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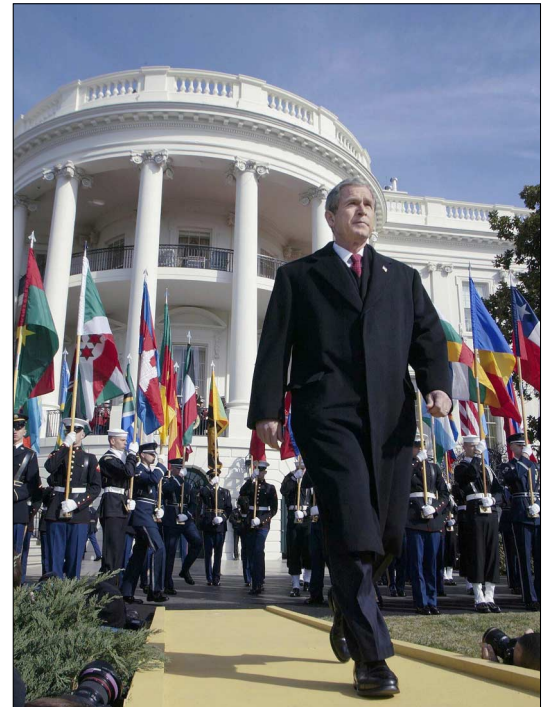
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Presidential Power

Has Bush overstepped his authority in fighting terrorism?

President Bush's war on terrorism and his desire to wage war on Iraq are testing the constitutional system of checks and balances. While many of Bush's actions appear within his authority as commander-in-chief, some unilateral decisions regarding prosecutions of terror suspects appear in conflict with existing laws. Bush's insistence on blanket authority to pursue his policies also has stirred resentment in Congress, where Democrats and some Republicans believe they have been bypassed on key policy decisions. The administration says the unusual nature of the terrorist threat justifies the aggressive stance, arguing it needs maximum flexibility to confront a dangerous enemy. But given the open-ended nature of the war on terrorism, many lawmakers are contemplating how to regain institutional clout.



INSIDE THIS ISSUE

THE ISSUES	947
BACKGROUND	954
CHRONOLOGY	955
CURRENT SITUATION	959
AT ISSUE	961
OUTLOOK	963
BIBLIOGRAPHY	965
THE NEXT STEP	966



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THE ISSUES

- 947 • Has the administration overstepped its authority in the war on terrorism?
 • Did Congress give the president too much leeway by authorizing the use of force against Iraq?

BACKGROUND

- 954 **'Imperial Presidency'**
 After the Sept. 11 terrorist attacks, President Bush envisioned minimal consultation with Congress.
- 957 **Jackson's Model**
 President Andrew Jackson first affirmed the concept of a strong chief executive in the late 1820s.
- 958 **Congress Pushes Back**
 The run of unchallenged White House power ended during Lyndon B. Johnson's administration.

CURRENT SITUATION

- 959 **Homeland Security**
 The Bush administration and Congress are fighting to control the new department of homeland security.
- 960 **Election Politics**
 GOP victories in the 2002 midterm elections gave the White House a chance to pass homeland security legislation.
- 962 **Other Bush Moves**
 President Bush has reversed an array of longstanding environmental-protection laws and regulations.

OUTLOOK

- 963 **Anti-terror 'Proxy'**
 Critics warn the administration could cite national security to justify increasing police powers and other policies.

SIDEBARS AND GRAPHICS

- 949 **Congress' Power of the Purse**
 Few congressional powers can tie a president's hands more than control of discretionary spending.
- 952 **War Powers Act Pits Congress vs. President**
 Every president since Nixon has viewed it as an unconstitutional infringement on the commander-in-chief's authority.
- 955 **Chronology**
 Key events since 1787.
- 956 **Was Lincoln a Dictator?**
 His forceful use of executive powers during the Civil War prompted charges he had become a military dictator.

- 961 **At Issue**
 Did the president act responsibly in seeking authority to pre-emptively strike Iraq?

FOR FURTHER RESEARCH

- 964 **For More Information**
 Organizations to contact.
- 965 **Bibliography**
 Selected sources used.
- 966 **The Next Step**
 Additional articles from current periodicals.
- 967 **Citing The CQ Researcher**
 Sample bibliography formats.

Cover: President Bush walks toward the White House South Lawn before delivering remarks at ceremonies on March 11, 2002, commemorating the six-month anniversary of the Sept. 11, 2001, terrorist attacks. (AFP Photo/Stephen Jaffe)

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Presidential Power

BY ADRIEL BETTELHEIM

THE ISSUES

Sen. Robert C. Byrd, the self-appointed guardian of congressional prerogatives, was shaking with rage.

Standing on the floor of the Senate on Oct. 3, the 85-year-old West Virginia Democrat bitterly denounced the Bush administration for pressuring Congress to quickly approve a resolution authorizing the use of unilateral force against Iraq on the grounds that it poses a threat to U.S. interests.

"This is an unprecedented and unfounded interpretation of the president's authority under the Constitution, not to mention the fact that it stands the charter of the United Nations on its head," Byrd declared. "The president is using the Oval Office as a bully pulpit to sound the call to arms, but it is from Capitol Hill that such orders must flow."

Byrd saw the resolution as the latest example of the White House's attempt to steamroll the legislative branch on a key national security matter — this time by forcing the House and Senate to vote just weeks before the midterm elections on whether to launch a pre-emptive strike on a sovereign nation that intelligence reports indicated was amassing weapons of mass destruction. Lawmakers for the first time in history were put in the difficult position of having to give the commander-in-chief open-ended authority to begin firing when he pleases — or attaching conditions and appearing to tie his hands.

After more than a week of debate in the House and Senate, the administration got what it wanted. Congress passed compromise language empow-



AFP Photo/Tim Sloan

After meeting with President Bush, Senate Minority Leader Trent Lott announces that President Bush will resume briefing congressional leaders on anti-terrorism operations. Bush had restricted secret information after accusing lawmakers of leaking classified information.

With Lott on Oct. 10, 2001, were, from left, House Speaker Dennis Hastert, Senate Majority Leader Tom Daschle and House Minority Leader Dick Gephardt. The November 2002 elections changed Congress' leadership.

ering the president to wage war, though making it clear he should first gain support from the United Nations. * While the House cleared the resolution by better than a 2-to-1 margin, and the Senate by better than 3-to-1, there was palpable concern on Capitol Hill about the precedents that were being set and the possible consequences. Some lawmakers like Byrd questioned the timing of the vote, while others wondered whether they were affirming an imperial presidency that would march to its own beat in international relations.¹

"The Constitution clearly [creates a] separation of powers to stop the president from going off on foreign adventures without the express consent of the American people," says Rep. Sam Farr, D-Calif., who voted against the resolution.

* The U.N. Security Council unanimously adopted a tough weapons-inspection mandate for Iraq on Nov. 6, 2002, calling on Saddam Hussein to scrap his weapons of mass destruction or face "serious consequences."

"We need to have a national dialogue," added Sen. Chuck Hagel, R-Neb., a decorated Vietnam veteran and Senate Foreign Relations Committee member, who initially questioned Bush's plan but supported a modified version of the resolution. "We didn't have that dialogue before we got into Vietnam. We have to be careful about what we're doing."

The Iraq debate reflected the tense state of relations between the Bush administration and Congress since the Sept. 11, 2001, terrorist attacks on New York and the Pentagon. The administration has used the threat of terrorism — and less specific challenges to U.S. interests — to try to wield a brand of clout

similar to that seen during World War II and the Cold War. After trying to score narrow political victories in their first year in office, Bush Cabinet officials now are aggressively asserting authority over foreign and domestic affairs, aided by Bush's administrative fiat and Congress' general tendency to look to the executive branch for leadership.

Some scholars attribute the move to a strongly held belief within the administration that presidential power has slipped over the past two decades, evidenced most recently by former President Bill Clinton's unsuccessful invocation of executive privilege during the scandals that plagued his administration. The chief advocate of this view, according to many observers, is Vice President Dick Cheney, who in 1987 — as ranking Republican on the House select committee that investigated the Iran-Contra scandal — had scolded fellow lawmakers for stepping on then-President Ronald W. Reagan's toes.²

But the administration's tactics have angered Democrats and some Repub-

licans in Congress, who increasingly believe they are being bypassed on key decisions and may be ceding too much power to the executive branch in the name of national security. Some, such as Byrd and House Judiciary Committee Chairman F. James Sensenbrenner Jr., R-Wis., are mulling ways to publicly express their displeasure, including holding hearings on administration policies, issuing subpoenas and possibly withholding funding for some presidential initiatives.³

“It’s quite a tug-of-war, and Cheney and others in the administration think it is time Congress gives the executive branch its due,” says Fred I. Greenstein, a presidential scholar at Princeton University. “Presidents have been constrained by other actors and constitutional complexities and have had to use all their wiles and political savvy to get their way. Congress goes back and forth on how much the president should be constrained. A lot of it boils down to whose ox is being gored.”

The showdown over Iraq is only the latest friction point in the struggle between the two branches. For most of 2002, Bush and Congress have also fought over the merits of creating a domestic security agency. Then in June, facing declining approval ratings and questions about intelligence lapses prior



Army MPs take a handcuffed detainee at Camp X-Ray in Guantanamo Bay, Cuba, for questioning at the Joint Interrogation Facility. Critics say that while many of the arrests of terrorism suspects appear legal under President Bush’s authority as commander-in-chief, some unilateral decisions regarding prosecutions of terror suspects may conflict with existing laws.

AFP Photo/Peter Muhly

to Sept. 11, the White House abruptly reversed its previous policy of rejecting congressional efforts to create a governmental counterterrorism agency. Bush proposed creating a homeland security department by combining 22 existing federal agencies with at least 170,000 employees and a budget of \$37.5 billion. He then demanded that Congress give him more power over federal civil service employment practices — such as the authority to hire, fire and transfer workers and to exclude some from civil service protec-

tions — all in the name of national security. Senate Democrats’ resistance to those demands threatened to stall action on a homeland security bill in the 107th Congress.

The administration similarly pressed lawmakers for expanded authority soon after the Sept. 11 attacks, when it asked for, and received, new prosecutorial powers to track terror suspects and their sympathizers in an anti-terrorism law commonly known as the USA Patriot Act. But while lawmakers were debating and writing the legislation, the administration was separately instituting a series of rules without consulting Congress that allowed authorities to indefinitely detain suspects, listen in on conversations between some federal prisoners and their lawyers and more closely scrutinize visa applications from certain countries. The White House also authorized the use of military tribunals to try foreigners suspected of terrorism. The actions raised questions

about whether Bush was deliberately shifting power away from Congress and into the domain of the executive branch and the courts.⁴

“The thread running through all of this is the feeling on the part of the administration that it can arrogate power to itself and dismiss review either by Congress or the courts, saying any questions will hurt the war on terrorism,” said Neil Sonnett, former assistant U.S. attorney in Florida, who chaired an American Bar Association task force that reviewed the administration’s legal tactics.

Congress' Power of the Purse

Few congressional powers can tie a president's hands more than control of discretionary spending, known informally as "the power of the purse."

This constitutionally conferred prerogative is the most effective way to force a president to use military force — or make other policy changes — in ways he might otherwise not consider. But lawmakers run the risk of triggering a political backlash if their actions are viewed as jeopardizing the well-being of troops already committed in the field.

Since the Vietnam era, Congress frequently has used funding cutoffs or significant reductions to end or limit the use of military personnel abroad. Because the cutoffs usually are included in annual spending bills, they have to be renewed each year to have the effect of being permanent policy:

- Congress tried several times during the last years of the Vietnam War to restrict U.S. military activity in Indochina. A supplemental foreign-assistance appropriations act, cleared by Congress in December 1970, prohibited the use of funds to introduce ground combat troops in Cambodia or to provide U.S. military advisers to Cambodian military forces.
- A supplemental fiscal 1973 appropriations bill cut off funds for combat activities in Indochina after August of that year. Similar language was included in a stopgap funding measure passed in June 1973. Then Congress passed the Foreign Assistance Act of 1974, which set a personnel ceiling of 4,000 Americans in Vietnam within six months of

enactment, and 3,000 Americans within one year.

- More recently, the fiscal 1994 defense spending bill approved the use of U.S. combat forces in strife-torn Somalia for certain purposes — such as security roles and protecting United Nations units — but it cut off funding for other purposes after March 31, 1994. The fiscal 1995 defense-spending bill went further, stipulating no funds appropriated by the act could be used for a continued presence in the African nation.
- The fiscal 1995 defense-spending bill also cut off funding for military participation to address ethnic and other conflicts in the African nation of Rwanda, except for action to protect the lives of U.S. citizens.

Congress also has periodically used funding restrictions to limit military or paramilitary actions around the world. The fiscal 1976 defense-spending bill restricted military activity in Angola to intelligence gathering. Congress later made the ban permanent law through the International Security Assistance and Arms Export Control Act of 1976.

The 1984 dispute over funding anti-government guerrillas in Nicaragua known as "contras" also led to a funding ban on continuing CIA, Pentagon or other federal agency activities in the Central American nation in fiscal 1985. The legislation provided that, after Feb. 28, 1985, the president could spend \$14 million on the contras, subject to congressional approval, if he specified why continued military assistance was necessary.

The power tug-of-war goes beyond national security matters. Bush also has resisted congressional and public oversight on non-terrorism matters, such as denying requests for documents from an energy task force chaired by Cheney. Environmental and congressional critics said the panel, charged with crafting the administration's energy plan, was too closely aligned with the oil, coal and electricity industries. And Bush in November 2001 ordered that a sitting president could have unlimited time to decide whether to release presidential documents and new powers of censorship over those documents — a move that raised the hackles of archivists, historians and librarians. They said the order violated the spirit of the 1978 Presidential Records Act, which gives the public access to old White House papers.

To some extent, Congress is at a natural disadvantage in power struggles with the executive branch, because its decentralized nature and highly charged partisan environment makes it difficult for the House or Senate to coordinate strategy or speak with one voice. In rare cases, courts have been left to decide whether a president overreached, such as when the Supreme Court in 1952 ruled that President Harry S. Truman had no legitimate power to nationalize steel mills during the Korean War.⁵

Congress has had an especially difficult time reacting to the war on terrorists, because it has scrambled traditional concepts of deterrence and use of force. But scholars note that the legislative branch still has options. For instance, Congress can influence public opinion by stretching out debate on

administration initiatives so that the public dialogue takes into account opposing views. It also can shift its agenda to issues the administration wants to avoid, such as the sputtering economy. In extreme cases, it can even cut off funding for administration initiatives. However, lawmakers must propose solutions and not simply appear to be guarding their turf or trying to score political points, according to analysts.

"The president in the past benefited from a certain ambiguity in the way people perceive his role, because the bully pulpit allowed him to quickly stake a claim — such as declaring that the Cheney task force documents are confidential — and have it accepted," says George C. Edwards III, a professor of political science at Texas A&M University. "Now, on the biggest issues, particularly the war, you're see-

ing Congress challenge him, and raise questions before it's too late."

In the aftermath of the midterm elections that delivered the Senate back into Republican hands, Congress is not expected to mount robust challenges immediately and create the perception that it is disloyal and unpatriotic. Indeed, Republicans are expected to eagerly work to advance the president's agenda — for example by trying to pass homeland defense legislation and enact tax cuts to spur the economy. Democrats, trying to regroup in time for the 2004 elections, may not have the appetite to quickly challenge the politically popular chief executive. But given the open-ended nature of the war on terrorism, many are contemplating how to regain institutional clout instead of being relegated to a long-term supporting role.⁶

As Congress mulls the executive branch actions and the constitutional system of checks and balances, here are some questions being debated:

Has the administration overstepped its authority in the war on terrorism?

House Judiciary Committee Chairman Sensenbrenner has a tempestuous relationship with the Bush administration. The veteran Republican congressman from the Milwaukee suburbs is a stickler for rules and insists on deference, frequently erupting in anger when he doesn't get it. Sensenbrenner was in a particularly cranky mood when he met with a group of *Milwaukee Journal-Sentinel* reporters and editors during Congress' August recess.

For two months, the Bush Justice Department had refused to answer questions from Sensenbrenner's committee about how the administration was using new powers conferred by the USA Patriot Act in its foreign intelligence investigations. The committee wanted to know, for example, how many times U.S. citizens or resident legal aliens had been electronically

monitored, how many times authorities had been allowed to monitor suspects' conversations as they moved from phone to phone and how library, newspaper and bookstore records were being used. The committee said it needed the information to assess whether to reauthorize the law when it expires in 2004. But the administration was not rushing up to the Hill with answers, saying the information was secret and would only be shared later with the House Intelligence Committee, which does not have jurisdiction over the anti-terrorism law.

Quipping that the White House was playing "I've Got a Secret," Sensenbrenner told journalists: "I've never signed a subpoena in my five and a half years as chairman. I guess there's a first time for everything."⁷

Although the administration has since provided more details, such incidents and broader questions about its prosecutorial powers have fueled concerns that the White House is openly disregarding Congress and compromising civil liberties in the name of national security. The incidents also have raised questions about whether the administration is using a cloak of secrecy to dodge congressional and public oversight.

"They're not using the war to advance a hidden agenda, but their policies reflect what some would regard as a peculiar notion about executive branch power that emphasizes unilateral action and obstructs even the most routine requests for information," says Steven Aftergood, director of the project on government secrecy of the Federation of American Scientists.

Aftergood points to administration efforts such as a recent decision to define a new category of government information — tentatively called sensitive homeland security information, or SHSI — that could be withheld from the public on the grounds that making it public is tantamount to making it available to terrorists. While the White House has not said what the

category would encompass, it could include everything from blueprints of government buildings to scientific research deemed useful for making biological or chemical weapons.⁸

Administration officials defend their actions, saying the stealthy and often lethal nature of terrorism requires a broad and swift response. They add some personal liberties may have to be sacrificed for national security.

"The mission of the Department of Justice has been transformed from a focus on prosecution of illegal acts to a focus on the prevention of terrorist acts," Attorney General John Ashcroft told the Eighth Circuit Judges Conference in Duluth, Minn., in August. "Like many Americans, I am concerned about the expansion of preventative law enforcement. That is why we . . . [are] mindful that we seek to secure liberty, not trade liberty for security."

One policy that has aroused concern and comment is the administration's secret detention of two U.S. citizens accused of terrorism and at least 147 others detained in the investigation of the Sept. 11 attacks. Lawmakers, including Sen. Arlen Specter, R-Pa., a former prosecutor, have questioned whether the detentions without access to a lawyer of U.S. citizens José Padilla and Yaser Hamdi as "enemy combatants" violates a 1971 law that bars citizens who haven't been charged with a crime from being imprisoned or detained indefinitely, except pursuant to an act of Congress. Padilla was detained for allegedly plotting to detonate a radioactive bomb. Hamdi was nabbed fighting for the Taliban in Afghanistan. The law was inspired by the controversial World War II internment of Japanese-Americans.⁹

Critics say the White House is trying to claim a right to detain citizens without charging them with a crime, creating a paradox in which a citizen charged with being an enemy combatant, such as so-called "American Taliban" John Walker Lindh, has more rights than the uncharged citi-

zen detainees. The White House defends the prosecutorial strategy as legal, however, citing a 1942 Supreme Court ruling in a case dealing with Nazi saboteurs, which stated that the military may detain a U.S. citizen who joined the enemy or entered the country to carry out hostile attacks.

Similarly, critics complain about secret deportation proceedings against aliens detained in the Sept. 11 investigation that exclude the public, the press and even the families of the accused. Some were not initially told why they were being held. The 6th U.S. Circuit Court of Appeals ruled in August that the insistence on closed proceedings was unconstitutional because it denied the public's right to know whether the government is acting legally. The three-judge panel called the policy "profoundly undemocratic," warning that it could result in a "wholesale suspension of First Amendment rights."¹⁰

Congress separately is discussing whether to hold hearings into whether some detentions violate the USA Patriot Act, which gave law enforcement seven days to charge or release suspects or to begin deportation proceedings. The administration defends the secret proceedings, saying disclosure of charges could compromise ongoing investigations. Though lawmakers are not about to argue for quicker releases of suspects, it is pondering new legislation that would set standards for lengthy detentions.

"Instead of expending resources to prevent the release of information about

detainees, the administration should show it has confidence in the Justice Department's investigation by opening the department's actions to public scrutiny," says Sen. Russell D. Feingold, D-Wis.

Even the ultrasecret federal court that oversees terrorism investigations is criticizing the administration. Last May, the Foreign Intelligence Surveillance Court refused to expand Justice Department powers to use intelligence information, saying the administration was trying to thwart the will of Congress



Flanked by Vice President Dick Cheney, left, and Defense Secretary Donald H. Rumsfeld, President Bush speaks in the White House Rose Garden on Oct. 23, 2002, before signing legislation increasing defense spending for 2003. Bush's insistence on blanket authority to pursue his anti-terrorism and war policies has antagonized some members of Congress, who believe they have been bypassed on key policy decisions.

AFP Photo/Joyce Nalchayan

and give criminal investigators free access to classified information.

The so-called FISA court meets in secret to approve warrants and almost never publishes opinions. But it said federal agents had misled the court in applications for secret eavesdropping warrants during both the Clinton and Bush administrations. It concluded the Bush administration's efforts to expand the use of classified information could violate the Fourth Amendment, which prohibits unreasonable searches and seizures.

Ironically, the ruling could prompt Congress to give the administration more prosecutorial powers, albeit within specific guidelines. Specter, Sen. Charles E. Grassley, R-Iowa, and others on the Senate Judiciary Committee concerned about the effectiveness of ongoing probes are considering legislation to make it easier for the FBI and other investigative agencies to obtain warrants. The lawmakers were infuriated last summer on learning that the Minneapolis office of the FBI could not obtain a FISA warrant to inspect the laptop computer of terror suspect Zacarias Moussaoui in the weeks before the Sept. 11 attacks because there was no clear evidence linking the French Muslim to an international terror group.

"We need to give the government some expanded powers," says Sen. Charles E. Schumer, D-N.Y., a Judiciary Committee member. "The real trick is finding the right balance."¹¹

While the administration's assertive strategy clearly has bruised egos and drawn admonitions, it remains unclear whether the president actually has overreached

and skewered the system of checks and balances. Some scholars cite the strong congressional reaction as proof that the system is alive and well. In fact, they say, it has prevented the United States from following Europe's lead and enacting even tougher anti-terrorism measures. According to this line of thinking, Bush is no different from his predecessors who sought sweeping authority during wartime. But, the administration almost certainly would not have been able to enact a law like Britain's anti-terrorism act, which authorizes the

War Powers Act Pits Congress vs. President

Tensions between Congress and the Nixon administration already were reaching the boiling point in 1973 when lawmakers, on learning about the secret bombing of Cambodia, passed the War Powers Resolution, serving notice they were reasserting influence over the country's foreign affairs.

But in trying to limit the president's power to send U.S. forces abroad without congressional approval, they created a document that, nearly 30 years later, continues to stir controversy and confusion over presidential power.

When Congress approved the act, Richard M. Nixon's presidency was already weakened by the Watergate scandal, his firing of special prosecutor Archibald Cox and the scandal surrounding the Watergate tapes.¹

Nevertheless, Nixon vetoed the resolution, arguing it would "seriously undermine the nation's ability to act decisively and convincingly in times of international crisis" and "give every future Congress the ability to handcuff every future president."²

But the House and Senate — intent on flexing their muscle — each overrode his veto and enacted the resolution into law, arguing that the president could only commit forces pursuant to either a declaration of war, specific statutory authorization or an emergency created by an attack on the United States. Without such approval, the resolution required terminating troop commitments within 60 days, with a 30-day extension, if necessary, to ensure safe withdrawals.

"If the president can deal with the Arabs, and if he can

deal with the Soviets, then he ought to be able and willing to deal with the U.S. Congress," said then-House Majority Leader Thomas P. "Tip" O'Neill Jr., D-Mass.³

Every president since Nixon has viewed the War Powers Resolution as an unconstitutional infringement on the commander-in-chief's authority as head of the armed forces to defend vital national security interests. Congress has never used the resolution to compel the withdrawal of military forces against the president's will. But the mere existence of it has led the two sides to compromise over a series of foreign showdowns.⁴

One of the first deals was struck in September 1983, when President Ronald Reagan and Congress agreed to authorize the participation of U.S. Marines in a multinational peacekeeping force in Lebanon for 18 months. But the next month, a suicide truck bombing killed 220 Marines and 21 other U.S. service members at the Marines' compound in Beirut. Reagan announced he was pulling the Marines out, and in March 1984 he reported to Congress that U.S. participation in the multinational force had ended.

Six years later, at the outset of the Persian Gulf War with Iraq, Congress bristled at President George Bush's deployment of military personnel to Saudi Arabia to defend U.S. interests in the region without congressional approval.

Congress belatedly approved the use of military force against Iraq, but, citing the War Powers Resolution, lawmakers stipulated that the president must certify to Congress that such use of force was necessary and that diplomatic efforts had failed. While the sides ultimately agreed on the common objective, Bush made

government to record and store citizens' e-mails, Internet browsing habits and other electronic communications and to make the information available to authorities without a court order. The European Union in May authorized members to pass similar data-retention measures.

"So far, in the face of great stress, the system has worked relatively well," George Washington University law Professor Jeffrey Rosen wrote recently in *The Washington Post*. "The executive branch tried to increase its own authority across the board, but the courts and Congress are insisting on a more reasoned balance between liberty and security. Of all the lessons about America's strength that have emerged since the attacks, this is one of the most reassuring."¹²

Did Congress give the president too much leeway by authorizing the use of force against Iraq?

As Congress returned from its August recess, President Bush aggressively worked to develop compromise language on the use-of-force resolution against Iraq that so upset Sen. Byrd. The administration dispatched high-level officials to Capitol Hill to offer private, classified briefings for undecided lawmakers about Iraqi weapons capabilities and to make the case for pre-emptive strikes. It also previewed proposed drafts of the resolution, which eventually would win a solid bipartisan majority in both houses.

But perhaps the president's most effective selling job took place 235 miles to the north. On Sept. 12 Bush

addressed the United Nations and laid out his rationale for an attack, making his case in the context of international law and U.N. agreements, and finally warning that the United States was prepared to act with or without Security Council sanction. The appearance did not win over the world body, especially after Iraq agreed to a new round of U.N. weapons inspections.

However, his tough talk and bow to the international body unified congressional Republicans and even brought skeptical Democrats into the administration's corner. Senate Majority Leader Tom Daschle, D-S.D., dropped his plan to postpone a vote on a resolution until next year. And House Democratic Leader Richard A. Gephardt of Missouri — like Daschle

it clear that he never sought congressional authorization. Congress, however, characterized its action as the requisite authorization to proceed.

Another flareup over presidential authorization of combat activity occurred in March 1999, when President Bill Clinton notified Congress he had begun air strikes against Yugoslavia in response to its repression of ethnic Albanians in the province of Kosovo.

Congressional Republicans tried to use the War Powers Resolution to overturn the president's actions, and later attempted to withhold funding for the operation. In fact, 18 members of Congress, led by Rep. Tom Campbell, R-Calif., even sued Clinton in federal district court in Washington, alleging his actions violated the act. The suit was dismissed after the judge ruled the members lacked legal standing to bring the suit. The U.S. Court of Appeals for the District of Columbia Circuit upheld the ruling. The lawmakers appealed to the U.S. Supreme Court, but justices refused to hear the case, letting stand the appeals court decision.

Experts believe the resolution remains a useful and appropriate way to express congressional sentiment, even if presidents

War Powers Resolution

Sec. 4 — Consultation

“The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.”

continue to argue it is not legally binding. Louis Fisher, a specialist in separation of powers at the Congressional Research Service, argues that if the legislative branch does not use the powers available to it and acquiesces to the executive branch, courts cannot be relied on to rule on abuses that may arise.

“Congress must be prepared, and willing, to exercise the ample powers within its arsenal,” Fisher writes. “It needs also the institutional courage and constitutional understand-

ing to share with the president the momentous decision to send U.S. forces into combat.”⁵

¹ For background, see “Watergate Crisis, 1972-1976 Political Chronology,” in *Congress and the Nation, 1973-76* (1977).

² See *1973 CQ Almanac*, pp. 905-917.

³ *Ibid.*

⁴ For background, see Congressional Research Service, “Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments,” Report No. RS20775, Jan. 10, 2001.

⁵ See James A. Thurber, ed., *Divided Democracy: Cooperation and Conflict Between the President and Congress* (1991), pp. 199-215.

a possible 2004 presidential aspirant — unexpectedly one-upped his Senate counterpart, cutting a deal with the White House giving Bush authority to wage war but stipulating that he must first consult with Congress and provide evidence that diplomacy is no longer working.¹³

Bush's dual-track selling job came with polls indicating lukewarm public support for a U.S. attack on Iraq. Many lawmakers also were unconvinced that there is a real connection between Iraq and the war on terrorism. Analysts said the result was tribute to the president's effective use of the bully pulpit and his bare-knuckles political tactic of challenging Congress to defy him on a national security matter in an election year. Many also attributed the widespread Demo-

cratic acquiescence to a desire to dispense with the matter so they could concentrate on traditional party issues, like prescription drugs for the elderly and protecting Social Security.

“The president has run a successful campaign to win a vote,” Thomas E. Mann, a senior fellow at the Brookings Institution, said after the vote on the resolution. “The president has not persuaded the public or the Congress that a full, careful, cost-benefit analysis has been done and that this is the wisest course to follow.”

The Iraq vote could set a new precedent for a chief executive seeking war powers. Congress for the first time allowed the president to launch military strikes, without advance notice, under conditions that preclude a lengthy debate. That conflicts with Article I, Sec-

tion 8, of the Constitution, which gives Congress power “to declare war.” Though Congress has only done so on five occasions — the War of 1812, the Mexican War, the Spanish-American War and the two world wars — institutionalists like Byrd fear future presidents will use a pre-emption doctrine to bypass the legislative branch when it suits them.

Since passage of the 1973 War Powers Resolution, Congress has used the act for leverage in debates over war. (See sidebar, p. 952.) The law allows Congress to compel — against the president's will — the withdrawal of military forces from foreign deployments if Congress does not approve of the action. While Congress has never actually used it to pull back troops, the existence of the act has, from time

to time, forced presidents to compromise even though they view it as an unconstitutional infringement on their authority.¹⁴ Congress also has the politically risky option of not funding military actions — a move that can be viewed as not supporting U.S. troops in the field.

Congress was not sure how to react to the White House's insistence for war authority, especially given the speed with which the Iraq debate progressed and overshadowed other items on the House and Senate agendas. Some lawmakers chose to parse the dilemma from a legal perspective, questioning whether it is appropriate to react to a "continuing threat," as opposed to an "imminent threat." Skeptics like Senate Armed Services Committee Chairman Carl Levin, D-Mich., say lowering the threshold for a pre-emptive strike could lead unfriendly countries with weapons of mass destruction — such as Iran or North Korea — to strike unilaterally, possibly against U.S. interests. But during Senate and House debates, Levin and Rep. John M. Spratt Jr., D-S.C., each failed to persuade colleagues to add language requiring the White House to seek another congressional vote before launching unilateral strikes against Iraq, unless it were part of an international coalition.

Byrd questioned whether Bush's swagger will hinder future attempts to build international coalitions and accused him of timing the vote to coincide with the politically charged period before midterm elections. Byrd intended to use Senate rules to drag out debate beyond the elections, but Daschle thwarted him by using his own procedural tactics to change the order of the text of the resolution. The chamber adopted the resolution after two weeks of debate and within hours of the House. "We debated it at least as long as the debate we had in 1991 [over war with Iraq], and I think everyone knows how they're going to vote," Daschle said.¹⁵

The final version attaches some conditions, though it generally is more broadly worded than similar resolutions in the past. It allows the president to wage war as long as he informs Congress within 48 hours after the start of military action. In contrast, the resolution authorizing President Bush's father to commence the 1991 Gulf War stipulated that the president had to tell Congress that diplomatic efforts had failed before he could launch an attack.

The new resolution requires the president to certify that non-military methods of eliminating the threat have failed and reaffirm that removing the threat posed by Iraq is consistent with, and an integral component of, the war on terrorism. The language also requires Bush to report to Congress every 60 days on relevant matters concerning the confrontation with Iraq, and reaffirms the 1998 Iraq Liberation Act, which said Iraqi President Saddam Hussein should be removed from power.¹⁶

Some observers suggest debates over how much power the president accumulates are pointless, because the Founding Fathers envisioned the president having to quickly authorize military action in self-defense, even when it was unilateral. They point out that Congress recognized this in 1798, when it authorized the first military action: to block France from interfering with U.S. maritime commerce. Since then, presidents have sent American troops into conflict at least 200 times without formal declarations of war, though most of the actions were authorized by congressional statute.

"We're living in a post-Cold War world where deterrence alone just doesn't do the job it used to," says Jack Spencer, security analyst at the conservative Heritage Foundation. "Our president has all the authority he needs to address this new threat, and he should use it."

"The question isn't why now, but why not earlier," said Sen. Joseph I. Lieberman, D-Conn., as he supported the resolution during the Senate debate. "Over the last decade, Saddam has built up weapons of mass destruction, developed the means to deliver them on targets near and far and consistently ignored and violated U.N. resolutions. We've waited too long to address this threat."

Others contend, however, that Congress capitulated by giving the president extraordinary powers that cannot be challenged. They say Congress signed its authority away — and did so clearly understanding that the Bush administration is trying to overthrow the Iraqi regime. Some worry about similarities to the 1964 Gulf of Tonkin Resolution, in which Congress authorized President Lyndon B. Johnson to use force and effectively authorized the Vietnam War because of reports of an attack on U.S. vessels in Southeast Asian waters.

"To have the president draft the resolution, submit it to Congress and demand they pass it — it's incredible arrogance of power, but they did it," says Shirley Anne Warshaw, a political science professor at Gettysburg College. "The fear of terrorism has emasculated Congress." ■

BACKGROUND

'Imperial Presidency'

President Bush was sworn into office at a time when presidential clout was on the wane. Since the end of the Cold War, Congress has taken the initiative in areas once the exclusive domain of the chief executive, forcing the president into political bat-

Continued on p. 956

Chronology

1780s-1820s

The office of the presidency is conceived and its powers spelled out.

1787

The Constitution spells out the president's executive powers, such as military command, involvement in the legislative process, pardon and the execution of laws. While the president is designated "commander-in-chief" of armed forces, Congress is given the power "to declare war."

1801-1803

Thomas Jefferson battles with the Supreme Court over the concept of judicial review. The question of whether ultimate authority rests with the president and elected representatives in Congress or in a fixed legal standard has come up repeatedly in U.S. history.

1830s-1860s

Presidents seek to expand executive powers, increasing their influence over legislation, military matters and responses to national emergencies.

1832

Andrew Jackson vetoes a congressional bill to re-charter the National Bank of the United States for four years, arguing for the first time that a veto is justified if the president had a policy disagreement with Congress. By demanding to be involved in the drafting of legislation, Jackson alters the relationship between the executive and legislative branches. Jackson later tries to kill off the bank, triggering a bitter power struggle over control of the executive administration.

1844-1848

James K. Polk further asserts presidential power, for the first time creating an executive-branch budget and insisting on being the decisive authority in all military matters during the Mexican War.

1861-1865

Abraham Lincoln seizes extraordinary powers during Civil War, suspending habeas corpus and imposing martial law. Lincoln also pushes the anti-slavery 13th Amendment through Congress.

1900s-1960s

Economic and military crises help define a modern notion of presidential power.

1901-1908

Theodore Roosevelt expands executive power, claiming the president possesses a special mandate from the people. He wins authority to regulate railroad shipping rates, takes control of the Panama Canal Zone and intervenes in the Russo-Japanese War, for the first time recognizing one power's claim on the territory of another.

1918

Woodrow Wilson fails to win Senate approval to create the League of Nations, indicating the presidency still can be limited by Congress and public opinion.

1935-1937

Franklin D. Roosevelt triggers a constitutional crisis when he tries to "pack" the Supreme Court by replacing the oldest justices after the court strikes down a series of New Deal laws on the grounds they delegate too much authority to the executive. Roosevelt fails to get the plan

through Congress. Roosevelt's actions spark a backlash, as conservative Democrats and Republicans block further presidential reform initiatives.

1952

Supreme Court, in *Youngstown Sheet and Tube Co. v. Sawyer*, rebuffs Harry S. Truman's effort to assume emergency economic powers by trying to nationalize steel mills during the Korean War.

1964

Congress inadvertently authorizes the Vietnam War through the Gulf of Tonkin Resolution, which gave Lyndon B. Johnson the right to use force in response to what is claimed to be an attack on U.S. ships in Asian waters.

1970s-Present

Resurgent Congress seeks to make presidents more accountable to the legislative branch.

1973

Congress passes War Powers Act allowing Congress to compel the withdrawal of U.S. military forces from foreign deployment against the president's will.

Dec. 19, 1998

House impeaches President Bill Clinton on charges of lying under oath and obstructing justice over his affair with White House intern Monica Lewinsky. Senate acquits Clinton.

2001-2002

President Bush strengthens executive branch counterterrorism efforts after the Sept. 11 terrorist attacks, winning expanded prosecutorial powers from Congress and using administrative fiat to establish new rules for terrorism investigations.

Was Lincoln a Dictator?

Although President Bush's war on terrorism has raised questions about the boundaries of a president's legal authority in wartime, his actions fairly pale in comparison to those of Abraham Lincoln. The 16th president's forceful use of executive powers during the Civil War prompted charges that he had turned the presidency into a military dictatorship.

Lincoln unilaterally suspended the writ of *habeas corpus*, blockaded the nation's southern coast and added 40,000 enlisted men to the Army and Navy after Confederates bombarded Fort Sumter in April 1861. He believed that in times of crisis he had constitutional authority as commander-in-chief to prosecute the war without having to first seek congressional approval. Indeed, in calling for military enlistments beyond existing limits, Lincoln conceded he was overstepping statutory authority.¹

Lincoln's actions were particularly notable because as a Whig member of Congress he had criticized President James K. Polk's aggressive leadership during the Mexican War, arguing that the Constitution gave "war-making power" to Congress.

Lincoln knew he was playing with a weak hand politically after only winning about 40 percent of the popular vote during the fragmented 1860 election. However, he believed that the extraordinary circumstances of the Civil War justified re-thinking the rules. By the time he was inaugurated in March 1861, six Southern states had seceded. Lincoln judged the action treasonous and vowed to enforce federal laws in all of the states, as the Constitution enjoined him to do.

He served early notice that he would use his executive powers forcefully. For instance, after issuing his first executive orders, he deliberately postponed a special session of Congress until July 4, even though the session had been called for in April. When Congress arrived, Lincoln submitted his early actions to the legislative branch for approval, and lawmakers rat-

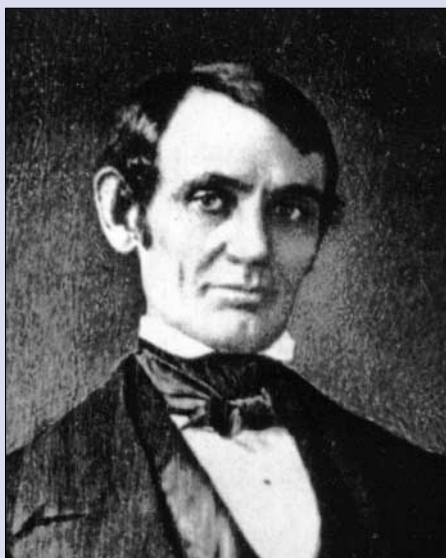
ified them. In effect, Lincoln expected the legislative branch to rubber stamp his policies, but he respected the Constitution enough to submit his agenda to Congress for approval.

Some of Lincoln's most controversial moves involved prosecutorial powers. By suspending *habeas corpus*, he allowed citizens to be arrested without warrants and without authorities having to offer proof to a court. In September 1862, he began authorizing more power for military authorities — again without consulting the legislative branch — by declaring all draft resisters and suspected Confederate sympathizers subject to martial law and liable to be tried by military tribunals.

Congress put up some resistance, challenging the suspension of *habeas corpus* in an 1863 law that ordered the release of prisoners unless they were first indicted in civil courts. However, the legislature never succeeded in shifting the venue from military courts to civilian courts. The courts also refused to weaken the expanded prosecutorial powers while the war was on. It was not until after the war, in 1866, that the Supreme Court ruled, in *Ex Parte Milligan*, that Lincoln had violated constitutional guarantees of a fair trial, and that military courts could only be used if civil courts had been closed by the rebellion.

Scholars view Lincoln's tenure as extraordinary, because while he stretched the boundaries of the Constitution, he was, at times, scrupulous about maintaining some balance of power. He issued the "Emancipation Proclamation" in January 1863, then showed deference to the legislative branch by pushing it through Congress, arguing that freeing slaves in existing states was beyond the legislative branch's enumerated powers.

Lincoln based the proclamation on his war powers, arguing it was necessary in order to suppress rebellion. Congress ratified the 13th Amendment in 1865.



Library of Congress

The earliest known photo of Lincoln is believed to show him after he won his first seat in Congress, in 1846.

¹ For background, see Michael Newman, ed., *Congressional Quarterly's Guide to the Presidency* (1989), pp. 80-84.

Continued from p. 954

on an issue-by-issue basis and blocking him from assembling permanent working majorities in either the House or Senate. Myriad interest groups further complicated the president's task by weighing in on nation-

al debates and exerting strong pressure on various votes.¹⁷

Bush spent the first few months of his administration following a pattern set by his immediate predecessors — identifying fundamental problems and broaching solutions, while

leaving the details of how they would be enacted to the legislative branch. But in contrast to Clinton, a perpetual campaigner who weighed in on a wide range of issues, Bush focused only on a small subset of priorities, such as education reform and tax cuts.

As leader of the first unified Republican government in half a century (with the GOP in control of the House and an evenly divided Senate that only later swung to Democratic control), Bush did not have to pander to each Republican constituency. Only occasionally did he seek to reassure core supporters by nominating reliable conservatives, such as Ashcroft.

“His style of governing and his claim to fame was to focus on a few big things and get them done,” says Texas A&M political scientist Edwards. “It would be difficult to conclude they were taking an expansive view.”

But after the terrorist attacks exposed a new and grave national security threat, Bush changed course, using an almost corporate “top-down” management style that envisioned minimal consultation with Congress. For example, he did not apprise members when he established a “shadow government” in secret locations along the East Coast to ensure that the executive branch could continue functioning in the event of a nuclear attack. Some saw his moves to establish broad institutional authority in national security and international affairs as an attempt to re-establish “the imperial presidency” that prevailed during World War II and the Cold War, according to historian Arthur Schlesinger Jr.¹⁸

Jackson’s Model

Presidents always have had considerable elbowroom to define their jobs, in part because of the vagueness of the Constitution. While Congress’ roles and responsibilities were clearly spelled out in Article I, opinions differed on whether the chief executive was a supreme leader or just an important part of a bigger plan built around the separation of powers. Adding to the ambiguity is the

fact that the president is elected from much broader electoral coalitions than representatives and senators, who have narrow constituencies in districts and states and, thus, cannot represent the nation as a whole.¹⁹

The murky questions have left the balance of power between the branches in constant flux. Thomas Jefferson, elected president by the House of Representatives after a tie vote in 1801, regarded Congress, not the public, as his primary constituency, though he still held considerable sway as head of the new majority Democratic-Republican Party.

The concept of a strong chief executive was first affirmed two decades later by Andrew Jackson, who built the first modern political-party organization and installed a spoils system that inserted allies into key government jobs, triggering huge power struggles. The party system allowed Jackson to appeal directly to the public, thereby circumventing the elected representatives, when it suited him.

Abraham Lincoln built on Jackson’s model by using political patronage to help pass a constitutional amendment abolishing slavery (he cut deals with a handful of House members to allow Nevada to enter the union and provide the deciding votes). As the Civil War split the nation, Lincoln asserted that the president was entitled to assume “war power” and did not need specific constitutional authority to act at home or on foreign soil. (*See sidebar, p. 956.*)

In the early 20th century, Theodore Roosevelt again adopted this model, after a change in public thinking following the Spanish-American War led the once-isolationist U.S. government to pursue more foreign policy objectives. Woodrow Wilson refined and modernized the approach, becoming the first president to propose and draft legislation, hold regular news conferences, lobby Congress and actively as-

sess public opinion. Though Congress granted Wilson expanded war powers during World War I, he failed to convince lawmakers of the need to join the League of Nations after the conflict ended.

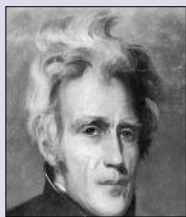
It was Franklin D. Roosevelt who most reshaped the concept of presidential power to fit modern times. Elected as a rattled nation tried to come to grips with the Great Depression, Roosevelt won huge victories as Congress ceded authority in fiscal policy, banking, housing and agriculture. He also gained unprecedented emergency authority to dispense economic relief and, later, to plan military actions in World War II.

Roosevelt’s tenure created the expectation that the president should be a chief legislative leader. Dwight D. Eisenhower was able to centralize power in the White House after Congress created the Council of Economic Advisers and a National Security Council in the late 1940s. Congress continued to defer as the president grew more involved in global affairs. The Marshall Plan to rebuild Europe, the Bretton Woods agreement on an international gold standard and sending troops to Korea were all executive-branch initiatives.

In October 1962, John F. Kennedy similarly was ready to act on his own during the Cuban missile crisis, asserting that he had full authority as commander-in-chief to take military action against the island nation. Congress — worried that unilateral action would not reflect the collective judgment of the government and could threaten national prestige — passed a Cuba Resolution that did not authorize presidential action but did express sentiments in favor of keeping Cuba’s regime in check. When Kennedy acted that month to block the delivery of weapons to Cuba, he based his action on his constitutional authorities “as endorsed by the resolution of the Congress.”

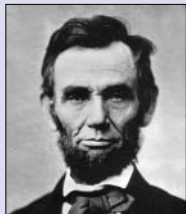
Building Presidential Power

The Constitution clearly spells out Congress' roles and responsibilities but is less explicit about the role of the president. Consequently, chief executives always have had considerable elbowroom to define their jobs. Presidents who played key roles in shaping the power of the office include:



National Archives

Andrew Jackson (1829-37) — set the precedent for the concept of a strong chief executive. Jackson built the first modern political-party organization and installed a spoils system that inserted allies into key government jobs, triggering huge power struggles. The party system allowed Jackson to circumvent the elected representatives and appeal directly to the public.



Library of Congress

Abraham Lincoln (1861-65) — built on Jackson's model by using political patronage to help pass a constitutional amendment abolishing slavery (he cut deals with a handful of House members to allow Nevada to enter the union and provide the deciding votes). When the Civil War split the nation, Lincoln asserted that the president was entitled to assume "war power" and did not need specific constitutional authority to act.



Library of Congress

Woodrow Wilson (1913-21) — followed President Theodore Roosevelt's model and pursued more foreign-policy objectives. Wilson became the first president to propose and draft legislation, hold regular news conferences, lobby Congress and actively assess public opinion. Though Congress granted him expanded war powers during World War I, he failed to convince lawmakers to join the League of Nations.



FDR Library

Franklin D. Roosevelt (1933-45) — almost single-handedly reshaped the concept of presidential power to fit modern times. Amid the Great Depression, Congress ceded authority to FDR in fiscal policy, banking, housing and agriculture, plus unprecedented emergency power to dispense economic relief and later to plan military actions in World War II.



Library of Congress

Harry S. Truman (1945-53) — pushed through executive-branch initiatives such as the Marshall Plan to rebuild Europe, the Bretton Woods agreement on an international gold standard and sending troops to Korea. In one of the rare instances where a court ruled against presidential power, the Supreme Court in 1952 held that Truman had no legitimate power to nationalize steel mills during the Korean War.



JFK Library

John F. Kennedy (1961-63) — prepared to act on his own during the 1962 Cuban missile crisis. Worried lawmakers passed a resolution that did not authorize presidential action but supported keeping Cuba's regime in check. When Kennedy blocked the delivery of weapons to Cuba, he based his action on his constitutional authorities "as endorsed by the resolution of the Congress."

Congress Pushes Back

But the run of unchallenged White House power ended during President Johnson's administration. Despite giving Johnson de facto power to fight a war in Vietnam through the 1964 Gulf of Tonkin Resolution, Congress — particularly Senate Foreign Relations Committee Chairman J. William Fulbright, D-Ark. — refused to accept the president's decision to send troops to the Dominican Republic to suppress a revolt. Fulbright later broke with precedent and held televised hearings into the legitimacy of military action in Vietnam.

Congress continued to assert itself during Richard M. Nixon's terms, first by reviewing U.S. overseas commitments and agreements. Nixon responded by refusing to release congressionally approved funds for programs he thought were wasteful or unnecessary. Congress struck back by passing legislation restricting presidential autonomy — most notably the 1973 War Powers Resolution — forcing the chief executive to obtain congressional blessing for extended military engagements. Congress also passed the 1974 Budget Act, which gave the legislative branch its own economic forecasts and deficit estimates, which sometimes challenge the conclusions of the White House Office of Management and Budget.

Congress finally exercised its most dramatic check on the president when it began impeachment proceedings against Nixon in connection with the burglary of the offices of the Democratic National Committee in the Watergate Hotel complex and the ensuing cover-up by the administration. The House Judiciary Committee recommended Nixon be impeached. But he resigned before a full session of the House could vote on the issue.

Similarly, dramatic institutional tensions existed during Reagan's terms,

when congressional Democrats seized on a sputtering economy to fight the president's efforts to spend more on defense without raising taxes. Congress also used investigations and inquiries to assert its power and undercut the chief executive during the Iran-Contra scandal, which greatly diminished Reagan's public standing and effectively ended his conservative revolution.

Increased partisanship and an assertive Congress frustrated the administration of the first President George Bush and, in many instances, Clinton, who fought a Republican majority in Congress by using the appropriations process and the power of the veto. Scandals surrounding Clinton's personal behavior also led the House to impeach Clinton, though he was acquitted in the subsequent Senate trial.²⁰

Some historians and commentators see the current President Bush as trying to rekindle the spirit of President Jackson by battling Congress over war powers, advocating aggressive use of U.S. power and trying to redefine the judicial notions of the rights of the accused. Bush, like Jackson, also advocates an America-first foreign policy, which rejects internationalist solutions to dilemmas like global warming and anti-ballistic-missile buildups. Bush believes global accords to address such problems do not necessarily serve U.S. interests, even though he may support their principal objectives. He has called for new approaches that better serve U.S. needs.²¹

But such an approach can pose perils. If Bush does not build a popular response for his policies and cannot stop terrorism and other threats at the U.S. borders, some fear a backlash that could give rise to nativist fears and discrimination.

"We are at the zenith of our power and influence," former Clinton administration national security adviser Samuel Berger told Cox Newspapers. However, he said most of the dire global threats — from terrorism to the AIDS pandemic — are very dif-

ficult to confront alone. "We live in a world in which we can often get a lot more done by cooperating than acting alone."²²

"If Bush fails to contain terror and shape a popular response, you get something much tougher to deal with," said Walter Russell Mead, a historian at the Council on Foreign Relations. "I don't think the political alternative is moderation."²³ ■

CURRENT SITUATION

Homeland Security

As the 2002 midterm elections approached, Congress had yet to clear a major piece of unfinished Bush-agenda business: creation of a domestic security agency. The job of organizing nearly two-dozen federal agencies responsible for counterterrorism into a new Cabinet-level department at first seemed timely and non-controversial. In fact, many in Congress predicted they would complete the authorizing legislation by the symbolic first anniversary of the Sept. 11 attacks.

Yet the administration's insistence on having more authority over the department than it has over most other federal agencies turned the reorganization into an unexpectedly bitter partisan battle with Senate Democrats, for whom organized labor is a core constituency. Lawmakers abandoned the effort in mid-October, after a standoff over procedural rules, and agreed to resume debate in a less-partisan environment after the elections.

The controversy stemmed from the administration's insistence that Congress authorize it to develop a new personnel system for the department

that, among other things, would allow managers to fire unionized employees or transfer some workers out of collective bargaining units on national security grounds. The administration explained it did not want individuals in important security positions walking off the job in labor disputes. The administration added that it needed more flexibility than the civil service system now provides in order to recruit the most qualified job candidates and to quickly shift department resources to meet changing terrorist threats.

But Democrats and their labor allies charged that the request amounted to a backdoor attempt to gut labor protections. Their suspicions were rooted partially in an administration decision in January 2002 to remove some 500 Justice Department workers engaged in terrorism investigations from collective bargaining units on similar national security grounds.²⁴

"The unions have the votes and can influence the outcome," says Sen. George V. Voinovich, R-Ohio, the Senate's resident expert on civil service, who is friendly with organized labor. "There has to be some reconciliation."

The administration and unions have clashed in the past over workplace rules. After Sept. 11, the White House and Congress heatedly debated legislation that established the Transportation Security Administration. The White House wanted the freedom to hire federal employees to staff airport security checkpoints or to continue contracting for private personnel. Pro-labor forces prevailed, however, arguing that the checkpoints should be run only by federal workers. The transportation security agency was to become part of the new homeland security department, and policymakers on both sides of the debate seemed to anticipate that unions would try to organize approximately 3,000 federal screeners due to be at their posts by this November.

The administration is adamant that anything short of full authority to make

work rules would diminish powers presidents have enjoyed since the height of the Cold War, when then-President Kennedy in 1962 ordered personnel flexibilities on national security grounds. Senate Democrats want language that would add conditions and force the president to justify shifting employees.

The dispute took up some of the most arcane aspects of the federal work force. Administration officials complained about restrictive union rules that, for example, would protect a hypothetical intoxicated Border Patrol agent who allows a potential terrorist to enter the country from being fired without a 30-day written notice, during which time he would continue being paid. The administration also argued that work rules could prevent the new department from quickly deploying teams of workers to respond to biological or chemical attacks. At the heart of the issue, however, was the perception that Congress was trying to micromanage the executive branch.

Election Politics

It was unclear how quickly any compromise would emerge in the aftermath of the stunning 2002 midterm elections. Resounding GOP victories

that will give the Republicans control of the Senate were largely due to Bush's active campaigning on national security matters. Nowhere was this more evident than in the Georgia Senate race, in which Republican Rep. Saxby Chambliss defeated incumbent Democrat Sen. Max Cleland, a Vietnam War hero who lost both legs and an arm in that conflict. Chambliss characterized Cleland's votes against Bush's reorganization plan and the work rules as evidence that Cleland was soft on national security matters.



National Guard soldiers patrol San Francisco's Golden Gate Bridge on Sept. 11, 2002. The administration says the unusual nature of the terrorist threat justifies its aggressive stance, arguing it needs maximum flexibility to confront a dangerous enemy.

AFP Photo/John G. Mabanglo

The election results gave the White House a chance to prevail on homeland security legislation during a "lame duck" post-election session of the 107th Congress. Former Republican Rep. James Talent's victory over incumbent Democratic Sen. Jean Carnahan of Missouri in a special election allowed Talent to be certified the victor and be seated immediately, before the start of the 108th Congress. The death of Democratic Sen. Paul Wellstone of Minnesota days before the election also prompted Independent Gov. Jesse Ventura to appoint fellow Independent Dean Barkley as an interim senator.

However, it was unclear whether Senate leaders would seek to do more than pass a long-term continuing resolution to ensure that the government keeps running until early 2003.

At a Nov. 7 press conference, President Bush strongly urged the

Senate to pass a homeland security bill before the 107th Congress adjourns.

On Nov. 10, Senate Republican leader Trent Lott of Mississippi told NBC's "Meet the Press" that he hoped to get a homeland security bill passed within days after the Senate reconvened on Nov. 12, following its election hiatus. But Lott did not explain exactly how that could be achieved, since, technically, control of the Senate would not shift to the GOP for another two weeks, when Talent is to be sworn in.²⁵

Continued on p. 962

At Issue:

Did the president act responsibly in seeking authority to pre-emptively strike Iraq?

SEN. PAT ROBERTS, R-KAN.

RANKING MEMBER, ARMED SERVICES SUBCOMMITTEE ON EMERGING THREATS AND CAPABILITIES

FROM A SPEECH TO THE SENATE, OCT. 9, 2002

the United Nations has completely and unequivocally failed to disarm Iraq consistent with its own resolutions. . . . Saddam Hussein has demonstrated ad nauseam over the last 10 years that he will never permit the removal or destruction of his weapons of mass destruction, [which] are the very source of his authority. . . . He has [been] willing to use [such] weapons against his own countrymen and against other nations. And he rules by fear. So, . . . he [will never] disarm — ever.

Any notion that the United States itself is off-limits to a massive attack by groups cooperating with or supported by Baghdad should now be gone. It is [a] sanctuary for further terrorist attacks against our homeland. . . .

While “hard evidence” of an Iraqi role in the attacks of 9/11 may be hard to prove . . . I do not think we can afford to be naive. Particularly in the Middle East, terror groups and states work together when and where their interests are common. And their intent is the destruction of the United States, the murder of our citizens and the elimination of our influence, real and perceived. . . . If Iraq and other regimes are left unchallenged, it is only a matter of time before they transfer the capability for weapons of mass destruction to a terrorist cell that will use that capability against the United States.

The criminal-justice model of gathering evidence and presenting a case does not apply here. By the time you have evidence, it is too late. We will not lose buildings and thousands of people when that happens. We will lose whole cities and hundreds of thousands of people.

In light of the events of Sept. 11, 2001, this body has more reason to support action against Iraq than it had in the winter of 1991. . . . because preventing weapons of mass destruction from being acquired by terrorist cells should be the No. 1 policy priority of this government. This means neutralizing regimes that possess or seek such weapons and are predisposed to harboring, assisting [and] sympathizing with the bin Ladens of the world.

American survival must be assured. It is a first priority. It is our highest agenda. . . . We must be pre-emptive. . . . Yes, pre-emptive, that new doctrine that is causing a rethink of our foreign policy, our military strategy, our politics, our foreign relations. It is a brand new world. It is an asymmetrical world. This has nothing to do with partisan rivalry. This is about our future, both immediate and long term. This is the state of affairs we leave our children and our grandchildren.

SEN. ROBERT C. BYRD, D-W.VA.

MEMBER, ARMED SERVICES SUBCOMMITTEE ON EMERGING THREATS AND CAPABILITIES

FROM A SPEECH TO THE SENATE, OCT. 3, 2002

we are rushing into war without fully discussing why, without thoroughly considering the consequences or without making any attempt to explore what steps we might take to avert conflict.

The newly bellicose mood that permeates this White House . . . is clearly motivated by campaign politics. Republicans are already running attack ads against Democrats on Iraq. . . . Before risking the lives of American troops, all members of Congress — Democrats and Republicans alike — must overcome the siren song of political polls and focus strictly on the merits, not the politics, of this most serious issue.

The resolution is . . . a product of presidential hubris. . . . [It] reinterprets the Constitution to suit the will of the executive branch. It would give the president blanket authority to launch a unilateral, pre-emptive attack on a sovereign nation that is perceived to be a threat. This is an unprecedented and unfounded interpretation of the president’s authority under the Constitution, [which] stands the charter of the United Nations on its head.

Article I, Section 8, of the Constitution grants Congress the power to declare war and to call forth the militia “to . . . repel invasions.” Nowhere is it written that the president has the authority to call forth the militia to pre-empt a perceived threat. . . .

Think for a moment of the precedent this resolution will set, not just for this president, but for future presidents. . . . Other nations will be able to hold up the United States as the model to justify their military adventures. Do you not think that India and Pakistan, China and Taiwan, Russia and Georgia are closely watching the outcome of this debate?

A war against Iraq will affect thousands, if not tens of thousands of lives, and perhaps alter the course of history [and] affect the balance of power in the Middle East. It is not a decision to be taken in haste, under the glare of election-year politics and the pressure of artificial deadlines. And yet any observer can see that that is exactly what the Senate is proposing to do.

Let us be convinced that a reinvigorated inspection regime cannot work before we move to any next step, and let us, if we must employ force, employ the most precise and limited use of force necessary to get the job done. Let us guard against the perils of haste, lest the Senate fall prey to the dangers of taking action that is both blind and improvident.

Continued from p. 960

In the 108th Congress, Republicans will have at least a 51-seat Senate majority, pending the outcome of a runoff in Louisiana. They also will continue to have control of the House, having added at least four additional seats to its majority there. But because legislation cannot carry over into a new Congress, a new homeland security reorganization bill — if it doesn't clear Congress this fall — will have to be reintroduced and make its way through both chambers, giving both parties a chance to reprise this year's debate.

Some believe the White House did not really want to compromise before the elections, preferring to charge that Democrats were endangering national security by pandering to political allies. Others contend the White House may have unwisely used the homeland security bill as a vehicle for broader civil service reforms.

"There's no doubt this is all about politics," says Ivo Daalder, senior fellow at the Brookings Institution. "If there is another terrorist attack, a lot of people are going to blame the Senate and the White House for dicker-ing for months over how to reorganize instead of figuring out what a [counterterrorism] strategy should be."

Should the personnel issue be settled, Congress would likely resolve remaining differences over such matters as intelligence-sharing and contractor insurance and pass authorizing legislation creating the third-largest Cabinet department. The new homeland security department would contain 22 federal agencies, including the Federal Emergency Management Agency, Coast Guard, Secret Service, Immigration and Naturalization Service and Border Patrol. It would not include either the FBI or CIA, which the administration and Congress decided should remain independent. The new department would have a fiscal 2003 budget of \$37.5 billion and a workforce of 170,000 employees, not including the new airport screeners.

But even if the department is created, Congress and the White House will have to agree on funding levels for new counterterrorism initiatives. Increased spending on borders, infrastructure protection and "first responders" was to be dealt with in fiscal 2003 appropriations bills. But partisan friction in Congress prevented the House and Senate from completing action on most of those bills before the elections, freezing funding at 2002 levels. Observers estimate that further skirmishes will prevent the new department from being up and running before late 2003, at best.

"They're trying to balance everything these agencies already do with the new mission of homeland security, and they have to deal with all of the politics. It's an awesome task," says Donald Kettl, professor of public affairs and political science at the University of Wisconsin-Madison.

Other Bush Moves

While the homeland security debate simmers, the administration continues to assert executive branch prerogatives. In a series of recent statements issued when the president signs new legislation into law, Bush has advised Congress that he regards some mandated new requirements as "advisory," meaning they can be overridden by intrinsic executive branch authority.

The Federation of American Scientists' Aftergood says requirements that the administration disclose information to Congress or the public, in particular, are typically deflected by language stating the administration is construing the requirement "in a matter consistent with the constitutional authorities of the president to supervise the unitary executive branch." The boilerplate language also states the president can withhold information when disclosure may impair foreign relations, national security and the president's ability to do his job.

The administration has also been flexing its muscle outside of national security matters — particularly in the environmental-regulation arena. Since taking office, President Bush has used his executive power to reverse an array of regulations and longstanding environmental-protection laws, usually by issuing "guidance" on regulatory matters, often without oversight and with little public notice.²⁶

Conservationists say such actions jeopardize progress made in restoring environmental health since the 1970s, when bedrock environmental-protection laws were passed. They also contend that the president's policies favor oil producers, loggers, electric utilities and other industrial sectors that have long chafed at environmental regulations.

Administration officials say many of the old rules harm the environment and the economy. For instance, some rules delay removal of flammable deadwood from forests, triggering devastating forest fires in the West last summer. Others bar such activities as logging and oil and gas production and snowmobile use on certain public lands.

Critics say the administration is purposely using the "guidance" mechanism to avoid exposure to public scrutiny or debate. "Rulemaking requires a public process, while guidance can happen with almost no public process," says Gregory Wetstone, director of programs at the Natural Resources Defense Council (NRDC), an environmental advocacy group in New York City. "We've seen big changes in forest policy and policy on snowmobiles in national parks that weren't even [advertised as] rule-makings." Wetstone points to more than 100 separate actions by six federal agencies and the White House taken outside the regular rulemaking process.

This year, for example, the administration lifted a ban on new oil and gas drilling in the Rocky Mountains, changed tough air-conditioner efficiency

standards and formally designated Nevada's Yucca Mountain as a nuclear-waste repository. In June, Bush announced a plan that critics say would weaken enforcement of Clean Air Act pollution limits. In August, the administration opposed a sweeping proposal by the World Summit on Sustainable Development to increase the use of renewable energy.

In addition to rewriting regulations, Bush has made other controversial environmental decisions. Within weeks of taking office, he reversed a campaign pledge to push for limits on industrial emissions of carbon dioxide and other "greenhouse gases," which most scientists believe are causing a potentially catastrophic warming of Earth's atmosphere.²⁷ Bush also renounced the Kyoto Protocol, an international treaty calling for mandatory carbon emission reductions designed to slow global warming.

Environmentalists say Bush's approach constitutes an unprecedented assault on the nation's commitment to protect the environment. "The Bush administration has the worst record of any presidential administration ever," Wetstone says. "I don't think we've ever seen a more sweeping or potent assault on our bedrock environmental laws."

Conservatives, on the other hand, extol Bush's policies as innovative alternatives to bureaucratic red tape. "The Bush administration wants to emphasize the next generation of environmental policy," says Steven F. Hayward, a resident scholar at the American Enterprise Institute (AEI), a conservative think tank. That policy will produce "less of the old-style, command-and-control regulation" from Washington, he explains, and more use of markets, incentives and regulatory flexibility to enable companies "to get around some of the rigidities in the way we've implemented environmental laws for the last 30 years." ■

OUTLOOK

Anti-terror 'Proxy'

Because the war on terrorism is open-ended and comprises so many aspects of domestic and foreign policy, many observers question whether the Bush administration will use it as a proxy for its entire agenda. The administration could cite national security to justify increasing police powers, changing labor laws, building highways and bridges, reforming immigration policies or advocating public-health initiatives like vaccinating the population against smallpox. For that reason, analysts believe Congress and the executive branch must develop a comprehensive strategy delineating options and priorities, committing the executive branch to a blueprint.

"Nowhere in the discussion about homeland security has there been anything indicating how the first additional dollar is to be spent," says Brookings' Daalder. "They have spent all this time talking about how to reorganize the government, but homeland security is about more than just being in the same department or wearing the same uniform."

Foreign policy experts believe the administration similarly may use the broad war on terrorism to justify continuing a policy of pre-emption that includes nation-building. While few object to overthrowing a despot like Hussein, they question whether the American public will tolerate a protracted

military involvement that could cost hundreds or thousands of lives.

"I don't sense any appetite in the American body politic for this kind of large imperial role," says Harvard University political scientist Stephen Walt, who is skeptical about the United States' ability to reconstruct countries. "In Iraq, we're going to go in there and not be able to get out."

Realists like Walt believe there are limits to America's economic and military might, and that it may be more prudent to play traditional enemies against each other to serve America's interests. However, such sentiments conflict with so-called neoconservatives within the administration, who — encouraged by the rapid U.S. victory in Afghanistan — believe the president should flex his muscle in foreign affairs.²⁸

Regardless of which paths the administration chooses, it must continue to deal with congressional oversight of its agenda and regularly consult with the legislative branch. With Republicans in control of both houses of Congress, Bush will lead a unified government and be able to push a more ambitious agenda. He likely will seek maximum flexibility in dealing with public labor unions and take other steps, such as indemnifying corporations that make anti-terrorism equipment — like bomb-detection systems — from lawsuits.

"The American people have indicated that they want the Congress, the House, the Senate and the president to work together to get things done," Lott said after the elections. "People do want security here at home. They didn't understand why we couldn't come to an

About the Author

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agreement on creating a new homeland security department. They have confidence in this president's leadership in fighting the war on terror and taking on Al Qaeda. And they do want Congress to support and work with our president as the commander-in-chief."

However, Democrats caution the election results in no way constitute a mandate and already are putting the administration on notice that they will vigorously challenge its policies. For instance, they could use Senate rules to put "holds" on controversial nominees or filibuster legislation they deem questionable. And experts believe they may pick up Republican allies if the administration interprets its victory too broadly and is perceived as stepping on congressional toes.

"Right after Sept. 11 there was a kind of patriotic silence that stood for, 'Tell us what to do, sir,' " says Stephen Flynn, senior fellow for national security studies at the Council on Foreign Relations. "Now, there's a pendulum swing, and the Congress could be well-positioned to say, 'Yeah, but . . .'" ■

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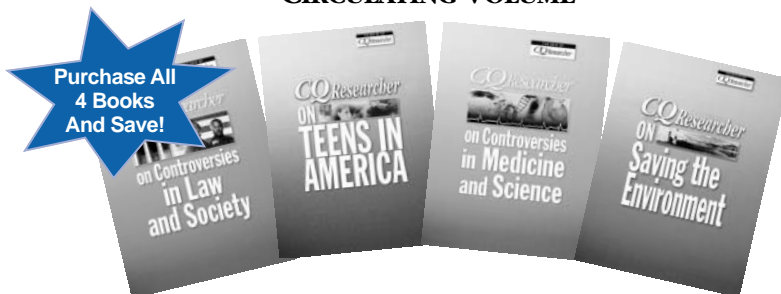
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