

# Why Rumsfeld's 'Transformation' Bill Is Unconstitutional

by Edward Spannaus

In Lyndon LaRouche's "Rumsfeld's *Notverordnung*" statement issued on May 10, the Democratic Presidential pre-candidate charged that Defense Secretary Donald Rumsfeld's "Defense Transformation for the 21st Century Act," violates the separation of powers provisions of the United States Constitution, and that it would be "a leak in the dike which opens the way for the kinds of dictatorial powers assumed by the Adolf Hitler regime on Feb. 28, 1933, powers from which all the principal crimes of the Hitler regime ensued."

Constitutional questions over the Rumsfeld legislation had been raised about ten days earlier, by members of Congress during May 1 hearings in the House Armed Services Committee.

Rep. Jim Cooper (D-Tenn.), for example, stated that what Rumsfeld wants is a "\$100 billion-plus blank check," to be spent entirely at the Secretary's discretion: "Because there's so much sole, exclusive, and unreviewable discretion here, I worry that we're abrogating our Constitutional responsibilities."

Rep. Gene Taylor (D-Miss.), citing the sweeping changes in acquisition procedures contained in the Defense Transformation bill, told the Undersecretary of Defense for Acquisition: "I have read the Constitution, sir, and it does not call on me to give to the Secretary of Defense my constitutionally mandated duties. And I deeply resent that you're trying to bury this somewhere in a 300-page bill and then give me one week to vote on it."

Citing the fact that Rumsfeld is demanding a rapid passage of the transformation bill, which would gut Congress's constitutional oversight responsibilities, Representative Taylor called this "appalling," and he said bluntly: "There's absolutely no reason for this committee to meet, if his bill passes."

Why this uproar? Isn't this whole business of Congressional oversight just a modern bureaucratic function? And why should Congress get so involved in writing laws and regulations for the military anyway?

Let's ask some experts—such as those who wrote the Constitution.

## Background to the Constitution

The Constitution of the United States places the responsibility for organizing, funding, and regulating the Armed Forces directly in the hands of the Legislative, not the Execu-

tive, branch. Article I, Section 8, Clauses 11-14 give to the Congress the exclusive power to declare war, to raise and support an Army and a Navy, and to make rules for governing and regulating the Armed Forces.

The decision to place the Armed Forces under the control of Congress, was not a matter of extensive debate—in contrast to other issues concerning the plan of the new government—simply because there existed general agreement on this point. The only objection raised, was that it might be too cumbersome to have the power to declare war rest in the entire Congress; Alexander Hamilton's original proposal was to vest the power in the Senate, and there was some support for this.

There was one voice heard (that of Pierce Butler, a wealthy South Carolina planter and slave-owner) proposing to vest the power to declare war, in the President. The notes of the Convention report the response of Elbridge Gerry of Massachusetts to Pierce's suggestion: "Mr. Gerry never expected to hear in a republic a motion to empower the Executive alone to make war."

Even the formal motion to vest the power in the Senate alone, offered by Charles Pickney of South Carolina, was rejected overwhelmingly.

The firm opposition of the Founding Fathers and the Framers of the Constitution to giving war powers, and the power to raise armies, to the Executive, was shaped by their knowledge of the British system, and their experience under British colonial rule, during which the British military was deployed at the whim of the King, to the detriment of the colonists, and sometimes directly against them.

Among the grievances against the King, cited in the 1776 Declaration of Independence, were:

"—He has kept among us, in times of peace, Standing Armies, without the Consent of our legislatures.

"—He has affected to render the Military independent of and superior to the Civil power."

## Not the British Model

The Articles of Confederation, drafted by Benjamin Franklin in 1775, gave the Congress "the sole and exclusive power of determining on peace and war," except under conditions where a state had been attacked. The Congress also established detailed rules of discipline and regulations for the military. The fatal weakness of the government under the

*The relevant elements of the United States Constitution are found in Article I, Section 8, Clauses 1 and 11-14:*

Section 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States . . . ;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces. . . .

Articles of Confederation was the lack of an Executive—the Congress itself exercised executive powers—which caused Washington and Hamilton, among others, to argue the need for a strong Executive.

But, nonetheless, even the most fervent proponents of a strong Executive, never considered putting the power over war and the military in the hands of the Executive, except insofar as the President would be the Commander in Chief in wartime, a function which obviously could not be exercised by Congress.

Both of the original plans submitted to the Constitutional Convention—the Virginia Plan with its strong, single Executive, and the New Jersey Plan with a weaker, plural Executive—vested the power to declare war and raise armies in the Legislature. These powers, and the designation of the President as Commander in Chief, were enumerated in the plan submitted by the Committee on Detail on Aug. 6, 1787, apparently without significant debate.

There were repeated general declarations throughout the Convention that the British system of government could not be the example for the United States. As James Wilson of Pennsylvania put it: “The British Government cannot be our model. . . . Our manners, our laws, the abolition of entails and primogeniture, the whole genius of the people, are opposed to it.”

The provision which is now Clause 14 of Article I, Section 8, giving to the Congress the power to make rules for the governing and the regulation of the Armed Forces, was inserted by the Committee on Style almost word-for-word from the Articles of Confederation, and this was also a matter over which there was no disagreement among the delegates.

The only conclusion admissible from this, is that the Framers of the Constitution were determined that the Armed Forces could not be used by the Executive for imperial pur-

poses, or against the people, but that the military must operate under the authority of, and under rules and regulations set by, Congress. Congress cannot constitutionally delegate this power to the Executive branch, in the person of the President or the Secretary of Defense—no matter what some modern judges might say.

## **The Accountability Clause**

There is yet another Constitutional question posed by the Rumsfeld “Transformation” bill, which was raised recently by the four senior Democrats on the relevant House oversight committees. Their letter details a number of the ways in which Rumsfeld’s proposal would impede Congress’s oversight responsibilities, and reduce accountability on the part of the Pentagon—including eliminating more than 100 reports to Congress now required under law, and “sunsetting” almost all those remaining—reports which are essential for Congress to fulfill its oversight responsibilities.

The Democratic letter points out that the Rumsfeld proposal also violates the provision of Article I, Section 9 of the Constitution, known as the “Accountability Clause,” which reads: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”

The Congressmen state that “it would be a dereliction of Congress’ constitutional responsibilities to adopt these provisions, because they would significantly curtail Congress’ ability to monitor the spending of taxpayer dollars at the Defense Department.”

## **An Imperial Presidency**

There is a pattern here. Since Sept. 11, 2001, acting under the advice of Attorney General John Ashcroft and Defense Secretary Rumsfeld, President Bush and his Administration have violated the separation of powers regarding the Armed Forces in at least two crucial respects.

Most important of these, which is properly regarded as an impeachable offense, was the Administration’s launching of a full-scale invasion of Iraq—a country which had not attacked the United States—without a Congressional Declaration of War. As we have seen, the Constitution is unequivocal, that the power to declare war is vested in the Congress—the present cowardice of that body notwithstanding.

Preceding that, was Bush’s October 2001 Executive Order establishing military tribunals for prisoners captured by the military in Afghanistan or elsewhere; this also violated the military rules and regulations clause of Article I, which has always been taken to include the rules for military tribunals and courts martial.

With this sorry record, it remains to be seen whether the members of the House and Senate themselves can be made to show more regard for the Constitution and its separation of powers, than has the Administration to date.