2009 DRAFTING REQUEST

Bill

Received: **12/22/2008**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Spencer Black (608) 266-7521**

By/Representing:

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Military Affairs - nat'l guard**

Extra Copies:

Submit via email: **YES**

Requester's email: **Rep.Black@legis.wisconsin.gov**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

National guard Iraq authorization

Instructions:

Require governor to determine if the Irag authorization for national guard is still applicable, and if not, take appropriate action, including any legal action necessary to keep the guard in WI

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?							
/P1	rnelson2 12/23/2008	kfollett 01/20/2009	mduchek 01/21/2009	_____ _____	cduerst 01/21/2009		
/1	rnelson2 01/26/2009	kfollett 01/29/2009	jfrantze 01/30/2009	_____ _____	sbasford 01/30/2009	cduerst 03/05/2009	

FE Sent For: None

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	rnelson2	1P1 6f 1/20	MD	MD JF 1/21			

FE Sent For:

<END>

Nelson, Robert P.

From: Rep.Black
Sent: Monday, December 22, 2008 11:34 AM
To: Nelson, Robert P.
Subject: Guard memo

Attachments: Guard Memo 12 18 2008.doc

Hi Bob

Good to talk with you

Attached is the memo re: the Guard Bill

Spence

Guard Memo 12 18 2008.doc (92 ...

12/22 Spencer Black 6-7521

Nat'l Guard -- deployment of guard ~~not~~ not authorized in IRAQ - Has expired now

- If troops are federalized, gov. (or appropriate person) to look at whether there is authorized to do so. If not legal, do what is necessary to keep them from going.

? Special counsel - 14.11 (2)

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

By Benson Scotch[1]

I. Introduction

This note examines the legal implications of legislation introduced in Vermont in 2008[2] and similar bills and resolutions introduced or proposed in other states declaring that Congress' 2002 authorization for the war has expired and no longer supports the federalization of state National Guard units for service in Iraq.

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

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[1]Benson Scotch is a member of the Vermont Bar and worked with Vermont Rep. Michael Fisher on the crafting of legislation that was introduced in the Vermont House in January 2008 and, along with similar bills introduced or proposed in at least a dozen other states, is the subject of this note. In 2005 Mr. Scotch worked with Joseph Gainza of the American Friends Service Committee and other groups to promote Town Meeting Day Resolutions in more than 50 Vermont towns and cities calling for the end of the Iraq War.

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

the Iraq War.) The author of this Note has helped with the drafting of a few—but far from all—of the bills introduced or proposed in these states. It is not the present goal to compare and critique the various iterations of these bills, but rather to focus on a prototype as a model that raises the principal legal issues shared in common by all of them. That prototype will be, fittingly if somewhat arbitrarily, the resolution (SJR 55) introduced in the New Jersey Senate by Sen. Loretta Weinberg, which is a later and in our view improved model of Vermont's initial legislation. One improvement: The New Jersey resolution clarifies that governors do not have the power to call Guard members back from Iraq once they are federalized and deployed—a point considered ambiguous in Vermont's H.746.[3] *Though SJR 55 is our discussion model, we do not suggest that it has primacy over any other bill or resolution, and we will hereafter refer to the bills/resolutions collectively as "the National Guard Legislation."*

II. Governing Concept for the National Guard Legislation

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

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

> SEC. 3. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
> (a) AUTHORIZATION.—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—
>
> (1) defend the national security of the United States against the continuing threat posed by Iraq; and
>
> (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

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

Why?

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

Second, other than the power of the purse, Congress has no practical power to enforce its conditions. The federal courts have generally rejected attempts to enforce congressional mandates with respect to wars, even where a member of Congress asks the courts to enforce such a mandate.4 And legislative attempts to set a timetable for the end of the war in funding legislation are subject to a presidential veto and an elusive veto override that must achieve a two-thirds majority in both houses of Congress. Congress could in theory withhold funding for the war altogether, but that alternative has never been seriously considered by Congress.

Paradoxically perhaps, the states, which do not share *direct* war powers with the Congress and the President under the Constitution, may question the federal call-up of their National Guards, not on the basis of location, purpose, type, or schedule of such duty,[5] but because a particular order is no longer valid and enforceable. And under federal law, except in certain emergencies, without an authorization from Congress, units of a state National Guard may not be called into service in the National Guard of the United States. Section 18 of the National Defense Act Amendments of 1933 makes clear that only when *Congress* acts, can Guard units be mobilized:

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[4] See Schlesinger v. Holtzman, 414 U.S. 1316 (1973).

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

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

Thus, even if the President can, continue a war that is no longer supported by congressional authority, and even if it is unlikely that a court would order the President to order the defederalization of units already federalized and deployed in Iraq,[6] if the President, under the same circumstances, orders *additional* Guard units from the states, the language of the 1933 Act presents a credible obstacle–a question that the courts have not considered or decided.

Despite the force and clarity of the 1933 Act and the 2002 AUMF, a common question put to proponents of the Guard legislation is, "What is the authority of a state legislature to challenge a federalization order on the basis that the federal government is not following federal law? That question in turn often leads to the further question, "If the bill becomes law, will it survive a court challenge?" These further questions are the focus of this Note: How should we evaluate a bill in an area of the law infrequently visited by the courts?

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

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

Under the 1973 War Powers Act,[7] Congress authorizes the use of military force, even though the President as commander-in-chief controls the day-to-day decisions in the war zone. Since Congress deliberately established limited goals for military force in the 2002 AUMF, it is at least arguable that the fulfillment of those goals should bring the use of force to an end. Again, for reasons that the nonpartisan Congressional Research Service (CRS) has explained in a report to Congress,[8] Congress has little practical power to end a war that it has authorized, even when the authorization is conditional or has expired. That lack of practical power in Congress is not rooted in the language of the AUMF. It is hard to argue that the stated purposes of the AUMF are unclear. And its implications are central to the National Guard legislation, which relies not on Congress or the courts, but on those powers of state governments over their National Guards remaining after more than a century of whittling away by Congress. At the end of the day, under the Supremacy Clause of the Constitution governors must follow federal mandates, which

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[7] P.L. 93-148. For a comprehensive but compact summary of the WPA, see http://en.wikipedia.org/wiki/War_Powers_Act

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

enjoy a presumption of validity. But pursuant to their oaths to uphold the law, governors also have the duty to read and examine orders federalizing their National Guards and to determine whether a call-up based on the 2002 AUMF is a lawful and valid order as of 2008.

Proponents of the National Guard legislation contend that the 2002 AUMF has expired based on a facial reading of its text. They argue that either the Congress must explicitly extend the mandate of the AUMF or the entire enterprise of the Iraq War or the President should bring it to a close in a prompt, secure, and reasonable manner. The states lack the power to do that, but they should exercise the power to permit the federalization of their National Guards only when presented with a lawful order to do so, based on a law that is valid and effective on the date the federal order arrives on the governor's desk.

II. The National Guard Legislation in Operation.

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

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

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

Section 1 *requests* the defederalization of units of the State National Guard and their return to the home state as members of the National Guard of that state. The new administration in Washington will surely announce its own policies and plans vis a vis Iraq, as President-Elect Obama indicated often during the campaign. It seems likely that U.S. Armed Forces will remain in that country for the immediate future.

We believe that retaining Section 1 is important while Guard members are present in Iraq, for reasons of consistency and equity. The states do not have the power to defederalize the Guard once called into federal service, but it would be inconsistent—and curious—for the states to zealously defend their powers over state Guard members not yet federalized, based on an expired AUMF, and not even use their moral suasion to ask the President—any President—to look critically at the 2002 AUMF and do the same thing.

In his plans to draw down forces from Iraq President Obama may not wish to distinguish between Guard forces and other military units, nor is speculation about his policy priorities productive in our analysis. Section 1 emphasizes that "Follow the Law" is the core idea in this campaign—a concept that the new President, a legal scholar as well as the commander-in-chief,

should welcome. In no event should he see this provision as hostile. He opposed the war and should have no quarrel with a campaign based on at least holding the erring Congress to its words. As Maryland's Guard Home Campaign recently blogged: "The newly elected administration does not change the need for this legislation. There has never been a more important time than now to emphasize the rule of law as a moral and practical predicate to the use of military force"

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

It is not the purpose of this memorandum to predict the course of events after a state declines to follow a federalization order based on an AUMF that has expired, particularly since a President who opposed the war will be in office. The possibilities under the Bush administration, excluding the remote chance that he would agree with the logic of the campaign and bring all U.S. forces home, were that the federal government would (1) do nothing, (2) seek to enforce its order in federal court, (3) seek to curtail or eliminate federal financial support for the National Guard of the non-complying state, or (4) ignore the state's action and attempt to order federalization of the unit of the state National Guard in question directly. The arrival of President

Obama noted, these remain the federal options, and for purposes of our analysis we must consider the National Guard legislation in their context.

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

That said, whether the forum is an administrative agency or a federal court, on the question of continued federal funding for the National Guard or a court in which the federal government seeks to enforce a mobilization order and has the burden of proceeding first—sometimes called the burden of production[9]—it is the safest course to assume that the state would have the burden of showing that it has acted reasonably in refusing to comply with a federalization order and that the President and the Department of Defense or Department of the Army lack the legal authority to issue a National Guard mobilization order based on the 2002 AUMF.

Given the absence of judicial precedent in a case in which the state asserts the invalidity of the federal requisition order, it

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

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

III. The Major Opposition Arguments

We referred earlier to the "widely held spoken and unspoken assumptions about the diminished powers of the states over their National Guards," and it is with these assumptions in mind that we will address the probable criticisms of the bill especially closely.

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

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

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

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

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

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

Let us consider each:

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

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

to report to Congress any introduction of forces into hostilities or imminent hostilities, Section 4(a)(1); into foreign territory while equipped for combat, Section 4(a)(2); or in numbers which substantially enlarge U.S. forces equipped for combat already in a foreign nation, Section 4(a)(3). Once a report is submitted "or required to be submitted" under Section 4(a)(1), Congress must authorize the use of forces within 60 to 90 days or the forces must be withdrawn.[10]

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

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

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

denominated an AUMF, as made clear in Congressional Research Service Report "War Powers Resolution: Presidential Compliance,"11. *And See, Kinkoph, Neil, "The Congress as Surge Protector,"* American Constitution Society for Law and Policy (2007).12

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

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

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[11] http://www.fas.org/sgp/crs/natsec/RL33532.pdf

[12] www.acslaw.org/pdf/Kinkopf-Surge.pdf

under President Clinton stated in testimony to the Senate Judiciary Committee on January 30, 2007:

> I believe that the president has extensive inherent powers to protect and defend the United States. . . .Once Congress has acted, however, the issue is fundamentally different. The question then becomes whether the Act of Congress is itself unconstitutional.
>
> What is a valid exercise of congressional control over war making? Presidential administrations have generally acknowledged that Congress may by legislation determine the objective for which military force may be used, define the geographic scope of the military conflict and determine whether to end the authorization to use military force. Consider, for example, the position taken by the late Chief Justice William Rehnquist while serving as Assistant Attorney General in 1970. Assistant Attorney General Rehnquist opined as follows:

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

> It is too plain ... to admit of denial that the Executive, under his power as Commander-in-Chief, is authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior Congressional approval. However, if the contours of the divided war power contemplated by the framers of the Constitution are to remain, constitutional practice must include Executive resort to Congress in order to obtain its sanction for the conduct of hostilities which reach a certain

> scale. Constitutional practice also indicates, however, that Congressional sanction need not be in the form of declaration of war.
>
> A declaration of war by Congress is in effect a mandate to the Executive to conduct military operations to bring about subjugation of the nation against whom war has been declared. The idea that while Congress may do this, it may not delegate a lesser amount of authority to conduct military operations, as was done in the instances referred to above, is both utterly illogical and unsupported by precedent.

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

But if the theory of the Guard legislation is sound and Congress should be a constitutional check on the President's war powers, the reality does not follow the theory. As is clear from the conflict between Congress and the President over setting a timetable for withdrawal, once the Congress writes an AUMF, even one with conditions, it is difficult to rein in a President who

decides to continue the war despite and in the face of those conditions. Proponents of the Guard legislation believe that when the President functionally ignores conditions set by Congress to the use of military force–even as he states that he is acting "consistently" with the War Powers Act of 1973–he is venturing beyond the limits of his powers. In the words of Justice Jackson in a notable concurring opinion in the *Steel Seizure Cases*, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 637, 638 (1953):

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

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

Comment [Comment1]: BM 1724652736Capitalize?

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

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

(a) The first thread is simply that the fact that Congress has paid for further war-fighting means *ipso facto* that everything Congress did or said in enabling the war continues. No look at the language of the AUMF is required. Nor is it necessary to look at congressional intent in refunding the war, or at the legislative history of the AUMF, or at the refunding resolutions. Finally, it follows under this thread that it that comparing this AUMF to any prior legislation authorizing war is utterly unnecessary. We call this approach the reverse Pottery Barn rule. "If you fix it, you own it."

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

(b) The second thread is the estoppel principle, "Don't ask us to fix it, Congress, when you have the power to fix it but won't. At most we, the judicial branch, only get into political questions when all else fails."[13]

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

A more vernacular argument in support of the National Guard legislation might run like this: "Congress has failed to stop what it authorized in 2002, even though its stated purposes have been achieved or are no longer apply. The only authorization to call up state Guard troops came in 2002, and for wars of choice,

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[13] This argument is based on a theory known as *estoppel*–a legal principle in the law of equity that prevents a party from asserting otherwise valid legal rights against another party because conduct by the first party makes it unjust for those rights to be asserted. In short, "You could have fixed it–don't ask us to do it."

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

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

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

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

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

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

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

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

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

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

Comment [Comment2]: BM 1724652727This

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

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

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

Comment [Comment3]: BMNeeds more. Referemce to Hussein.

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

> SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
>
> (a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those *nations, organizations, or persons* he determines planned, authorized, committed, or aided the terrorist attacks that

occurred on September 11, 2001, or harbored such *organizations or persons*, in order to prevent any future acts of international terrorism against the United States by such *nations*, organizations or persons. (Emphasis supplied.)

Opponents will surely argue that Iraq is now awash in terrorists and terrorist groups such as Al Qaeda in Iraq and that these groups present a threat to the United States. But if the mission has changed, the President should go back to Congress and ask for an expanded AUMF. Again, there will be arguments that addition funding for the war amounts to an expansion of the narrow purposes set forth in the 2002 AUMF.

But it is more likely that President Bush, like his predecessors, is leery of embracing the WPR too closely and prefers to assert his powers as commander-in-chief. But if so, and in the absence of a direct and palpable threat to the United States, the argument that Congress' declaration of a national emergency as provided for in Section 18 of the National Defense Act Amendments of 1933 is a condition precedent to the mobilization of the Guard is strong.

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

Comment [Comment4]: BM 1724652738Transition needed. 1-2 sentences.

* * *

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

The CRS reports assume, without citing any legislative history, that "relevant United Nations Security Council

Resolutions" means existing or future resolutions. We assert the counter-argument that endorsing future UN resolutions would be unworkable, unthinkable, and unconstitutional delegation of legislative power, since such future resolutions would not be constrained by the language of the AUMF (unlike, for example, federal agency regulations that must conform to authorizing statutes).

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

The only resolution[14] that would appear to even come close to a "relevant" resolution under United Nations Security Council Resolution 1723.[15] But not even Secretary of State Condoleeza Rice's letter to the Security Council and annexed to Resolution 1723 hints at the notion that Iraq is a threat to the United States.

A counter-argument would surely be heard that if U.S. Forces were to leave, Iraq would descend into chaos. But even if this thesis were taken as a fact, no one suggests that Iraq would

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[14] A convenient resource for UN Security Council Resolutions on Iraq is found at

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

Resolutions_concerning_Iraq

[15]

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

become the species of threat that it was claimed to be in 2002—armed to the teeth with WMD. It would become the same kind of threat that any unstable country in this region is or might become, and that would include Afghanistan and Pakistan and in a longer perspective possibly Iran and Saudi Arabia.

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

In any event, the President could have requested and Congress could have adopted additional AUMF language including new goals for the use of military force and making the National Guard legislation moot if it chose to do so. It did not, and your author would be taking scant risk to speculate that the new President and the new Congress will not do so either.

IV. The Inevitable Subtext

Much as we may like to dwell on legal analysis, much of the debate about this bill will be a debate about patriotism and terrorism. It is hard to say how supporters of the bill should respond, other than to repeat that this is not about the decision to go to war or how the war has been conducted.

Congress and the President continue to struggle over who should have what powers to go to war and to make peace. The least the states can do is to insist that federal law be followed.

Comment [Comment5]: BMI think this is too defensive. It is not the current environment. It reflects 2002, not 2009. 2009 is an environment in which people will say it is a debate about peace and the mandate of the 2008 election to withdraw from Iraq. If anyone tries to say that this is about patriotism, they will be marginalized, in the current moment. They might say it is a debate between "popular opinion" and "going against the crowd mentality to get the job done." That is more like the moment. That is what the other side will say. I think.

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

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

AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST IRAQ RESOLUTION OF 2002

Public Law 107–243
107th Congress

Joint Resolution

Oct. 16, 2002
[H.J. Res. 114]

To authorize the use of United States Armed Forces against Iraq.

Whereas in 1990 in response to Iraq's war of aggression against and illegal occupation of Kuwait, the United States forged a coalition of nations to liberate Kuwait and its people in order to defend the national security of the United States and enforce United Nations Security Council resolutions relating to Iraq;

Whereas after the liberation of Kuwait in 1991, Iraq entered into a United Nations sponsored cease-fire agreement pursuant to which Iraq unequivocally agreed, among other things, to eliminate its nuclear, biological, and chemical weapons programs and the means to deliver and develop them, and to end its support for international terrorism;

Whereas the efforts of international weapons inspectors, United States intelligence agencies, and Iraqi defectors led to the discovery that Iraq had large stockpiles of chemical weapons and a large scale biological weapons program, and that Iraq had an advanced nuclear weapons development program that was much closer to producing a nuclear weapon than intelligence reporting had previously indicated;

Whereas Iraq, in direct and flagrant violation of the cease-fire, attempted to thwart the efforts of weapons inspectors to identify and destroy Iraq's weapons of mass destruction stockpiles and development capabilities, which finally resulted in the withdrawal of inspectors from Iraq on October 31, 1998;

Whereas in Public Law 105–235 (August 14, 1998), Congress concluded that Iraq's continuing weapons of mass destruction programs threatened vital United States interests and international peace and security, declared Iraq to be in "material and unacceptable breach of its international obligations" and urged the President "to take appropriate action, in accordance with the Constitution and relevant laws of the United States, to bring Iraq into compliance with its international obligations";

Whereas Iraq both poses a continuing threat to the national security of the United States and international peace and security in the Persian Gulf region and remains in material and unacceptable breach of its international obligations by, among other things, continuing to possess and develop a significant chemical and biological weapons capability, actively seeking a nuclear weapons capability, and supporting and harboring terrorist organizations;

Whereas Iraq persists in violating resolution of the United Nations Security Council by continuing to engage in brutal repression of its civilian population thereby threatening international peace

and security in the region, by refusing to release, repatriate, or account for non-Iraqi citizens wrongfully detained by Iraq, including an American serviceman, and by failing to return property wrongfully seized by Iraq from Kuwait;

Whereas the current Iraqi regime has demonstrated its capability and willingness to use weapons of mass destruction against other nations and its own people;

Whereas the current Iraqi regime has demonstrated its continuing hostility toward, and willingness to attack, the United States, including by attempting in 1993 to assassinate former President Bush and by firing on many thousands of occasions on United States and Coalition Armed Forces engaged in enforcing the resolutions of the United Nations Security Council;

Whereas members of al Qaida, an organization bearing responsibility for attacks on the United States, its citizens, and interests, including the attacks that occurred on September 11, 2001, are known to be in Iraq;

Whereas Iraq continues to aid and harbor other international terrorist organizations, including organizations that threaten the lives and safety of United States citizens;

Whereas the attacks on the United States of September 11, 2001, underscored the gravity of the threat posed by the acquisition of weapons of mass destruction by international terrorist organizations;

Whereas Iraq's demonstrated capability and willingness to use weapons of mass destruction, the risk that the current Iraqi regime will either employ those weapons to launch a surprise attack against the United States or its Armed Forces or provide them to international terrorists who would do so, and the extreme magnitude of harm that would result to the United States and its citizens from such an attack, combine to justify action by the United States to defend itself;

Whereas United Nations Security Council Resolution 678 (1990) authorizes the use of all necessary means to enforce United Nations Security Council Resolution 660 (1990) and subsequent relevant resolutions and to compel Iraq to cease certain activities that threaten international peace and security, including the development of weapons of mass destruction and refusal or obstruction of United Nations weapons inspections in violation of United Nations Security Council Resolution 687 (1991), repression of its civilian population in violation of United Nations Security Council Resolution 688 (1991), and threatening its neighbors or United Nations operations in Iraq in violation of United Nations Security Council Resolution 949 (1994);

Whereas in the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102–1), Congress has authorized the President "to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolution 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677";

Whereas in December 1991, Congress expressed its sense that it "supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 687 as being consistent with the Authorization of Use of Military Force Against

Iraq Resolution (Public Law 102–1)," that Iraq's repression of its civilian population violates United Nations Security Council Resolution 688 and "constitutes a continuing threat to the peace, security, and stability of the Persian Gulf region," and that Congress, "supports the use of all necessary means to achieve the goals of United Nations Security Council Resolution 688";

Whereas the Iraq Liberation Act of 1998 (Public Law 105–338) expressed the sense of Congress that it should be the policy of the United States to support efforts to remove from power the current Iraqi regime and promote the emergence of a democratic government to replace that regime;

Whereas on September 12, 2002, President Bush committed the United States to "work with the United Nations Security Council to meet our common challenge" posed by Iraq and to "work for the necessary resolutions," while also making clear that "the Security Council resolutions will be enforced, and the just demands of peace and security will be met, or action will be unavoidable";

Whereas the United States is determined to prosecute the war on terrorism and Iraq's ongoing support for international terrorist groups combined with its development of weapons of mass destruction in direct violation of its obligations under the 1991 cease-fire and other United Nations Security Council resolutions make clear that it is in the national security interests of the United States and in furtherance of the war on terrorism that all relevant United Nations Security Council resolutions be enforced, including through the use of force if necessary;

Whereas Congress has taken steps to pursue vigorously the war on terrorism through the provision of authorities and funding requested by the President to take the necessary actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President and Congress are determined to continue to take all appropriate actions against international terrorists and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such persons or organizations;

Whereas the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States, as Congress recognized in the joint resolution on Authorization for Use of Military Force (Public Law 107–40); and

Whereas it is in the national security interests of the United States to restore international peace and security to the Persian Gulf region: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

Authorization for Use of Military Force Against Iraq Resolution of 2002.
50 USC 1541 note.

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force Against Iraq Resolution of 2002".

SEC. 2. SUPPORT FOR UNITED STATES DIPLOMATIC EFFORTS.

The Congress of the United States supports the efforts by the President to—

(1) strictly enforce through the United Nations Security Council all relevant Security Council resolutions regarding Iraq and encourages him in those efforts; and

(2) obtain prompt and decisive action by the Security Council to ensure that Iraq abandons its strategy of delay, evasion and noncompliance and promptly and strictly complies with all relevant Security Council resolutions regarding Iraq.

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

(a) AUTHORIZATION.—The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—

(1) defend the national security of the United States against the continuing threat posed by Iraq; and

(2) enforce all relevant United Nations Security Council resolutions regarding Iraq.

(b) PRESIDENTIAL DETERMINATION.—In connection with the exercise of the authority granted in subsection (a) to use force the President shall, prior to such exercise or as soon thereafter as may be feasible, but no later than 48 hours after exercising such authority, make available to the Speaker of the House of Representatives and the President pro tempore of the Senate his determination that—

(1) reliance by the United States on further diplomatic or other peaceful means alone either (A) will not adequately protect the national security of the United States against the continuing threat posed by Iraq or (B) is not likely to lead to enforcement of all relevant United Nations Security Council resolutions regarding Iraq; and

(2) acting pursuant to this joint resolution is consistent with the United States and other countries continuing to take the necessary actions against international terrorist and terrorist organizations, including those nations, organizations, or persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001.

(c) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this joint resolution supersedes any requirement of the War Powers Resolution.

SEC. 4. REPORTS TO CONGRESS.

(a) REPORTS.—The President shall, at least once every 60 days, submit to the Congress a report on matters relevant to this joint resolution, including actions taken pursuant to the exercise of authority granted in section 3 and the status of planning for efforts that are expected to be required after such actions are completed, including those actions described in section 7 of the Iraq Liberation Act of 1998 (Public Law 105–338). President.

(b) SINGLE CONSOLIDATED REPORT.—To the extent that the submission of any report described in subsection (a) coincides with the submission of any other report on matters relevant to this joint resolution otherwise required to be submitted to Congress pursuant to the reporting requirements of the War Powers Resolution (Public Law 93–148), all such reports may be submitted as a single consolidated report to the Congress.

(c) RULE OF CONSTRUCTION.—To the extent that the information required by section 3 of the Authorization for Use of Military Force Against Iraq Resolution (Public Law 102–1) is included in the report required by this section, such report shall be considered as meeting the requirements of section 3 of such resolution.

Approved October 16, 2002.

LEGISLATIVE HISTORY—H.J. Res. 114 (S.J. Res. 45) (S.J. Res. 46):

HOUSE REPORTS: No. 107–721 (Comm. on International Relations).
CONGRESSIONAL RECORD, Vol. 148 (2002):
Oct. 8, 9, considered in House.
Oct. 10, considered and passed House and Senate.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 38 (2002):
Oct. 16, Presidential remarks and statement.

○

State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1256/P1
RPN:

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

AN ACT ...; **relating to:** the governor's duty to review national guard federalization orders.

Analysis by the Legislative Reference Bureau

This is a preliminary draft. An analysis will be provided in a later version.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 321.02 (3) of the statutes is created to read:

321.02 **(3)** The governor shall examine every order that places the national guard on federal active duty, including national guard members ordered into federal active duty for deployment to Iraq or Afghanistan after the effective date of this subsection [LRB inserts date], to determine whether the order is lawful and valid. If the governor determines that the order is not lawful or valid, he or she shall take appropriate action to prevent the national guard from being placed on federal active

duty. Appropriate action may include commencing a legal action in state or federal court to prevent the national guard from being placed on federal active duty. The governor shall submit a report to the standing committees of the legislature with specified subject matter jurisdiction over military affairs, as provided under s. 13.172 (3), that summarizing his or her review of every order that places the national guard on federal active duty and any action he or she took in response to that review, within 30 days after his or her review is completed.

(END)

D-Note

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1256/P1dn
RPN:

Date

Please review this draft carefully to ensure that it is consistent with your intent.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.wisconsin.gov

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1256/P1dn
RPN:kjf:md

January 21, 2009

Please review this draft carefully to ensure that it is consistent with your intent.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.wisconsin.gov

State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1256/P1
RPN:kjf:md

PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

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(END)

D-Note

insert anl:

This bill requires the governor to examine every federal order that places the Wisconsin national guard on federal active duty to determine if that order is lawful and valid. If the governor determines that the federal order is not lawful or valid, the bill requires the governor to take appropriate action, which may include commencing legal action in state or federal court, to prevent the Wisconsin national guard from being placed on federal active duty.

The bill also requires the governor to submit to the appropriate standing committees of the legislature a summary of the governor's review of every federal order that places the Wisconsin national guard on federal active duty and any action he of she takes in response to that review.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1256/1dn
RPN:kjf:md

Date

Rep. Black,

I notice when redrafting this bill that there are no time limits on the requirement that the governor examine the federal orders and take action. Is that OK? Even if time limits were added, I do not know what could be done if the governor disregarded the time limits.

Robert P. Nelson
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DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1256/1dn
RPN:kjf:jf

January 30, 2009

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Duerst, Christina

From: Zimmerman, Terri
Sent: Thursday, March 05, 2009 1:55 PM
To: LRB.Legal
Subject: Draft Review: LRB 09-1256/1 Topic: National guard Iraq authorization

Please Jacket LRB 09-1256/1 for the ASSEMBLY.