

# Separate But Equal – the Clash Between the President and Congress Over the Power to Wage War

**Appellate Practice Committee**

## **I. A Video Introduction**

The Events Leading Up to the Clash

America's Views on Executive and Congressional Power to Wage War

## **II. Program Hypothetical – Setting the Stage for the Clash**

In late February 2008, insurgents in Iraq launch a major attack on the Green Zone in Baghdad. Penetrating the outer defenses, they destroy the U.S. Military Headquarters, killing the U.S. Ambassador, wounding General Petraeus and inflicting heavy casualties across the city. Five Shia members of the Iraqi Cabinet are killed and the Prime Minister is severely wounded. Some insurgents take cover in a U.S. military hospital in the Green Zone as fighting rages. When these insurgents are finally overrun, a number of soldiers, who had been patients, along with several American doctors and nurses are found beheaded. Pictures of the burning Green Zone flood the cable news channels

Within twenty-four hours, legislation is introduced in Congress to cut off all funding for U.S. military operations in Iraq. The bill that finally passes prohibits, beginning sixty (60) days after enactment, expenditures in Iraq of any funds by the Department of Defense, or any other agency of the U.S. government, for any purpose except transportation of personnel back to the United States. The bill also requires removal of all U.S. military and civilian personnel from Iraq within ninety (90) days and prohibits transfer of any new military personnel or equipment to Iraq. The President promptly vetoes the bill, declaring that it is an unconstitutional interference with his authority as Commander-in-Chief and threatens the lives and safety of U.S. military personnel. The veto is overridden, by a single vote in the U.S. Senate, and the bill, the Iraq Redeployment, Usage and Normalization Act, becomes law.

During the two weeks between introduction of the bill and its becoming law, General Petraeus, who lost an arm in the attack but remained on duty, has rallied U.S. troops in Baghdad and driven the insurgents out of most of Baghdad, including the neighborhoods near the Green Zone. General Petraeus makes a personal plea to the President for additional troops to finish clearing the city and hold it while the new Iraqi government, to be headed by the brother of one of the slain cabinet members, reasserts control. Without these additional troops, the General informs the President he cannot accomplish his mission – including the safe removal of United States forces demanded by Congress. The General asks for two brigades, one that had withdrawn to Kuwait just before the attacks to be rotated home and another which had been previously scheduled to arrive from Fort Hood, Texas the following month. The President goes on television to announce that as Commander-in-Chief, he will not leave soldiers in the field without support and orders the two brigades to Baghdad immediately. To transport the troops from Texas, The President invokes a provision in post-9/11

legislation providing government bailout for airlines that required the airlines to make available civilian planes for use in any military emergency as determined by the President.

A National Guard private assigned to the Fort Hood brigade brings suit challenging his orders to Iraq. At the same time American and Delta Airlines, facing loss of revenue from not having sufficient planes during the coming Spring Break period -- and concerned that under the new IRUN Act they will not be paid by the government -- also file suit. The two actions are consolidated and the plaintiffs are joined by the Majority Leader of the Senate and the Speaker of the House of Representatives, the original sponsors of the legislation. The district court grants an injunction against both transfer of the private and use of any airplanes. On expedited appeal, the Fifth Circuit Court of Appeals, over a spirited dissent, affirms, upholding the constitutionality of the IRUN Act. On the basis of an emergency petition from the Solicitor General, the U.S. Supreme Court grants certiorari and schedules argument the following week.

### **III. Oral Argument**

Distinguished Supreme Court advocates present oral argument to the Court on the Constitutionality of the IRUN Act.

#### The Clash Between the Branches Addressed

“The whole powers of war [are], by the Constitution of the United States, vested in Congress . . . .” *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (Marshall, C.J.).

The purpose of the Commander and Chief clause was to “vest in the President the supreme command over all the military forces – such supreme and undivided command as would be necessary to the prosecution of a successful war.” *United States v. Sweeney*, 157 U.S. 281 (1895).

#### Effective Advocacy Techniques Demonstrated

“I should like to leave with you, particularly those of you who are among the younger barristers, the thought that your oral argument on an appeal is perhaps the most effective weapon you have got if you will give it the time and attention it deserves. Oral argument is exciting and will return rich dividends if it is done well. And I think it will be a sorry day for the American bar if the place of the oral argument in our appellate courts is depreciated and oral advocacy becomes looked upon as a pro forma exercise which, because of tradition or because of the insistence of his client, a lawyer has to go through.” Justice John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 *Cornell L.Q.* 6, 11 (1955).

#### **IV. Panel Discussion and Audience Participation**

Our advocates and judges (to the extent possible) will discuss their views and opinions on the clash between the President and Congress on the power to wage war, what made the arguments effective and maybe not so effective, and the present status of the conflict between the branches. Participation in the form of questions and comments from the audience will be encouraged.

#### **V. Supplemental Written Materials**

The following materials frame the issue to be argued and discussed:

October 2002 - Joint Resolution to Authorize the Use of the United States Armed Forces Against Iraq - The White House – President George W. Bush

January 17, 2007 - Correspondence to Congressional Leaders from Bruce Ackerman Sterling Professor of Law and Political Science Yale University and Mark Barenberg Columbia University School of Law supporting and promoting Congress's role in overseeing the Iraq war conflict.

January 30, 2007 - Notice of Full Committee Hearing - Exercising Congress's Constitutional Power to End a War – Senate Judiciary Committee

January 28, 2007 – Testimony of David J. Barron, Professor of Law, Harvard Law School – A Hearing on Exercising Congress's Constitutional Power to End a War – Statement based on historical examples and legal pronouncements in support of the exercise by Congress of power over the Iraq war as legitimate and Constitutional.

January 30, 2007 – Testimony of Bradford Berenson, Sidley Austin, LLP – former Associate Counsel to the President - before the United States Senate Committee on the Judiciary – A Hearing on Exercising Congress's Constitutional Power to End a War – Statement based on experience and legal precedent identifying Constitutional uncertainty that may accompany Congressional action to limit the President's war time power.

July 11, 2007 – CRS Report for Congress – Congressional Authority to Limit U.S. Military Operations in Iraq, Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola, Legislative Attorneys, American Law Division. Survey of history, precedent and commentary to conclude that under the Constitutional allocation of powers, Congress has the prerogative of placing conditions on the use of appropriations to regulate or end the deployment of United States troops in Iraq.

January 30, 2007 – Exercising Congress's Constitutional Power to End a War (Without in the Process Breaking the Law), prepared statement of Professor Robert F. Turner, S.J.D., Center for National Security Law, University of Virginia School of Law, before the United States Senate Committee on the Judiciary. Statement asserting Congressional action to use appropriations to usurp the President's wartime power is unconstitutional.