

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

Appellate Practice Committee

## **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.