

## THE TENSION BETWEEN LAW AND POLICY IN IRAQ WAR

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### Abstrak:

Pertarungan antara kepentingan hukum dan politik dalam perang melawan terror sangat kompleks dan ambigu. Dalam perang Irak tarik menarik kepentingan antara Resolusi PBB dan kepentingan politik sangat menarik untuk dicermati. Pada kajian ini pertarungan kepentingan antara penggunaan kekuasaan militer dan konstitusi, Resolusi PBB, U.N. Charter dan War Power Act of 1973 menjadi sangat kentara dalam perang Irak.

**Key words:** *Tension, Law, Policy, Iraq War*

The relation between law and policy in the war on terror is very complicated because of ambiguities in the U.S. Constitution, and the complex relationship between the Constitution and treaties to which the U.S. is a party. This essay will discuss the tension between the authorization of military use and the Constitution, U.N. Resolution, and U.N. Charter, and War Power Act of 1973.

After 9/11, the United States, Europe, and other major countries had various views fostering changes about their foreign policies. Some contrasting and common policies appeared among countries and potentially affect their national security strategies in future decades (Elworthy and Rogers, 2001). The notorious change happened to the U.S. government in 2002 as mentioned by George Bush, the former President of the U.S. when giving an address at West Point:

The gravest danger to freedom lies at the perilous crossroads of radicalism and technology. When the spread of chemical and biological and nuclear weapons, along with ballistic missile technology when that occurs, even weak states and small groups could attain a catastrophic power to strike great nations. Our enemies have declared this very intention, and have been caught seeking these terrible weapons. They want the capability to blackmail us, or to harm us, or to harm our friends and we will oppose them with all our power (Bush, 2002 p. 2)

The speech, then, the so-called Bush Doctrine, shaped the changing of the U.S. policy toward international peace and war of terror. In short, this set of guidelines shifted U.S. policies from backing and deterrence to an open advocacy of anticipatory military (Jarrat, 2006).

In general, this doctrine aimed to fight and defeat terrorism, to build relations with other major worlds, and to endorse open international communities of freedom, democracy, and free trade. Related to the war on terror, the Bush Doctrine also explicitly mentions two core component strategies: 1) prevention through international diplomacy, law enforcement, military power, and economical control, and 2) preemption, as its substantial strategy, that allows preemptive attacks to any potential countries, states, organizations, groups, or persons suspected to be involved with or support terrorism. Nonetheless, spotlighting anticipatory action, the doctrine still remains the defense plan against terror by improving cooperation with alliances. It was officially taken as a formal policy in the National Security Strategy (NSS) document on September 17, 2002.

Invading Iraq during the Bush administration was a controversial debate about whether it was Constitutional or not. In his graduation speech at West Point, Bush promised to protect the American people and their interests after the New York and Pentagon attacks by using military force. The rationalization for this is laid in Article II, Section 2 that states: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states when called into the actual service of the United States". Nevertheless, the Commander-in-Chief - Clause was considered a misinterpretation (Adler, 2006) in light of Article 1, Section 8 that reads: "The Congress shall have power... to declare war, grant letters of marquee and reprisal." This War Clause gives Congress the privilege to state war, not the president or executives, on behalf of American

people. Historically, this clause was provided by the Framers to avoid the tyrant, king, or president to march their people to war without reason. Nonetheless, Bush is not the first one to do this. As mentioned by Adler (2006) Bush's forerunners such as Harry Truman, Lyndon Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H. W. Bush, and Bill Clinton (Fisher 2004, 81-236; Weekly Compilation of Presidential Documents 2003, 39-348) also administered the executive privilege on war that violated the Constitution (see also Article 1, Section 8 par. 1, 11, 12, 13, 14 for more details about the Congressional privilege to war).

Furthermore, the preemptive policy also violates the War Power Act of 1973. The law explicitly says that "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only

pursuant to ... a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

Not only breaking the national laws, Bush military policy to declare war also betrayed the U.N. Charter as it is stated in its The table shows that both Congressional authorizations for using military force deviate from the U.N. Charter. The preamble states that using armed forces is not allowed, in order to protect every nation's interests. This is derived from the purpose of the U.N. as set forth in the first paragraph of the preamble. The Resolution is also consistent with the preamble, which strongly encouraged Iraq to open his territory for U.N. officers to investigate whether Iraq owned massive destruction weapons. In other words, the resolution does not imply the use of any military forces in Iraq, but rather it promotes disarmament policy. Therefore, the invasion of Iraq explicitly betrayed the international law (O'Connell, 2002).

The Iraq war was unconstitutional as its

**Table 1**  
**Document Text Comparison Relates to Iraq War**

UN Charter Preamble: "...to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest..."	UN Resolution 1441 "...to afford Iraq, by this resolution, a final opportunity to comply with its disarmament under relevant resolutions of the Council with and accordingly decides to set up an enhanced disarmament process established by resolution 687 (1991) and subsequent resolutions of the Council"	US Constitution Article 1, Section 8 that "The Congress shall have power... to declare war, grant letters of marque and reprisal."	The War Power Act of 1973 "The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to ... a national emergency created by attack upon the United States, its territories or possessions, or its armed forces"	2001 Congressional authorizations for use of military force 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	2002 Congressional authorizations for use of military force "...The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to... defend the national security of the United States against the continuing threat posed by Iraq..."
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documentary bases are uncommitted to the Constitution and the War Power Act of 1973. Article 1 section 8 of the Constitution states that only Congress has power to declare war. In fact, Bush as president did so based on a misinterpretation of the Commander-in-Chief clause. Bush policy also contradicted the War Power Act of 1973, which only allows use of army force under certain circumstances, "...a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." The unconstitutional war, therefore, was challenged by the House of Democrats, three anonymous U.S. soldiers, and fifteen parents of U.S. soldiers (American Society of International Law, 2003), for exceeding military limits and wrecking the national treasury (Gordon, 2006). However, the Bush administration justified its continued war efforts in Iraq, Saddam's country, based on the country's "criminal record" (Barnathan-Press, 2004) and as part of the pre-emptive strategies implementation (O'Connell, 2002)

Based on the previous analysis of Bush Doctrine, the Constitution, U.N. Charter and Resolution 1441, and the War Power Act of 1973, the tension between policy and law in the war on terror caused three consequences: a failure in democracy, emerging instability within the system, and potential negative affects on the other sectors. The Democratic system holds that law reigns supreme but the interpretation of laws can be biased among the people who enforce it. For example, Bush circumvented the anti-war laws by unilaterally escalating war to terrorism, claiming that Iraq was a hotbed for extremists developing massive destruction weapons. In fact, there has not been enough proof that those weapons exist yet. The failure of synchronizing law and policy also manifests internal instability by causing tension between legislatives and the executive. Although the Constitution strictly mentions that declaring war is Congress's power, the commander-in-chief clause also grants the President power to declare war in order to protect the country. The checks and balances system inherent in the Constitution allows any parties involved in policy making to have multi-interpretations of every clause and paragraph in it.

Another consequence is that this situation will potentially affect other sectors. For instance, the war on terror in Iraq influenced

the economic situation since the government exceeded its available funds by contracting out food and other services to private companies. Tatom estimates the amount was around \$ 140 billion (Dunn, 2003). This sort of situation endorses negative externality because not every taxpayer wants their money to be allocated to war in other countries without certain constitutional reason. Therefore, to minimize the tension between law and policy, it is strongly recommended that law is separated from politics.

Conclusively, the Iraq war run by the Bush administration was considered unconstitutional since there are many discrepancies between its governing documents: the U.S. Constitution, U.N. Charter, Resolution 1441 and the War Power Act of 1973. The disharmony between law and policy caused the democratic failure and the emergence of negative externalities in other sectors. To prevent this situation it is urgently necessary to separate law and politics.

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Preamble, "...to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest..." Consecutively, the war of Iraq was uncommitted to Chapter I, Article 1 par 1, Article 2 par 3 and 4, and Chapter VII Article 43. Bush's declaration of war betrayed the

UN Resolution 1441 which required disarmament and an examination of the massive destruction weapons existence in Iraq. These law violations that caused world wars contrast to what the U.S. did post-WW II in contributing to "peace enforcement" as supported by U.N. purposes (Stromseth, 1995).

Table 1 below compares the tension among the U.N Charter, U.N Resolution 1441, the U.S. Constitution, The War Power Act of 1973, and the policies to authorize military use within the Bush administration: