POLITICAL PENUMBRAS OF TAXES AND WAR POWERS FOR THE 2012 ELECTION

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1. INTRODUCTION

This Article evaluates taxing and spending consequences and political dynamics of war power negotiations surrounding the invasion and occupation of Iraq as an issue for reflection in the 2012 presidential election. Nobel Laureate Shirin Ebadi remarked:

Consider all the money spent and all the people killed in Afghanistan, yet still 60% of the country is in the hands of the Taliban. What was the result of the invasion of Iraq? The deaths of over one million civilians and the enrichment of two or three corporations. Why do you pay taxes when the money goes to waging wars?1

There are varying opinions regarding the success of operations in Iraq and Afghanistan. Likewise, civilian death toll estimates have ranged widely, presumably because an estimated 60,000 Iraqi refugees fled their homes monthly to escape adverse domestic conditions.2 Another study, published in the *Lancet*

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medical journal, involved physicians conducting a sectoral survey of Baghdad and estimated that there were 655,000 Iraqi deaths. President Bush postulated that the scientific methodology employed in this study was “pretty well discredited” and that the researchers were politicking. Other studies have yielded less nebulous numbers.

According to a database compiled by two nonprofit organizations, in the period surrounding the Iraq War, top Bush Administration officials made at least 935 patently false public statements and hundreds of other misleading statements about weapons of mass destruction (“WMDs”) and ties to al-Qaeda on 532 different occasions. Iraq possessed no WMDs and had no convincing ties to al-Qaeda, but Americans paid for military action. Over four thousand United States soldiers died while executing operations in Iraq. Direct costs mounted to over $800 (remarking about refugees in Iraq: “The U.S. invasion . . . far from resolving the problem, however, made it worse . . . [by] catapult[ing] the country into a near civil war . . . [and causing] some 60,000 Iraqis . . . to [leave] their homes every month.”); Id. at 320 (“One reason the Bush Administration has failed to do more to help Iraq’s refugees is that doing so would require an implicit admission that its policies have not produced peace and stability in Iraq but rather a refugee crisis.”).


5. Study: “False Pretenses” Led U.S. to War, CBSNEWS.COM, Feb. 11, 2009, http://www.cbsnews.com/stories/2008/01/23/national/main3741706.shtml; Charles Lewis & Mark Reading-Smith, False Pretenses, CTR. FOR PUB. INTEGRITY, Jan. 23, 2008, http://www.publicintegrity.org/2008/01/23/5641/false-pretenses; (“President George W. Bush and seven of his administration’s top officials, including Vice President Dick Cheney, National Security Adviser Condoleezza Rice, and Defense Secretary Donald Rumsfeld, made at least 935 false statements in the two years following September 11, 2001, about the national security threat posed by Saddam Hussein’s Iraq . . . On at least 532 separate occasions (in speeches, briefings, interviews, testimony, and the like), Bush and these three key officials, along with Secretary of State Colin Powell, Deputy Defense Secretary Paul Wolfowitz, and White House press secretaries Ari Fleischer and Scott McClellan, stated unequivocally that Iraq had weapons of mass destruction (or was trying to produce or obtain them), links to Al Qaeda, or both.”).


billion.\textsuperscript{8} Nobel Laureate Joseph Stiglitz and Harvard Professor Linda Bilmes included direct and indirect expenditures and estimated unbelievable spending totals in their book, \textit{The Three Trillion War: The True Cost of the Iraq Conflict} (2008).\textsuperscript{9}

But for repeated warnings of peril, Americans might not have initially acquiesced to the war. However, Iraq was purportedly also a regional threat, which connotes that U.S. military force was deployed to intervene in global security as a collective good. Several months after invasion, National Security Advisor Condoleezza Rice characterized Iraq as a threat to the Middle East even though contiguous countries had convened at a summit three months earlier, voted unanimously (with only Kuwait abstaining) that the invasion of Iraq was a threat to international peace and security, and demanded that military forces withdraw.\textsuperscript{10} Instead of heeding the demands of contiguous countries, the Bush Administration favored long-term occupation, conjecturally to “liberate” Iraqis, even as regularly-taken polls revealed that approximately eighty percent of Iraqis opposed continuing occupation.\textsuperscript{11} In 2007, the new Iraq government maintained that the U.S. military presence was still required to stave off threats to sovereignty.\textsuperscript{12} Ergo, before the invasion, “good” neighbors required protection from “bad” Iraq, but after the invasion, “good” Iraq required security from “bad” neighbors.

Due to the Iraq War and a troubled American economy, President Bush exited office with twenty-two percent approval ratings, the lowest departing approval ratings since Gallup began polling Americans on presidential approval ratings more than


\textsuperscript{11} Bejesky, \textit{Politico}, supra note 10, at 102-07.

seventy-five years ago. The Bush Administration nearly doubled the U.S. national debt from over five trillion to ten trillion. The national debt has since morphed to fifteen trillion, partially because of high oil prices and because President Obama implemented spending measures to stimulate the economy and alleviate the poor economic conditions that prevailed when he entered the Oval Office.

President Obama has normally been diplomatic in confronting political opposition, but in mid-August 2011 and during budgetary turmoil, he criticized the Republican presidential candidates for failing to use common sense and balance since “all eight of the candidates said they would refuse

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17. Stephen Eliot Smith, Defining Maybe: The Outlook for U.S. Relations with the International Criminal Court During the Obama Administration, 22 FLA. J. INT’L L. 155, 156 (2010); Robert Justin Lipkin, The Obama Phenomenon: Deliberative Conversationalism & the Pursuit of Community Through Presidential Politics, 12 U. PA. J.L. & SOC. CHANGE 169, 171, 200 (2008-2009) (Obama “infused the young with the will to sweep away, what they consider to be our broken political system and to replace it with the pursuit of community and the common good.”)
to support a deal with tax increase . . . .”18 Governor Mitt Romney, the Republican presidential candidate, did not offer a viable solution to the debt problem. During the second presidential debate in October 2012, President Obama pointed out that Romney wants to enact a platform that will reform the tax code with provisions that will cost nearly $5 trillion in lost tax revenue, “wants to spend $2 trillion on additional military programs even though the military’s not asking for them,” and “wants to continue the Bush tax cuts for the wealthiest Americans”— “that’s $8 trillion.”19 When queried how Romney’s programs will still balance the federal budget, Obama pointed out that Romney’s common explanation has been, “we can’t tell you until maybe after the election how we’re going to [pay for it].”20 As for the Republican candidates’ position on foreign policy during the primaries, a New York Times editorial opined: “Republican hopefuls have put to rest any lingering notion that their party is the one to trust with the nation’s security . . . [T]he candidates offer largely bad analysis and worse solutions, nothing that suggests real understanding or new ideas.”21

Republicans eagerly endeavor to recapture the White House. Senate Minority Leader Mitch McConnell stated: “The single most important thing we want to achieve is for President Obama to be a one-term president.”22 In February 2010, former Republican Vice President Candidate Sarah Palin commented, “I do not think Obama would be re-elected” if an election was held today, but if “he decided to declare war on Iran” or confronted a “national security threat,” the dynamics would change.23 It is not
clear that Congress would want to declare war, or that the American public would be interested in paying higher oil and gasoline prices that could prevail with a war, or that Americans currently have any appetite for war, but Palin is correct that conflict does change the political equation.

Leaders may reap short-term populace approval by responding to perceived foreign crises and may even use force to boost domestic support. There is a “rally around the flag” phenomenon. President Reagan employed elevated threat perceptions to drastically increase military spending, the Republican Party politically benefited from President Bush Sr.’s 1991 Gulf War, and the second President Bush “framed” the issue of Iraq as a part of the so-called “war on terror” to attain both congressional and populace approval. Through most of the Bush presidency, Republicans continued to support the Iraq War
while Democrats largely did not.\(^{31}\) As for Democrats using military force, while President Clinton was in the midst of impeachment proceedings, and after ordering bombing operations on Yugoslavia in 1999, various polls revealed that his approval rating dropped between five and ten points.\(^{32}\) In 2011, after Obama used force against Libya and the operation was marked as a success, his approval ratings still dropped to thirty-eight percent.\(^{33}\)

Presidents should exhibit prudent fiscal responsibility and be cautious when committing the country to war. Americans are opposed to having a wider hole blown in the national deficit with massive tax cuts and to being led into prolonged foreign conflict by zealous reactions to speculated security threats. This article addresses the consequential political processes as these issues arose during the Bush Administration, which then became an adversity for the Obama Administration.

## II. Bush-Era Fiscal Management Amid Security Threats

### A. Tax Cuts and War Spending

In 2010, U.S. Census data indicated that the gap “between

31. An October 2003 Pew Research Center poll discovered that nearly seventy percent of Republicans believed that the best way to ensure peace is by exhibiting military strength; and eighty-five percent of Republicans believed going to war in Iraq was the correct decision, while only thirty-nine percent of Democrats believed it was the correct decision. William A. Galston, *Political Polarization and the U.S. Judiciary*, 77 UMKC L. Rev. 307, 311 (2008). On the question of “Iraq, under Saddam Hussein, was a serious threat to U.S. security,” ninety-two percent of Bush supporters agreed, but only thirty percent of Kerry supporters agreed. HARRIS INTERACTIVE, *The Harris Poll #78: Iraq, 9/11, Al Qaeda, and Weapons of Mass Destruction, What the Public Believes Now*, Oct. 21, 2004 (on file with author). In March 2006, 70% of Republicans believed the U.S. military progress in Iraq was progressing favorably, while only 30% of Democrats believed it was progressing favorably. Galston, *supra* at 311. Throughout the war, Republican support for the Iraq war was 40 to 70 points higher than Democrat support. Gary C. Jacobson, *George W. Bush, the Iraq War, and the Election of Barack Obama*, 40 PRESIDENTIAL STUDIES Q. 207, 211 (June 2009).


rich and poor in the U.S. is the widest on record.” In his 2007 State of the Economy Address, Bush addressed the swelling socioeconomic statistic when he stated that “our citizens worry about the fact that our dynamic economy is leaving working people behind . . . [W]e have an obligation to help ensure that every citizen shares in this country’s future. The fact is that income inequality is real; it’s been rising for more than [twenty-five] years.” Twenty-five years prior to this speech was 1982, the second year of the Reagan Administration. Reagan cut taxes; fostered deregulation, privatization, and the merger and acquisition boom on Wall Street; and may have even precipitated developing world debt crises by countenancing multinational bank over-lending. Moreover, Bush’s dismay was unexpected after the Economic Growth and Tax Relief Act of 2001. Professor Charles Tiefer discussed the context:

[From] 2001-2006, a ‘Republican Revolution’ transformed the law of Congressional rules and procedures to allow that party to implement an ideological agenda. . . . They metamorphosed the tax system into a regressive form by moving trillions of dollars in unpaid-for tax cuts for the top brackets. And they enacted whole categories of indugent or otherwise conservative legislation epitomized by warping of health care (Medicare and Medicaid) and bankruptcy law, [and] the 2004 omnibus corporate tax giveaway . . .

It challenges even the most sophisticated observers to understand what and how Congressional Republicans did to the

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tax system. The rush of mammoth tax cuts primarily for the upper tax brackets evaded comprehension about just how they occurred or what they were. This is no accident.39

The 2001 budget resolution conferred a $1.35 trillion tax cut without an attempt to reconcile and offset deficits.40 Legislation adopted between 2003 and 2006 provided additional tax cuts.41 The United States went from a current account surplus under President Clinton to a $400 billion deficit in 2004 under President Bush, and Senator Robert Byrd emphasized that this economic descent was predominantly due to a “massive [two] trillion dollar tax cut bill mostly benefitting the wealthy.”42 Byrd continued:

Even worse, the tax cuts held an enormous lie – deliberately disguising their true size and effect on the budget by backloading them. Over [seventy-two] percent of the revenue losses from the tax cuts were set to occur between fiscal years 2007 and 2011, when George W. Bush would be well off the political stage. Also in place will be deficits in the Social Security trust fund and the Medicare trust fund – right around the 2010-15 time period. One has to marvel at the utter recklessness . . .43

Indeed, from 2009 to 2011, President Obama and Congress periodically deliberated proposals to confront the tax cuts, which had been inserted into bills and discussed behind closed doors with “lobbyists for the benefited well-off interests.”44 Not all beneficiaries appraised that the tax cuts were in America’s best interest. In November 2010, and on the same day that the Center for Responsible Politics revealed that half of the members of the Senate and House were millionaires, a group of forty millionaires, calling themselves “Patriotic Millionaires for Fiscal Strength,” wrote a letter to President Obama and requested that he discontinue Bush’s tax cuts and increase taxes on the richest

39. Id. at 249.
40. Id. at 252; Robert M. Ackerman, Taking Responsibility, 4 TENN. J. L. & POL’Y 11, 33 (2007) (Bush’s “tax breaks and pork-barrel expenditures continued”).
43. BYRD, supra note 42, at 28.
44. Tiefer, supra note 38, at 249.
Americans. For global prosperity issues, during the Bush Administration’s tenure, the developing world debt crisis again garnered global attention. Fifty-four countries were poorer in 2000 than they were in 1990. Budgetary problems ostensibly configured during the Bush Administration as an inaugural transfer to the Obama Administration may also have reduced attention from global economic problems.

B. Security Threats

Presidents Richard Nixon, Ronald Reagan, George H.W. Bush, and George W. Bush have all been criticized in various ways for their management of the economy. Less effective


47. Peerenboom, supra note 46, at 857.

economic policies under these presidents may be partially explained by their overemphasis on security threats. Democrats prefer addressing domestic issues such as health care, minimum wage increases, social issues, and environmental concerns; while Republicans traditionally have placed more attention on national security. If security threats take prominent attention, then domestic social issues might seem less poignant. As military spending escalated during the Bush Administration, war initiatives were patriotically extolled and conjoined with the virtues of cutting taxes. Two weeks after the invasion of Iraq, House Majority Leader Tom DeLay, a Republican from Texas, stated: “Nothing is more important in the face of a war than cutting taxes.” Military expenditures escalated to confront a security threat that was ultimately nonexistent, and taxes were concomitantly being cut. Professor Patsner wrote:

[T]he financing of the . . . conflict[s] has been with money borrowed from overseas. Instead of raising taxes so that American citizens were aware of the direct costs of this war and its long-term veterans’ healthcare consequences, the current Bush administration cut taxes for Americans and shifted the burden for paying off our war debt to future generations.

Prelude to Bush’s Election

opportunity to kind of undermine the presidency.” Alex Sundby, Bush Regrets Few Decisions from Presidency, CBS NEWS, Nov. 8, 2010, http://www.cbsnews.com/8301-503544_162-20022150-503544.html. As if a natural disaster led to political misfortune and there were no other acts that caused political fallout.

49. See supra notes 26-30.


53. BYRD, supra note 42, at 64-65.


55. Patsner, supra note 14, at 360.
Escaping meaningful criticism for this state is odd given the prelude to the 2000 presidential election. American taxpayers spent upwards of forty million dollars for long-running Independent Counsel Investigations of President Clinton’s alleged wrongdoings. \(^56\) Allegations that were either officially included in investigations or became media lore, include the Whitewater land deal, foul play surrounding Vince Foster’s death in the White House, Governor Clinton having knowledge of drugs being smuggled through a remote airport in Arkansas, and that Clinton sexually harassed Jennifer Flowers and Monica Lewinsky. \(^57\)

Five years later, David Brock, who levied charges in the national media and was a neoconservative who later abandoned the movement, provided point-by-point responses to the charges in a BBC documentary. \(^58\) Brock maintained that Whitewater involved “no criminal wrongdoing” and the accusations of wrongdoing were “a complete inversion of what happened,” Vince Foster committed suicide, and the Clintons did not smuggle drugs. \(^59\) The right-wing promoted the stories “because they were having a devastating effect. . . . It was terrorism. Political terrorism.” \(^60\)

The media relentlessly reported on Independent Counsel Ken Starr’s investigations of President Clinton, but was rather languid in purposefully examining apparent executive wrongdoing during the Bush Administration. \(^61\) When queried


\(^58\). Id.

\(^59\). Id.

\(^60\). Id.

\(^61\). Leslie Gielow Jacobs, Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force, 26 CONST. COMMENTARY 433, 453-54 (2010) (arguing that the media embraced the threat claims, advocated for war, and stimulated patriotism); Louis Fisher, Lost Constitutional Moorings: Recovering the War Power, 81 IND. L.J. 1199, 1226 (2005). There may be conformity to patriotic sentiment and fear of offending viewers in a time of war. Patriotism during wartime and a possible ingrained favoritism for “states of chaos” that breeds viewership seemed to dominate the media. David L. Altheide, The Mass Media, Crime and Terrorism, 4 J. INT’L CRIM. JUST. 982, 995
over the American media’s deference to Bush, particularly regarding false statements about WMDs in Iraq, John Walcott, Washington Bureau Chief of McClatchy News, remarked that the public “[does not want to] hear the President lied to them.” 62 This is true, but the media actuated public interest in President Clinton’s apparent misdeeds,63 particularly by accentuating his public statement that he “did not have sex with that woman [Monica Lewinsky]),"64 and that he arguably committed perjury when he testified under oath in the Jennifer Flowers sexual harassment case that “sex” only meant traditional intercourse.65

There are distinctions among questionable behavior that impact public policy, democratic choice, and the American tax base; conduct involving personal ethics; and behavior that disregards the rights of parties to a dispute or disrespects the court system, such as with the crime of perjury under oath.66 President Clinton’s controversy involved the latter two categories. By comparison, the Bush Administration waged the Iraq War without Security Council authorization; made false statements to Americans regarding the security threat from Iraq;67 violated other laws and rules, such as non-derogable international human
rights by issuing orders that authorized abusive interrogation methods of combatant-detainees; 68 and billed Americans hundreds of billions of dollars for the Iraq War. 69 But when the Senate Select Committee on Intelligence (“SSCI”) completed its five-year investigation on the Iraq War, which acknowledged the false statements, Chairman Rockefeller stated, “Democrats would not formally prosecute the point against the administration because doing so would automatically shut down relations between the Legislative and Executive branches.” 70

Republicans were unconcerned with the end of the Clinton Administration’s tenure and the relations between the branches. They controversially interpreted President Clinton’s deeds and apparent false statements as a “high crime and misdemeanor” under the Constitution, and impeached him just one year before completing his eight-year presidency. 71 Congressional Republicans asserted that President Clinton’s acts placed immorality in government at an all-time high—the president should not prevaricate to the public and should respect court processes. 72 Impeachment proceedings may have influenced the


69. STIGLITZ & BILMES, supra note 9; Glanz, supra note 8.


71. Michael C. Dorf, Iqbal and Bad Apples, 16 LEWIS & CLARK L. REV. 217, 224 (2010) (the “runaway investigation of President Clinton”); Jonathan Mermin, Free But Not Independent: The Real First Amendment Issue for the Press, 39 U.S.F. L. REV. 929, 954 (2005) (impeachment involved personal ethics issues). Political divisions in Congress were at an all-time high, with Republicans portraying Clinton as unethical, and Democrats defending Clinton for being a successful president, and criticizing Republicans for invading the president’s personal life. Power of Nightmares, supra note 57. It was the first time in American history that an elected president was impeached for partisan and flimsy reasons. CHALMERS JOHNSON, BLOWBACK 220 (2000).

72. Brian Bolduc, Why Newt Left the House, NAT. REV., Jan. 30, 2012, http://www.nationalreview.com/articles/289552/why-newt-left-house-brian-bolduc (noting that House Speaker Newt Gingrich was one of the most vociferous advocates to impeach President Clinton, and that this unpopular impeachment process rose to
tone for the 2000 presidential election and hoisted Bush to victory.

Governor George W. Bush ran a campaign that insisted he was an ordinary American country boy. Bush rejected Clinton's peacekeeping missions (aka "nation-building" exercises) in foreign policy, emphasized that he was not blemished as a Washington insider, and promised that he would be honest with the American people to restore morality to the presidency. Granted, rational political candidates frequently accentuate the weaknesses in opposition to garner public support and get elected. However, after President Bush was elected, the events of September 11, 2001 ["9/11"] catalyzed an opportunity for relatively unrestrained government action that wracked campaign promises.

C. Emotion and Poll Approvals


times, even vindicated the use of military force. For example, on February 15, 1898, an explosion sunk the U.S. battleship Maine in Havana Harbor, Cuba, and 266 crewmembers died.\textsuperscript{77} Presuming the cause was a Spanish attack, the American press spread a bellicose fervor and the Spanish-American war ensued.\textsuperscript{78} On May 7, 1915, one year into World War I, Germany sank the Lusitania, a British passenger ship transporting munitions, killing 1,198 people, including 128 Americans.\textsuperscript{79} The U.S. entered the war two years later. The Japanese attack on Pearl Harbor promptly led to U.S. involvement in World War II.\textsuperscript{80} In 1964, after an alleged attack on U.S. Navy vessels in the Gulf of Tonkin, the Vietnam War followed days later.\textsuperscript{81}

\textsuperscript{77} The Maine’s captain believed there was an internal explosion, but after a quick Navy investigation, the Secretary of the Navy declared the Spanish committed “an act of dirty treachery.” Peter Irons, \textit{War Powers: How the Imperial Presidency Hijacked the Constitution} 90 (2005); Chalmers Johnson, \textit{The Sorrows of Empire} 40 (2004).


\textsuperscript{79} Frederick C. Luebke, \textit{Bonds of Loyalty: German-Americans and World War I} 131 (1974) (“no event in World War I stirred American emotions more profoundly”). The U.S. declared neutrality, the Germans forewarned that vessels carrying munitions would be attacked, and the Lusitania was carrying six million rounds of U.S. ammunition and 1,248 cases of artillery shells bound for Britain. Irons, supra note 77, at 102-04. U.S. Secretary of State William Jennings Bryan advised President Wilson that Germany had every right to attack the Lusitania, noting that “a ship carrying contraband should not rely on passengers to protect her from attack – it would be like putting women and children in front of an army.” 33 \textit{The Papers of Woodrow Wilson} 134-35 (Arthur S. Link, ed., 1974). Bryan’s dissent was ignored and he resigned in December 1915 as Wilson sent army and navy expansion plans to Congress based on his attempt to get the U.S. into the war.

\textsuperscript{80} Critics contended that President Roosevelt provoked the attack by freezing Japanese assets and imposing an embargo on the sale of oil to Japan. B.H. Liddell Hart, \textit{History of the Second World War} 199, 202 (1970); White House Statement and Executive Order No. 8832 (July 26, 1941), \textit{reprinted in 10 Public Papers and Addresses of Franklin D. Roosevelt} 281 (1941).

For the first six months in office, President Bush spent a significant amount of time on vacation and fifty-five percent of Americans thought he was taking too much time off. During his first eight months as president, approval ratings hovered between fifty and sixty percent, but immediately following the 9/11 attacks, ratings soared above ninety percent. Senator Robert Byrd described that Bush entered office after a virtual tie election, but after 9/11 the “shock, trauma, and fear among the American people, the surge of patriotism, and the sense of common danger: all of these quickly catapulted this rather inarticulate, directionless man . . . to [an elevated] level of power.” He emerged from the election as an ordinary country boy to become a leader who would be tasking career security officials in the FBI, CIA, Pentagon, police, and other security-related agencies with obligations.

After gradually descending, two days after the invasion of Iraq, President Bush’s approval rating rose to seventy percent while the percentage of Americans who believed that the U.S. would be the victim of another major terrorist attack sharply increased. A security threat atmosphere does ostensibly boost political support, but Bush’s approval ratings dropped below fifty percent (September 2005), to thirty to thirty-five percent (May 2007), and to twenty-eight percent (April 2008).
Diminishing public approval may have been due to Americans gradually registering the depth of false statements that led to the Iraq War. Bush departed with twenty-two percent approval ratings, and these low ratings were due to Iraq and poor domestic economic conditions. The next Part considers the politics of the war powers in the Authorization for Use of Force Against Iraq ("Authorization").

III. THE IRAQ WAR

A. Advocacy Prior to the Authorization for Use of Force

Justice Jackson wrote of the war power:

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. . . . It is executed in a time of patriotic fervor that makes moderation unpopular. . . . Always . . . the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

Alternatively, deliberative democracy theory necessitates that political decisions be justified to those who must accept the consequences of the decisions. Implicit in this theory is that a public policy will be more acceptable if pluralistic voices advocate interests and positions with reasoning, justifications, and


90. Bejesky, Politico, supra note 10, at 31-34. In the context of President Bush having 32% approval ratings, Stephen Colbert noted that there is a “well-known liberal bias” in such statistics. Adam Benforado & Jon Hanson, Naïve Cynicism: Maintaining False Perceptions in Policy Debates, 57 EMORY L.J. 499, 501 (2008).


argumentation. If the process is legitimate, there is shared responsibility for policies, including if government action progresses amiss. Impediments to the deliberative democracy process include exerting power and coercion to compel other political actors to accept the position and skewing informed contemplation by offering false data and biased assumptions. The same holds true for authorizing military action under war powers.

It is not clear that Bush needed encouragement from his party to support action against Iraq since he tasked his National Security Council members with considerations to depose Hussein’s regime in February 2001. Nonetheless, some Congressional Republicans pushed for military action against Iraq shortly after 9/11. In December 2001, Republicans Lindsey Graham and Porter Goss sponsored House Joint Resolution 75 within the House International Relations Committee, which sought to deem an Iraqi refusal to permit U.N. inspectors to enter the country and inspect facilities an “act of aggression against the United States.” The Act claimed that a “high risk exists that Iraq has continued to develop weapons of mass destruction.” Also in December, nine members of Congress (McCain, Helms, Hyde, Shelby, Ford Jr., Lieberman, Lott, Gilman, and Brownback) sent a letter to Bush urging confrontation with Iraq:

Saddam Hussein has reinvigorated his weapons programs. Reports indicate that biological, chemical and nuclear programs continue apace. The threat from Iraq is real, and it cannot be permanently contained. For as long as Saddam Hussein is in power in Baghdad, he will seek to acquire weapons of mass destruction and the means to deliver them. We have no doubt that these deadly weapons...
are intended for use against the United States and its allies. Consequently, we believe we must directly confront Saddam, sooner rather than later.\textsuperscript{100}  

The White House lobbied members of Congress for an invasion and some top officials maintained that unilateral action would be taken against Iraq by summer 2002.\textsuperscript{101} War plans and discussions of troop deployments began in mid-2002.\textsuperscript{102} More aggressive rhetoric commenced at an American President and British Prime Minister news conference on September 7, and continued on the next day with Defense Secretary Rumsfeld, Vice President Cheney, National Security Advisor Rice, and Secretary of State Powell circulating the Sunday political talk shows and offering a barrage of new security threat claims about Iraq.\textsuperscript{103} The allegations were a precursor to a presidential address to the United Nations General Assembly on September 12,\textsuperscript{104} riding the coattails of 9/11 memorials. Neoteric allegations merged with emotions and dangers from terrorism.\textsuperscript{105} This sequence prefaced the unveiling of the National Security Strategy, which alleged the right to preemptive attacks against other countries, and an anticipated address to Congress about the peril from Iraq.\textsuperscript{106}

\textsuperscript{102.} Bejesky, Politico, supra note 10, at 65-69.  
\textsuperscript{103.} The chief allegation was that Iraq attempted to procure aluminum tubes that allegedly could be used to enrich uranium for a nuclear weapons program. Bejesky, Weapon Inspections, supra note 67, at 303-10; Walter Pincus & Dana Priest, Bush, Aides Ignored CIA Caveats on Iraq, WASH. POST, Feb. 7, 2004, at A17, http://www.washingtonpost.com/wp-dyn/articles/A20194-2004Feb6.html (noting that “they [the Bush administration] made some of the most unequivocal assertions about unconventional weapons before the October 2002 (NIE) was completed”).  
\textsuperscript{105.} Id.  
Senator Daschle remarked: “Every time the president continues to speak out . . . he strengthens his case.” 107 Senator Trent Lott stated: “As the president noted in his comments, [there is a serious threat] . . . that has been gathering and growing.” 108 Most Republicans stalwartly backed military action from the beginning and some did not even care about evidence of wrongdoing or WMDs. 109 Some Democrats were primed for confrontation with Iraq, but most were reluctant to commit to a use of force. 110 A New York Times editorial explained:

[T]he American people deserve some time to ponder the matter and give the Security Council a chance to act . . . The newly bellicose mood on Capitol Hill materialized almost overnight. Last night, Democrats wanted the Security Council to act first and were calling for measured consideration of the political and military issues involved in going to war. The haste . . . is clearly motivated by campaign politics. Republicans are already running attack


108. Id.


ads against Democrats on Iraq.\footnote{111}

The alleged jeopardy had a frail basis. United Nations weapons inspectors left Iraq in 1998 and acknowledged that they lacked evidence of Iraq possessing prohibited weapon programs.\footnote{112} The SSCI later indicated that the U.S. Intelligence Community (“IC”) was devoid of intelligence sources after inspections ceased in 1998.\footnote{113} As claims intensified on September 9, 2002, SSCI member Dick Durbin addressed a letter to CIA Director George Tenet to “direct the production” of an National Intelligence Estimate (“NIE”) because “policymakers in both the executive branch and the Congress will benefit from the production of a coordinated, consensus document produced by all relevant components of the Intelligence Community.”\footnote{114} An NIE had never been produced that was devoted to Iraqi WMD programs.\footnote{115} The work launched on September 12 at the National Intelligence Office and under Tenet’s guidance.\footnote{116} Several members of Congress objected to authorizing the use of force without having more information, and disapproved of the President speaking publicly about dangers without an NIE.\footnote{117}

On September 19, 2002, Bush submitted his draft resolution to Congress to authorize the use of military force,\footnote{118} and Congress held hearings on the alleged threat. During September, top Bush
administration officials made approximately 300% more false statements about threats from Iraq than in the previous month.\footnote{119} In congressional debates, members, particularly Republicans, similarly maintained that Iraq might develop nuclear weapons within months, and posed an immediate threat to Americans.\footnote{120} Politicians did not want to be responsible if Iraq attacked the U.S.\footnote{121} with arsenals of chemical and biological weapons\footnote{122} or if Iraq showed signs of connections to al-Qaeda members.\footnote{123} CNN reported that the Executive’s advocacy elevated political stakes: “He has democrats in a box . . . It’s very hard for them to oppose the president, especially just weeks before the November election.”\footnote{124} Congress tends to support presidents on political initiatives more when public opinion polls are high.\footnote{125}

\section*{B. The CIA’s White Paper}

On October 1, 2002, and in a brisk three weeks, the IC produced the NIE.\footnote{126} Since NIEs normally remain classified, and are only available to select government officials, the CIA produced a White Paper, \textit{Iraq’s Weapons of Mass Destruction Programs}, to “meet requests from Congress for an unclassified version of the NIE.”\footnote{127} The White Paper was “substantially similar to,” but “not nearly as detailed as” the NIE.\footnote{128} The White Paper also excluded a list of caveats, equivocal language, and dissenting opinions from the classified NIE. The SSCI report acknowledged: “The Intelligence Community’s elimination of the

caveats from the unclassified White Paper misrepresented their judgments to the public which did not have access to the classified National Intelligence Estimate containing the more carefully worded assessments.”129 In short, the NIE generally supported White House allegations,130 and the White Paper was a bit more aggressive.

Top administration officials are provided with classified intelligence information in Presidential Daily Briefings (“PDB's”),131 and can selectively release classified information, possibly keeping controversial and weak foundations of the claims classified.132 SSCI members later remarked that the Bush Administration was “selectively releasing and mischaracterizing intelligence information that supported an Iraq-al-Qaeda collaboration while continuing to keep information classified and out of the public realm that did not.”133 When security is at issue and the executive is secretive, Congress and courts must be deferential.134 The president has control over whether intelligence data that forms the threat claim remains classified or is declassified, but members of Congress do not have such access.135 Moreover, but for the select members of Congress who have more privileged access and receive briefings, it is otherwise difficult for Congress to even know what to request to obtain a more accurate

129. Id. at 295. Senate Select Committee on Intelligence members Rockefeller, Levin and Durbin explained that eliminating the caveats and dissenting opinions from its White Paper “mised the public” and that the CIA also “selectively declassified information” favorable to the Bush administration. Id. at 457.

130. Bejesky, Intelligence, supra note 6, at 875.

131. S. REP. NO. 108-301 at 501. In addition to a public White Paper, there was a one-page summary of the NIE for the president and 80 other members of the White House. Id. The CIA would not provide a copy noting that “we will not provide any materials written exclusively for the President or for the PDB [President's Daily Brief] readership.” Id. at 22; 501 (noting that the NIE was generated by “layering” previous reports and “primarily using previous judgments without substantial new intelligence reporting.”); S. REP. No. 109-330 at 192 (2006). Presumably, the President and other top officials attained their information to make the earlier public claims from PDBs or other similar reports.


133. S. REP. No. 108-301, at 463.


135. Bejesky, Intelligence, supra note 6, at 877; Jacobs, supra note 61, at 442-43.
understanding of the security threat. For example, Republican Senator Graham, as a privileged member of Congress who could request more detailed intelligence information, explained that he obtained other classified information that tended to discount the unequivocal NIE determinations.\textsuperscript{136} Graham was able to “complain that the administration’s and [the director of the CIA’s] own statements contradicted the classified reports they had read, [but] they could not say what was actually in those reports.”\textsuperscript{137}

Consequently, while Congress is unable to appraise the underlying data used to produce the estimates, members, including Democrats, used the declassified CIA White Paper to ground their arguments on the floor of Congress.\textsuperscript{138} One day before the October 10 vote, Senator John Kerry remarked: “According to the CIA’s report, all U.S. intelligence experts agree that Iraq is seeking nuclear weapons. There is little question that Saddam Hussein wants to develop nuclear weapons.”\textsuperscript{139} Hillary Clinton stated: “In the four years since the inspectors left, intelligence reports show that Saddam Hussein has worked to rebuild his chemical and biological weapons stock . . . and his nuclear program. He has also given aid, comfort and sanctuary to terrorists, including al-Qa’ida members.”\textsuperscript{140} Senator Rockefeller assessed: “I have come to the inescapable conclusion that the threat posed to America by Saddam’s weapons of mass destruction is so serious that despite the risks and we should not minimize the risks we must authorize the President to take the necessary steps to deal with that threat . . . I do believe Iraq

\footnotesize{\textsuperscript{136} Mark A. Chinen, \textit{Secrecy and Democratic Decisions}, 27 QUINNIPIAC L. REV. 1, 49-50 (2009).\textsuperscript{137} Id. at 50.\textsuperscript{138} Julie Hirschfeld Davis, \textit{CIA report on Iraq opens Congress talks}, BALT. SUN, Oct. 9, 2002, at 1A, available at http://articles.baltimoresun.com/2002-10-09/news/0210090087_1_saddam-hussein-iraq-bush.\textsuperscript{139} S. REP. NO. 110-345 at 104 (2008) (citing Senator John Kerry, October 9, 2002) (“The more difficult question to answer is when Iraq could actually achieve this goal. That depends on his ability to acquire weapons-grade fissile material. If Iraq could acquire this material from abroad, the CIA estimates that it could have a nuclear weapon within 1 year . . . . In addition, Iraq is developing unmanned aerial vehicle (‘UAVs’), capable of delivering chemical and biological warfare agents.”).\textsuperscript{140} Id. at 103; \textit{Bill Moyers Journal, Buying the War}, PBS television broadcast Apr. 25, 2007 (transcript available at http://www.pbs.org/moyers/journal/btw/transcript1.html) (Statement made by Senator Hillary Clinton on floor of Senate, October 10, 2002) (“It is clear, however, that if left unchecked, Saddam Hussein will continue to increase his capacity to wage biological and chemical warfare, and will keep trying to develop nuclear weapons.”).}
poses an imminent threat.”

Senator Charles Schumer opined: “Hussein’s vigorous pursuit of biological, chemical and nuclear weapons, and his present and potential future support for terrorist acts and organizations . . . make him a terrible danger to the people of the United States.” Senator John Edwards explained: “We know that he has chemical and biological weapons . . . We know that he is doing everything he can to build nuclear weapons, and we know that each day he gets closer to achieving that goal.”

Significant opposition came from Democratic Senator Robert Byrd, the longest serving Senator in U.S. history, who remarked: “I will not give the benefit of the doubt to the President. I will give the benefit of the doubt to the Constitution.” Byrd observed the evidentiary foundation and expounded: “And before we put this great nation on the track to war I want to see more evidence, hard evidence, not more Presidential rhetoric.” Byrd sought to precisely confine the Authorization to only permitting the president to use military force 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.” In an October 10, 2002 New York Times, editorial, Byrd wrote:

A sudden appetite for war with Iraq seems to have consumed the Bush administration and Congress . . . . Are we too feeble to resist the demands of a president who is

141. S. REP. NO. 110-345, at 103-05 (citing Senator John Rockefeller, CONG. REC., Oct. 10, 2002) (“There is unmistakable evidence that Saddam Hussein is working aggressively to develop nuclear weapons within the next 5 years . . . . Saddam’s existing biological and chemical weapons capability pose real threats to America today, tomorrow . . . . He is working to develop delivery systems like missiles and unmanned aerial vehicles that could bring these deadly weapons against U.S. forces and U.S. facilities in the Middle East. He could make these weapons available to many terrorist groups, third parties, which have contact with his government. Those groups, in turn, could bring those weapons into the United States and unleash a devastating attack against our citizens. I fear that greatly.”).

142. Id. at 103 (citing Senator Charles Schumer, CONG. REC., Oct. 10, 2002).

143. Id. (citing Senator John Edwards, CONG. REC., Oct. 10, 2002) (“Almost no one disagrees with these basic facts: that Saddam Hussein is a tyrant and a menace; that he has weapons of mass destruction and that he is doing everything in his power to get nuclear weapons.”).

144. 148 CONG. REC. S9188 (daily ed. Sept. 25, 2002).


determined to bend the collective will of Congress to his will – a president who is changing the conventional understanding of the term “self-defense”? . . . I have searched for that single piece of evidence that would convince me that the president must have in his hands, before the month is out, open-ended Congressional authorization to deliver an unprovoked attack on Iraq. I remain unconvinced. . . . We must not yield to this absurd pressure to act now, [twenty-seven] days before an election that will determine the entire membership of the House of Representatives and that of a third of the Senate. . . . Because while it is Congress that casts the vote, it is the American people who will pay for a war . . . .

After the invasion, the evidentiary basis for the security threat claims became public through a series of post-invasion SSCI reports that took five years to complete. The SSCI concluded either expressly or implicitly on virtually every point that estimates “were not supported by the intelligence.” Congress voted based upon an unclassified version of a hastily produced NIE with substantively false data. The CIA report and restrictions endemic to the national security apparatus granted cover to anyone who voted for the war if it turned out badly. Congress cannot question the estimates without accessing the data. Information asymmetries and compulsion necessarily furnished a politicized vote.

C. A Politicized Vote

One scholar commented, “Democrats tried to propose postponing the request [for a vote] until after the November 2002 election, but ultimately they relented when Republican members of Congress started accusing them of playing politics with the country’s national security.” Louis Fisher wrote, “leading
Democrats folded, one by one, looking less to constitutional requirements than to their own political calculations.” Senator Byrd was vocal, but that may have been because he was not in danger of losing his position. Senator Mark Dayton accentuated that “there appears to be no imminent threat to the United States from Iraq” and the timing is intended for a “political advantage in the upcoming election.” Senator Patrick Leahy said during the debates on the vote:

Many respected and knowledgeable people—former senior military officers and diplomats among them—have expressed strong reservations about this resolution. . . . But they have not seen that evidence, and neither have I. We have heard a lot of bellicose rhetoric, but what are the facts? I am not asking for 100 percent proof, but the administration is asking Congress to make a decision to go to war based on conflicting statements, angry assertions, and assumption based on speculation.

The president can escalate conflict and contour public opinion. The public was already primed on the issue of WMD threats, which may have goaded members of Congress to vote in accordance with constituent perceptions. Representatives’ foremost self-interest is getting reelected, which means that rationally acting politicians from both parties will respond to its party rather than to the constitutional architecture and its particular institution”); Fisher, supra note 117, at 398 (PresidentBush remarking on September 23, 2002 that Democrats are “more interested in special interests in Washington and not interested in the security of the American people”). Richard Gephardt, Democrat House Minority Leader, explained about the vote: “This should not be about politics . . . We have to do what is right for the security of the nation.” President George W. Bush, Speech: President, House Leadership Agree on Iraq Resolution (Oct. 2, 2002) (transcript available at http://georgewbush-whitehouse.archives.gov/news/releases/2002/10/20021002-7.html).

151. Fisher, supra note 61, at 1215.
152. Nzelibe, supra note 150, at 933.
trends in public opinion.¹⁵⁷

A Republican president will campaign for Republican candidates and appear in districts in contention, increasing the political fortunes of the Republican Party. In late September 2002, CNN reminded that Bush had been campaigning for fellow Republicans in an aptly titled article, *Bush talks Iraq, stumps for GOP in N.J.*¹⁵⁸ Members of Congress will defend and support presidents of the same party because of the coattail effect in which members of the same party will benefit when presidential approval ratings are high.¹⁵⁹ Republicans will support the president’s agenda—a cohesion exists inside the parties, such that members exhibit ideological allegiance and often vote along party lines to bestow reciprocal support.¹⁶¹ Since congressional dissenters must confront collective action problems,¹⁶² legislative agendas may frequently be approved without robust opposition.¹⁶³

Members of Congress, including many Democrats, accepted the threat allegations presumably either due to the intelligence estimates and/or White House publicity regarding the dire threat. One week after the CIA provided *Iraq’s Weapons of Mass Destruction Programs*, Congress authorized the resolution to use

force, which ostensibly would be activated if the conditions of the Authorization for Use of Force were met. Almost all Republicans voted in favor of the Authorization. In the House, 215 Republicans and 81 Democrats voted in favor. In the Senate, forty-eight Republicans and twenty-nine Democrats voted for it. The White House extensively lobbied to pass the resolution. Professor Mermin wrote:

Democratic support for a Republican military intervention is not compelling evidence that the policy advances American interests, or even that a broad spectrum of elected officials believe that it does. It may simply be that reelection-seeking Democrats have made a strategic decision not to criticize an American war.

D. Secretary of State Powell's United Nations Presentation

After the vote, threat oratory in the U.S. remained high for the next six months prior to war. However, the diplomatic milieu entailed U.N. inspectors reentering Iraq and providing periodic updates that predominantly affirmed that Iraq was cooperating, and that inspectors had not discovered anything that credibly demonstrated Iraq possessed prohibited weapon programs. Bush administration officials countered the findings by contending that intelligence indicated that Iraq was meshed in denial and deception, U.N. teams were not sufficiently aggressive, Iraq was uncooperative with inspectors, WMDs were hidden in tunnel complexes and civilian neighborhoods, Iraqis were transporting WMDs in vehicles, and intelligence was shared with


168. Mermin, supra note 71, at 958.


170. Id. at 321-27, 332-34.
inspectors although data was also highly sensitive for inspectors to possess.\textsuperscript{171}

Secretary of State Collin Powell’s address to the United Nations on February 5, 2003 was the most official diplomatic aggregation of the allegations. Expectations were high. Almost sixty percent of Americans believed the content would be important to diplomacy and the circumstances surrounding the use of force against Iraq.\textsuperscript{172} Fox’s Bill O’Reilly explained, “opposition to removing Saddam is shrinking. Germany and France are on the defensive, China is wishy-washy and Russia is on board.”\textsuperscript{173} The problem was analogous to Congress’s quagmire when it voted for the \textit{Authorization} in October 2002. Just as the CIA report unhesitatingly relayed jeopardy to Congress, Powell prefaced his address with the proviso that all statements were facts and conclusions based on “solid intelligence.”\textsuperscript{174} Investigations later disclosed that virtually nothing had been verified.\textsuperscript{175} Members of Congress and the United Nations had no means to critique declarations premised on data veiled inside the national intelligence apparatus.

Nonetheless, the media’s response was brimming with drama before the presentation\textsuperscript{176} and gushing with accolades afterwards.\textsuperscript{177} The American media called Powell’s discourse “A Masterful Legal Summary,” “a Strong Credible and Persuasive Case,” “A Powerful Case,” “An Ironclad Case . . . Succinct and Damning Evidence,” “A Detailed and Convincing Argument,” “An Overwhelming Case,” “A Compelling Case,” and “A Persuasive, Detailed Accumulation of Information.”\textsuperscript{178} The media expressed

\textsuperscript{171}. Id. at 321-34.
\textsuperscript{173}. Id. at 122.
\textsuperscript{175}. Id.; Bejesky, \textit{Intelligence}, supra note 6, at 875-82.
\textsuperscript{176}. McLeod, supra note 172, at 121.
\textsuperscript{177}. A former CIA analyst explained: “I was actually struck by both how conservative they were. I think Colin Powell picked the evidence that he showed to make sure that it could really be substantiated . . . . That said, there is far, far more evidence out there. I think that the great success of Colin Powell’s presentation is I think he made an incredibly compelling case using just the limited amount that he actually showed.” McLeod, supra note 172, at 127.
\textsuperscript{178}. \textit{Bill Moyers Journal}, Interview with Jonathan Landay, Nat’l Sec. Correspondent, (PBS television broadcast Apr. 25, 2007), (transcript available at http://www.pbs.org/moyers/journal/btw/transcript1.html); McLeod, supra note 172, at
that Powell proffered a “sinister nexus” between Iraq and al-Qaeda, “compelling evidence” of Iraqi deceit, and “a scathing indictment of Iraq’s weapons programs and efforts to conceal them from inspectors.”

Several members of Congress were quoted, such as Senator Richard Lugar who called the presentation “extremely powerful” and Senator Joe Biden who labeled the oration an “irrefutable case.”

E. Growing Dissent

War powers discord unfolded and later intensified. Prior to attack, members of Congress and interested plaintiffs attempted unsuccessfully to obtain judicial review of the Authorization for the Use of Force, but the court observed precedent in preferring not to intervene on political questions and war-making authority. Again, the Authorization specified conditions that ostensibly had not been met. In terms of Justice Jackson’s resilient executive and legislative power sharing framework from Youngstown Sheet & Tube Co. v. Sawyer—which places the president’s power at the lowest ebb when going against congressional will and within the “zone of twilight” when power-sharing is ambiguous—the interactions during the Iraq War authorization process exhibit the political reality, which is that executive rhetoric can overwhelm a complaisant majority and mute the dissenting minority in Congress. Professor Jacobs explained: “[A] pattern has developed whereby Presidents persuade the Nation to consent to the use of force based upon threat claims for which they are effectively unaccountable until

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179. McLeod, supra note 172, at 124, 126.
180. Id. at 122.
182. Nzelibe, supra note 157, at 997.
after the decision had been made.” 186  

Existing scholarship would presumably forecast that Congress would vote as it did, and that support for the war would remain sufficiently high to impede reversing the action even after the espoused security threat justification for the war was proven false. First, polls indicate that if presidents assert that a use of force is required to alleviate danger to U.S. citizens, public support for the action will be higher. 187 A wartime atmosphere breeds a rallying around the flag dynamic. 188 Second, studies confirm that once a president makes a foreign policy decision, at least fifty percent of the public will support the decision regardless of the nature of the decision. 189  

Third, incumbents can attain favorable political benefits by supporting the president’s agenda because the use of force increases a president’s popularity rating. 190 Other representatives and senators, particularly of the same party, may not controvert the president on international affairs when they have local constituents to appease. 191 Fourth, with these phenomena, presidents will also have an enhanced ability to influence other political elites in government to secure support. 192 Fifth, in order to maintain a positive image of the Iraq conflict, the White House prospered from operations that sought to craft public opinion, including the Pentagon’s embedded reporter and military analyst programs, the Bush Administration’s Video News Releases, and Pentagon operations that controlled Iraqi media. 193  

186. Jacobs, supra note 61, at 433.  
190. Lian & Oneal, supra note 188, at 277; Mueller, supra note 27, at 18.  
191. Nzelihe, supra note 150, at 914.  
192. Leeds & Davis, supra note 188, at 817.  
Sixth, congresspeople who are inclined to dissent can be confined by their previous position and be reminded of inconsistencies.\(^{194}\) For example, in the 2004 presidential election, candidates Bush and Kerry held fundamentally analogous positions on the Iraq War. In the first presidential debate, Kerry was queried on the use of preemptive force and remarked that the “president always has the right and always has had the right to pre-emptive strike. . . . [Y]ou’ve got to do it in a way that passes the test . . . [for] your countrymen . . . [and to] prove to the world that you did it for legitimate reasons.”\(^{195}\) Preemptive strikes are, in fact, more controversial than this under international law than is implied by this portrayal, but Bush injected contextual innuendo about Iraq and retorted that Senator Kerry called our allies a “coalition of the coerced and the bribed . . . Senator Kerry last night said that America has to pass some sort of ‘global test’ before we can use American troops to defend ourselves. He wants our national security decisions subject to the approval of a foreign government.”\(^{196}\) Bush’s insinuation sparked bickering over a red herring. By the time of this presidential debate, it was well known that there was no security threat from Iraq.

F. Elevated Dissent

Some members of Congress sought to immediately withdraw troops from Iraq,\(^{197}\) but that position did not prevail. However, when war expenditures mount, the public is more apt to turn against the president’s decision, impelling more members of Congress to dissent.\(^{198}\) A *Harris Poll* demonstrated that negative public sentiment of Bush’s handling of the Iraq War grew consistently from fifty (March 2004) to sixty percent (December

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2005).\textsuperscript{199} Also, during that period, a \textit{Gallup Poll} found that almost sixty percent of Americans wanted some or all troops withdrawn from Iraq immediately.\textsuperscript{200} Even as the Bush Administration sought to maintain high support for the war, by the end of 2005, “[o]pinion polls show[ed] that a majority of the population . . . oppose[d] the decision to attack Iraq. A majority also want[ed] troops brought home . . . .”\textsuperscript{201} In a November 2005 \textit{Washington Post-ABC} poll, Bush’s approval ratings dropped to thirty-nine percent and fifty-eight percent of Americans had doubts about his honesty.\textsuperscript{202}

Professor Douglas Kriner assembled a database of Congressional hearings following the invasion of Iraq and concluded that “critical oversight of the war was quite rare in the conflict’s first year; indeed it was muted throughout the entire period of Republican control of Congress.”\textsuperscript{203} Americans strongly disapproved of the Republican-led Congress, giving it a thirty-seven percent approval rating in March 2005.\textsuperscript{204} Professor Michael Duran details how majority rules and restrictions permitted Republicans to thwart controversial issues, particularly those relating to the war in Iraq, from reaching the floor and introducing their preferred measure “to the floor without any threat that it would be changed by floor amendments.”\textsuperscript{205}

In October 2004, forty-one percent of Americans believed that either the number of troops in Iraq should be decreased or withdrawn, but by March 2006 this preference grew to sixty-eight percent.\textsuperscript{206} In the 2006 congressional election exit polls, seventy-

\textsuperscript{199} ANTHONY ARNOVE, IRAQ: THE LOGIC OF WITHDRAWAL 97 (2006) (referring to Table 2).
\textsuperscript{201} ARNOVE, supra note 199, at 96.
\textsuperscript{205} Doran, supra note 72, at 1391.
\textsuperscript{206} Americans on Iraq: Three Years On, WORLDPUBLICOPINION.ORG, 1, 10 (2006),
four percent of Democrats wanted to withdraw troops from Iraq, while only twenty-four percent of Republicans agreed.\textsuperscript{207} Republicans had to choose whether to abandon or support Bush on Iraq.\textsuperscript{208} As experts predicted, Bush’s low approval ratings\textsuperscript{209} translated into landslide victories for Democrats in the 2006 Congressional elections, giving Democrats control of both the House of Representatives and Senate for the first time since 1994.\textsuperscript{210} A record number of women retained or won seats and women from the Democratic Party more heartily supported an exit strategy position.\textsuperscript{211} There was a high correlation between district-level losses and legislators who voted for the war,\textsuperscript{212} and victories were viewed as a rejection of the Iraq War.\textsuperscript{213}


\textsuperscript{211}. Mueller, supra note 208, at 63-65, 75 (calculating that thirty-eight percent of Democrat women, sixty-seven percent of Democrat men, three percent of Republican women, and four percent of Republican men supported “Need exit strategy” for Iraq; and that only 1% of Democrat women and 0% of Democrat men represented a “Stay the Course” on the war position); Women in the 2006 Elections, LAKE RESEARCH PARTNERS at 1, 7 (Nov. 17, 2006), http://www.lsapa.com/polls/pdf/Women%20in%20the%202006%20Elections%20-%20Lake%20Research.pdf (noting that Iraq was perceived as the most important issue facing Congress for 2007 and that women led the way for change in the 2006 election and will be “directing the agenda for the new Congress on Iraq, health care and retirement security”). There is also a significantly higher percentage of women who are Democrats in Congress. Historical Data, WOMEN IN CONGRESS, (last visited Oct. 15, 2012), http://womenincongress .house.gov/historical-data/representatives-senators-by-congress.html?congress=110 (statistics representing that of those women holding a congressional office in 2007, 67 were Democrats and 26 were Republicans).


\textsuperscript{213}. Alan Cowell, Reactions From Abroad Set Conciliatory Tone, Seeing Vote as a
G. Authority to De-Escalate or End War

Shortly after Democrats gained control of both Houses of Congress in 2007, Congress sought to reduce the number of troops in Iraq and eventually end the occupation. Of course, it may not be in a president’s self-interest to withdraw the military from a conflict. A president could lose credibility, experience negative populace reactions that erode approval ratings, weaken the commander in chief power, or even have a legacy smirched for seemingly losing a U.S.-initiated war.

Polls revealed that Americans’ rejection of the war and occupation continued to rise to new highs. In January 2007, ABC News surveyed members of Congress who had voted for the October 2002 Authorization and discovered that a substantial percentage reversed their positions in hindsight, confirming that the 2002 resolution would have been rejected with more accurate intelligence estimates. As with the repeal of the Gulf of Tonkin Resolution for the Vietnam War, Congress’s approval to use force is revocable. Legislating and administering war powers is not analogous to Congress endeavoring to wield an
unconstitutional legislative veto over the actions of an administrative agency. Congress can, and in fact has, escalated and de-escalated war. Professors Barron and Lederman examined the past half-century of precedent in U.S. military conflicts and concluded that “if a war goes badly, or if concerns about its wisdom become significant, the modern Congress has been willing – more than in previous eras – to temper or constrain the President’s preferred prosecution of the war, and sometimes even to contract or end the conflict contrary to the President’s wishes.” An initial Congressional authorization to use the military does not end Congress’s authority. As the Supreme Court’s plurality in *Hamdi v. Rumsfeld* held, “a state of war is not a blank check for the president.”

In early 2007, Steny H. Hoyer, House majority leader, discussed “revising the authorization . . . to use military force.” Senator Hillary Clinton cited the false threat allegations about Iraq when she stated, “I was duped” by the administration into voting for the war resolution, and offered a bill to revoke the *Authorization for the Use of Force*. The White House instead proposed “send[ing] more than 20,000 new combat troops to Iraq,” and the House of Representatives formally renounced the plan.

In late April 2007, Congress passed a bill requiring U.S. troops to be completely withdrawn from Iraq within six months, but Bush vetoed the bill, which was only his second veto in over six years. The American people became irritated

225. H.R. 1591, 110th Cong. § 1904(c), (e) (2007).
226. Id.; Anne Flaherty & Jennifer Loven, *Bush vetoes troop withdrawal measure*,
with Congress, giving the body a thirty-five percent approval rating in May 2007 because members did not do anything to overcome Bush’s veto on Iraq. Presumably following advice of his appointed legal advisors who supported expansive power for the president, Bush asserted: “This legislation is unconstitutional because it purports to direct the conduct of the operations of the war in a way that infringes upon the powers vested in the Presidency by the Constitution, including as Commander in Chief of the Armed Forces.”


228. Memorandum from John Yoo, Deputy Assist. Att’y Gen., Office of Legal Counsel, U.S. Dept. of Justice, to Alberto Gonzales, Deputy Counsel to the President (Sep. 25, 2001), available at http://www.justice.gov/olc/warpowers925.htm (Regarding the War Powers Resolution and the September 2001 Authorization to Use Force, the advisory opinion read: “Neither statute, however, can place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make.”); David Luban, On the Commander in Chief Power, 81 S. CAL. L. REV. 477, 478 (2008) (“the Bush Administration has made frequent dramatic appeals to the president’s commander in chief power, arguing that his decisions as military commander in chief in the global war on terror cannot and should not be second-guessed by other branches of government”). Shifting attention off of Iraq and on a new security threat, Bush further contended, “any statutory restrictions Congress might approve on the use of force against Iran would be unconstitutional.” Barron & Lederman, supra note 220, at 711 [emphasis added]. Ely wrote: “[If Congress doesn’t approve of a war it can pull the plug, and if the people don’t approve they can pressure Congress to do so. Acquiescence by Congress (assuming there was such) cannot be deemed the constitutional equivalent of acquiescence by the people.” John Hart Ely, The American War in Indochina, Part II: The Unconstitutionality of the War They Didn’t Tell Us About, 42 STAN. L. REV. 1093, 1123 (1990). In light of the Authorization for Use of Military Force, in which Congress permitted the military to be used to respond to the 9/11 attacks, many scholars expressed concern that other countries with alleged contacts with al-Qaeda could be subject to attack. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); Cass R. Sunstein, Administrative Law Goes to War, 118 HARV. L. REV. 2263, 2264 (2005). Scholars offered constitutional and legal framework arguments that restrained power. See generally Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 HARV. L. REV. 2047 (2005).

229. H.R. Doc. No. 110-31 at 153 CONG. REC. H4315 (May 2, 2007) (Veto Message from the President); John Norton Moore, Do We Have An Imperial Congress?, 43 U.
astonishing assertion, and perhaps a misrepresentation of the proper separation of powers balance in war powers authority.230 There were many problems with the president’s rebuff of Congressional action. First, Congress was not infringing on the Executive’s authority by micromanaging the commander in chief authority, which in its purest sense means directing troops, approving battle plans, or executing tactical battlefield operations.231 The constitutional collision involved the president’s duty to execute congressional directives, which can only be avoided when Congress ventures to utilize a power within the sole prerogative of another branch of government.232 If Congress legislates, the president has a “high constitutional duty to see that the laws are faithfully executed.”233 The president’s obligation is to carry out the nation’s laws, not to violate or dismiss them.234 In Hamdan v. Rumsfeld, the Court held that the president “may not disregard limitations that Congress has, in proper exercise of its own powers, placed on his powers.”235

Second, while Congress’s recent authorizations to use force “have been relatively short on substance and long on rhetoric,”236

MIAMI L. REV. 139, 145-46 (1988) (“A series of attorney general opinions, and the concept of unconstitutional conditions, refute the notion that the appropriations power can be a valid basis for broad congressional claims of absolute plenary authority.”).

230. Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?, 90 CORNELL L. REV. 97, 172 (2004) (“For the past eighty years, no scholar has undertaken an in-depth analysis of the proper line of demarcation between the Commander in Chief’s exclusive power over battlefield operations and the areas where Congress and the President share concurrent authority.”); Saikrishna Prakash, Regulating the Commander in Chief: Some Theories, 81 IND. L.J. 1319, 1319-23 (2005) (there was no official examination of Bush’s contention).

231. Jinks & Sloss, supra note 230, at 171 (It is generally agreed “that the President has exclusive authority over battlefield operations, and that Congress’s war powers are constrained by the need to avoid interfering with the President’s Commander-in-Chief power during wartime”).


233. U.S. CONST. art. II, § 1, cl. 7 (“Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”); CONG. GLOBE, 31st CONG., 2d Sess. 828 (1851).


236. Saikrishna Bangalore Prakash, Exhuming the Seemingly Moribund
the Authorization contained conditions. The conditions, reiterated verbatim by the president in his letter to comply with the forty-eight hour reporting requirement in § 3(b), were to (1) “protect the national security of the United States against the continuing threat posed by Iraq;” (2) “enforce . . . all relevant United Nations Security Council resolutions regarding Iraq,” and be consistent with the U.S. and other countries’ responses to 9/11. Many congresspeople regarded these as contingencies for the use of force, and that the provisions were not per se endorsing invasion.

For example, if the Authorization was intended to accord a prompt right to attack, why did Congress discuss military operation costs and appropriate funds immediately before invasion instead of at the time of voting for the Authorization? Why did the invasion follow nearly six months after the Authorization passed and after U.N. inspectors spent four months searching for evidence of WMD programs? The Security Council recognized the U.N. inspection findings, and did not authorize a right to use force. Rather than addressing the inadequate factual basis to support the conditions in the Authorization, Bush changed the reason for invasion to “liberating the Iraqi people” and labeled the mission “Operation Iraqi Freedom.” The Authorization did not substantiate any such mission, and the Security Council did not ponder the issue of humanitarian intervention. Professors Ackerman and Hathaway affirm that this was a limited authorization to use force conditioned on there

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241. *Id.* at 360-62.

being an actual imminent threat. Thus, when the White House began offering additional rationalizations, particularly of humanitarian intervention, “such talk was blatantly inconsistent with the plain language of the 2002 resolution.” Official investigations confirmed that there were no WMDs, or confirmed ties between Iraq’s government and al-Qaeda. Since these conditions did not exist, then perhaps Congressional authority to implicate the commander in chief authority to engage in hostilities against Iraq did not technically exist.

Third, one can scrutinize the timing of the beginning and end of war. Congress could include a sunset clause in a use of force authorization. Congress did not do that and doing so would have been peculiar in this case. The conventional experience is as Justice Frankfurter wrote: “Congress leaves the determination of when a war is concluded to the usual political agencies of the Government.” By that standard, possibly the Iraq War was over, and hence Congress’s Authorization terminated when Bush stood on the deck of the U.S.S. Abraham Lincoln, and announced: “My fellow Americans, major combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed.” Courts have recognized this speech as the end of the war. From this perspective, the commander in chief authority pursuant to sanctioned war powers ended in May 2003. After this point, the authority became less about war and more about basing operations and occupation law, including by executing U.N. Security Council Resolution 1483 for one year of occupation. Another point at which the conflict in

244. Id. at 464.
245. Bejesky, Intelligence, supra note 6, at 818-19, 855-56, 858-59.
246. Ackerman & Hathaway, supra note 167, at 464; Bejesky, Weapon Inspections, supra note 67, at 350-69; Bejesky, Intelligence, supra note 6, at 817-19.
249. President George W. Bush, Address to the Nation on Iraq from the USS Abraham Lincoln (May 1, 2003), in 39 WEEKLY COMP. PRES. DOC. 516, 516 (May 5, 2003).
Iraq may have been over was with Security Council Resolution 1637 in November 2005.252

A fourth and related intricacy that calls into question the commander in chief authority derives from depending initially on U.S. soldiers for operations and later on private contractors. An abundant scholarship flourished over the absence of Pentagon and Congressional oversight for the operations of private military contractors.253 The White House seemingly gainsaid responsibility over private contractors254 and the Coalition Provision Authority that was constituted to implement occupation measures.255 The number of high-priced256 private

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254. JEREMY SCAHILL, BLACKWATER: THE RISE OF THE MOST POWERFUL MERCENARY ARMY 47 (2007) (criticizing Bush Administration and the Justice Department for their “refusal to hold mercenary forces accountable for their crimes in Iraq”); Deborah Avant, What Are Those Contractors Doing in Iraq?, WASH. POST, May 9, 2004, at B1 (Speaking of contractors involved in interrogations, “[w]e are not even sure for whom these contractors work or worked. . . .We do not know. . . .to which group or agency they were accountable”). During Congressional hearings, Secretary of State Condoleezza Rice regretted that the State Department did not have a framework to supervise security contractors, Karen DeYoung, On Hill, Rice Talks About Blackwater, WASH. POST, Oct. 26, 2007, at A8. The Department of State’s Bureau of Diplomatic Security was blamed for not providing adequate oversight of its contractors, but apparently the president had granted the Department of State “authority over all but military operations.” Karen DeYoung, State Department Struggles To Oversee Private Army: The State Department Turned to Contractors Such as Blackwater Amid a Fight with the Pentagon Over Personal Security in Iraq, WASH. POST, Oct. 21, 2007, at A1; Jennifer K. Elsee, Moshe Schwartz & Kennon H. Nakamura, CONG. RESEARCH SERV., RL32419, PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 41-43, (updated Aug. 25, 2008), http://www.fas.org/sgp/crs/natsec/RL32419.pdf (describing a problem in assessing responsibility as government agencies did not know which private firms are under their control).

contractors in Iraq steadily escalated from 20,000 (mid-2004), to 100,000 (December 2005), and to 180,000 (July 2007). This seemingly averts the prerogative for armed forces as enumerated in the Constitution and potentially circumvents Congress’s regulatory power regarding the size of the military, authority to receive detailed updates and provide oversight, the right to establish rules and discipline the military, oversee and control appropriations, and other authorities. Other than obsolete Letters of Marque, there is no coherent basis for the unrestricted and pervasive use of private contractors within Constitutional war powers, particularly when the Pentagon and the White House did not effectively exert authority or responsibility for contractor actions. If the chain of command is premised on derivative authority, with private contractors, it is not clear that the president was exercising an effective commander in chief authority over a large percentage of security operations in Iraq.

A fifth muddle is that Congress’s review of the pre-war intelligence, which was an assessment of the justification for executing the Authorization, was tardy and politicized. Had there been an expeditious review of the data underlying the conditions to use force, perhaps dissent and more scrutiny of operations in Iraq would have intensified earlier. Congress’s first official call for a probe into whether the White House manipulated pre-war intelligence claims was in June 2003, but Republican members of Congress blocked the query. The SSCI became involved, and 

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258. Michaels, supra note 253, at 1062-76.

259. U.S. CONST., art. I, § 8, cls. 11-14, 18.

260. See supra notes 254-55, 258.

261. Helen Dewar & Peter Slevin, GOP rejects outside Iraq probe, WASH. POST,
provided the first assessment of the WMD claims in July 2004, which largely determined that pre-existing intelligence did not sustain the estimates.262 Amid more fervid congressional insistence to deepen the analysis of the pre-war information, the SSCI agreed in late-2004 to continue its investigation, but the process was delayed for several months.263 The SSCI completed this portion of its review in September 2006, three-and-a-half years after the invasion.264 The White House and Republican SSCI members apparently delayed the investigation at several stages.

Senator Rockefeller remarked that the Bush Administration interfered with the investigation. Rockefeller mentioned that Cheney “exerted ‘constant’ pressure on the Republican former chairman [Senator Pat Roberts] of the Senate Intelligence Committee to stall an investigation,” “that he knew that the vice president attended regular policy meetings in which he conveyed White House directions to Republican staffers,” and that Republicans on the committee “just had to go along with the administration.”265 In 2008, Rockefeller again contended that Roberts was “stalling” and “halting the investigation” because the report was “evidently a task too politically sensitive to handle.”266

The last phase was the June 2008 SSCI report, which chastised the Bush Administration’s false claims, but five dissenting Republican members would not ratify the report and complained that “none of these statements [to the contrary were] considered worthy of analysis by the majority’s review staff.”267 It

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266. S. REP. No. 110-345 at 89.

267. Id. at 104; Press Release, U.S. Senate Select Comm. on Intelligence, Senate Intelligence Committee Unveils Finals Phase II Reports on Prewar Iraq Intelligence (June 5, 2008), http://intelligence.senate.gov/press/record.cfm?id=298775.
was the White House that caused erroneous beliefs with an estimated 935 false statements and hundreds other misleading ones on over five hundred different occasions, and it is the White House that controls the intelligence apparatus and can easily classify and declassify the intelligence. 268 Had Americans been provided with a more accurate depiction of the intelligence, the SSCI probably would not have needed to expend five years reviewing the details. And none of these Senators were apparently present at the Bush Administration’s National Security Council meetings in late January 2001 that began to discuss deposing the Iraqi government. 269

H. Congressional Actions and Bush Administration Responses

What could be done after Congress approved a bill to withdraw troops, and Bush adamantly opposed the measure as an infringement on the commander in chief authority? Impeachment, 270 a pellucid ultimatum, 271 and cutting off funding were all viable options to end the conflict. 272 Altogether ceasing funding and requiring a plenary and abrupt withdraw would be a harsh and emboldened measure. The more likely possibility is for Congress to impose conditions and “relatively nuanced policy changes” to make departure gradual. 273 For example, to fully end the Vietnam War, and halt incursions into Cambodia and Laos, 274 appropriations legislation in 1973 contained the condition:


269. Bejesky, Politico, supra note 10, at 62-65 (Based on former Secretary of the Treasury Paul O’Neill’s whistleblower accounts).

270. As with Richard Nixon, impeachment is a remedy to remove the president. Holtzman, supra note 234, at 213-17. Former Congresswoman Holtzman wrote: “As a member of the House Judiciary Committee that undertook impeachment proceedings against President Richard Nixon . . . we determined that ‘high crimes and misdemeanors’ encompassed grave and serious abuses of presidential power. We determined that the conduct did not have to be criminal; in other words, it did not have to violate provisions of the U.S. Criminal Code.” Id. at 214.


273. Tiefer, supra note 272, at 293; Prakash, supra note 219, at 347-48.

Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.  

However, typical of mechanisms presidents have previously adopted to circumvent budgetary allocation restrictions on military operations, after 2004 the White House evaded budgetary accountability by obtaining over $50 billion a year, mostly for Iraq, through the “emergency” supplemental appropriation funding. This enabled spending authorizations to be allocated to broad categories. Perhaps to end military conflict against the will of the president, Congress might also need to restrict general, discretionary funding.

Congress approved a $124 billion Iraq War funding bill and attached a troop withdrawal timeline, but, on May 1, 2007, Bush vetoed the bill. Congress failed to override the veto by a two-thirds majority, and Bush asserted: “I’m confident that we can

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276. In terms of executing the mission, in 1998, Colonel Richard D. Rosen wrote: “To operational lawyers, the proposition that a presidential spending authority exists independent of Congress is particularly alluring. During military operations, intense pressure exists to find fiscal tools – any fiscal tools – to accomplish the mission. The notion that either congressional inaction or congressionally prescribed prohibitions may be disregarded is indeed seductive. If the proposition is sustainable, it would greatly simplify the operational lawyer’s job, ensuring that, at least in situations the President deems essential to national security, funding will always be available. . . . [H]owever, neither the Constitution nor the nation’s experience supports such a conclusion. Congress’s power to appropriate – while not plenary – is certainly exclusive.” Colonel Richard D. Rosen, Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse, 155 MIL. L. REV. 1, 13 (1998).


278. Ackerman & Hathaway, supra note 167, at 491; Tiefer, supra note 277, at 49 (“the administration deviously merged the Iraq and Afghanistan expenditures as one ‘war on terror,’ so the 9/11 provided cover for the Iraq war”).

reach agreement.”280 During congressional hearings, many members of Congress opposed proposals to send more troops.281 Two weeks later, the showdown was finished, and Bush was able to send more soldiers to Iraq,282 and obtain another $100 billion to fund the war with no pullout date.283 Something as rudimentary as increasing the number of soldiers was a strategic solution to past mistakes, and was advanced as a fresh start. It was similar to the Vietnam War in that “[w]ith each new commitment [of more troops and new proposals] and then failure, U.S. objectives would change and grow increasingly ill-defined and vague . . . [T]hose involved in the . . . decision sought to rationalize and justify their previous actions.”284

Bush successfully opposed Congress’s gradualist egress measures, seemingly because of perception management maneuvers that paralleled tactics exploited during the Vietnam War. Both the Johnson and Nixon Administrations linked support for the troops with “loyalty to the government and its policy in Southeast Asia, [and] impugned the loyalty of their critics.”285 Members of Congress resented this strategy of “do not turn your back on the troops” during the Vietnam War, but the

284. PRATKANIS & ARONSON, supra note 76, at 240.
rhetoric still impelled Congress to continue funding.\footnote{286} Ultimately, none of the allotments for operations were “actually intended to promote troop safety, but in reality advanced the same policies of conducting a wider war that the public and Congress had rejected.”\footnote{287} The Court in \textit{Mitchell v. Laird} stated that “[a] Congressman wholly opposed to the [Vietnam War’s] commencement and continuation might vote for military appropriations and . . . [even] draft measures because he was unwilling to abandon without support men already fighting.”\footnote{288}

Amid Congressional dissent over deploying more troops to Iraq, Secretary of State Rice remarked: “I think the president is going to, as commander in chief, need to do what the country needs done. . . . I can’t imagine a circumstance in which it’s a good thing that their [commanders in Iraq] flexibility is constrained by people sitting here in Washington, sitting in the Congress, trying to micromanage this war.”\footnote{289} Vice President Cheney asserted: “When members of Congress pursue an antiwar strategy . . . they are not supporting the troops, they are undermining them. . . . Anyone can say that they support the troops and we should take them at their word, but the proof will come when it’s time to provide the money.”\footnote{290} To defend the “troop surge” proposal, Bush resorted to patriotism: “I believe that members of Congress were sincere when they say they support our troops, and now is the time for them to show that support.”\footnote{291} Bush exerted the same stratagem during the 2004

presidential campaign against Democratic candidate Kerry after he voted to reject funding: “[Senator Kerry] said the whole matter about the $87 billion is a complicated matter. There’s nothing complicated about supporting our troops in combat.”

Professors Lobel and Loewenstein explain that the “immediate appeal of the ‘support our troops’ argument usually outweighs any rational consideration of the merits of voting for or against funding.” Frankly, it is not evident what “supporting the troops” means when public sentiment turned so forcefully against the war. Likewise, if it is a genuine reflection of U.S. soldiers’ sentiment, a Zogby poll in March 2006 found that seventy-two percent of U.S. troops in Iraq favored withdrawal within a year. Many members of Congress concluded that supporting the troops meant bringing them home. Senator Rockefeller reported that members of Congress would not have “sent so many U.S. troops in harm’s way” had they known the truth about the intelligence allegations. Democratic House of Representatives member John Murtha sponsored a bill to bring U.S. soldiers home, opining that the war was a “flawed policy


294. See supra Part III.(F)-(G).


296. PETER LANCE, COVER UP: WHAT THE GOVERNMENT IS STILL HIDING ABOUT THE WAR ON TERROR 252 (2004); See Woolsey: We Must Do the Right Thing for Our Troops, supra note 197.
wrapped in illusion.” Senator Kennedy remarked that Bush and Cheney “have begun a new campaign of distortion and manipulation... The two men could not find weapons of mass destruction... and they can’t find the truth, either.”

Republican Senator Gordon Smith, on the floor of the Senate, expressed: “I, for one, am at the end of my rope when it comes to supporting a policy that has our soldiers patrolling the same streets in the same way, being blown up by the same bombs day after day... That is absurd. It may even be criminal. I cannot support that anymore.”

American Enterprise Institute scholar Norman Ornstein construed: “This is very significant... What this tells me is that Gordon Smith’s very stunning speech was in some ways the tip of the iceberg.” Former Senator Campbell remarked: “we were leaned on pretty heavily by the administration.... [I]f you didn’t support the president you weren’t a good soldier.... So we got stampeded into doing something, but unfortunately we didn’t have enough international help.”

In addition to utilizing the phrase “support the troops,” the Bush Administration defended the continuing occupation by emphasizing obligations owed to the new Iraqi government. Senator Clinton voted in favor of the invasion, but altered her position during the occupation. Clinton wanted clarity regarding a withdrawal of troops from Iraq; however, Undersecretary of Defense Eric Edelman responded to questions of withdrawal by retorting that “premature and public discussion of the withdrawal of U.S. forces from Iraq reinforces enemy propaganda that the United States will abandon its allies in Iraq.”

Approximately ninety percent of the invading troops, Coalition Provisional Authority employees and occupation soldiers were from the U.S., and polls consistently depicted that

299. Tapper, supra note 217.
300. Id.
301. Id.
302. See supra notes 140, 220, 293.
about eighty percent of Iraqis were opposed to occupation.304 “Allies” ostensibly refers to the new Iraqi government. Two months earlier, as appropriations and “troop surge” debates brewed in Congress, Iraqi President Talabani claimed that U.S. and British troops must remain in Iraq for the good of Iraqi people and its security.305 At that critical juncture, commentators claimed that Iraq would become a “terrorist Disneyland” if the U.S. were to leave.306 For the domestic audience, the persuasiveness of this reason for continuing occupation reverts back to memories of 9/11.307

In November 2007, Congress inserted another rider into an appropriations bill to withdraw troops from Iraq, but Democrats were seven votes short of impeding a Republican filibuster.308 Polls from mid-2008 revealed that over twenty-five percent of Americans still considered Iraq to be the most important issue in the presidential election.309 Bush departed with the second lowest presidential approval rating in history at twenty-two percent due to Iraq and poor economic conditions.310 Within six months of the Bush Administration’s departure, favorable foreign views of the U.S. surged,311 and several months later President Obama was

awarded a Nobel Peace Prize for “extraordinary efforts to strengthen international diplomacy and cooperation between peoples.” In October 2011, President Obama announced that all U.S. soldiers would be withdrawn by the end of the year. As for the economic travail that began during the Bush Administration, as time passed, a higher percentage of Americans started to blame Obama for the poor economy and for the growing deficit.

IV. CONCLUSION

Scholars waged debates over war powers and international law during the Bush Presidency. What some scholars considered international law violations and extraordinarily broad interpretations of the commander in chief power were addressed by the Bush Administration by tendering loopholes. The Geneva Convention was supposedly inapplicable to captured detainees because Afghanistan was a “failed state” and militants were “unlawful enemy combatants.” Captured detainees in 2008, 71% of Americans said “leaders of other countries around the world . . . [d]on’t have much respect” for Bush; and in February 2009, 20% of Americans said “leaders of other countries around world . . . [d]on’t have much respect” for Obama; Voice of the People: Global Survey Gives Thumbs Down to U.S. Foreign Policy, GALLUP INT’L, (Sept. 7, 2002), http://www.voice-of-the-people.net/ContentFiles/Terrorism_and_US_foreign_policy.pdf (example of drastic foreign approval rating drop for Bush as diplomacy over Iraq began).

foreign conflicts were subject to torture at the same time that the administration authorized harsh interrogation methods, extraordinary renditions, and secretive military tribunals to determine detention status and guilt. 318 The Authorization for the Use of Force Against Iraq was approved because of security threats, but the data to demonstrate the conditions to use force were veiled from Congress inside the national intelligence apparatus. 319 The Security Council and U.N. weapons inspectors toiled for four months, straining to discover evidence that would substantiate the Bush Administration’s security threats. 320 When the inspectors were unsuccessful in discovering prohibited weapon programs, the invasion still ensued and the rationale for war was swapped from national security jeopardy to “liberating” Iraqis. 321

At the domestic level, Bush implemented programs under the commander in chief authority that shielded nefariousness with secrecy, including by issuing domestic terror threat announcements that lacked verification, 322 scorning those who questioned secrecy prerogatives, 323 and conducting illegal authorize violations of the Geneva Conventions and of criminal law prohibitions against torture . . . was intended to remain secret”); Richard B. Bilder & Detlev F. Vagts, Speaking Law to Power: Lawyers and Torture, 98 AM. J. INT’L L. 689, 690 (2004) (calling the legal justification for not applying the Geneva Conventions to the Taliban “legally untenable”).


320. See generally Bejesky, Weapon Inspections, supra note 67.


323. Bejesky, Flow, supra note 132, at 22-23. On October 17, 2003, Senator Robert Byrd remarked to Congress about the Bush Administration’s false allegations about the Iraq War and noted that war critics have had patriotism questioned: “Those who dared to expose the nakedness of the Administration’s policies in Iraq have been subjected to scorn. . . . The time has come for the sheep-like political correctness which has cowed members of this Senate to come to an end. . . . Taking this nation to war based on misleading rhetoric and hyped intelligence is a travesty and a tragedy. . . . [T]his administration must now attempt to sustain a policy predicated on falsehoods.” 149 CONG. REC. S12800-01 (Oct. 17, 2003), http://www.gpo.gov/
surveillance operations. If the president’s authority under the National Security Act to monopolize secrecy was not so expansive, if Congress had more information, or if there were sufficient checks on the use and verifiability of intelligence information, perhaps so much discord over the president’s exploits would not arise. In March 2006, the Republican-controlled Senate Judiciary Committee held a censure hearing on President Bush’s unauthorized domestic surveillance program. Professor Iglesias explained that a “public performance of intra-party conflict orchestrated the illusion of inter-branch accountability—a tempest in the teapot of a censure resolution. What, after all, was the significance of a censure resolution in the Senate Judiciary Committee when, outside the committee, the ever louder call was for impeachment?” President Clinton was impeached.

There are public costs of unpopular wars. Presidents Truman and Johnson did not run for reelection because of the fallouts from the Korean War and Vietnam Wars, respectively. It may be particularly precarious to assume that Americans voluntarily accepted the negative repercussions of war if they were led by emotive allegations and insufficient information. For Congress, political realities permit the president to employ a congressional authorization as a shield to deflect blame as “members of Congress who are on record for supporting the conflict cannot credibly claim once the war becomes unpopular that the President has no good rationale for going into war.” Political costs for a war are diffused to other elected officials even though Congress can be restricted from accessing the national security data that premised the decision. Propaganda permits the Executive to shift attention from substantive issues

326. Iglesias, supra note 325, at 183-84.
327. Nzelibe, supra note 150, at 918.
328. See generally Bejesky, CFP, supra note 307 (analyzing the use of information surrounding the invasion of Iraq by applying research in linguistics, emotion, cognition medical science, and marketing).
329. Nzelibe, supra note 150, at 919.
330. Id. at 910.
in numerous ways,\textsuperscript{332} including by promoting something that Congress cannot oppose, such as “supporting the troops.”\textsuperscript{333}

Congress should not desert U.S. soldiers who risk their lives to defend Americans. However, Iraq was not a security threat. The U.S. military was not legitimately used under the conditions for the war powers authorization. Deploying soldiers for an unsanctioned mission may violate the interests of U.S. soldiers, the rights of citizens who are devoted to the soldiers and do not want them to be placed in danger when there never was a real security threat to Americans, and the oath of members of Congress who voted on the basis of false information. Also, if there is a nexus among war spending, higher oil prices due to war risks, and a weakened American economy,\textsuperscript{334} President Obama should not be culpable for conditions prevailing when he entered office.

\textsuperscript{332} See generally Bejesky, PDP, supra note 193 (distinguishing ambiguous government statements made to various target audiences during the pre- and post-invasion periods of Iraq).

\textsuperscript{333} MIT Emeritus Professor Noam Chomsky emphasizes how critical substantive inquiries can be dismissed by shifting attention: “Support our troops. Who can be against that? The issue was, [d]o you support our policy? But you don’t want people to think about the issue. That’s the whole point of good propaganda. You want to create a slogan that nobody’s going to be against, and everybody’s going to be for. Nobody knows what it means because it doesn’t mean anything. . . . So you have people arguing about support for the troops? Of course, I don’t not support them. Then you’ve won.” DOUGLAS RUSHKOFF, COERCION: WHY WE LISTEN TO WHAT THEY SAY 162 (1999) (citing NOAM CHOMSKY, MEDIA CONTROL (1991)).

\textsuperscript{334} Bejesky, Politico, supra note 10, at 31-34, 37, 84-90, 111; Robert Bejesky, Geopolitics, Oil Law Reform, and Commodity Market Expectations, 63 OKLA. L. REV. 193, 273-77 (2011).