January 17, 2007

The Honorable Harry Reid
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

The Honorable John Boehner
Minority Leader
United States House of Representatives
Washington, DC 20515

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Arlen Specter
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable John Conyers
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

The Honorable Lamar Smith
Ranking Member, Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Congressional Leaders:

I write to add briefly to the views expressed in the letter of today from constitutional scholars, which I joined, expressing the view that Congress possesses ample power to respond to an executive plan to increase troops in Iraq. Some commentators have cited a legal memorandum I signed as Assistant Attorney General for the Office of Legal Counsel and suggested that it supports the contrary view, that Congress may not effectively legislate counter to the President's plan.

I do not agree that the conclusion of my OLC memorandum means that Congress lacks the power to prevent or limit the enhanced undertaking the President proposes for Iraq. Throughout my tenure as an advisor to the president I consistently acknowledged the authority of Congress to legislate with regard to the scope and duration of military action -- the question that is at issue here.

As I wrote in the 1996 memorandum, Congress cannot use its powers, including its power of the purse, to accomplish unconstitutional ends. I had been asked: May Congress through a condition on spending fundamentally alter the chain of command that the president has
determined as commander-in-chief? The answer I gave, as I would again today if Congress sought to tell President Bush who he must or may not put in the chain of command, was no.

That is not the issue Americans are now debating. Asked the very different question that Congress must now address -- does Congress have the authority to determine the scope and duration of a war? -- I gave the president a consistent answer: yes. 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.

I believe that the president has extensive inherent powers to protect and defend the United States. In the absence of any congressional legislation on point, I would often presume that the president can act on his own authority and pursuant to his own judgment in matters of national security. Once Congress has acted, however, the issue is fundamentally different. The question then becomes whether the Act of Congress is itself unconstitutional.

The scholars' letter sets out in some detail the numerous powers over national defense and the governance of the armed forces that the Constitution confers upon Congress. Congress, acting pursuant to those ample wellsprings of constitutional authority, may set bounds on the president's discretion about the scope and duration of military action. The president, in our constitutional republic, is obligated to adhere to those limits.

Respectfully,

Walter Dellinger

*The writer served as Assistant Attorney General of the United States and head of the Office of Legal Counsel from 1993 to 1996.