acknowledge the widely held spoken and unspoken assumptions about the diminished powers of the states over their National Guards, since at least 1903 with the passage of The Dick Act and 1986 with the passage of the Montgomery Amendment. But in either context the government no less than the state asserting the power to decline the federal order will have to finally address issues of law as they are, not as official history may wish they were.

That said, whether the forum is an administrative agency or a federal court, on the question of continued federal funding for the National Guard or a court in which the federal government seeks to enforce a mobilization order and has the burden of proceeding first—sometimes called the burden of production¹¹—*it is the safest course to assume that the state would have the burden of showing that it had acted reasonably in refusing to comply with a federalization order, and that the President and the Department of Defense or Department of the Army lacked the legal authority to issue a National Guard mobilization order based on a facial reading of the 2002 AUMF.*

¹¹ “The duty upon a party in a legal proceeding to introduce enough evidence relating to an assertion of fact to have the issue be considered by the fact-finder rather than summarily dismissed or decided; part of the burden of proof.”

Given the absence of judicial precedent in a case in which the state asserts the invalidity of the federal requisition order, it is difficult to predict what a federal judge would require for the State to prevail. A federal call-up during wartime would come with a strong inference of validity, just as the power exercised by the President would be presumed to be valid. But these will not be conclusive presumptions, and campaign advocates believe that a strong case can be presented in favor of the arguments set forth by the National Guard legislation. The very scarcity of court precedents in war powers cases underscores the importance of the National Guard legislation, which raises important issues that have long remained unsettled by the courts at a time in history it is imperative to think and rethink how and by whom war and peace are made.

III. The Major Opposition Arguments

Criticisms of the National Guard legislation may focus on what we will call substantive issues—the analysis of the 2002 AUMF and the respective roles of the President, the Congress, and the states in light of that analysis—and process or procedural issues—whether states and their governors might have an occasion, no less the legal power, to resist a federalization order on grounds that the order is not valid under federal law.

The major substantive arguments of opponents, as we view them, will be:

(1) The President never needed the 2002 AUMF to go to war in Iraq, since he is the commander-in-chief and presidents have deployed the military, including the Guard (as a component of the Reserves), on many occasions without the consent of Congress.

(2) Even if the 2002 AUMF was necessary to go to war in Iraq, it is still in force, since Congress has authorized continued funding for the war, thereby extending the AUMF.

(3) Even if continued funding does not amount to an extension of the AUMF, the AUMF has not yet achieved its purposes (and has therefore not expired), because:

(a) Iraq is still a continuing threat to the national security of the United States, and

(b) There are still relevant United Nations Security Council Resolutions regarding Iraq to be enforced.

(4) Federal Preemption under the Supremacy Clause of the Constitution.

Response to (1) The President never needed the 2002 AUMF to go to war in Iraq, since he is the commander-in-chief and presidents have deployed the military, including the Guard (as a component of the Reserves), on many occasions without the consent of Congress.

The 1973 War Powers Resolution (WPR) is squarely at the center of the current and ongoing debate over the President's war powers and those of Congress. The WPR states that the President's powers as commander-in-chief to introduce U.S. forces into hostilities or imminent hostilities are exercised only pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by an attack on the United States or its forces. It requires the President in

every possible instance to consult with Congress before introducing American armed forces into hostilities or imminent hostilities unless there has been a declaration of war or other specific congressional authorization. It also requires the President to report to Congress any introduction of forces into hostilities or imminent hostilities, Section 4(a)(1); into foreign territory while equipped for combat, Section 4(a)(2); or in numbers which substantially enlarge U.S. forces equipped for combat already in a foreign nation, Section 4(a)(3). Once a report is submitted "or required to be submitted" under Section 4(a)(1), Congress must authorize the use of forces within 60 to 90 days or the forces must be withdrawn.¹²

The WPR does not distinguish between peacekeeping or containment operations, on the one hand, and actions that are broader in scope and involve the U.S. as a combatant nation in a war, whether or not the action has been mandated by the UN or is part of a NATO operation. Bosnia, Kosovo, post-1991 Iraq (i.e., after the first Iraq war and prior to the present war), and Haiti are all examples of actions that generally fit the words of the WPR ("introduce U.S. forces into hostilities or imminent hostilities") but were short of a war involving the U.S. as a combatant or as part of a NATO, UN, or (in the case of Iraq 2003) Coalition force acting as combatants.

A few key points emerge: First, when the U.S. initiates or participates in a war as a belligerent (Gulf War, Iraq War, Afghanistan), Congress is involved and adopts legislation, either as an explicit AUMF, starting with the Gulf War's AUMF, P.L.102-1 or legislation relating the use of force to the WPR, though not denominated an AUMF, as made clear in Congressional Research

¹² Grimmett, Richard F. (February 14, 2006). "CRS Report for Congress: War Powers Resolution: Presidential Compliance," at page 1. <http://www.fas.org/man/crs/IB81050.pdf> – viewed Nov. 20, 2008. Two other helpful reports on the WPR "The War Powers Resolution: After Thirty-Three Years," Code RL32267 and "War Powers Resolution: Presidential Compliance," Updated June 12, 2007, Code RL 33532.

Service Report "War Powers Resolution: Presidential Compliance,"¹³. And See, Kinkopf, Neil, "The Congress as Surge Protector," American Constitution Society for Law and Policy (2007).¹⁴

*Second, while Presidents and Congress have often disagreed about the necessity for complying with terms set down by Congress for the use of force, the President usually complies, while couching compliance in language that preserves the claim of Art. II powers. And a strong case can be made that in wars that do not involve an attack on the United States, Congress should have the last word. Even scholars who favor strong presidential powers are careful not to state that the President may act without congressional authorization in calling up the National Guard. This point is clear, e.g., in an article disfavoring a strong role for governors when their National Guards are called up: Kester, J.G., *State Governors and the Federal National Guard*, 11 Harv. J.L. & Pub. Pol'y 177 (1988).*

In sum, when Congress decides to play no role or a minor role in a decision to use military force overseas, the President has in the past controlled policy. When the Congress becomes involved, as in the 2002 AUMF, the terms of the Authorization should govern the scope and extent of the action. As Prof. Walter Dellinger of Duke Law School and an assistant attorney general under President Clinton stated in testimony to the Senate Judiciary Committee on January 30, 2007:

I believe that the president has extensive inherent powers to protect and defend the United States. . . .Once Congress has

³³ <http://www.fas.org/sgp/crs/natsec/RL33532.pdf>

⁴⁴ www.acslaw.org/pdf/Kinkopf-Surge.pdf

acted, however, the issue is fundamentally different. The question then becomes whether the Act of Congress is itself unconstitutional.

What is a valid exercise of congressional control over war making? Presidential administrations have generally acknowledged that Congress may by legislation determine the objective for which military force may be used, define the geographic scope of the military conflict and determine whether to end the authorization to use military force. Consider, for example, the position taken by the late Chief Justice William Rehnquist while serving as Assistant Attorney General in 1970. Assistant Attorney General Rehnquist opined as follows:

[The following two paragraphs of text, quoting Asst. Atty. Gen. Rehnquist, are included as text in Prof. Dellinger's statement.]

It is too plain ... to admit of denial that the Executive, under his power as Commander-in-Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior Congressional approval. However, if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include Executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain scale. Constitutional practice also indicates, however, that Congressional sanction need not be in the form of declaration of war.

A declaration of war by Congress is in effect a mandate to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct military operations, as was

done in the instances referred to above, is both utterly illogical and unsupported by precedent.

Prof. Dellinger and Asst. Atty. Gen. Rehnquist, though supportive of strong executive powers with respect to national security, got it right. War powers are shared between the executive and legislative branches under the Constitution. Congress has always passed an AUMF before or in connection with the use of force in which the United States is a combatant. And there is an AUMF governing the use of force in the present Iraq war. While no President has acknowledged the WPR as controlling—always submitting reports to Congress *consistent with* the AUMF, but not *in compliance with* the AUMF—the fact is that Congress has acted in this case, and here the presumption of validity favors the constitutionality of the WPR and the validity of the 2002 AUMF.

But if the theory of the Guard legislation is sound and Congress should be a constitutional check on the President's war powers, the reality does not follow the theory. As is clear from the conflict between Congress and the President over setting a timetable for withdrawal, once the Congress writes an AUMF, even one with conditions, it is difficult to rein in a President who decides to continue the war despite and in the face of those conditions. Proponents of the Guard legislation believe that when the President functionally ignores conditions set by Congress to the use of military force—even as he states that he is acting "consistently" with the War Powers Act of 1973—he is venturing beyond the limits of his powers. In the words of Justice Jackson in a notable concurring opinion in the *Steel Seizure Cases, Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637, 638 (1953):

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at

its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

While we know of no court case in which the question is whether the right to federalize state National Guards is always identical to and coincident with the President's power to use military force in an overseas war, the 2002 AUMF may raise such an issue. If we are correct that the two goals set forth in the AUMF have been achieved or are no longer applicable, and if Congress has not amended the AUMF (and indeed has tried to require a timetable for departure in bills to continue funding for the war), the President is continuing the war "*only by disabling the Congress from acting upon the subject,*" to quote Justice Jackson in the *Steel Seizure Cases*.

Response to (2). *Even if the 2002 AUMF was necessary to go to war in Iraq, it is still in force, since Congress has authorized continued funding for the war, thereby extending the AUMF.*

There are at least three threads to the funding-as-reenacting argument:

(a) The first thread is simply that the fact that Congress has paid for further war-fighting means *ipso facto* that everything Congress did or said in enabling the war continues. No look at the language of the AUMF is required. Nor is it necessary to look at congressional intent in refunding the war, or at the legislative history of the AUMF, or at the refunding resolutions. Finally, it

follows under this thread that it that comparing this AUMF to any prior legislation authorizing war is utterly unnecessary. We call this approach the reverse Pottery Barn rule. “If you fix it, you own it.”

The “reverse Pottery Barn rule” is the least favorable to the cause of the National Guard legislation, since it is outcome-based and does not allow a reasoned response. In effect, under the “reverse Pottery Barn rule” so long as Congress continues to fund the war, it maintains the *status quo* on all aspects of the war, including the AUMF and Guard call-ups that rely on the AUMF.

(b) The second thread is the estoppel principle, “Don’t ask us to fix it, Congress, when you have the power to fix it but won’t. At most we, the judicial branch, only get into political questions when all else fails.”¹⁵

The estoppel argument depends on Congress’ ability to end funding for the war—a power that the Constitution says that Congress has, but which may not be a power that Congress can readily exercise in fact, given the collateral consequences that such a step might imply. But assuming for argument’s sake that estoppel should apply to Congress, which has the power to end funding for the war, it surely does not operate against state governors, who do not.

A more vernacular argument in support of the National Guard legislation might run like this: “Congress has failed to stop what it authorized in 2002, even though its stated purposes have

⁵⁵ Estoppel is a legal principle in the law of equity that prevents a party from asserting otherwise valid legal rights against another party because conduct by the first party makes it unjust for those rights to be asserted. In short, in the example of the courts and Congress: “*You* could have fixed it, Congress—don’t ask *us* to do it.”

been achieved or are no longer apply. The only authorization to call up state Guard troops came in 2002, and for wars of choice, only the Congress, and not the President, may call up the Guard. The 2002 document no longer supports a new call-up. Arguably, Congress may not be heard to say so, estoppel-bound slouch that it is. But governors may be heard to say so, since they have not participated in any refunding. In sum, the 2002 AUMF text is clear, and it has expired. Case closed."

(c) The last thread would examine the language of specific funding reauthorization bills and to argue on the basis of the text that Congress specifically intended to reenact or extend the AUMF.

This thread is potentially the most powerful in favor of the National Guard legislation.

First, let us clear up what we mean by "intent." After-the-fact opinions by members of Congress that the AUMF has expired will not persuade courts, which, at most, will from time to time look at legislative history—the talk that goes on in the legislative forum before a bill is enacted in that forum. Members of Congress thereafter have no more authority to say what a law means than anyone else. See the CRS Report "War Powers Litigation Initiated by Members of Congress Since the Enactment of the War Powers Resolution," Report RL30352.

What is important in analyzing funding legislation is whether a funding authorization bill, read as a whole, together with its legislative history, fairly reflects intent to extend or reissue the AUMF. Not only is there an absence of such evidence, but the Congressional Record indicates a contrary conclusion. On May 1, 2007 President Bush vetoed H.R. 1591, stating in his veto message that it was objectionable because it set a date for

withdrawal from Iraq. The next day the House failed to override the veto 222-203. The President signed P.L. 110-28 on May 25, absent the timetable.

If the question arose whether Congress, in failing to override the veto of a bill that would have set a timetable for withdrawal from Iraq, intended to reenact the 2002 AUMF, there would be a strong argument that no such intent was evident. This conclusion would be buttressed by the unusually clear and narrow goals in the 2002 AUMF, compared to earlier authorizations. Congress in May 2007 wanted to require an exit plan and could hardly be said to be reenacting or extending the 2002 authorization.

Opponents of this third, intent-based analysis are forced into the position that in order to avoid extending or reenacting the 2002 AUMF, its only choice was to vote to leave U.S. forces in Iraq unfed, unsupported, and exposed to the enemy—the kind of argument that Charles Dickens described in *Bleak House*, but not a convincing argument to place in the mouths of members of Congress.

In sum, there may be several reasons why Congress continues to fund the war in Iraq, and without taking evidence from members of Congress, it is hard to say that pouring more dollars into the effort amounts to an intent to extend the AUMF. Congress' continued funding of the war is not what our constitutional system requires as a thoughtful contemplation and authorization for the use of the military. One can rather argue forcefully that continuing the funding without any reexamination of the Authorization for the war is a flight from the Founders' intent to allocate war powers between the Congress and the President.

Perpich¹⁶ will surely surface as an issue, and it will continue to be of marginal relevance at most. The Guard legislation requests the Governor to examine a federal mobilization order to make sure that requests to send state citizens overseas as part of the National Guard of the United States are valid under the law purporting to authorize such orders. In *Perpich* the question centered on whether and on what grounds a governor could limit particular call-ups and Congress' authority to legislate limitations—an issue not even remotely similar.

Response to (3)(a). Even if continued funding does not amount to an extension of the AUMF, the AUMF has not yet achieved its purposes (and has therefore not expired), because:

(a) Iraq is still a continuing threat to the national security of the United States.

Iraq as a nation is no longer a continuing threat to the national security of the United States. End of the matter.

And we know from the 2001 AUMF concerning the use of post-9/11 military force—the authority for the war in Afghanistan¹⁷—that Congress full well knows the difference between nations and terrorist groups:

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations,

⁶⁶ See footnote 5, *supra*.

⁷⁷ Pub.L. 107-40, 115 Stat. 224, enacted September 18, 2001.

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*. (Emphasis supplied.)

Opponents will surely argue that Iraq is now awash in terrorists and terrorist groups such as Al Qaeda in Iraq and that these groups present a threat to the United States. But if the mission has changed, the President should go back to Congress and ask for an expanded AUMF.

Response to (3)(b). Even if continued funding does not amount to an extension of the AUMF, the AUMF has not yet achieved its purposes (and has therefore not expired), because:

* * *

(b) There are still relevant United Nations Security Council Resolutions regarding Iraq to be enforced.

The CRS reports assume, without citing any legislative history, that “relevant United Nations Security Council Resolutions” means existing or future resolutions. We assert the counter-argument that endorsing future UN resolutions would be unworkable, unthinkable, and unconstitutional delegation of legislative power, since such future resolutions would not be constrained by the language of the AUMF (unlike, for example, federal agency regulations that must conform to authorizing statutes).

But we should address the CRS view, since the conventional wisdom—or post-*Perpich* folklore—about withholding consent to future call-up orders is that “You just can’t do that.”

The only resolution¹⁸ that would appear to even come close to a "relevant" resolution under United Nations Security Council Resolution 1723.¹⁹ But not even Secretary of State Condoleezza Rice's letter to the Security Council and annexed to Resolution 1723 hints at the notion that Iraq is a threat to the United States.

A counter-argument would surely be heard that if U.S. Forces were to leave, Iraq would descend into chaos. But even if this thesis were taken as a fact, no one suggests that Iraq would become the species of threat that it was claimed to be in 2002—armed to the teeth with WMD. It would become the same kind of threat that any unstable country in this region is or might become, and that would include Afghanistan and Pakistan and in a longer perspective possibly Iran and Saudi Arabia.

But these untested assumptions are very far from the language in the 2002 AUMF, and even if future UN Security Council resolutions were contemplated in that document, no such resolution comes even close.

In any event, the President could have requested and Congress could have adopted additional AUMF language including new goals for the use of military force and making the National Guard legislation moot if it chose to do so.

(4) The Supremacy Clause.

⁸ A convenient resource for UN Security Council Resolutions on Iraq is found at

http://www.en.wikipedia.org/wiki/United_Nations_Security_Council_Resolutions_concerning_Iraq

⁹

http://en.wikisource.org/wiki/United_Nations_Security_Council_Resolution_1723

Questions about federal preemption arise under Art. VI, Clause 2, of the Constitution, commonly called the Supremacy Clause, which states

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

See, e.g., *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316 (1819).

Supremacy Clause questions arise where federal and state laws are in conflict, and the issue is generally whether federal law expressly or impliedly preempts a conflicting state enactment. See, generally, *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (Explicit language, structure, and purpose of the Employee Retirement Income Security Act of 1974 (ERISA) demonstrate a congressional intent to preempt a state common law claim that an employee was unlawfully discharged to prevent his attainment of benefits under an ERISA-covered plan.)

The proposed Guard legislation presents no federal preemption issue. The only federal statute that an assistant attorney general from a participating state cites in an informal (and therefore unidentified) opinion relies on is 10 U.S.C. § 12301(a), which states in relevant part:

(a) In time of war or of national emergency declared by Congress, or *when otherwise authorized by law*, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve

component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter. (Emphasis supplied.)

How this provision might conflict with the proposed legislation the draft opinion does not state, nor is the conflict readily apparent. Under § 12301(a) Congress authorizes, the Secretary orders, and the state in question complies.

Nothing could be simpler.

But § 12301(a) by its clear language does not apply where Congress has not declared war or a national emergency or has not otherwise authorized the use of military force. The proposed legislation only applies to a law enacted by Congress, the 2002 Authorization for Use of Military Force, that has expired and is no longer in effect *by its terms*, and not because a governor disagrees with the President on the question. If the proposed legislation were to be enacted and the Secretary were to differ with the a governor acting under the statute, following a federal order under § 12301(a), the principle of federal preemption would not resolve the issue. If the conflict were considered in federal court —assuming that a federal court would accept jurisdiction— the issue would be the continuing power (or not) of the federal government to call up state National Guard under the AUMF or under some other authority. The state would be bound by the resolution of that issue and would surely comply with any resultant court order. The federal government would similarly be bound.

But since the proposed legislation does not authorize a governor to resist a federalization order that a governor or a legislature simply opposes, there are no clashing statutes and

federal preemption is not at issue. *Cf. Printz v. United States*, 521 U.S. 898 (1997) (“Federal law establishes policy for the States just as firmly as laws enacted by state legislatures, but that does not mean that state or federal officials must implement directives that have not been specified in any law.”)

A suggested process or procedural problem.

We include this subject area, though the specifics of process or procedural arguments are necessarily speculative. One thesis expressed—again informally—to a state legislator is that the federal government could order state National Guard units to be deployed directly, and without notice to governors and without any opportunity to object or decline to comply with such federal order.

Assuming, *arguendo*, that the Department of Defense might issue an order bypassing the governor’s office, the question of the continuing validity of the 2002 AUMF remains a critical question of law and policy, even if the process for addressing that question is shaped by the nature of the federal response to a state’s action under its Guard legislation. A governor pursuing a judicial remedy in response to a call-up that the governor believed was not legally defensible would be a plaintiff rather than a defendant, which he or she would in an action brought by the federal government in response to a governor’s refusal to comply with a federalization order.

We may only speculate about the effect, if any, of a governor’s party status on the likelihood that a court would decline to hear a case raising the continuing validity of an AUMF because that case raises a “political question.” There are strong grounds to assert that an objection to federalization of a state

National Guard unit for service in Iraq, based on the expiration of an AUMF is not a political question—one that involves judgment and discretion—but rather a justiciable legal issue. If the decision to go to war—the most solemn action any nation can undertake—is one that is shared between the President and Congress under the Constitution, then there can be no more important legal issue than how this divided power is allocated between the branches and how an excessive claim of power by one of the branches of may be redressed.¹⁸

IV. The Politics of Following the Law.

At the outset of the war in Iraq the specificity of the congressional authorization for the war—the limited purposes set forth in the AUMF—was little noted, since there was an interim before it was clear beyond debate that there were no WMF in Iraq and that Iraq before the occupation posed no military threat to the United States. Nearly six years later the public has turned strongly against the war, and the language and limits of the AUMF have become, in our view, a critical legal issue. Yet in the years since H.746 was introduced in the Vermont House and a parallel national movement launched in other states governors, state legislators, and other state officials may not necessarily be eager to act on the conviction that the 2002 AUMF has expired and may be glad to leave the task of dealing with the Iraq war to the President and Congress.

¹⁸ Though beyond the scope of this memorandum, there is the further issue of whether the federal judiciary—one of the three branches of government—has used the political question doctrine too readily in war powers cases and should revisit its reluctance to weigh in on war powers questions that are delineated by statutory and constitutional analysis, rather than by policy and judgment questions, such as the dimensions of national security, the limits of diplomacy, or the cause for war.

In our view that would be unfortunate. While Congress and the President share war powers under the Constitution, states have a powerful and longstanding interest in their National Guards—descendants of militias that pre-date the Constitution. The least the states can do as stewards of their National Guards is to insist that federal law be followed.

In doing so, they would be setting the stage for a broader debate about involving state and local governments in an appropriate way on questions of war, peace, and U.S. power. If anyone demurs on grounds that states and localities have no policy role in the areas of international affairs and terrorism, it is appropriate to point out that the U.S. has lost power, prestige, and a sense of its mission in the world, as U.S. states and localities have been brushed to the sidelines.

War and peace are back-home issues, and while no one is suggesting that the concept of a national defense be set aside, state and local voices have been out of the debate for too long, with sorry results. Let these voices be heard, let broad policy decisions be truly shared, and let the law be followed.