

**EXERCISING CONGRESS'S CONSTITUTIONAL
POWER TO END A WAR**

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UNITED STATES SENATE
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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Durbin, Hon. Richard J., a U.S. Senator from the State of Illinois	8
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	1
prepared statement	150
Hatch, Hon. Orrin G., a U.S. Senator from the State of Utah	6
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts, prepared statement	170
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont, prepared statement	186
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	3

WITNESSES

Barron, David J., Professor of Law, Harvard Law School, Cambridge, Massa- chusetts	10
Berenson, Bradford, Partner, Sidley Austin LLP, Washington, D.C.	15
Dellinger, Walter, Douglas B. Maggs Professor of Law, Duke University School of Law, Durham, North Carolina, and Former Acting Solicitor Gen- eral	17
Fisher, Louis, Specialist in Constitutional Law, Law Library, Library of Con- gress, Washington, D.C.	14
Turner, Robert F., Center for National Security Law, University of Virginia School of Law, Charlottesville, Virginia	12

QUESTIONS AND ANSWERS

Responses of David J. Barron to questions submitted by Senators Whitehouse and Kennedy	33
Responses of Bradford Berenson to questions submitted by Senator White- house	41
Responses of Louis Fisher to questions submitted by Senators Whitehouse and Kennedy	43
Responses of Robert F. Turner to questions submitted by Senator White- house	49
Questions submitted by Senators Kennedy and Whitehouse to Walter Dellinger (Note: Responses to questions submitted by Senators were not received as of the time of printing, November 2, 2009)	

SUBMISSIONS FOR THE RECORD

Barron, David J., Professor of Law, Harvard Law School, Cambridge, Massa- chusetts, prepared statement	58
Berenson, Bradford, Partner, Sidley Austin LLP, Washington, D.C.	65
Center for American Progress, Washington, D.C.	80
Congressional Restrictions on U.S. Military Operations, (CRS Report, January 16, 2007), Washington, D.C.	85
Constitution Project, Washington, D.C., report	115
Dellinger, Walter, Douglas B. Maggs Professor of Law, Duke University School of Law, Durham, North Carolina, and Former Acting Solicitor Gen- eral, prepared statement and letter	145
Fisher, Louis, Specialist in Constitutional Law, Law Library, Library of Con- gress, Washington, D.C., prepared statement	153
Grimmett, Richard F., Specialist in National Defense, Washington, D.C., CRS Report (Congressional Use of Funding Cutoffs)	164

IV

	Page
Kmiec, Douglas W., Chair and Professor of Constitutional Law, Pepperdine University School of Law, Malibu, California, letter	178
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania: Attorney General Alberto Gonzales, January 30, 2007, letter	188
Attorney General Alberto Gonzales, January 26, 2007, letter and attachment	189
Turner, Robert F., Center for National Security Law, University of Virginia School of Law, Charlottesville, Virginia	203
Whose War Powers?, Noah Feldman, February 4, 2007, article	266

EXERCISING CONGRESS'S CONSTITUTIONAL POWER TO END A WAR

TUESDAY, JANUARY 30, 2007

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Russell D. Feingold, presiding.

Present: Senators Feingold, Kennedy, Durbin, Cardin, Whitehouse, Specter, Hatch, and Graham.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Good morning. I call the Committee to order. Welcome to this hearing of the Senate Judiciary Committee entitled "Exercising Congress' Constitutional Power to End a War." We are honored to have with us this morning a distinguished panel of legal scholars to share their views on this very important and obviously timely issue.

I really do want to thank Chairman Leahy for allowing me to chair this hearing. Let me start by making a few opening remarks, and I will recognize Senator Specter for an opening statement, and then we will turn to our witnesses.

It is often said in this era of ubiquitous public opinion polls that the only poll that really matters is the one held on election day. On November 7, 2006, we had such a poll, and all across this country the American people expressed their opinion on the war in Iraq in the most significant and meaningful way possible. They voted. And with those votes, they sent a clear message that they disagree with this war and they want our involvement in it to stop.

The President has chosen to ignore that message, so it is up to Congress to act. The Constitution gives Congress the explicit power "to declare War," "to raise and support Armies," "to provide and maintain a Navy," and "to make Rules for the Government and Regulation of the land and naval Forces." In addition, under Article I, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." These are direct quotes from the Constitution of the United States.

Yet to hear some in the administration talk, it is as if these provisions were written in invisible ink. They were not. These powers are a clear and direct statement from the Founders of our Republic that Congress has the authority to declare, to define, and ultimately to end a war. Our Founders wisely kept the power to fund

a war separate from the power to conduct a war. In their brilliant design of our system of Government, Congress got the power of the purse and the President got the power of the sword.

As James Madison wrote, "Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued, or concluded."

The President, in my view, has made the wrong judgment about Iraq time and again—first by taking us into a war on a fraudulent basis, then by keeping our brave troops in Iraq for nearly 4 years, and now by proceeding, despite the opposition of the Congress and the American people, to put 21,500 more American troops into harm's way.

If and when Congress acts on the will of the American people by ending our involvement in the Iraq war, Congress will be performing the role assigned it by the Founding Fathers—that is, defining the nature of our military commitments and acting as a check on a President whose policies are weakening our Nation. There is little doubt that decisive action from the Congress is needed.

Despite the results of the election and 2 months of study and supposed consultation, during which experts and Members of Congress from across the political spectrum argued for a new policy, the President has decided to escalate the war. When asked whether he would persist in this policy despite congressional opposition, he replied, "Frankly, that's not their responsibility."

Last week, Vice President Cheney was asked whether the non-binding resolution passed by the Foreign Relations Committee that will soon be considered by the full Senate would deter the President from escalating the war. He replied, "It's not going to stop us."

In the United States of America, the people are sovereign, not the President, and it is Congress' responsibility to challenge an administration that persists in a war that is misguided and that the country opposes. We cannot simply wring our hands and complain about the administration's policy. We cannot just pass resolutions saying your policy is mistaken. And we cannot stand idly by and tell ourselves that it is the President's job to fix the mess he made. It is also our job to fix the mess, and if we do not do so, I think we are abdicating our responsibilities.

So tomorrow I will introduce legislation that will prohibit the use of funds to continue the deployment of U.S. forces in Iraq 6 months after the enactment of the bill. By prohibiting funds after a specific deadline, Congress can force the President to bring our forces out of Iraq and out of harm's way. The legislation will allow the President adequate time to redeploy our troops safely from Iraq and will make specific exceptions for a limited number of U.S. troops who would remain in Iraq to conduct targeted counterterrorism and training missions and protect U.S. personnel.

It will not hurt our troops in any way. They will continue receiving their equipment, training, and salaries. It will simply prevent the President from continuing to deploy them to Iraq. By passing this bill, we can finally focus on repairing our military and countering the full range of threats that we face around the world.

Now, there is plenty of precedent for Congress exercising its constitutional authority to stop U.S. involvement in armed conflict. In

late December 1970, Congress prohibited the use of funds to finance the introduction of United States ground combat troops into Cambodia or to provide U.S. advisors to or for Cambodian military forces in Cambodia.

In late June 1973, Congress set a date to cut off funds for combat activities in Southeast Asia. The provision read, and I quote, "None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose."

More recently, President Clinton signed into law language that prohibited funding after March 31, 1994, for military operations in Somalia, with certain limited exceptions. And in 1998, Congress passed legislation including a provision that prohibited funding for Bosnia after June 30, 1998, unless the President made certain assurances.

Now, our witnesses today are well aware of this history, and I look forward to hearing their analysis of it as they discuss Congress' power in this area. They are legal scholars, not military or foreign policy experts. We are here today to find out from them not what Congress should do, but what Congress can do. Ultimately, of course, it rests with the Congress itself to decide whether to use its constitutional powers to end the war.

The answer should be clear. Since the President is adamant about pursuing his failed policies in Iraq, Congress has the duty to stand up and use its power to stop him. If Congress does not stop this war, it is not because it does not have the power. It is because it does not have the will.

Now let me recognize the Ranking Member, Senator Specter, for any opening comments he would like to make.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you very much, Mr. Chairman. I thank Chairman Leahy and you, Senator Feingold, for convening this very, very important hearing, and I thank the very distinguished array of experts who are here to give us some constitutional scholarly insights into these important issues.

Before addressing the subject at hand, I want to make a very brief comment on a matter of some urgency. On Friday, the New York Times reported that there were procedures being employed in the Sixth Circuit and in the United States District Court in Oregon on the testing of the constitutionality of the Terrorist Surveillance Program which might undercut the ability of the litigants to present their case on a very important constitutional issue. And I wrote immediately to Attorney General Gonzales, and I received an answer yesterday from his Office of Legislative Affairs. And I would ask unanimous consent that both of those letters be incorporated in the record.

Senator FEINGOLD. Without objection.

Senator SPECTER. With the additional comment that the explanation in my judgment is insufficient. This is a very pressing matter, and this Committee has undertaken very extensive oversight

on this program, with some four hearings last year and legislation to bring that program under the Foreign Intelligence Surveillance Court. I am glad to see it is there. I do not think it eliminates the pending cases in the Federal court, and I believe this is a matter which will require considerable oversight by this Committee on an immediate basis.

It is hard to have a problem more urgent than the Terrorist Surveillance Program, but we have one here today. It seems that one problem piles onto another, and all of enormous importance.

My own judgment on the current confrontation between the executive and legislative branches, Article I and Article II, is that it leads to the answer that we have shared powers. Shared powers. The genius of the Constitution is in the separation of power and the checks and balances, and it is not only the checks and balances between Article I and Article II, the Congress and the executive, but Article III, the judicial branch. And it is my hope that we will yet avoid the confrontation which is imminent, with the Senate scheduled to take up these resolutions next week.

Senator Lugar has an op-ed piece in the Washington Post today with some words of wisdom. Senator Lugar often has words of wisdom. I think they are especially wise today, and I make a couple of references. "The President and Congress must reach a consensus on how to protect our broader strategic interests regardless of what happens in those Baghdad neighborhoods or on the floor of the Senate. Otherwise, the fatigue and frustration with our Iraq policy that is manifest in the resolutions of disapproval before the Senate could lead not just to the rejection of the Bush plan but also to the abandonment of the tools and relationships we need to defend our vital interests in the Middle East."

We have an atmosphere, regrettably, of considerable suspicion with what the executive branch is doing to expand executive authority, really an ideological approach. And there are key figures in the administration who make no bones about it, very direct and very blunt, when they seek signing statements to contravene what is in the legislation the President has signed, where you have the Terrorist Surveillance Program or where you have the acts in Guantanamo that has to be struck down by the Supreme Court of the United States. And that has set the stage for, if not an atmosphere of distrust, an atmosphere of confrontation.

There have been meetings. I attended one with the President. I attended another with the National Security Counselor Stephen Hadley. And those meetings are good. There is an overtone, I must say, more of persuasion by the administration than of consultation, but the voices in Congress which have been expressed are many undisputably friendly voices for the President—friendly voices of Republicans. I think the Democratic voices are not unfriendly voices, but there is an overtone perhaps of partisanship. But the Republican voices, mine included, which have been heard are friendly voices, really trying to work with the President to find an answer. And the words of Senator Lugar pick up on an alternative plan which has been floated, and this is what Senator Lugar says in a nutshell: ". . . with troops stationed outside urban areas in Iraq. Such a redeployment would allow us to continue training

Iraqi troops and delivering economic assistance, but it would not require us to interpose ourselves between Iraqi sectarian factions.”

The President has asked for alternatives as well as objections, and the plan which has been articulated by key military figures and key political figures to give the Iraqis a time reference that they are going to have to act to restrain the sectarian violence and they are going to have to take over the security in Baghdad, those are two conditions explicitly laid down by the President in his State of the Union speech, and not to reduce our forces in Iraq, but to take them out of the cities where they are in the midst of the gunfire in what is conclusively a civil war, and to protect the infrastructure, to protect the oil resources, to aid and train the Iraqis, but not to try to deal with the sectarian violence which has led to so many casualties. And it would be my hope that the President would yet consider that option and perhaps other options in an effort to avoid the confrontation which is going to come next week.

The President repeatedly makes reference to the fact that he is the decider. I would suggest respectfully to the President that he is not the sole decider, that the decider is a shared and joint responsibility, and that when we talk about the authority of the Congress on the power of the purse and the authority under Article I to maintain armies, we are talking about authority which ought to be recognized.

There is one portion of Article I which I think has had insufficient attention, and that is the section which says, “to raise and support armies, but no appropriation of money to that use shall be for a longer term than 2 years.”

Now, there is an express constitutional statement which is superior to the President’s generalized Article II authority or the congressional generalized Article I authority. The Constitution says it cannot be for a period longer than 2 years. I would supplement what Senator Feingold has said to point out that in 1974, legislation was signed by President Ford, passed by Congress, which said the troops have to be reduced to 4,000 in Vietnam within 6 months and 3,000 within a year.

The President has shown flexibility on quite a number of matters. He opposed the 9/11 Commission, then agreed to it. He opposed the Department of Homeland Security, then agreed to it. He opposed the Weapons of Mass Destruction Commission, then agreed to it. He opposed putting the Terrorist Surveillance Program under the FISA Court, then agreed to it. And he opposed increasing our troops in Iraq, and now he is doing it.

So I would say, with my red light about to go on, Mr. President, reconsider and recognize the shared responsibility with the Congress, and let’s work it out, and to respect Senator Feingold who has stated the dominant fact of the entire matter, and that is, the election. And it is true that the people are sovereign, and it is not a public opinion poll. It is a statement of policy reinforced by our Congress in a representative democracy.

Thank you, Mr. Chairman.

Senator FEINGOLD. Thank you, Senator Specter. Not only am I honored to have served with you on this Committee in many capacities, with you as Ranking Member of the Committee, and as Chairman of the Committee, but your statement indicates the im-

portant bipartisan role you play of trying to protect the role of the Constitution.

It is interesting you talk about the NSA issue because it is really very closely related to what we are doing here today. This administration on many occasions and in many areas has put out a notion of Executive power that is not only extreme, but in many cases flies directly in the face of the words of the Constitution. You and I both are very pleased that the NSA program has come within the FISA process, and I intend to continue to work with you on that. And I am also grateful for your strong remarks about Congress' power and the type of system that we have. And I think it is an excellent way to kick off this hearing.

Now I would like to turn to Senator Hatch, who, of course, is also a very distinguished member of the Committee, a former Chairman of the Committee, who I have enjoyed serving with. Senator Hatch, would you like to make some remarks?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. If I could. I have enjoyed serving with you as well, Senator, and certainly with Senator Specter, who is doing a very good job on our side on this Committee.

You know, words have meaning and titles send messages. The title of today's hearing, when it refers to Congress's constitutional power to end a war, can be taken at least two ways. To some, it might sound like an assertion of an explicit power directly to terminate a war or declare it over. If that is its message, that is incorrect. The Constitution grants no such power.

The convention that framed our Constitution rejected empowering Congress to make war in favor of declaring war. Similarly, that convention unanimously rejected an amendment that would have granted Congress the power to declare peace. So the idea that Congress has some explicit power directly to end war or to declare peace does not come from the Constitution.

The title of today's hearing might instead be saying that the Constitution grants powers to Congress which might be used to help bring a war to an end.

In general, that is a more defensible proposition that where we end up depends on where we start. I believe we must start with and be guided by the Constitution—not any constitution or a constitution invented to give us what we want at the moment, but the real Constitution. The real Constitution is built on the principle of the separation of powers which James Madison said has more intrinsic value than any other political truth. Only Congress can declare war, but while a declaration of war is necessary to define certain legal relationships between nations or with our own citizens, it is not necessary for the United States to engage in armed conflict. Congress has the authority to raise and support armies, but while this relates to the existence of the armed forces, it does not extend to commanding them in conflict or dictating battlefield policies and tactics.

Some politicians here in Washington want to say what they would have done about authorizing force in the war on terror if they knew then what they know today. Neither our personal nor

political lives work that way. We have to do our best today based on what we know and what we have available to us today.

It seems to me that the separation of powers leaves those who oppose the war with two options: they can either try to defund our troops, or they can add to the overall debate by publicly expressing their views. And we have, of course, both views being represented here on Capitol Hill. In exercising either of those options, I think we must consider not only our policy objectives but also the message that we send by our actions. We all know what the polls say about general support for that portion of the war on terror currently taking place in Iraq. We all saw on the news the public demonstrations as well as the vandalism taking place here in Washington just last weekend. But in addition to sending a message to the general public and the specific political constituencies, we must also consider the message that we are sending to our troops—

[Protestors interrupt.]

Senator FEINGOLD. The Committee will come to order.

Senator HATCH. I understand—

Senator FEINGOLD. The Committee has a long history of free speech, and I strongly support the First Amendment that guarantees that right. But—

[Protestors interrupt.]

Senator FEINGOLD. The Committee will be in order.

Senator HATCH. All right—

Senator FEINGOLD. The Committee will stand in recess until the police can restore order.

Senator HATCH. I think we have order. Let me just say that I empathize with you, having lost my only brother in World War II, having lost a brother-in-law in Vietnam, and having just buried a top sergeant in the Marines in Arlington just a short while ago. But some who say they support our troops turn around and talk about defunding them, while others talk about—and I am concerned about your son and others if we defund them here and we do not support them and we do not do what is right. Or others talk about splitting appropriations hairs to fund certain troops but not others.

The message to our troops is that we—

[Protestors interrupt.]

Senator HATCH. Let me finish my remarks. The message to our troops is that we no longer support them on our mission if we talk that way.

Now, we have authorized whatever force is—

[Protestors interrupt.]

Senator HATCH. We have authorized whatever force is necessary to fight this war, and then some talk about de-authorizing certain uses of that force. The message to our troops is that we no longer support them or their mission.

Now, some who voted to confirm General David Petraeus to lead the troops—and it was unanimous—to lead the troops in Iraq turn around and publicly attack the strategy that he developed. The message to our troops is that we no longer support them or their mission.

The Constitution distinguishes between a singular declaration of war which it assigns to Congress and the active engaging in or lev-

ying war, which it assigns to the President or the Commander-in-Chief.

Now, disagreement with how the President uses his power does not give Congress the power to step in and take over. That would be the antithesis of the separation of powers.

Now, I realize that it is easy to acknowledge the President's power when we agree with how he uses it. The real test is when we disagree. Then the American people will see whether there are some principles on which we in this body will stand, or whether in the end it is just politics after all.

This is an important hearing, and there are very strongly held views on all sides of these issues, certainly all sides of the issues involving war, and there are more than two sides. It is a very difficult time for us in Congress. It is an equally difficult time for the President. And I think we have to take into consideration all of these thoughts and do our very best to—

[Protestors interrupt.]

Senator FEINGOLD. Could we please—if we want to have this hearing, I need your cooperation so that we can proceed.

Senator HATCH. That is all I have to say, Mr. Chairman.

Senator FEINGOLD. Thank you, Mr. Chairman.

I would simply say that the kinds of arguments that Senator Hatch has made—and he made them eloquently—are the kinds of arguments that have repressed over the last few years valid criticism of the Iraq war that would have, I think, caused us to recognize our mistakes earlier. But we have a friendly and open disagreement about that.

Senator Durbin.

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Mr. Chairman, thank you for calling this hearing. It is long overdue. I am sorry that we did not initiate this discussion earlier.

Clearly, there is a frustration and anxiety among the American people about whether Congress has been listening. The last election told us that people wanted a change. It is clear that the American people do not want the change the President has proposed. We will debate that in the days to come.

Though I disagree with the President's policies and was one of 23 to vote against the Use of Force resolution, I commend the President for coming to Congress for that vote. There were Presidents in years gone by who did not bother to make the trip, who decided to use force, commit troops, engage America in a war without any congressional voice. Many times I thought the silence of Congress was complicity; they did not want to be put on the spot to vote. That is why we are here. We represent a lot of good people across this country who count on us to be their voice.

If you read the Use of Force resolution, the one that was considered and enacted a little over 4 years ago, and try to apply it to the situation today, you just wonder under what authority do we continue what we are doing in Iraq. The authorization that we gave the President—and I knew full well, and I think most did, that if we gave him this authority, he would use it—said that the

President is authorized to use the armed forces as he determines necessary and appropriate to defend the national security of the United States against a continuing threat posed by Iraq and enforce all relevant United Nations Security Council resolutions regarding Iraq.

It goes on, of course, to speak about the threat of Saddam Hussein, the threat of weapons of mass destruction. All those are gone now, and the obvious question is: By what authority do we continue this war? And I think it is an important constitutional question.

Let me also say for those who argue that for the United States Congress to engage in a bipartisan debate about our Constitution and our policy is somehow, quote, emboldening the enemy or undercutting our troops, they are wrong. This debate is evidence of what a democracy is all about. If we truly want democracy in Iraq and around the world, we need to lead not just by our great military but by example to show that yes, we can stand behind our troops—and we will—and their families, and still debate whether this is a wise policy or not.

And to suggest that this debate undermines morale is to ignore another obvious fact—a fact which is shown in this morning's newspaper. The President wants to send 21,000 more soldiers into Iraq, and this morning's Washington Post tells us they will go into battle without the equipment they need. They will not have the body armor; they will not have the vehicles; they will not have the equipment they need to go into battle.

Now, who is standing behind the troops when it comes to escalating this war in Iraq? Those who question whether this is the right policy in the right place, or those who would send 21,000 more into battle and risk their lives without giving them the rest that they need, the time with their families, the equipment and training that they need to come home safely?

I do not think that this is an indication of lack of support for our troops. We need to acknowledge the obvious. The President is the Commander-in-Chief, but we in Congress have a constitutional responsibility. Mr. Chairman, your hearing today will give us a chance to explore the options available to Congress to express the will of the American people, and I thank you for convening it.

Senator FEINGOLD. Thanks, Senator Durbin.

I thank Senator Whitehouse, our new member of the Committee, for his attendance as well.

We will now turn to our panel of witnesses. We will proceed from the left to the right. I would ask the witnesses to limit their oral testimony to 5 minutes, and your complete statements will, of course, be included in the record.

Will all the witnesses now please stand and raise your right hands to be sworn? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Barron. I do.

Mr. Berenson. I do.

Mr. Dellinger. I do.

Mr. Fisher. I do.

Mr. Turner. I do.

Senator FEINGOLD. Thank you. You may be seated.

Our first witness will be Professor David Barron from the Harvard Law School. A graduate of Harvard Law School, Professor Barron clerked for Judge Reinhardt in the Ninth Circuit and for Justice Stevens on the United States Supreme Court. After his clerkships, he worked in the Office of Legal Counsel at the Department of Justice. In 1999, he joined the faculty at Harvard Law School.

Professor Barron, welcome, and, of course, thank you for making the time to be here this morning. You may proceed.

**STATEMENT OF DAVID J. BARRON, PROFESSOR OF LAW,
HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS**

Mr. BARRON. Chairman Feingold and members of the Committee, thank you for inviting me to address the constitutional question that is the subject of this morning's hearing.

As Chairman Feingold mentioned, from 1996 to 1999 I served as an attorney advisor in the Office of Legal Counsel of the United States Department of Justice. I now teach at Harvard Law School and write about, among other things, presidential power, both the need for its vigorous protection and the extent to which it can and should be limited.

The subject of this hearing is clearly a momentous one. I have supplied the Committee with written testimony that reviews relevant legal precedents dating back from the time of the founding and running through up continuously more recent history that, in my view, demonstrates an unbroken pattern consistent with the constitutional text of a recognition of the broad powers of the Congress to define the parameters, including the size, scope, and duration of a military conflict. Limits such as these have been adopted in every age, from the Quasi-War on France right up through the Vietnam War. They have been accepted by the Chief Justice of the United States John Marshall in connection with the Quasi-War on France and have been recognized as valid as well by the late Chief Justice William Rehnquist while he was serving as a legal advisor to the Nixon administration during the Vietnam War.

In between those periods, limits on operations that have been even far more intrusive than the caps on troop levels, restrictions on increases in new troops, or prohibitions on continued funding for troops at all by a date certain have been imposed at other times in our history, including the Confiscation Acts during the Civil War, which President Lincoln accepted and did not challenge, restrictions on the location of troops in the Eastern Hemisphere in 1940, as well as many other restrictions of this kind. In fact, one searches in vain across our history for a single case in which the Supreme Court has invalidated such a measure. And one searches also in vain for a single instance in which a President has defied a measure once it has been validly enacted.

But rather than repeat the entirety of that review here, I just want to step back for a second and note that in considering a question of this magnitude, we are obviously not dealing with just a technical legal question in the ordinary sense. We are dealing with a constitutional question in the truest sense. The question put before us is one that is really about how we are constituted as a Government, committed to self-government and democracy, the rule of

law rather than the rule of men, and the diffusion and separation of powers rather than the concentration of authority in a single figure.

In that sense, the review of the legal materials need to be reviewed through that larger lens and from the point of view of the constitutional structure as a whole. And from that perspective, I think the question admits of really just one answer, which is that Congress does possess the power that the question asks as to whether it possesses.

Under our structure of Government, there is no doubt that a massive use of force involving more than 100,000 troops continuing for years at a time would require congressional sanction at some point. That is true not only because that was the constitutional plan, but because the text of the Constitution gives the appropriation power to Congress. No action could proceed for that long without appropriations providing for it. The Framers knew this and the Framers intended it.

The legal question that arises, though, is that when a war continues for some time, undoubtedly circumstances may change, and that may lead people to reassess the authority once willingly given and to reassess the utility of continuing with the same kind of authorization that was earlier granted gladly.

When that happens, the question is: Can Congress do anything in response to that change and the reassessment that is occurring within the country? Or is it to stand by as a spectator, not by choice but by operation of the constitutional plan itself?

From that perspective, looked at that way, given all we know about the Framers' concern about unchecked power, given all we know about their desire for Congress to have a role in the authorization of such a massive use of force at the beginning, I think to ask whether the constitutional plan permits the Congress, in consideration of the changes that have occurred, to decide to act upon that reassessment admits of only one answer. How could it be that our constitutional plan would not give Congress that power?

Inevitably, answering the question the way that I suggest it should be answered will raise some to say, "Well, that invites micromanagement of the war." Whatever the outer reaches of micromanagement might be, to content that a cap on troop levels, a prohibition on increases in new troops, or a prohibition on the use of funds to continue military operations altogether amounts to micromanagement, when the first serious reconsideration of authorization given years before trivializes, in my view, the nature of what Congress is at the present time contemplating. And I am happy to get into the details of what maybe those outer limits might be, but I think it is very important to recognize, given all that we know about the Framers' understandings and all the precedents that we have had over 200 years of the Nation's history of engagement in military conflicts, that it is clear that the measures being considered, as I understand them, fall well within the substantial zone of authority that Congress possesses.

Thank you.

[The prepared statement of Mr. Barron appears as a submission for the record.]

Senator FEINGOLD. Thank you very much, Professor Barron.

Our next witness will be Professor Robert Turner. After completing two tours of duty in Vietnam, Professor Turner attended law school at the University of Virginia. Now a professor at UVA, he co-founded the Center for National Security Law there and has published several books on the War Powers Resolution. He also contributed chapters to a law school casebook on national security law. Professor Turner served as national security adviser to Senator Robert Griffin in the mid-1970's and worked at the Pentagon, the White House, and the State Department during the Reagan administration.

Professor Turner, it is nice to see you again and you may proceed.

STATEMENT OF ROBERT F. TURNER, CENTER FOR NATIONAL SECURITY LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VIRGINIA

Mr. TURNER. Thank you, Mr. Chairman. I am delighted to be here. Let me just summarize some of the key points in my rather extensive written remarks.

First of all, by vesting the executive power in the President in Article II, Section 1 of the Constitution, the Founding Fathers gave to that office the general management of our relations with the external world. I document in my prepared statement this was the view of George Washington, James Madison, Thomas Jefferson, Alexander Hamilton, Chief Justices John Jay and John Marshall, and many others. As Hamilton noted in his first *Pacificus* essay in 1793, "The power of Congress to declare war was an exception out of the general executive power vested in the President," and, thus, it was to be, I quote, "construed strictly."

Chief Justice John Marshall, a decade later in *Marbury v. Madison*, noted the Constitution had vested the President with important political powers "in the exercise of which he is to use his own discretion," and the Chief Justice added, "Whatever opinion may be entertained of the manner in which executive discretion is used, still there exists, and can exist, no power to control that discretion." And to illustrate this point, he noted the President's control over the Department of Foreign Affairs. In the conduct of war and the conduct of foreign affairs, the President, in fact, is the decider.

Having acknowledged the President's vast and often unchecked powers over war and foreign affairs, we must also recognize that Congress has very important powers in this area, including the power to raise and support armies, without which the President has no army to command. It also has control of appropriations, but decisions involving the conduct of war, including where to move troops, whether to reinforce troops, whether to move troops from one hill to another are vested exclusively in the President. And when Congress tries to control this power, either directly by statute or by conditions to appropriations, it becomes a lawbreaker. It violates the Constitution. The Authorization for the Use of Force in Iraq clearly was the equivalent to a constitutional declaration of war. The *Bas v. Tingy* decision in 1800 has already been referred to.

Late last June, Justice Stevens in the *Hamdan* case quoted Chief Justice Chase's remarks in *Ex Parte Milligan*, where he noted,

“Neither can the President in war more than in peace intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Congress cannot direct the conduct of campaigns.” And I would submit that is what we are talking about here. We are fighting a war, and we are talking about who can decide how many troops to apply and so forth. That is core presidential, exclusive authority.

At the core of this authority is this absolute discretion on how to fight the war with whatever resources Congress has provided. Now, Congress certainly may refuse to provide new funds, refuse to provide new troops, refuse to provide new equipment and so forth. What it cannot do is use that power to indirectly seize the discretion of the President in how to fight the war. Legislators may refuse to provide the President new funds; otherwise, the only way legislators can control the Commander-in-Chief power is to run for office and be elected President.

The Chairman noted the precedent of the statute in 1970 that cut off funds to Cambodia. I talk about that and also the cutoff of funds in the rest of Indochina in my prepared testimony. And I would conclude with a prudential consideration. Even if I am wrong, even if Jefferson and John Marshall are wrong, and Congress has this power, I would urge you to act very carefully in exercising this power. Have you considered the consequences of the 1970 legislation? Congress authorized the use of force to protect Cambodia in 1964. Congress later cut funds for that purpose. As a result, we allowed the Communists to take control of Cambodia. As a result of that, according to the Yale Cambodia Genocide Project, 1.7 million people, 21 percent of the population of that country, were murdered by the Communists. Four years ago National Geographic Today had a story about the killing fields that noted, small children were picked up by their legs and “battered against trees” to kill them. That resulted because Congress prohibited the United States from fulfilling John Kennedy’s pledge that we would “oppose any foe” for the cause of freedom.

What about emboldening the enemy? Let me just close with a reference to the Beirut situation in 1983.

I followed that closely, and former Marine Commandant P.X. Kelley and I wrote an article about it in the Washington Post some years ago. Congress had this same kind of debate, and the White House said, “You are endangering our troops.” And P.X. Kelley, the Marine Commandant, said, “You are endangering our troops.” And Congress said, “Oh, no, no. This is free, fair debate.” And as a result, the Syrians said, “The Americans are short of breath,” and we intercepted a message from the terrorists saying, “If we kill 15 marines, the rest will leave.” And on the 23rd of October 1983, a terrorist truck bomb killed 241 marines, sailors, and soldiers because Congress had signaled the terrorists that if there are any more casualties, we can reconsider our vote and cut off the funds.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Turner appears as a submission for the record.]

Senator FEINGOLD. Thank you, Professor Turner.

Our next witness will be Dr. Louis Fisher, who is a constitutional law specialist at the Library of Congress. I have benefited from his writings and his thoughts on many occasions.

Before joining the Library of Congress, Mr. Fisher spent 36 years at the Congressional Research Service. During his time at CRS, he served as Research Director of the House Iran-Contra Committee in 1987. Mr. Fisher literally wrote the book on this issue, "Constitutional Conflicts Between Congress and the President," one of more than a dozen books he has written.

Mr. Fisher, it is an honor to have you before the Committee again, and the floor is yours.

STATEMENT OF LOUIS FISHER, SPECIALIST IN CONSTITUTIONAL LAW, LAW LIBRARY, LIBRARY OF CONGRESS, WASHINGTON, D.C.

Mr. FISHER. Thank you very much, Mr. Chairman. The purpose of my statement is to state that the Constitution not only gives Congress the authority but the duty and the responsibility to decide national policy, domestic policy, foreign policy, national security policy. That is why you are elected.

The system of Government we have, as has been mentioned here this morning, is that we believe in the Constitution where the sovereign power is placed with the people, and they give you their power temporarily to discharge. And that is the system we have. It is a democratic, small-R republican system. The power is with the people, and you can revisit legislation any time you like. If you do not meet their needs, you may not be around very long. So you are a temporary custodian. You are a temporary custodian of the Constitution which, very importantly, includes the checks and balance system and the separation of powers system. We have that because the Framers did not trust in human nature. They were afraid of any concentration of power being abused. That is why we have our system.

Now, when you passed the Iraq resolution in October 2002, you did not sign off and say the rest is for the President. Any statute that you pass, you have a duty to revisit it and recalibrate in light of new information. That is just the duty of the legislative branch. You have few restrictions on what you can do. The restrictions that exist are the kind of restrictions no one is thinking about, up this street but not down that street. I do not have any grounds for believing that the President has any special expertise or better judgment on whether to continue a war than the elected Members of Congress. The Framers put their trust in the deliberative process.

You can look at Article I and Article II, and Article I obviously gives the lion's share of the war power to Congress. My statement explains why that is so; that is, the Framers looked at the British models—Blackstone and John Locke—and they would have given the executive all the power over war and foreign affairs. None of those war prerogatives are given solely to the President of the United States. They are either given expressly to Congress, or they are shared between the President and the Senate.

When you look at the Framers, their view of history was that executives over time, in their search for fame and glory, got nations into wars that were ruinous to the people and ruinous to the Treas-

ury. So that is why the power of initiating war was placed in Congress, and the President has certain powers of a defensive nature to repel sudden attacks.

Now, about the Commander-in-Chief Clause. It is an important clause but not the way it is read today: one, it affirms unity of command. The unity of command means that the President is in charge of troops, but those troops can be controlled by Congress. The second very important part of the Commander-in-Chief Clause is civilian supremacy. The same duty that commanders have to the President, the President has to the elected representatives. So the Commander-in-Chief Clause does not get anyone anywhere.

I mention in my paper, as others do, contemporary statutory restrictions. Now, when the elected Members of Congress decide that a war has declined in use or value and you want to revisit it, you can place various conditions on appropriations, change legislative language. That is up to you. You may decide in doing that that you want to move U.S. troops to a more secure location. So there is no issue here about not protecting our troops.

The key question to me is for Congress to determine that the continued use of military force and a military commitment is in the Nation's interest. That is the core question. Once you decide that, if you decide it is not in the national interest, you certainly do not want to continue putting U.S. troops in harm's way.

I don't think when you are trying to decide that question that there is any help by saying that if you express an independent view, you are somehow emboldening the enemy.

I want to end—a lot of people talk about the Steel Seizure case and the three categories and so forth. They miss what I think is Robert Jackson's view at the end of his decision where he says—and this is the constitutional system we are talking about. He says, "With all its defects, delays, and inconveniences, men have discovered no technique for long preserving free government except that the executive be under the law and that the law be made by parliamentary deliberation."

Thank you.

[The prepared statement of Mr. Fisher appears as a submission for the record.]

Senator FEINGOLD. Thank you so much, Mr. Fisher.

Our next witness will be Bradford Berenson. Mr. Berenson graduated from the Harvard Law School and clerked for Judge Silberman on the D.C. Circuit and Justice Kennedy on the United States Supreme Court. Mr. Berenson served as associate counsel to President George W. Bush from 2001 to 2003, where he focused on the relationship between the Congress and the executive. He is now a partner at Sidley and Austin.

Mr. Berenson, thank you for making time to testify today. You may proceed.

**STATEMENT OF BRADFORD BERENSON, PARTNER, SIDLEY
AUSTIN LLP, WASHINGTON, D.C.**

Mr. BERENSON. Thank you, Mr. Chairman. I appreciate the opportunity. I certainly think this is a valuable and important debate, nothing at all illegitimate or disreputable about it, and the ques-

tions are indeed very serious and, as Professor Barron said, very deep in that they address our structural Constitution.

I am mindful of your admonition that we are here today to discuss law rather than policy, and that the question whether Congress should exercise whatever power it has is not the subject of the present hearing. I do, however, want to echo at the outset one of Professor Turner's observations, which is that whatever constitutional authority the Congress does have to terminate a war, there are very important prudential considerations that need to be taken into account before it is exercised, even by those who feel most strongly that the war is a mistake.

I would suggest that for a variety of institutional and political reasons, both domestically and abroad, the country is best off when the two branches are closely cooperating and consulting with one another on these matters and confrontations are not forced through legislation.

That said, I think the constitutional scheme does give Congress broad authority to terminate a war. As I see it, there are three basic spheres: there is a sphere of exclusive congressional authority in the area of warmaking; a sphere of exclusive executive authority in the area of warmaking; and then by far the broadest and, in some ways, the most significant sphere is the sphere, as Senator Specter suggested, where the powers are shared in a particular way.

Broadly speaking, the exclusive powers of Congress and the President are those that are enumerated in the Constitution, at least in my view. So Congress has the exclusive authority to declare war, to raise and fund the armies, and to prescribe rules for how to regulate and govern the conduct of those forces. But the President's power as Commander-in-Chief is likewise exclusive, and any congressional statute that would usurp his command over our military forces would, in my view, be unconstitutional. The Supreme Court in *Ex Parte Milligan*, Chief Justice Chase, recognized Congress' broad power to regulate the conduct of warfare, "except such as interferes with the command of the forces and conduct of campaigns." That power and duty belong to the President as Commander-in-Chief.

The outer boundaries of the Commander-in-Chief power are quite difficult to discern and raise a lot of difficult questions, as Professor Barron suggested. But, broadly speaking, I think the division is between tactics and military strategy on the one hand and broad questions of national policy on the other. The closer Congress gets to regulating the disposition of troops and the way in which they may engage the enemy, the closer it gets to trenching on the President's power to command with that unity that Dr. Fisher described.

On the other hand, the question of where in the world our troops may fight and who should be treated as an enemy of the United States and just how many of our national resources should be dedicated to that kind of a conflict I think is a proper subject for congressional regulation through the Spending Power and the Necessary and Proper Clause.

It is important to recognize, though, that even in enacting a statute such as the one that Chairman Feingold suggested he is going to introduce shortly, there may be difficult questions of application.

I have not seen the details of the proposal, of course, but in my judgment, a statute which says as of 6 months from the date of enactment the United States shall no longer be engaged in hostilities in Iraq is presumptively constitutional. That would be, if it could be passed, presumably over the President's veto, a constitutional statute and proper exercise of Congress's authority to set this broad policy. It would be constitutional on its face.

That does not mean, however, that it would be constitutional in every application. The President's Commander-in-Chief powers, in my view, do give to him certain emergency authorities—to repel a sudden attack, to protect our troops in the field—that cannot be taken away by Congress even through a presumptively and facially constitutional statute. So in respect of the bill that Chairman Feingold proposes to introduce, if on the last day of that 6-month period our troops were attacked in force, and in order to protect them and to effect the redeployment safely, the President had to continue to order them to fight for a period of days or weeks after the 6-month deadline, I think the debate would be ill-served by suggesting that that is somehow an unlawful action by him. I think we do need to recognize that there is play in the joints and there are reserves of presidential constitutional authority that exist even in the shadow of constitutional legislation of that kind.

Thank you very much.

[The prepared statement of Mr. Berenson appears as a submission for the record.]

Senator FEINGOLD. Thank you so much for your balanced testimony, and now our final witness is Professor Walter Dellinger. A graduate of Yale Law School, Professor Dellinger clerked for Justice Hugo Black on the United States Supreme Court. He headed the Office of Legal Counsel at the Department of Justice from 1993 to 1996. During this time he advised President Clinton on the executive's authority to deploy U.S. forces in Haiti and Bosnia. Professor Dellinger served as the Acting Solicitor General of the United States from 1996 to 1997, where he argued nine cases before the Supreme Court in a single term. He then joined the faculty of the Duke University School of Law and is also head of the Appellate Practice Group of the Washington office of O'Melveny and Myers.

Professor Dellinger, thank you as well for joining us today, and you may proceed.

**STATEMENT OF WALTER DELLINGER, DOUGLAS B. MAGGS
PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW,
DURHAM, NORTH CAROLINA, AND FORMER ACTING SOLICITOR
GENERAL OF THE UNITED STATES**

Mr. DELLINGER. Mr. Chairman and members of the Committee, thank you. Mr. Berenson and I both bring an executive branch perspective to these discussions. We served in administrations of different parties, he in the White House and I in the Department of Justice. But I think we both recognize the limits that Congress may place on the President's use of U.S. forces, and we both recognize that there may be urgent exceptions to those limits.

The President does have the authority to command the troops, and I also believe that a President has a great deal of authority,

when Congress is silent, to act in the national defense and in behalf of national security. I think as a legal officer of the Government, I would be hard pressed to find that a presidential action taken in good faith to protect U.S. national security was *ultra vires*, was simply beyond his authority.

The situation, however, is quite different when Congress has acted. When Congress has acted using its ample authorities set out at length in Article I of the Constitution, then the question is whether the act of Congress is constitutional or not. In this circumstance, the President as Commander-in-Chief I think has the authority to choose the sub-commanders to determine the tactics, to decide how to carry out the tasks to which the military has been assigned. But it is ultimately Congress that decides the size, scope, and duration of the use of military force, and this has been recognized by administrations of both political parties throughout our time.

Robert Jackson recognized that Congress could validly say no U.S. troops may be stationed outside the Western Hemisphere, as they had in 1940 prior to Pearl Harbor.

Assistant Attorney General William Rehnquist argued very forcefully that Congress does not have simply an all- or-nothing choice to declare war; Congress may limit, validly limit the President's use of force.

Now, here in this circumstance, the question is what powers a President should use, and I would like to note that it is not, by any means, clear to me that the appropriations power is what Congress may necessarily need to resort to. Congress may simply, in my view, directly legislate under the Necessary and Proper Clause in light of its other authorities without using the appropriations power. Indeed, I think if it tried to interfere with actual direct Commander-in-Chief exercises of the true functions of the Commander through the appropriations power, that would not be constitutional. But with or without the appropriations power, Congress can place limits upon the use of U.S. forces.

Now, I think it is important to recognize, however, that Senator Feingold's proposal is not one that, as I read it, cuts off funds to anyone. It is a proposal that calls for redeployment. It cites the spending authority, though I think it could also do so directly, but there is a long tradition of using the appropriations authority.

Under that proposal, as I read it, Mr. Chairman, there would not be one penny less for salary of the troops. There would not be one penny less for benefits of the troops. There would not be one penny less for weapons or ammunition. There would not be one penny less for supplies or support. Those troops would simply be redeployed to other areas where the armed forces are utilized. And that, it seems to me, is fully within the authority of Congress to do.

Finally, the prudential questions that are raised about whether it has an adverse effect on morale when the President and the Congress take different views. When the President intends to use or to increase or enhance the use of military force, and Congress is of the view that that is not within the national interest, there is a discord and a dissonance. But you first have to ask who has the primary constitutional authority. If it is in the President to determine where to go to war and how to go to war and how long to

go to war, then Congress—we put the question to Congress. Why are you undercutting that? But if it is true, as I think it is, that the Constitution gives this fundamental choice to the Congress of the United States, then it is appropriate to ask what justification would a President have for using forces in circumstances where it is known that the Congress elected by the people is opposed to that use of force.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Dellinger appears as a submission for the record.]

Senator FEINGOLD. Thank you, to you and the whole panel. The panel did just an excellent job and was very respectful of the time limits and you got right to the point of the hearing, to the point where a couple of the questions I was going to ask have already been clearly answered on the record.

We will now turn to questions for the witnesses. Each member of the Committee will have 5 minutes for the first round of questions. Before I begin, I would like to place the following items in the record of the hearing: a letter from Professor Dellinger dated January 17, 2007; a Constitution Project reported titled, “Deciding to Use Force Abroad: War Powers in a System of Checks and Balances”; and two Congressional Research Service reports—one titled “Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces in Overseas Deployments,” and another titled “Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches.” Both of those are dated January 16, 2007. And also a statement from the Chairman of the Committee, Senator Leahy. Without objection, they will be included in the record.

Let me begin with my round. Mr. Fisher, why did the Framers believe it was so important to place the purse and the sword in the hands of different branches of Government?

Mr. FISHER. Well, the quote you had from James Madison said that the person who is to decide the scope of the operation, the Commander-in-Chief, cannot be the same one to decide whether to continue the operation. That is a separate judgment made by Congress. So Congress always had control up to—the first time we had an exception was 1950 with the Korean War, the first time a President went to war without coming to Congress. So for 160 years, in the offensive use of troops, all Presidents, all courts, all Congresses understood that was a legislative judgment, not for the President. Very limited powers. Only in the last 50 years have we gotten the notion that Presidents can go to war on their own and bypass Congress and go to the UN Security Council or go to NATO members.

Senator FEINGOLD. That seems to suggest that the Congress does not just have the right but the responsibility to provide a check on the executive branch and to use its power to fix the failed Iraq policy, doesn't it?

Mr. FISHER. It has the responsibility, and you are the custodian of the public power. You are the ones to make sure that when the people vote—that is why we have elections. You are the one to make sure that that public will is respected and carried out. The power is much more in Congress in protecting the democratic system than it is on the President.

Senator FEINGOLD. Thank you.

Professor Dellinger, you have in the past been a strong proponent of presidential power. For example, as you explained in your testimony, at the Justice Department you argued that Congress did not have the power under the Constitution to prevent the President from putting U.S. troops under United Nations command. Yet here today you have testified that you believe Congress has any number of options legally available to it to end or constrain the Iraq war and that the President would be required to comply if Congress took that action. Why does someone like you who has worked in the executive branch and who has advocated for presidential authority in related areas nonetheless believe that Congress can cut off funds for the Iraq war or otherwise limit the scope and duration of the war?

Mr. DELLINGER. Mr. Chairman, I do believe that the Commander-in-Chief Clause of the Constitution confers authorities on the President with which the Congress may not interfere, for example, the selection of sub-commanders or those whom the President will put in charge of the troops, I do not think Congress has any power to undercut that. To say that funds are appropriated but only if General Smith is placed in command by the President would not be a constitutional use of Congress' authority.

But I think throughout our history we have recognized that Congress may place limitations on the duration and scope. For example, I issued the opinion that the President did have the authority to send 20,000 U.S. troops into Haiti. But we acknowledged that we were fully complying with a set of congressional limitations that the Congress has passed that were preconditions to the use and deployment of U.S. forces into Haiti. And we also recognized in the Haiti opinion—it is an opinion of the Office of Legal Counsel, and I believe it is cited in some of the testimony. We also said in that opinion that the President's authority to deploy U.S. forces around the world without advance congressional authorization assumes the absence of limits imposed by Congress. And there is a large constitutional issue over the fact that a President, I think, has large inherent powers, but once Congress has acted, then the scope of the President's power is quite different. And then the only question is: Is the act of Congress unconstitutional?

Senator FEINGOLD. Thank you.

Mr. Fisher, it has been discussed already that there are a number of historical examples in which Congress has wielded its power to end war by cutting off funds and thereby bringing troops home, including the Vietnam War. In fact, I understand there were a number of efforts to end the Vietnam War before the legislation that was ultimately successful in terminating funding became law in 1973.

Can you explain a little bit more the steps that Congress took in the context of the Vietnam War and the ultimate outcome?

Mr. FISHER. Well, the cutoff in funds, of course, came in 1973. It was interesting, I thought, in 1971 there was what was called the Mansfield amendment. It placed limitations on what could be done in Southeast Asia. It went to President Nixon, and he signed it, and in the famous signing statement we hear about, he says, "That is not the policy of this administration." Remarkably, it got

into court a year later, and a Federal judge said, "No. That is the policy of the United States." It is in a public law. The policy of the United States is what is in the statute, not in what the President says.

So even there, in the middle of the Vietnam years, Federal courts recognized that Congress by statute, when it is signed into law, can limit the President.

Senator FEINGOLD. Thank you very much.

Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

There have been several mentions in the record that the issue of congressional debate is undercutting the troops. I do not think anybody has gone quite so far as to say that we are aiding and abetting the enemy, but that issue has been raised.

I am pleased to note that President Bush himself in the State of the Union said, "Such debates are essential when a great democracy faces great questions." And Professor Dellinger raises the issue as to whether there is an adverse effect on the morale of the troops.

There have been some interesting polls taken as to how the military personnel feel about the war. And on December 29, 2006, just exactly a month ago, a poll done by the Military Times showed that only 35 percent of the military members polled this year approved of the way President Bush is handling the war, while 42 percent disapproved. Forty-one percent of the military said the U.S. should have gone to war in Iraq, down from 65 percent in 2003. That raises a question in my mind as to whether the military does not approve of questions being raised by Congress and a recognition that there are open questions here which have to be decided in a democracy.

The election results are a very forceful statement as to how the people of America feel. I think there is no doubt that those results reflected dissatisfaction with the war in Iraq. Certainly that was my sense in traveling through Pennsylvania and other places, and my colleagues in the Congress have expressed a similar point of view.

Professor Turner, you have been the most explicit advocate of presidential authority. Do you find any problem with the kind of debate we are having or with the resolutions which have been introduced even by the President's harshest critics, resolutions of disapproval?

Mr. TURNER. It is a very good question. As a constitutional matter, obviously the debate is legitimate. You know, I do not think you can argue that.

There is an important prudential issue here, and that is—and I used to teach U.S. foreign policy, and I teach a seminar still today on War and Peace, so I am getting a little bit out of—

Senator SPECTER. Come to the question. I only have 5 minutes.

Mr. TURNER. Yes, sir. The concern is—I can tell you as a soldier in Vietnam, there were a lot of morale problems because of the criticism back home. The concern is our enemies know they cannot beat us militarily. Their biggest hope is we will lose our will, and the concern is, as we saw, I think, in Beirut, that if they see Congress threatening to pull the plug, they are going to say we have

to kill more Americans to encourage Congress to do that. And I think that is exactly what happened in Beirut.

Senator SPECTER. So you think it does hurt morale.

Mr. TURNER. I think it does hurt morale, but that may not overcome the positive value. This is something you have to judge, you know, the contribution of the debate, is it going to change the—

Senator SPECTER. Well, my judgment is that it is the price of democracy.

Mr. TURNER. That may well be true, sir.

Senator SPECTER. That there is no doubt that the Congress at least has colorable authority, if not 50 percent authority, or shared authority to some extent.

Professor Dellinger, I see you waving your hand, but I have another question for you, and I want to approach a little different subject. Where the electorate has spoken forcefully, or at least my interpretation of the vote in the election was a very positive repudiation of the Iraq policy, and we live in a representative democracy. We have a Republic and we are going to keep it, notwithstanding Frankel's interdiction.

We also, I think, observe a principle that leadership sometimes requires disagreeing with public opinion and taking a different stand, that that is the cost of leadership. Perhaps President Truman is the best example of that.

And my question to you is: Where the electorate has spoken and there is so much sentiment in Congress, is there a heavier burden on the President to establish the wisdom and efficacy and superiority of his program than if the electorate had not spoken and Congress has not expressed itself?

Mr. DELLINGER. Senator Specter, I do believe that the Constitution is structured so that the judgment of the people can play a role, and here the country has elected a third of the Senate and all of the House since the last time it chose a President, so that they do reflect a fresher judgment of the people.

You reference my raising the question about morale with this debate, and I did want to make clear that I believe the debate is essential—

Senator SPECTER. Come to the question of morale after you answer my question. Is there a heavier burden on the President—

Mr. DELLINGER. Yes, I do think there is a burden when the country has spoken on the President—

Senator SPECTER. Is there a heavier burden on the President to show the efficacy of his program in the face of this kind of popular and congressional disapproval?

Mr. DELLINGER. I think the answer to that question is clearly yes with respect to both because we want the use of U.S. force to reflect a consensus.

Now, the debate is essential in that once we are engaged in hostilities, I think it is generally accepted that Congress has the authority to limit or end those hostilities. That means there has to be a discussion about whether to do that. And if you could not have that discussion, it would be a system set up for a perpetual war, because you could never discuss whether and how to end it. And I would think that those who serve are entitled to expect that there is a continuing assessment of whether their service in that theater

of war is indeed vital to the national interest. They would hope and expect that that assessment would go on and would not be cut off simply when the war had started.

Senator FEINGOLD. Thank you, Professor Dellinger. Thank you, Senator Specter.

Now I would like to turn to somebody who has frequently and successfully dealt with these difficult issues throughout his career. Senator Kennedy.

Senator KENNEDY. Thank you. Thank you, Senator Feingold, for chairing these enormously important hearings today.

Let me ask the panel, Iran's nuclear ambitions and support for international terrorism pose a threat to the stability in the Middle East and to our national security, and the question is how we respond to this challenge. The President said on January 10th that Iran has provided material support for attacks on American troops and that we would disrupt the attacks and destroy their networks. The next day we raided an Iranian Government office in Iraq.

Last week, President Bush authorized U.S. forces in Iraq to kill or capture Iranian operatives inside Iraq. Yesterday, the President further raised the temperature by saying if Iran escalates its military actions in Iraq to the detriment of our troops or innocent Iraqi people, we will respond firmly.

The U.S. recently sent an additional aircraft carrier battle group to the Gulf Region. This morning, the Armed Services Committee is holding a hearing on the nomination of Admiral Fallon, who would become the first naval officer to hold the Central Command.

Some have read this activity as preparation for military action against Iran. I certainly hope that is not the case.

The question, just quickly through the panel: Is the President required to seek authorization from Congress before using military force against Iran?

Mr. FISHER. Let me give it a try. I think if there is some action that is a threat to U.S. soldiers, I think a President has the power to repel sudden attacks to protect U.S. troops. Otherwise, if it goes beyond isolated incidents like that, I think you are running into the purpose of the Iraq resolution, which when it came up to the Congress was of such a broad nature, it could have covered the whole Middle East, and Congress amended it to make sure it applied only to Iraq. So I think by statute, by legislative policy, you have confined the President to Iraq.

Senator KENNEDY. I am interested either in another comment on that or what actions can Congress take now to ensure the President does not take us into war in Iran without congressional authorization. Professor Barron, maybe you could answer either both of them or take the second part.

Mr. BARRON. I think the question of whether the President could right now initiate any actions against Iran, I think the proper way to think about it is what authority does he have under the current Iraq authorization statute which would require some close consideration.

There is some writing on this from, again, William Rehnquist when he served President Nixon with respect to the President's inherent power to go into Cambodia when there was no statutory limitation imposed at the time. I think it was quite clear under

Rehnquist's view, though, that a statutory limitation on the exercise of such authority would be constitutionally valid. So I think the legal question then comes to there is no doubt Congress could restrict him from going and widening the war, not just in terms of the amount of troops used but in the geographic area covered, and the only issue is whether Congress has, in effect, already done so by virtue of the limitations and bounds of the Authorization to Use Military Force in Iraq that it has already enacted.

Senator KENNEDY. Yes, Professor Turner?

Mr. TURNER. Senator, let me just make a nuanced point on this. John Hart Ely, in his *War and Responsibility*, made the point that after Congress declared war against Germany, FDR did not need a new declaration of war to go into North Africa after the German forces. Going into Cambodia I think was perfectly legal because the North Vietnamese had taken over the whole border area of Cambodia, and so there are difficult lines to draw here, but I could see a situation in which Iran became involved in the Iraq war where the President would be able to use force. I hope he does not, and I think in terms of launching a major war against Iran he should get and would need an AUMF for Iran. But there is some area in there where I think he could act.

Senator KENNEDY. Well, I want to just hear from others here. If Congress passed legislation requiring the President to seek authorization from Congress before using military force against Iran, would the President be obliged to seek such authorization before launching military action? I will add that to the pot, too, because I am going to run out of time here.

Mr. BERENSON. Senator Kennedy, I think the questions that you are posing fall into the sphere that I spoke about before as the sphere of shared powers. And it is important to recognize that for very important institutional reasons, the President is the first mover and the prime mover in this area of shared powers. That has to do with the fact that unlike Congress, which needs to go through an often time-consuming and difficult legislative process, a process that can sometimes be stymied, the President has the ability to receive information in real time to act to protect the national security.

So the President through the Vesting Clause, through his executive authority, in the absence of legislation to the contrary by the Congress, I think unquestionably would have authority to engage Iran in hostilities. Whether in defense of our forces inside the borders of Iraq, or if he decided that we needed to do something to address Iran's nuclear facilities, I do not think he would be acting outside the scope of his constitutional authority.

That said, for major military actions most Presidents have recognized the importance of coming to Congress as a political and practical matter. It is certainly unwise, albeit not unconstitutional, to try to engage in large-scale hostilities or engage a new enemy in warfare without public support, and the best way to ensure that at the outset is, of course, to come to Congress.

Senator KENNEDY. My time, Mr. Chairman—Mr. Dellinger?

Mr. DELLINGER. Yes, Senator Kennedy, briefly. I agree with Mr. Berenson's statement. I believe that the President does have the authority to introduce U.S. troops into situations of hostilities, in-

cluding in Iran, in the absence of congressional limitation as long as the anticipated scope and duration does not amount to a war. I do not believe he has the authority to send 500,000 troops into Iran, but he does have the authority to deploy U.S. forces in hostilities. And, indeed, the War Powers Resolution recognized this. It says when the President introduces troops into situations of hostilities in the absence of congressional authorization, he has to report and take other steps. But it does recognize that.

That said, it is also clear that Congress can impose limits, either before or after the fact, on the size, scope, and duration of that. But I do believe that is a consistent executive branch position that the President has the authority to deploy U.S. forces into hostilities when Congress has not spoken to the question.

Senator KENNEDY. Thank you.

Thank you, Mr. Chairman.

Senator FEINGOLD. Thank you, Senator Kennedy.

Senator Hatch.

Senator HATCH. This has been an extremely interesting panel to me, and I think all of you have done rather well. I agree with Dr. Fisher that Congress has almost unlimited powers under our Constitution to do just about anything it wants if it can, and that is a very difficult thing for Congress sometimes.

But let's come back to the Iran situation. If it is brought to the attention of the President that Iran is sending materials, weapons, IEDs, and a lot of other things to kill our soldiers over there in Iraq, even if the Congress of the United States says we cannot go to war with Iran, would the President have a right to remedy that situation? Mr. Turner, Professor Turner?

Mr. TURNER. In *Marbury v. Madison*, John Marshall said that "an act of the legislature repugnant to the Constitution is void". The conduct of military operations is clearly an exclusive presidential power. That is why I am arguing that things like moving troops around, bringing in reinforcements, that is a presidential decision that cannot be placed else where. Trying to tie the President's hands in the conduct of the operation, that is an unconstitutional act, it is void, and it has no effect.

Senator HATCH. Has any court ever held—has the Supreme Court ever held that?

Mr. TURNER. That is an interesting question.

Senator HATCH. I am interested in Professor Barron's comments about the Civil War, Lincoln, and some of these other instances where the President acquiesced to what the Congress had done, but was it tested before the Supreme Court?

Mr. TURNER. There are so few cases—

Senator HATCH. If it was tested, would the decision have gone otherwise?

Mr. TURNER. There are so few cases where Congress has tried to do this, I doubt it has been tested. But it—

Senator HATCH. I do not know of any test, but maybe there has been. Professor Berenson.

Mr. BERENSON. In the Prize cases, which arose in the context of the Civil War, the Supreme Court recognized that President Lincoln had the power and, indeed, the obligation to respond to the Confederacy's rebellion militarily.

Senator HATCH. I agree that our courts like the Prize cases. They back up the President. Now, Professor Barron has said Congress could do almost anything it wants, and so has Professor Fisher. I am not quite as sure as they are.

Mr. BARRON. You are right that the Confiscation Acts that are referred to by President Lincoln did not reach the Supreme Court of the United States. There was a huge issue as to whether he would veto them on grounds that it violated the Commander-in-Chief power, and though he did assert the veto power, he decided not to assert the Commander-in-Chief objection, apparently because he himself believed it was not ultimately unconstitutional to act. But you are right to say that we do not have a clear decision on it. The best we have, as far as the Supreme Court's own view on the enforceability of a limit on the use of force, is the *Little v. Barreme* case, in which there was an issue from a military commander as to the ability to seize a ship in foreign waters. The claim of the commander was that he was acting on the direct orders of the President as Commander-in-Chief; and notwithstanding that, Chief Justice Marshall concluded that order was legally invalid because it was beyond the scope of the authorization as limited by Congress as to which ships could be seized.

So I think that is the best we have got on it, and I think that just on the other side I would say there is certainly no case we have of a President either defying such a restriction or the Supreme Court upholding such a restriction, once defied.

Senator HATCH. Professor Turner?

Mr. TURNER. Yes, it is very important to distinguish between internal and external affairs; but also, Congress does under Article I, Section 8, have certain expressed grants of powers that are exceptions. One of those is the right to "make rules governing captures on land and water." So the *Barreme* case involved an area where Congress had expressed power, and I would not apply that to cases involving the President's general Commander-in-Chief power.

Mr. BERENSON. I agree with Professor Turner's reading of the *Barreme* case, and the other thing I would point out is that, although we do not have a direct precedent on point in relation to the conduct of military operations, we do have precedents in analogous circumstances like *Myers*, in which the Supreme Court has held that congressional legislation which intruded upon a presidential power was invalid—in that case, the President's power to remove Cabinet officers, which is not granted to him explicitly in the Constitution, but is instead an implicit adjunct to his appointment power.

Senator HATCH. Well, I think that is one of the points I am trying to make.

Dr. Fisher and then Professor Dellinger, my time is about up, but we will listen to both of you.

Mr. FISHER. Yes, I think on the Civil War issue, that was the greatest—

Senator HATCH. One of the things about you, Dr. Fisher, I have almost got the impression that you think there is nothing Congress cannot do. I do not quite agree with that.

Mr. FISHER. Oh, no. I think there are some things that Congress cannot do.

Senator HATCH. I hope so.

Mr. FISHER. But on the Civil War precedents that people spoke about here, that was the greatest emergency we ever faced, and Lincoln did take, which I think is true, certain emergency powers. He recognized that he had gone outside his own powers and exercised those belonging to Congress, and he came to Congress to get authority. On the Prize cases, I think it is very important to remember that what Justice Grier upheld there were presidential powers in a domestic emergency, not going to war against another country. Even the attorney for the White House, Richard Henry Dana, Jr., said exactly the same thing. Going to war outside the United States is a congressional power.

Senator HATCH. Okay. Professor Dellinger, do you care to comment?

Mr. DELLINGER. Yes. Senator Hatch, the October 16, 2002, resolution—

Senator HATCH. Now, I might add, knowing you as well as I do, you have not argued really forcefully for the President so far. I would like to hear it a little bit stronger.

[Laughter.]

Senator HATCH. I am just kidding. Go ahead. Sorry to interrupt.

PROTESTOR. He is under oath.

Senator HATCH. He is under oath. That is a good comment.

Senator FEINGOLD. Mr. Dellinger.

Mr. DELLINGER. The resolution of 2002 is quite broad, quite broadly worded, and if the President determined that Iran was facilitating or making the job being done in Iraq more difficult or facilitating it, that resolution has fairly ample authority. It is not geographically limited, and the President is authorized to use—

Senator HATCH. What if it did not? What if it did not have broad authority, that resolution?

Mr. DELLINGER. I think the President has inherent authority to act in the absence of congressional limitation, and here I think even you could—the President could invoke the 2002 authorization if the use of force against Iran were necessary to facilitate the defense against the continuing threat posed by Iraq. The resolution, rightly or wrongly, I just would have to note that it is quite unrestricted in the authorization it gives the President, which is why I think it is appropriate for the Chairman to say it is time for us to revisit the authority that is conferred and to reconsider it now. But it would be a basis a President can cite.

Senator HATCH. Thank you, Professor.

Senator FEINGOLD. Thank you, Senator Hatch.

Senator Durbin.

Senator DURBIN. Thank you very much. And so most of this debate has been over how Congress can legally, constitutionally limit the authority of a President to wage a war once the war is underway. The resolution, which Professor Dellinger and others have alluded to, which passed in October of 2002, premised the actions of the President on three things: the presence of weapons of mass destruction, which did not exist; and the activities of Saddam Hus-

sein in repressing the people of his country and threatening his neighbors; and as we all know, Saddam Hussein no longer exists.

So let me ask you, when you read this resolution today, is there anyone among you who believes that what we are currently doing in Iraq is outside the scope of power and authority granted to the President?

Mr. BARRON. Senator Durbin, the way I think I would answer that is that even if reading the terms of it would lead one to conclude, totally reasonably, that what is happening now is beyond what was contemplated there and is outside that authority, the fact of the continued appropriations on behalf of the action to this date couldn't be ignored in interpreting how best to understand that statute now. So I do not think there is a legal problem with what is now happening as far as the authority to be there, given the appropriations that support it. But that, of course, I think is partly what has prompted the hearing, which is that so long as the appropriations continue, in light of an authorization which seems to have actually contemplated quite different circumstances, there is the suggestion that nothing has really changed, even though it may be that many people in the Congress and the country as a whole believe quite a lot has changed, raising the legal question of what can Congress do then to revisit those terms in light of its new understandings.

Senator DURBIN. So are you suggesting that our appropriations process is, in fact, de facto a reauthorization of the President's authority?

Mr. BARRON. I think any executive branch lawyer would advise the President to that effect, and I think it would be a quite legitimate argument and one that has precedent as to how other executive branch administrations have interpreted appropriations authority.

Senator DURBIN. Any other thoughts, Dr. Turner?

Mr. TURNER. Senator, the Supreme Court has said that appropriations can provide authority. I think it was in the Prize cases they talked about there is no declaration of war. That may not have been—but also in the AUMF in October of 2002, there are references to promoting democracy and the rule of law, I think references to human rights. I may be wrong on that, but my recollection is at least in the whereas clauses, it is not just WMD but it is also the welfare of the people. And I would think that it would be a reasonable—that is, like in domestic law, there is no duty to rescue, but there is a duty, once you try to rescue through a competent job and in the middle of the operation, going in there to help the people of Iraq, which was obviously our goal, you know, to say now we are going to walk away, we have knocked all the beehives down in the room and we are going to go home and let you guys sort it out, I think, you know, the President does have some area here. If Congress were to say you cannot do this in a constitutionally legitimate way, that would control. But I do not think it can do that if it is interfering with the actual command decisions like reinforcing troops. That to me is so core Commander-in-Chief that Congress cannot touch it. You can deny him new troops and new money.

Senator DURBIN. Mr. Fisher.

Mr. FISHER. On appropriations, in the Vietnam years, there were many cases, and at first judges said, well, Congress appropriated money. It looks like they endorsed the policy. Later, judges understood that because you fund a program maybe out of pity or piety, that is not an endorsement of the program, and they were instructed that policy is made in the authorization committee, not the appropriation committee. So I would raise some questions about that.

I think on the Iraq resolution of 2002, whatever was assumed at the time based on the information, you are fully empowered now, based on your own understanding today, as to how to change and restrict military action any way you want to. You are not locked in by 2002.

Senator DURBIN. Let me give you one example: Somalia, a controversial situation, leading to the Defense Appropriations Act of 1995, fiscal year 1995. It prohibited the use of funds for the continuous presence of U.S. forces in Somalia except for the protection of U.S. personnel after a certain date. Is there anyone here who believes that that was outside the scope of the constitutional authority which Congress has?

Mr. FISHER. Just one point on that. That was a fine statute because it said not only no more appropriations, but that you do not go back in until you come back to Congress and get authorization. That is the Somalia statute.

Senator DURBIN. Is there anyone here who believes that that was inappropriate?

[No response.]

Senator DURBIN. Well, it seems—I do not know how much time I have left. Very little, I am sure. It seems to me that one of the elements here that is at play that we have not spoken about is a very different view of the Presidency and the White House. And I assume most White Houses have a different view than the Congress does. But Mr. Yoo, for example, in his famous memo now about executive power talked about the plenary powers of the President. Does anyone here subscribe to his views on the plenary powers of the President in the midst of war?

[Laughter.]

Mr. TURNER. I would rather not just endorse Professor Yoo, but it is very clear the President does have some plenary powers. Military command is a plenary power, and it is also clear, I think, at least if you accept all three Federalist authors—along with Washington, Jefferson, Marshall—all of them argued that by granting the executive power, as that term was understood by Locke and Montesquieu and Blackstone, it included the general control of the Nation's external intercourse. And, for example, the Supreme Court has said in *Curtiss-Wright*, "Into the field of negotiations the Senate cannot intrude. Congress itself is powerless to invade it."

So to the extent you are passing laws telling the President what he can or cannot negotiate or telling him how to fight a war—

Senator DURBIN. How about the duration and scope of war?

Mr. TURNER. In terms of how to fight it. Now, in terms of—

Senator DURBIN. Duration and scope.

Mr. TURNER. Duration and scope, it is an iffy issue.

You have got to draw—you know, drawing narrow lines is hard, but you have some power in that area, clearly.

Senator DURBIN. Was the Somalia action by Congress, do you think, inappropriate and unconstitutional?

Mr. TURNER. I would rather hold judgment on that and look at it more carefully. I think there have been some of these—if it is a situation that does not involve a need for a declaration of war, the power of Congress is limited. Again, as Hamilton said in *Pacificus I*, the power of Congress to declare war is an “exception” out of the general executive power grant, and thus should be “construed strictly.” So, I think most of the—or many of these legislative powers ought to be viewed as vetoes. Jefferson referred to them as “negatives.” The President cannot appoint the Secretary of Foreign Affairs without the approval of the Senate—

Senator DURBIN. I would like to let Professor Dellinger say a word before—

Mr. TURNER. Go ahead.

Mr. DELLINGER. Just very quickly, Senator Durbin. The point you make that the predicate for the resolution authorizing force in 2002, the predicates of the regime of Saddam Hussein and the suspected weapons of mass destruction are gone, shows how vital it is in carrying out the constitutional function of the Congress to have this debate and discussion, because the question of whether U.S. forces should be used in a different situation for different goals and different purposes is one that I think you owe it to the families and those who serve and to the country generally to have that debate and see is it now in the vital interest of the United States to do that.

[Applause.]

Senator FEINGOLD. I would like Professor Barron to respond to Senator Durbin’s question.

Mr. BARRON. Since you have raised the general issue of plenary power of the President, I thought it—we are saying, as someone who worked in the executive branch advising the President, I know Professor Dellinger did that, Mr. Berenson did that, Professor Turner did that. Many people on the panel come with a quite expansive and robust view of presidential power. In my view, the assertion of this plenary power that you referred to has given presidential power a bad name, and it has seriously undermined the ability of people to convince the public that there are reasons for the President to have substantial authority because it has been asserted so wildly in some many different contexts, from the interrogation context to now the claim that even as to revisiting the predicates of a war authorized years before, Congress is without power to have any say as to what it should be.

Senator DURBIN. Mr. Chairman, thank you for this long overdue hearing.

Senator FEINGOLD. Thank you, and if there are no further comments from my colleagues, after a few concluding remarks I will bring this hearing to a close.

This hearing has been extremely illuminating, and a number of my colleagues have commented to me privately how much they appreciate the job you have done here. I thank our witnesses for attending and my colleagues for participating. The hearing record

will remain open for 1 week for additional materials from other scholars or interested citizens or organizations to be submitted. Written questions for the witnesses must also be submitted by the close of business 1 week from today, and we will ask our witnesses to respond to those questions promptly so we can complete the record.

It is clear that this administration took the country into war on a fraudulent basis, with the President insisting we had no other option but to preemptively attack Iraq. Now, 4 years into the war, we are still in Iraq, and the President insists that we have no other option but to stay, with no end in sight. As long as this President goes unchecked by Congress, our troops will remain needlessly at risk and our national security will be compromised.

Today, we have heard convincing testimony and analysis that Congress has the power to stop a war if it wants to. The President—

[Applause.]

Senator FEINGOLD. The President has no plan for ending the mission in Iraq. Worse still, his Iraq-centric policies have undercut our national security strategy worldwide. By finally setting a limit on our involvement in this misguided war in Iraq and backing up that judgment with the power of the purse, we can redeploy our troops from that country and begin to refocus on the global terrorist networks that do continue to threaten the United States.

Let me just quickly dispel a few myths that have been generated as a result of the discussion about the use of the power of the purse.

Some have suggested that if Congress uses the power of the purse, our brave troops in the field will somehow suffer or be left hung out to dry. This is completely false. Congress has the power to end funding for the President's failed Iraq policy and force him to bring our troops home. Nothing—nothing—will prevent the troops from receiving the body armor, ammunition, and other resources they need to keep them safe before, during, and after their redeployment. By forcing the President to safely bring our troops and our forces out of Iraq, we will protect them, not harm them.

Others have suggested that using the power of the purse is micromanaging the war. Not so. That is certainly not what I heard from this panel. It makes no sense to argue that once Congress has authorized a war it cannot take steps to limit or end that war. Setting a clear policy is not micromanaging. It is exactly what the Constitution contemplates, as we have heard today. Congress has had to use its power many times before, often when the executive branch was ignoring the will of the American people. It has done so without micromanaging and without endangering our soldiers.

Some have argued that cutting off funding would send the wrong message to the troops. The Under Secretary of Defense even made this argument last week with respect to the nonbinding resolution now under consideration. I find these claims offensive and self-serving. Congress has the responsibility in our constitutional system to stand up to the President when he is using our military in a way that is contrary to our national interests. If anything—

[Applause.]

Senator FEINGOLD. If anything, Congress's failure to act when the American people have lost confidence in the President's policy would send a more dangerous and demoralizing message to our troops: that Congress is willing to allow the President to pursue damaging policies that are a threat to our national security and that place them at risk.

Any effort to end funding for the war must ensure that our troops are not put in even more danger and that important counterterrorism missions are still carried out. Every member of this body, without exception, wants to protect our troops and our country. We can do that while at the same time living up to our responsibility to stop the President's ill-advised, ill-conceived, and poorly executed policies which are taking a devastating toll on our military and our national security. It is up to Congress to do what is right for our troops and for our national security, which has been badly damaged by diverting so many resources into Iraq.

So as I said earlier, tomorrow I will introduce legislation that will prohibit the use of funds to continue deployment of U.S. forces in Iraq after 6 months from the enactment of that bill. This legislation will allow the President adequate time to redeploy our troops safely from Iraq, and it will make specific exceptions for a limited number of U.S. troops that must remain in Iraq to conduct targeted counterterrorism, training, and protection missions.

From the beginning, this war has been a mistake, and the policies that have carried it out have been a failure. Congress must not allow the President to continue a war that has already come at such a terrible cost. By redeploying our troops from Iraq, we can begin to refocus on our top national security priority: defeating terrorist networks operating around the globe.

This hearing has shown that this legislation is fully consistent with the Constitution of the United States. Congress should enact it, and soon.

The hearing is adjourned.

[Whereupon, at 11:43 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

United States Senate, Committee on the Judiciary

A Hearing on

“Exercising Congress’s Constitutional Power to End a War.”

Response to Questions from Senator Whitehouse

David J. Barron

Professor of Law, Harvard Law School*

February 20, 2007

I am pleased to elaborate on the testimony that I provided for the United States Senate Committee on the Judiciary’s hearing, “Exercising Congress’s Constitutional Power to End a War.” In particular, I would like to address the three questions you have posed regarding the extent of congressional war powers.

First, you ask whether it is illustrative to view a declaration of war as an authorization for the President to “conduct the war declared by Congress.” There is substantial Supreme Court precedent for that conclusion. Concerning Congress’s declaration of war in connection with World War II, the Supreme Court explained that the President’s authority as Commander in Chief is “to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.” See *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) (emphasis added). Earlier in our history, the Supreme Court concluded that the President’s power as Commander-in-Chief was limited by the terms of the statutes that authorized the use of military force in the Quasi-War with France. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding military seizure of a ship unlawful on grounds that it conflicted with a statutory limitation implicit in the initial authorization to use military force); see also *Bas v. Tingy*, 4 U.S. (4 Dall.) at 40 (Washington, J.) (explaining that those “who are authorised to commit hostilities . . . can go no farther than to the extent of their commission.”).

Second, you ask whether the law generally assumes that a grant of power may be revoked. To be sure, one can identify unusual circumstances in which a grant of authority may not be revoked. For example, although a property owner who grants a license is generally free to withdraw it, he may be barred from doing so in exceptional cases because of the licensee’s reliance upon the initial invitation. But private law doctrines such as easement by estoppel provide little guidance in cases that concern the

* Affiliation for identification purposes only.

grant of *sovereign* power. The Supreme Court has repeatedly reaffirmed the essential axiom that one legislature may not, through the conferral of sovereign authority, bind another legislature. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that legislative acts are "alterable when the legislature shall please to alter [them]"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (stating that "[t]he correctness of [the] principle . . . that one legislature is competent to repeal any [law] which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature . . . can never be controverted"). That principle supports the conclusion that one Congress may not preclude a subsequent Congress from *authorizing* the use of military force. *See* Memorandum to the Attorney General from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Authorization for Continuing Hostilities in Kosovo* (Dec. 19, 2000), <http://www.usdoj.gov/olc/final.htm>. By parity of reasoning, that same principle supports the conclusion that an earlier Congress may not preclude a later one from *prohibiting* the continued use of force. Indeed, as noted in my written testimony, there are numerous precedents for the imposition of statutory limits on military operations after they have commenced.

Third, you ask whether Congress's "greater" power to bring a military conflict to an end includes the "lesser" power to define the geographic boundaries of a conflict, to limit the funds that will be expended in connection with it, or to restrict the number of troops that may be deployed in it. The constitutional text clearly contemplates a large congressional role in authorizing substantial military operations. It is inevitable that circumstances may change after military operations of such a scale have commenced. It is difficult to believe, therefore, that the Framers intended to require the legislative branch to be a mere spectator to a significant military conflict that the Constitution requires that same branch to play such a key role in authorizing. In that sense, the power of Congress to authorize the use of force must be thought to include the power to regulate its ongoing use. For the reasons set forth at greater length in my written testimony, the bounds of this considerable power are surely broad enough to encompass statutes that place restrictions on the geographic scope of the conflict, cap the troops that could be deployed in it, or restrict the amount of funds that may be expended in connection with it.

United States Senate, Committee on the Judiciary

A Hearing on

"Exercising Congress's Constitutional Power to End a War."

Response to Questions from Senator Kennedy

David J. Barron

Professor of Law, Harvard Law School*

February 20, 2007

I am pleased to elaborate on the testimony I recently provided for the United States Senate Committee on the Judiciary's hearing, "Exercising Congress's Constitutional Power to End a War." Let me begin by stating that I agree with you that Congress's oversight role over military matters, particularly during wartime, is of critical import. Hearings may be a key means of carrying out that oversight role. They can provide an important way of informing the public as to matters of great concern. They can also serve as a crucial mechanism for ensuring that myopia does not set in within the executive branch. But if Congress becomes convinced that military operations are being carried out in a manner that is detrimental to the national interest, the Constitution does not limit the legislative branch to asking questions or raising concerns. The Constitution makes clear that Congress also possesses the legal power to go further by enacting statutes that would restrict the President's conduct of ongoing military operations. Let me now address the specific questions you have posed.

As to the questions you raise regarding Congress's authority to revise its initial authorization to use military force or even to repeal it, I believe that Congress clearly has such a power. That conclusion accords with the well-settled principle that one Congress may not bind a later one and thereby preclude it from exercising constitutionally vested powers. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (explaining that legislative acts are "alterable when the legislature shall please to alter [them]"); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (stating that "[t]he correctness of [the] principle . . . that one legislature is competent to repeal any [law] which a former legislature was competent to pass, and that one legislature cannot abridge the powers of a succeeding legislature . . . can never be controverted"). Of course, the fact that Congress repeals a prior authorization does not necessarily indicate that it has refused to authorize the conflict. Difficult interpretive questions might arise, for example, as to whether Congress has continued to provide authorization through continued appropriations. *See* Memorandum to the Attorney General from Randolph D. Moss, Assistant Attorney General, Office of Legal Counsel, *Authorization for Continuing Hostilities in Kosovo* (Dec. 19, 2000), <http://www.usdoj.gov/olc/final.htm>. But that complication aside, I agree

* Affiliation for identification purposes only.

with you that Congress can make it clear that it does not intend to authorize a military operation beyond a certain date, and the mere fact that it has not literally deprived forces on the ground of all funds in the process does not mean that it has necessarily provided the kind of authorization that may be legally required. I would be happy to provide further thoughts on the precise language that Congress might use to make legally manifest its intention not to authorize such a conflict.

You have also asked several questions concerning the lawfulness of proposed statutory restrictions on the President's authority to escalate the current conflict in either of two respects: by increasing the number of troops deployed in the field above present numbers or by expanding the geographic scope of the conflict to include Iran. To the extent that such an escalation would involve increasing the number of troops deployed to the theater of operations, I believe that a bill (such as the one you have introduced) to prohibit the expenditure of funds to effectuate such an escalation is plainly within the power of Congress to enact. The power of the purse surely extends that far, as my written testimony makes clear. Similarly, I believe that the same restriction could be enacted directly pursuant to Congress' other war powers, and without specific reliance upon the power of the purse. For that reason, the bill you refer to as having been introduced by Senator Dodd would be constitutional as well. Finally, I believe that a statute precluding the President from using substantial military force against Iran in the absence of statutory authority would also be constitutional, in just the same way that William Rehnquist, when he was the head of the Office of Legal Counsel during the Nixon Administration, indicated that statutory limitations on the geographic scope of the war in Vietnam would not be constitutionally objectionable. See Memorandum to the Attorney General from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970), at 20-21 http://www.stanford.edu/group/lawreview/content/issue6/bybee_appendix.pdf.

As to your question whether there is a legally significant difference between appropriations restrictions and direct prohibitions, I do not believe that there is as a constitutional matter. The Congress may not use its appropriations power to accomplish an unconstitutional end. See, e.g., *OPM v. Richmond*, 496 U.S. 414, 436 (1990) (White, J., concurring, joined by Blackmun, J.) (rejecting the view that "statutory restrictions on appropriations may never fall"). By the same token, the President has no power to disregard a constitutionally valid statute on the ground that it failed to place a direct condition on the use of an appropriation of funds. To the contrary, the President is legally obliged to faithfully execute *all* constitutionally valid laws. The constitutionality of a restriction on the use of military force, therefore, is not determined by the form that the statutory restriction takes. Indeed, it is not even clear that these two types of measures differ much in practice. Direct prohibitions necessarily operate as restrictions on the use of funds; the President has no power to use appropriated funds for unlawful purposes. Similarly, appropriations restrictions do not literally deprive the President of all possible funding sources. Short of the implausible case of a statute that purported to de-fund the military altogether, the President is always operating in a world in which substantial monies have been appropriated for the military. Thus, what prevents the

President from acting in contravention of an appropriation limitation is not really an empty Treasury but rather a *legal* restriction that bars him from using those monies that are actually in the Treasury.¹

Thus, the constitutionality of restrictions on ongoing military issues turns not on their form but on their relation to the following two legal issues: (1) whether Congress possesses affirmative power to enact such a restriction and (2) whether, if Congress does possess such power, the enactment of such a restriction would impermissibly infringe upon whatever exclusive powers have been vested constitutionally in the President as the Commander-in-Chief. As to Congress's affirmative power to limit a proposed escalation in size or geographic scope, Article I of the Constitution confers extensive war powers upon the legislative branch. These include not only the general appropriations power, *see* U.S. Const. art. I, s. 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"), but also specific spending powers with respect to the armed forces, *see* U.S. Const. art. I, sec. 8, cls. 12, 13. These powers also include, however, extensive additional powers, such as the Declare War power and the power to "to make rules for the government and regulation of the land and naval forces." *See, e.g.*, U.S. Const. art. I, sec. 8, cl. 11; *id.* at cl. 14. These grants of authority – both those that directly relate to the appropriations power and those that do not – are broad enough to provide the legislative branch with the authority to place limits on the introduction of additional troops in an ongoing military conflict or to circumscribe the geographic scope of a conflict.

Because the Constitution supplies the Congress with the affirmative power to enact such restrictions, the remaining legal question concerns whether their enactment would impermissibly infringe upon any *exclusive* war powers of the President. As my written testimony explains more fully, the Constitution does make the President the chief commander of the armed forces. Thus, measures that would interfere with the internal chain of command in a way that would preclude him from standing at its apex, or that would otherwise impermissibly obstruct his authority to **superintend those he commands**, would run afoul of the Constitution. But the restrictions on troop levels or geographic scope that you reference would not attempt to accomplish such impermissible purposes. They would merely limit the number of troops that the President may command or establish the theater of operations in which his command powers may be exercised. In addition, such flat, rule-like restrictions do not remotely implicate whatever questions might be presented if Congress were to attempt what is sometimes referred to as the impermissible micromanagement of every jot and tittle of the President's conduct of a campaign.

As you note, Professor Feldman has recently suggested otherwise in an article published in the *The New York Times Sunday Magazine*, in which he indicates that

¹ To be sure, even though a restriction on troop levels is constitutional whether or not it is enacted as a limitation on the use of appropriated funds, the disregard of an appropriations restriction may violate the Anti-Deficiency Act, which establishes criminal penalties and contains a relatively elaborate set of enforcement mechanisms, neither of which may be included in the statute establishing such a restriction through the imposition of a direct prohibition on executive action.

Congress lacks the constitutional authority to cap troop levels. He argues that Congress must either end the war entirely or permit the President to proceed with the escalation. Doing otherwise, he contends, is tantamount to impermissible micromanagement. I strongly disagree with the assertion that the Constitution presents the Congress with such an all-or-nothing choice when it comes to regulating ongoing military operations. My written testimony explains my specific reasons for concluding that measures capping troop levels do not present whatever constitutional concerns are meant to be invoked by references to impermissible legislative micromanagement of the conduct of war. I will not repeat my discussion of the numerous judicial and legislative precedents that support my conclusion (from the decision in *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), by Chief Justice Marshall early in our history through the earlier referenced legal memorandum concerning the lawfulness of statutory restrictions in the Vietnam War that was written by his successor, William Rehnquist, while he was serving as a legal advisor in the Nixon Administration). Instead, I wish here to emphasize only the simple fact that Professor Feldman's analysis is not based on the identification of contrary legal authority. Instead, Professor Feldman's argument rests on a syllogism.

Professor Feldman contends that "no one believes Congress could legitimately pass a law ordering the Army to take one hill rather than another." From that premise, he reasons that, because determinations of force levels are also tactical, they, too, must be illegitimate. What Professor Feldman never adequately explains, therefore, is why the fanciful statute that he posits must be deemed constitutionally indistinguishable from one that would cap troop levels. It cannot be enough to conclude that both statutes purport to regulate tactics. After all, there is a whole range of regulations of tactical matters that would surely be thought by many (and perhaps even by Professor Feldman himself, who has elsewhere written insightfully about the need for congressional action to restrain executive wartime decision making) to be perfectly legitimate exercises of congressional war powers. Such regulations would range from those restricting methods of detention, interrogation, and trial of enemy combatants, *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (interpreting provisions of the Uniform Code of Military Justice to impose limits on detention and interrogation practices), to those addressing the propriety of using certain weapons of mass destruction (such as chemical weapons), to those governing the decision to conduct a campaign with air rather than ground forces, *cf. The National Defense Authorization Act for Fiscal Year 1998* (prohibiting funding for Bosnia "after June 30, 1998, unless the President, not later than May 15, 1998, and after consultation with the bipartisan leadership of the two Houses of Congress, transmits to Congress a certification— (1) that the continued presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and Herzegovina is required in order to meet the national security interests of the United States; and (2) that after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or be used as, civil police in the Republic of Bosnia and Herzegovina."). But if measures regulating tactical decisions such as these are constitutionally legitimate, why is a cap on troop levels not? After all, a cap on troop levels does not constitute the kind of "detailed instructions as to the use of American forces *already in the field* to supersede the President as Commander in Chief of the armed forces" that so worried Rehnquist, *see* Memorandum to the Attorney General from William H. Rehnquist, Assistant Attorney

General, Office of Legal Counsel, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970), at 20 http://www.stanford.edu/group/lawreview/content/issue6/bybee_appendix.pdf. By contrast, the hypothetical statute that Professor Feldman assumes to be clearly unconstitutional operates precisely by ordering troops who are already in the field to undertake certain detailed operations. Thus, even on his own terms, his argument is not persuasive in seeking to equate a cap on force size with a command to take a particular hill.

Finally, it should be noted that in the effort to address a supposedly absurd case – that of a statute ordering troops to take a certain hill – Professor Feldman has invited some absurd consequences of his own. On his view, it would appear that Congress would be utterly powerless to preclude the President from shifting all of the forces now in Afghanistan to Iraq, or to move the entirety of the force holding the line against North Korea to Baghdad – unless that is, it was willing to bring the military conflict in Iraq to a nearly immediate end. After all, restrictions on the President’s power to effect such redeployments would appear to interfere with what Professor Feldman suggests is the President’s exclusive prerogative to determine “how many troops should be sent where” while military operations are ongoing. In my view, such an extreme position concerning the limited nature of congressional war powers demands far more in the way of support from conventional legal precedents than Professor Feldman has offered – particularly in light of the precedents that go against it, including a number of statutes enacted in recent decades cited in my written testimony.

Let me conclude by addressing the questions you raise concerning Congress’s powers to restrain a defiant President. Fortunately, our constitutional history indicates that Presidents will comply with duly enacted statutes concerning the size, scope and duration of a military conflict. During the course of the Civil War, President Lincoln did often take controversial actions in advance of legislative authorization, but he never once asserted a power to disregard the will of the Congress once it had been expressed in a validly enacted law. Similarly, throughout the litigation over the seizure of the steel mills during the Korean War, President Truman made clear that he would comply without whatever statutory limitations the Congress clearly imposed on him. Were a President to take the defiant step of disregarding a statutory restriction of this kind, particularly one that was enacted over his veto, it would truly pose a threat to the constitutional order. Congress and the public would accordingly possess and be advised to deploy all of the tools our system provides to ensure compliance with constitutionally valid statutes and thereby to uphold the rule of law. These tools include the exercise of oversight authority designed to mobilize public opinion so as to cause the executive to reconsider his defiant actions, litigation (perhaps supported by additional congressional enactments designed to overcome whatever legal obstacles to suit might otherwise stand in the way) aimed at securing a judicial order that he comply with a valid statute, and, in extreme cases, prosecution and/or impeachment. I should emphasize that while it is often reflexively assumed that the judiciary would not entertain a lawsuit concerning the conduct of a war, I personally think such predictions are mistaken. Although courts would be no doubt be appropriately reluctant to enjoin ongoing military operations in the face of congressional

silence, I think it much more hazardous to predict the likelihood of judicial nonintervention in a case of a President who was conducting substantial military operations in direct defiance of a clear and unequivocal statutory prohibition against him doing so. *Cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

Responses of Bradford A. Berenson to questions from Senator Whitehouse for all witnesses at the Judiciary Hearing: "Exercising Congress's Constitutional Powers to End a War"

February 21, 2007

Q1: Is it helpful or illustrative to view an Article I declaration of war as Congress empowering the President, as an agent of the U.S. Government, to conduct the war declared by Congress?

A: I do not believe that it is helpful or illustrative to regard the President in his role as Commander-in-Chief as the agent of Congress or the Government in conducting warfare pursuant to an Article I. The President is an independent constitutional officer of the government, and he is invested with independent authority, separate and apart from any congressional declaration to command the nation's armed forces. Unbroken precedents establish his authority to commit our troops to battle, with or without a congressional declaration, and indeed formal Article I declarations of war have been the rare exception rather than the rule since the founding of the republic. It is instead more accurate to regard a formal declaration of war as an act that brings about a set of defined legal relationships between the United States and the adversary against whom war is declared. A number of special and additional statutory powers of the President are triggered by a declaration, and there are important international law implications. But concepts of agency imply that the President may only exercise the authority delegated to him and that he remains a mere creature of Congress in prosecuting the declared war. In my view, this is an incorrect paradigm. Even following a declaration of war (and, as noted, even without one), the President has considerable independent power to command the armed forces and direct the conduct of hostilities.

Q2: In law, is it rare to have grants of power that are irrevocable by the grantor? Can you identify instances in law where grants of power once made to agent are irrevocable by the grantor?

A: In law, it is typical that a grantor or principal may revoke or alter authority granted to a beneficiary or agent, but there are exceptions. For example, certain categories of irrevocable trusts, once created, cannot be revoked. And other kinds of delegations of power or authority may be revocable only upon the occurrence of certain conditions. But in any event, for the reasons described in the response to Question 1, I do not believe that principles of agency are particularly instructive in considering the President's relationship to Congress in the context of the prosecution of a war, whether declared or undeclared.

Q3: If Congress has the power to "undeclare war" and thereby remove the constitutional authority for the war effort, doesn't that power necessarily incorporate the lesser power to limit war to geographic or national bound, to a limited expenditure of funds, and to a limited deployment of military forces?

A: Congress's power to terminate an ongoing war through legislation is not the same thing as a power to "undeclare" war. As noted, the overwhelming majority of wars in our history have been fought without a congressional declaration. Congressional limitations, therefore, are more properly regarded as the independent exercise of a constitutional authority granted to the Congress in an area of shared power with the President. Although the President has the constitutional authority to initiate hostilities where he deems it necessary to protect the nation, the Congress has legislative power under the Necessary and Proper Clause and/or the Spending Clause to terminate those hostilities, subject to certain reserves of power inherent in the President as Commander-in-Chief (such as the power to respond to emergencies or attacks or to protect our forces in the field). I do, however, agree that the power to terminate a war altogether includes certain lesser powers, such as the power to define the funding levels an ongoing war will receive, or to circumscribe hostilities within certain geographic limits or to certain identified foes. Where the Congress's wishes in these areas are contrary to the President's, Congress may need a veto-proof majority to work its will, but if it can muster such a majority, as a constitutional matter, it should be able to impose these kinds of limits. It is difficult to identify the precise line where Congress's power in this regard ends and where the President's begins, and legislation always remains potentially subject to exceptions emanating from the Commander-in-Chief power in Article II – there is almost no useful judicial precedent on these points – but as a general matter, Congress has authority to legislate on broad matters of national military policy, including where we fight, whom we fight, and how much of our national resources we dedicate to the fight.

**Questions from Senator Sheldon Whitehouse for all witnesses at the Judiciary Hearing:
“Exercising Congress’s Constitutional Power to End a War”**

Congressional power “to declare war” is found in Article I, Section 8 of our Constitution. The father of our Constitution, James Madison, once said, “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in the war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”

- (1) Is it helpful or illustrative to view an Article I declaration of war as Congress empowering the President, as an agent of the U.S. Government, to conduct the war declared by Congress?

Yes. The President is the agent of Congress in carrying out the declaration (or authorization) and is subject to the restrictions and conditions placed in that grant of power. For example, the Quasi-War with France in 1798 authorized a naval, not a land, war. When President John Adams issued a proclamation that exceeded the authority granted by Congress over seizure of ships, the Supreme Court in *Little v. Barreme* (1804) held that the proclamation was invalid because in violation of the statute. The Iraq Resolution of October 2002 authorized military action against Iraq, not the general region.

- (2) In law, it is rare to have grants of power that are irrevocable by the grantor. Can you identify instances in law where grants of power once made to an agent are irrevocable by the grantor?

Not in the war power area. Congress can revisit an authorization or declaration at any time to modify and reshape national security policy. Outside the war power area, there are examples of the Senate confirming a nominee and later, through its rules, insisting that it could “reconsider” its vote. The Supreme Court in *United States v. Smith* (1932) ruled that after the Senate confirms a nomination and the appointee takes the oath and enters into the duties of office, the Senate may not then reconsider and possibly reject the nomination.

- (3) If Congress has the power to “undeclare war” and thereby remove the constitutional authority for the war effort, doesn’t that power necessarily incorporate the lesser power to limit war to geographic or national bounds, to a limited expenditure of funds, and to a limited deployment of military forces?

Yes, that is correct. Congress may consider and adopt those measures as well as others.

Louis Fisher
Specialist in Constitutional Law
Law Library
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**Questions of Senator Edward M. Kennedy
Exercising Congress's Constitutional Power to End a War
February 6, 2007**

Louis Fisher

1. Which historical precedents are most on point in considering legislation to prevent the President's proposed troop escalation in Iraq?

During the Vietnam War, Congress passed a number of measures to place restrictions on the deployment of U.S. troops and eventually blocked funding for the war. Also, as with Somalia in 1993, Congress can allow troops to remain in the region for a time certain, after which they must be removed unless the President comes to Congress and obtains specific authority in advance for continued troop presence. Those examples, along with others, are included in my statement and testimony to the committee, and also in the CRS report, "Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches," January 16, 2007, which the committee has.

2. The Administration's activities in combating terrorism and in conducting war have been cloaked in secrecy. Whether the issue is warrantless wiretapping, the authority to open mail, seizing alleged enemy combatants and holding them without access to lawyers or courts, or using secret harsh interrogation programs, the Administration has used the veil of its commander-in-chief authority to hide its activities. That approach must stop. It is time for Congress to become a partner in making decisions about the conduct of the war. The Administration should be held accountable for its activities, and the planning as we go forward should be conducted in the light of day. What is the proper role of Congress in exercising its oversight role during wartime?

Congress, having authorized military operations in Iraq, may at any time pass supplemental authorization and appropriations measures to reshape U.S. policy. The framers knew that the separation of powers spelled out in the Constitution could be upset by any branch intent on concentrating power, and that the remedy would be for each branch to have an incentive to protect its powers and fight off encroachments. Over the past half-century, Congress has largely lost that instinct and respect for its institutional place in government, particularly in vigorously exercising checks and balances as a means of preserving liberty and limiting executive (or judicial) abuses. For the system to work as the framers hoped, lawmakers must value Congress as a separate body rather than define loyalty as automatic support for presidential initiatives. Individual freedom is best protected by checks and balances, not by deference to the President. There should never be any question of patriotism in opposing military operations that are not in the nation's interest. Lawmakers take an oath of office to support the Constitution, not the President. They need to impress upon their constituents that duty.

3. Many of us feel that the authorization to use military force in Iraq enacted in 2002 is no longer relevant. It was based on Saddam Hussein's possession of weapons of mass destruction, his ties to al Qaeda and his defiance of U.N. Security Council Resolutions. The mission of our armed forces today in Iraq bears no resemblance to the mission authorized by Congress.
 - a. Is the 2002 authorization still valid, even though it's obviously not relevant to our mission in Iraq today? If not, is the President acting outside his authority by continuing the war in Iraq?

The Iraq Resolution contains broad language in Section 3 regarding the use of force. It authorized the President "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 continued threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." The language in (1) relates to the threat posed by Iraq, not Saddam Hussein, and even though the nature of hostilities in Iraq today was unlikely to be foreseen in 2002 (sectarian fighting and guerrilla warfare), the Administration could still claim that Iraq "poses a threat," particularly to U.S. soldiers. It could argue that conditions in Iraq pose a threat to the region and to the "national security of the United States." The statute clearly gives generous discretion to the President to use force "as he determines to be necessary and appropriate." Although the nature of the war in Iraq has changed dramatically from the expectations of October 2002, it would be difficult to maintain that the President is acting outside his authority by continuing the war. The statutory language of the Iraq Resolution is too broad to sustain that conclusion.

- b. Do the annual appropriations for the war constitute a de facto authorization by Congress to continue the war? Is your answer affected by the fact that it will be necessary for Congress to appropriate funds to ensure the safety of troops in the field, whether or not it agrees entirely with the mission they are carrying out? How can Congress address the needs of the troops without necessarily re-authorizing the war by doing so?

Annual appropriations do not constitute a de facto authorization for the Iraq War. Section 8(a) of the War Powers Resolution specifically states that authority to introduce U.S. troops into hostilities or likely hostilities "shall not be inferred (1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution." It is true that during the Vietnam War some federal judges accepted continued funding as a de facto authorization of the war, but those same judges later reversed themselves on two grounds. One, they learned that Congress follows a two-step legislative policy: authorization bills for policy and appropriation bills to fund the policy. Policy, on the whole, is established in authorization bills, not appropriations bills. Second, they concluded that "[w]e should

not construe votes cast in pity and piety as though they were votes freely given to express consent.” *Mitchell v. Laird*, 476 F.2d 533, 538 (D.C. Cir. 1973). For further details on this point, see Louis Fisher, *Presidential War Power* 139-41 (2d ed. 2004).

4. Some have taken the position that the President as Commander-in-Chief does not need congressional authorization to wage war in Iraq. Under this view, even if Congress repealed the 2002 authorization to use military force in Iraq, the President could continue military operations there.
 - a. Under what conditions, if any, can the President wage war in the absence of congressional authorization?

The delegates at the Philadelphia Convention in 1787 recognized that the President, particularly when Congress is not in session, has authority to “repel sudden attacks.” At the same time, they understood that taking the country *from a state of peace to a state of war* represented a decision left solely to Congress. All three branches understood that fundamental constitutional principle until President Truman in 1950 took the country to war against North Korea by circumventing Congress and obtaining “authority” from the U.N. Security Council. In my analysis, his action represented the first unconstitutional war. The Constitution was not rewritten by that violation.

- b. What remedies does Congress have against a defiant President?

Congress has many remedies, including holding public hearings (both in the Nation’s Capital and in home districts and states) to educate constituents, passing non-binding resolutions expressing opposition to the President’s policy, refusing to grant funds for certain military operations (a decision over which a veto cannot be exercised), eliminating programs and funding for presidential priorities even when they are unrelated to the war, refusing to confirm appointments and treaties desired by the President, and, ultimately, beginning investigation and hearings into impeachment in the House and removal in the Senate. Those remedies increase in potency when the votes have a bipartisan quality.

5. Some have attempted to draw a distinction between the authority of Congress before a use of force is initiated and the power of Congress to shape or end ongoing hostilities. Is there any legal basis for such a distinction? Does congressional authority change once hostilities begin?

Congressional *power* changes once hostilities begin, because the President can now draw attention to his role as Commander-in-Chief, urge the necessity for “victory” and national unity, question the patriotism or judgment of those who are unsupportive, and invoke other political and emotional arguments. But congressional *authority* remains unchanged. Congress retains full authority at all times to revisit and revise military commitments.

6. In an article in the New York Times Magazine Section on February 4, attached, Noah Feldman concluded that Congress can use its appropriation power to end a war, but not to limit the number of troops the President can deploy once the war has been authorized. According to Feldman, legislation blocking the President's troop escalation violates the constitutional structure of divided government because it involves micromanaging the Commander-in-Chief's power. Do you agree or disagree with Feldman that Congress's war power is all or nothing, "an on-off toggle, not a dimmer switch"?

I disagree fundamentally with his entire article, which consists of a series of *assertions* and *ipse dixit*s with no supporting facts or history. He does not substantiate a single claim. Dozens and dozens of statutes demonstrate that Congress is not limited to an all-or-nothing choice, and the Constitution itself places Congress as a primary body to both authorize a military commitment and decide later on its continued viability and purpose. I am unaware of any scholarly work by Noah Feldman that would buttress the claims made in his article in the New York Times Magazine.

Consider the following difficulties with his article. (1) He states that once Congress "has authorized a war, as it did the war in Iraq, the president's power as commander in chief surely allows him to conduct the war without being micromanaged from Capitol Hill." The addition of 21,500 troops to Iraq is a significant step and cannot be called "micromanagement." Moreover, use of the word micromanagement is ill-defined and serves no analytical purpose. (2) "No one believes Congress could legitimately pass a law ordering the Army to take one hill instead of another." No one, to my mind, is even arguing that. Such comments appear to be a red herring, an attempt to distract the reader from real issues to non-issues. (3) "During the Civil War, Congress created the Joint Committee on the Conduct of the War, which exercised oversight with a vengeance, debriefing generals after battles and questioning tactical choices. But Lincoln struggled fiercely to preserve his decision-making independence . . ." First, "with a vengeance" is quite vague and journalistic. Second, Lincoln in fact benefited frequently from the Joint Committee's work and Feldman shows no awareness of scholarship in this area. (4) "When it comes to deciding how many troops should be sent where, there is reason to think [President Bush] is right." Feldman offers no reasons. (5) "Congress has used the appropriations power to limit combat before – but only to end wars." That is false, as indicated by many careful studies, including the CRS report cited above. (6) "Given this historical precedent, there is strong reason to think that the president is within his powers as commander in chief – and beyond the reach of Congress – when he allocates troops. Congress would be on much firmer ground if it exerted its power to pull financing for all troops in Iraq than it would be if it tried to dictate precise troop numbers." Feldman draws this conclusion from his position in (5), where he displays an unawareness of what Congress had done in the past. (7) "The constitutional structure of divided powers is designed to discourage Congressional intervention in particular tactical decisions." Unless Feldman explains the difference between tactical and strategic and puts the 21,500 troops in one category or another, this statement is empty.

Two points remain. (8) For laying out the “order of battle,” Feldman claims “a single supreme commander is necessary.” He doesn’t explain why. Another assertion. What *evidence* supports the statement that “a single supreme commander” has been effective in planning and executing a war? By that question I refer not merely to Iraq II but to Vietnam. What is the evidence? (9) In the final paragraph, Feldman states: “there are still some of us who believe that the greatest problem for the United States in Iraq has always been incompetent management.” That is a remarkable statement because it seems entirely at cross-purposes with (8). For his model, Feldman seems left with a single supreme incompetent commander.

Louis Fisher
Specialist in Constitutional Law
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Prof. Robert F. Turner's response to Questions from Senator Sheldon Whitehouse:

I believe a more helpful or illustrative approach is to view all sovereign power possessed by the United States as belonging ultimately to the people, who through the Constitution have vested certain powers in the Legislative chambers, certain powers in the Executive, and other powers in the Judiciary. Those powers are only revocable by the act of the people as provided in Article V of the Constitution through the amendment process.

As I explained in some detail in my prepared statement, the general management of the nation's external intercourse – the negotiation of treaties, the collection of foreign intelligence information, the management of military operations, and much else as well – was viewed by the Founding Fathers as “executive” business confided in the President by Article II, Section 1. Congress and the Senate were given certain “exceptions” to this general grant of power, including as we discussed during the hearing the power “to make Rules governing Captures on Land and Water” – which I believe permits Congress to legislate humane treatment of captured enemy combatants. The expressed power granted Congress in Article I, Section 8, Clause 10, to “define and punish Offenses against the Law of Nations” would similarly authorize Congress to attach criminal penalties to acts of genocide, violations of the Convention Against Torture, and war crimes prohibited by the 1949 Geneva Conventions.

Some of these “exceptions” vested in Congress or the Senate were of the nature of “negatives” or “vetoes” – such as the power of the Senate to reject a diplomatic nomination or a treaty. Congress was not given the “treaty power” (which, in fact, was placed in Article II concerning executive powers), but merely the power to negative or veto a decision by the President to ratify a negotiated treaty. That Congress itself is “powerless to invade” the business of negotiating a treaty has been affirmed by the Supreme Court in the landmark 1936 *Curtiss-Wright* case, and President Washington recorded in his diary that James Madison, Thomas Jefferson, and Chief Justice John Jay shared the view that the Senate had “no Constitutional right to interfere” with the business of the Department of Foreign Affairs save for the specific grants of negatives over appointments and treaties. This view was embraced as well by Chief Justice Marshall in *Marbury v. Madison*, when he used the business of the Department of Foreign Affairs as an example of presidential discretion that could not be checked by the other branches. I quoted this in my prepared statement, but it may warrant restatement. In perhaps the most famous of all Supreme Court cases, Chief Justice Marshall wrote:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting

to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

I believe Andrew Hamilton (who played a key role at the Constitutional Convention in drafting Article II) was correct in his first *Pacificus* essay when he explained:

The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument. . . . It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general "executive power" vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

So on your first question, I believe you have gone astray in confusing the Congress with the sovereign American people. By "declaring war" Congress does not confer upon the President the Commander-in-Chief power. The President received that power directly from the American people in Article II, Section 2, of the Constitution. Congress is joined in the business of war by having a veto over a formal "declaration of war" – which, as I discuss in my prepared statement, was understood to be necessary only in what we would today call "aggressive" wars. Congress also has the power to raise and support armies and control over the expenditure of treasury funds. But these important powers were not intended to be used to usurp the discretion of the President with respect to either the negotiation of treaties or the conduct of war.

Your second question is premised on the idea that the President's Commander-in-Chief power is bestowed by Congress rather than by the people, and that the President in war serves as the agent of Congress. I have no doubt that the American people may at any time amend the Constitution to alter grants of power, but Congress may not do so by a mere statute.

As to your third question, it is not at all clear to me that Congress has the power to "undeclared war." Certainly Congress has the power, by simply refusing to raise and support armed forces or provide funds for the military, to so weaken our military that an enemy victory will be virtually guaranteed. But when understood as a "negative" vested in Congress over a presidential decision to initiate a war in a setting where the Law of Nations (what we today refer to as "international law") would require a formal declaration, this congressional power might well be compared to the Senate's negative over diplomatic or military appointments.

The comparison is useful, because the issue of the residual power of the Senate with respect to the Secretary of Foreign Affairs once it has fulfilled its constitutional duty of

advising and consenting to the appointment was debated at length in the First Session of the First Congress, by men who had for the most part served as delegates to the Philadelphia Convention and/or to their state ratification conventions. Representative Madison took the view that, since the appointment of the Secretary was “executive” in nature, the involvement of the Senate in that process was to be construed strictly. And since the Senate was only joined in the appointment phase, of the process – with no mention of a Senate role in the *removal* of said officer – the Senate did *not* have a negative over a presidential decision to remove the Secretary. This view prevailed in both chambers of Congress, and is discussed at some length by Chief Justice Taft in the landmark 1926 case of *Myers v. United States*.

And by this same logic, since the Congress is given the power “to declare War” but *not* the expressed power to direct the termination of a war, Madison’s reasoning would suggest they have no such power. The Senate cannot terminate a lawful presidential appointment of a defense secretary or Army general merely by voting to “repeal” its resolution that had earlier granted its advice and consent to the President to make the appointment, and I’m not persuaded that Congress can order the end to a war by similarly “repealing” the declaration of war or authorization for the use of force. In any event, it is clear from *Chadha* that the Congress could not do so without the legislation being subject to a presidential veto.

One might also draw a comparison to the President’s “legislative” power granted in Article I, Section 7, Clause 2, to negative a bill passed by both houses of Congress unless it is subsequently re-passed over his veto by a two-thirds majority of each house. Would anyone claim that this narrow exception to the legislative powers granted to Congress in Article I carries with it a residual power in the President to decide that he erred years earlier in not vetoing a particular bill, and thus to declare it without force unless and until Congress re-enacts it by a two-thirds majority of each chamber?

These are interesting theoretical issues. But, as I have acknowledged, by simply refusing to enact new legislation to maintain an armed forces or rejecting supplemental appropriations acts to fight a war, Congress can certainly leave our forces without food or ammunition and probably ensure an enemy victory in any major war. And as was demonstrated tragically in Beirut on October 23, 1983, even if the President ultimately “wins” a vote, merely by holding a highly partisan political debate the Congress can embolden America’s enemies so as to weaken the position of our military forces and ultimately lead to their slaughter.

I would add that anyone who believes we should simply “assume” that the Framers of our Constitution intended for Congress to have not only the power to “declare War,” but also the power to legislate an end to a war, needs to explain why a specific proposal to “give the Legislature power of peace, as they were to have that of war,” was *unanimously* rejected at the Philadelphia Convention on August 17, 1787. (See pages 24-25 of my prepared testimony.) In a practical sense, whether the Constitution permits Congress to directly legislate the end of a war may be only of academic interest – because Congress clearly has the power to withhold approval of appropriations requests and to refuse to

authorize the existence of any military forces for the President to command. But to those of us who take the constitutional limits on Legislative power seriously, these are important matters.

During the hearing, the most popular authority cited by advocates of broad congressional authority in this area seemed to be James Madison's first *Helvidicus* essay. My old friend Dr. Louis Fisher wrote in his prepared statement:

For Madison, it was a fundamental principle of democratic government that “[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.”

(Uncharacteristically, Dr. Fisher cited this statement to “6 *The Writings of James Madison* 146,” when in reality it appears two pages later.) Chairman Feingold also quoted a portion of this Madison statement.

It is important to put Madison's statement in context. In early April of 1793, word reached America that France had two-months earlier declared war on Great Britain. Later that month, President Washington unilaterally proclaimed that “the duty and interest of the United States require, that they should . . . adopt and pursue a conduct friendly and impartial toward the belligerent [*sic*] Powers” Although he did not actually use the term “neutrality proclamation,” Washington's decision upset Thomas Jefferson, Madison, and others who felt the United States should have aligned itself with France (with whom we had a defensive military alliance) in the conflict.

Defending the President's proclamation, Alexander Hamilton wrote a series of seven essays under the *nom de plume Pacificus*. It was during the first of these that he argued that the grant to the President of the nation's “executive Power” included the general control of the nation's external intercourse. He reasoned:

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and the power of the Legislature to declare war, are exceptions out of the general “executive power” vested in the President, they are to be construed strictly, and ought to be extended no further than is essential to their execution.

On July 7, Jefferson wrote to Madison: “For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in face of the public.” And after making a number of excuses in an effort to avoid the task, Madison – in what he later characterized as “the most grating” task he had “ever experienced” – wrote the *Helvidius* essay that is being so widely quoted.

In essence, Jefferson and his Republican friends – who controlled the House and had close to a working majority in the Senate – were “forum shopping.” They wanted the United States to side with France and felt they had a better chance of that outcome if the decision were made by Congress. And the reason Madison found writing as *Helvidius* to be so difficult was probably because he was contradicting both his own and Jefferson’s earlier interpretation of the Constitution to make his case. Thus, three years earlier Jefferson had argued in a memorandum to Washington:

The Constitution has declared that “the Executive power shall be vested in the President,” submitting only special articles of it to a negative by the Senate

The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.

And even as *Helvidius*, Madison acknowledged that if “the powers of war and treaty are in their nature executive,” then “so far as they are not by strict construction transferred to the legislature, they actually belong to the executive” (6 *Writings of James Madison* 152.) And Madison further admitted (as I discussed in my prepared statement) that writers such as Locke and Montesquieu viewed these powers to be “executive” in character. But this time – in the finest traditions of lawyers changing their arguments to best serve the ends of their clients from one case to the next – he seeks to *discredit* Locke and Montesquieu by asserting they were “warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration ordering on idolatry.” (6 *Writings of James Madison* 144.)

So the question arises – was *Helvidius* voicing the honest views of James Madison and his instigator Thomas Jefferson, or was this legal advocacy motivated by forum shopping? How do we explain Madison’s views expressed during Jefferson’s first cabinet meeting on March 15, 1801, on the President’s power to send two-thirds of the new American navy to the Mediterranean with instructions to sink and burn ships (without any authority from, or even notifying, Congress) with his limited view of executive power as *Helvidius*? How do we reconcile Madison’s disdainful dismissal of Montesquieu as *Helvidius* with his reference to that same “celebrated” Frenchman in *Federalist* No. 47 as “the oracle who is always consulted and cited” on issues of separation of powers? And how do we reconcile *Helvidius* with Thomas Jefferson’s earlier argument that “the transaction of business with foreign nations is executive altogether” – a view that President Washington recorded was endorsed by Madison at the time, along with Chief Justice Jay? In candor, I would caution you to be a bit wary of giving too much reliance to Madison’s 1793 essays.

Finally, I should add that in cases like *Bas v. Tingy* and *Talbot v. Seemen* the Supreme Court recognized that Congress could authorize both “perfect” and “imperfect” war. In the former of these cases, Justice Washington wrote:

It may, I believe, be safely laid down, that every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised to commit hostilities against all the members of the other, in every place, and under every circumstance. In such a war all the members act under a general authority, and all the rights and consequences of war attach to their condition. But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers. It is a war between the two nations, though all the members are not authorised to commit hostilities such as in a solemn war, where the government restrain the general power.

Justice Patterson added in the same case: “As far as congress tolerated and authorized the war on our part, so far may we proceed in hostile operations.” But, in reading these excerpts, we must keep in mind that Congress was here exercising its expressed Article I, Section 8, power to “make Rules concerning Captures on Land and Water.”

I have serious doubts about whether Congress, in authorizing war, could attach conditions for the purpose of directly the President how to *conduct* military operations – such as telling him which military units to send where and when and prohibiting him from calling up reserves or moving forces from one hill to another as the Commander in Chief or his generals believed necessary to accomplish their mission.

Nor, I submit, may Congress properly legislate in such a manner as to usurp the independent discretion vested in the President by the Constitution – such as raising an Army but then providing (as Congress did on the eve of the U.S. entry into World War II, during consideration of the 1940 Selective Service Act) that “[p]ersons inducted into the land forces of the United States pursuant to this act shall not be employed beyond the limits of the Western Hemisphere except in the Territories and possessions of the United States, including the Philippine Islands.” When first-term Senator Henry Cabot Lodge (R-Mass.) introduced that amendment, this exchange occurred between Lodge and Senator Henry Ashurst of Arizona--then in his twenty-eighth year as a Senator:

Mr. ASHURST. . . . [I]t is my opinion that not to exceed three or four Senators would vote that American boys shall be sent to Europe to participate in European wars. . . . [B]ut I ask the Senator from Massachusetts, . . . Have we the power to limit the President in such a case? My judgment is that under the Constitution he may send the Navy or

the Army anywhere he chooses. It is the business of Congress to raise and support the Army and to provide and maintain a navy. I leave it to the judgment of the Senator, Is it not a fact that when we give or grant to the President an army he is the Commander in Chief and may send them wherever he pleases? Has the Senator reflected on that?

Mr. LODGE. I have reflected on it, and I think there is much force in what the Senator from Arizona says. . . .

Mr. ASHURST. I fear the Senator's amendment is what we call a *brutum fulmen*, a harmless thunderbolt, though it is a provision which should be in this bill. I am of the opinion that the present Chief Executive, or any other Chief Executive, would be inclined to respect an expression of this sort by the Congress, incorporating into the bill certainly the legislative wish and hope, the expression of our opinion that drafted troops should not be sent to Europe to participate in the wars of Europe; but *such an expression is not legally binding on the Executive*.

Mr. President, let us be under no illusions. Let us not, after we have passed a very important piece of legislation, discover that we have given to an Executive a large army, he may do with as he pleases.

Of course, very able lawyers disagree with my conclusion; but, after long study, and having passed through the experiences of the first World War, in which our country participated, I say to the Senate in all solemnity that *if we give the President this army he may send it where he chooses*.

Mr. LODGE. I think there is, of course, a great deal of learning and force behind the Senator's statement, as there always is in every contribution he makes in the Senate.

86 *Congressional Record* 10,895-96 (1940).

Despite this provision in the 1940 Selective Service Act, most of the American soldiers sent to Europe to fight World War II were draftees.

John Locke explained that a key reason for entrusting a nation's foreign intercourse to the executive was that large deliberative assemblies lack the **institutional competency** to act with unity of plan, secrecy, or speed and dispatch. Congress cannot pass laws controlling the behavior of foreigners beyond our shores, and it can't anticipate all of the developments that might occur in negotiations or during war that would warrant a major change in policy. I have been following these issues closely both as a scholar and government practitioner for well over three decades, and the wisdom of Locke's theoretical analysis routinely manifests itself.

I worked in the Senate in May 1975, when Cambodian forces seized the crew of the S.S. *Mayaguez* and took its crew of 43 men to Koh Tang Island. Although Section 2(c) of the War Powers Resolution implicitly denied the President the power to rescue American

citizens abroad who were not part of our armed forces, and Public Law 93-52 had prohibited the expenditure of any treasury funds for combat activities in the air, on the ground, or off the shore of Cambodia, President Ford had the courage to ignore these "laws" and rescued those Americans. When Senator Frank Church was asked about the fact that the popular rescue had been carried out in clear violation of statutory language he had helped pass, he replied that Congress had not intended to prohibit this kind of rescue operation. I worked for a member of the Foreign Relations Committee at the time, and I wondered how Congress would have reacted – and how the voters would have responded – had the President simply gone before the nation and explained that Congress had tied his hands, he could not violate the "law," and thus nothing could be done to help those American citizens. (You may recall that, at the time, the Khmer Rouge was in the process of slaughtering more than 20 percent of the population of Cambodia – so my guess is those merchant seamen would not have lasted long.

I could give you many other examples, but will mention just one more in the interest of time. When the U.N. Security Council sought help in ejecting Saddam's forces from Kuwait in 1990, it authorized the use of force not just to eject Iraqi troops from Kuwait (Res. 660), but also by Resolution 678 to "restore international peace and security in the area." But, wary of "Vietnam" and lacking confidence that our military could make such short work of ejecting Saddam's Revolutionary Guard, Congress carefully worded its authorization for the use of force to *exclude* any military activities beyond ejecting Iraqi forces from Kuwait. As I recall, the joint resolution said something like "pursuant to Resolution 678, the President is authorized to use military force to implement resolutions 660 . . . [to] 677." The only military objective in any of those resolutions was the removal of Iraqi forces from Iraq.

And yet, after General Schwarzkopf's brilliant "left hook" that left the Revolutionary Guard in route and fleeing across the dessert, and General Powell persuaded President Bush to cases military activities, how many congressional Democrats who had opposed assisting the Security Council in any way involving the use of military force denounced the President as being a "wimp" for "stopping forty-eight hours too soon" and not going all the way to Baghdad to capture Saddam Hussein and try him as a war criminal? I'm not saying we should have gone to Baghdad in 1991. My point is that Congress erred in its judgment of what was likely to happen, and by the time a decision had to be made a lot of members who had voted to tie the President's hands in mid-January were having second thoughts.

In December 1984 I took part in a panel discussion with former Senator Jacob Javits in New York City before the American Branch of the International Law Association on the War Powers Resolution, of which Senator Javits had been the chief Senate proponent. And I argued at the time that the denial of the President's constitutional power to rescue endangered American civilians abroad in Section 2(c) of the 1973 statute was unconstitutional. And, to my surprise, Senator Javits during his rebuttal conceded the point. But it remains on the statute books.

My own fear is that if Congress tries to tie the President's hands in Iraq, it will embolden our enemies, demoralize our own troops, and lead rather quickly to our defeat and withdrawal. That, in turn, will swell the ranks of militant Islam by hundreds of thousands if not millions of angry young men anxious to take the fight to the infidels. They might start by merely chasing us out of Jordan, Egypt, and Saudi Arabia. But, eventually, I suspect they will want to come here and bring the struggle to our own churches, schools, and shopping centers. For we will have showed them that America has no will to resist if our people are dying. That was the lesson bin Laden attributed to our bug out in Beirut after Congress virtually placed a bounty on the lives of our Marines by telling the terrorists that further casualties would likely produce a new vote in Congress on continuing the deployment. (I discuss this in my prepared testimony.) At some point, the American people may find out what Congress has been doing — how many Americans today realize that Congress has enacted a law prohibiting the President from protecting private U.S. citizens abroad or on the high seas from terrorist attacks absent a declaration of war or AUMF? — and there will be an accountability. Sadly, if Congress continues its current approach, the long-term cost in American lives may well dwarf the horror of September 11, 2001.

SUBMISSIONS FOR THE RECORD

United States Senate, Committee on the Judiciary

A Hearing on

"Exercising Congress's Constitutional Power to End a War."

Testimony of David J. Barron

Professor of Law, Harvard Law School*

January 28, 2007

I would like to thank the Committee for inviting me to address the important constitutional issues that are the subject of this hearing and that in recent weeks have occasioned so much debate among lawyers, legal scholars, and the public at large. I have previously explained in a letter to congressional leaders, signed by myself and other constitutional law scholars, that Congress possesses substantial constitutional authority to regulate ongoing military operations, and even to bring them to an end.¹ I would like to elaborate on those conclusions here and to address more directly the claim that some commentators have been making of late – namely, that once military operations have begun the Constitution essentially prohibits Congress from using its war powers to do anything short of cutting off funding altogether.

In my view, there is simply no support in either the founding materials, the decisions of the Supreme Court, or the actual practices of the executive or legislative branches for a rule that would so dramatically circumscribe Congress's powers in a time of war. Though congressional war powers are not plenary, neither do they limit the legislature solely to reliance upon a complete termination of funding in regulating the scope, duration or size of a military operation. To the contrary, our constitutional tradition shows that measures such as those now being considered concerning military operations in Iraq – whether they place caps on troop levels, restrictions on the introduction of new troops, or establish a date certain by which troops must be redeployed – are clearly constitutional exercises of well-established congressional war powers.

The clearest sources of congressional authority to regulate ongoing military operations are to be found in the spending powers the Constitution gives to the legislative branch. A military operation necessarily requires the expenditure of considerable funds. The Congress is alone vested with the constitutional power to appropriate money from the Treasury, and it is given specific spending powers with respect to the Army and

* Affiliation for identification purposes only.

¹ See *Letter from Constitutional Law Scholars to Congressional Leaders Concerning Constitutionality of Statutory Limitations on Troop Increase in Iraq*, January 17, 2007.

Navy.² Thus, Congress, acting pursuant to those powers, may clearly end a military conflict by denying the funds necessary to continue it (allowing, of course, as any sensible legislation should, for force to be used during the period of time necessary to effectuate an orderly and safe withdrawal.). There is a consensus among scholars on precisely this point, and I do not believe that it may be seriously questioned. In fact, I do not even believe the current Administration disagrees with it.³ And because increases in the size, scope or duration of a conflict themselves necessarily require new expenditures, these same powers also enable Congress to take the more modest step of barring the use of appropriations to maintain or increase the forces that may be committed to a war, even if it is not finally terminated.⁴

It bears emphasis, however, that legislative war powers are not solely a function of Congress's power of the purse. The Constitution names the President as the Commander in Chief, but it also expressly confers upon Congress an impressive array of war powers that are not tied to its general appropriations power (for example, the power "to make rules for the government and regulation of the land and naval forces.")⁵ Thus, Congress's authority over the conduct of war is more than a byproduct of its de facto power over the money that governmental operations always require. It is the intended consequence of the Founders' desire (made express in the constitutional text) to give the national legislature a range of war powers, and with them, the de jure right to exercise the checking function in wartime (whether by enacting funding limits or imposing direct prohibitions) that is the hallmark of our system of separated powers more generally.⁶

² U.S. Const. art. I, s. 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ..."); See U.S. Const. art. I, sec. 8, cl. 12.

³ Vice President Cheney has been quoted as saying, in this regard, that: "Congress has control over the purse strings. They have the right, obviously, if they want, to cut off funding." See Associated Press, Cheney Defends Bush on Iraq, (January 25, 2007), available at <http://www.msnbc.msn.com/id/16791858/> (last visited January 27, 2007).

⁴ This conclusion comports with James Madison's statement in the Federalist papers that the power of the purse is the "most complete and effectual weapon. . . for addressing every grievance, and for carrying into effect every just and salutary measure." See The Federalist No. 58, at 359 (James Madison). It also accords with the specific constitutional provision requiring that any appropriation for the raising of armies shall expire after two years, thereby ensuring -- indeed, mandating -- an ongoing congressional role as to the deployment of the armed forces. See U.S. Const. art. I, sec. 8, cl. 12.

⁵ These include the authority to raise revenues and pay debts so as to "provide for the common defence," U.S. Const. art. I, sec. 8, cl. 1; to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, *id.* cl. 10; to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water, *id.* cl. 11; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years, *id.* cl. 12; to provide and maintain a navy, *id.* cl. 13; to make rules for the government and regulation of the land and naval forces, *id.* cl. 14; to provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions, *id.* cl. 15; to provide for organizing, arming, and disciplining the militia and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress, *id.* cl. 16; and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States or any Department thereof, *id.* cl. 18.

⁶ "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." 343 U.S. at 645 (Jackson, J., concurring).

Indeed, the Constitution's sundry grants of congressional war powers led Chief Justice Marshall early in our history to conclude that "[t]he whole powers of war [are], by the Constitution of the United States, vested in Congress"⁷ Whatever nuances that statement fails to include, it does reflect the basic understanding, repeatedly reaffirmed by the Supreme Court, that constitutional war powers are shared by both branches. Both *Youngstown Sheet & Tube Co. v. Sawyer* (the Steel Seizure case),⁸ and the Supreme Court's more recent decision in *Hamdan v. Rumsfeld*⁹ make that much perfectly clear, as each invalidated assertions of presidential war time power that conflicted with statutory limitations.

Notwithstanding this precedent, some have argued that Congress's power over appropriations, like its power under the numerous other constitutional clauses identified above, is severely constrained when military hostilities are actually underway. They have suggested that the outbreak of hostilities cuts short, in effect, the broad authority that the Congress otherwise enjoys over the use of military force.

This argument is usually framed in terms of a constitutional concern about congressional micromanagement of military operations in the field, which is intended to recall problems relating to the Continental Congress's detailed oversight of George Washington's own authority as the Commander in Chief during the Revolutionary War. In response, the Continental Congress did give General Washington much greater discretion than his initial commission conferred, but, significantly, it did so by congressional act and without ever disavowing a legal power to exercise ongoing control over that conflict. The micromanagement concern is also said to find support in dicta in two concurrences from Supreme Court cases—Chief Justice Chase's opinion in *Ex Parte Milligan*,¹⁰ and Justice Jackson's concurrence in *Youngstown*¹¹—that arguably raise concerns about statutory limits on ongoing military operations, though no Supreme Court decision has ever invalidated a statute on those grounds.

Against this suggestion, however, is the fact that the Supreme Court has often described the scope of Congress's powers over the conduct of war in quite broad terms. The Court, during World War II, made clear that the two branches' shared power in this regard "extends to every matter and activity so related to war as substantially to affect its conduct and progress." That power "is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war."¹² The Court also explained during that same conflict that the President's authority as Commander in Chief is "to wage war which Congress has declared, and to carry into

⁷ *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

⁸ 343 U.S. 579 (1952).

⁹ 126 S. Ct. 2749 (2006).

¹⁰ 4 U.S. 2 (Wall.) at 139-140 (Chase, C.J. concurring in the judgment). This dictum is repeated in *Hamdan*, 126 S.Ct. at 2773-2774 (2006).

¹¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 645-46 (Jackson J., concurring).

¹² *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

*effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.*¹³

The concern about micromanagement is rarely specified in any detail, and thus those who raise it are not always clear in identifying its bounds. Perhaps it is meant to address the hypothetical prospect of a Congress actually attempting to assume day-to-day control over tactical judgments through the enactment of repeated statutes intended to override the chief commander's judgments. If so, the fact that the President possesses the veto power indicates that such a strange turn of events could only be effectuated if both the House and the Senate managed to muster consistent and repeated super-majorities, making it a necessarily remote possibility. But even if circumstances short of such a persistent legislative attempt to wrest day-to-day control might be hypothesized in which the micromanagement concern would not be without substance, its scope must of necessity still be a confined one.

The constitutional text reflects, after all, a vital competing concern that must be kept in mind – namely, a concern about the absence of adequate legislative checks on executive action in wartime. And while there is no direct support for the view that the Congress is powerless to limit the conduct of war by statute, there is abundant evidence revealing the Framers' concerns about such unchecked presidential authority. The founding generation obviously did not intend to recreate a chief executive who would in effect be beyond control, especially in military affairs. This concern is reflected even today in the worries that are from time to time expressed about the legislature abdicating its constitutionally assigned oversight role, worries which make sense only if the constitutional plan is understood to give the legislature authority over military operations already underway. Thus, the notion of what might constitute impermissible micromanagement cannot be so expansive as to leave the national legislature with no choice but to confer upon the Commander in Chief a "blank check," immune from even modest revision, whenever it first decides to authorize the use of military force.

In consequence, between the extreme poles of outright abdication and what might be thought to be undue micromanagement, there necessarily lies a substantial zone within which the Congress retains authority over the conduct of war. In my judgment, proposals to set flat caps on troop levels, limit the introduction of additional forces into the theater of operations, or to bring the deployment itself to an end through curtailment of funds fall well within that permissible zone of authority.

Such measures would not undermine the one specific wartime power that the Constitution does clearly assign to the President – that he and no other executive officer be the chief superintendent of the armed forces. The measures now being considered do not in any respect interfere with the constitutionally established internal chain of military command. They do not attempt to countermand the President's judgment as to who within the military may command the forces in the field. Nor do they regulate the

¹³ *Ex Parte Quirin*, 317 U.S. 1, 26 (1942) (emphasis added).

President's power of superintendence over the armed forces that have been made available to him by interfering with the way information may flow up or down the line. They simply define the amount of resources that the President will have under his unified and unchallenged command. For that reason, they cannot be said to be inconsistent with the Constitution's designation of the President as being the chief officer within the military hierarchy.

In addition, such measures clearly do not amount to legislative attempts to usurp anything like the day-to-day operational control over the minutiae of ongoing military that some have pointed to in attempting to give substance to the concern about micromanagement. In fact, the measures now under consideration concerning Iraq are the first to revisit the scope and duration of the conflict since the initial authorization was passed years before. In doing so, these measures do not tell the chief commander, or any military officer, to take a certain hill or to mount a particular offensive. They do not even establish how the troops in the field should be deployed within the existing theater of combat. Indeed, they do not instruct the president to use a single soldier in the field in any particular way. They instead deny the President the funds that would be required in order for him to introduce *new* troops into the field, set the maximum number of troops that may be in the field as of a date certain, or require those troops now in the field to leave it altogether as a means of bringing the once authorized military engagement to a close. Such rule-like definitions of the nature, size and duration of the force available to the President -- which touch not at all upon his power to command those forces already in the field -- cannot seriously be equated, therefore, with statutes that would purport to set the date for D-Day or instruct a particular platoon to take a certain hill on a certain date or any of the other remote hypotheticals that some offer as examples of what they believe would constitute impermissible micromanagement.

In sum, the measures now under consideration all afford the President broad latitude over tactical questions concerning those forces that are authorized to be in the field, for so long as that authorization lasts. But that, of course, is the full extent of the power that one Congress may ever confer on the President when it authorizes him to use military force, unless one accepts the dangerous doctrine that a President who has been given the power to go to war by one legislature becomes at that moment essentially free of subsequent legislative constraint altogether. As a result, whether or not Congress could enact even more restrictive measures, as it has on occasion done, measures of the type now being considered clearly fall within Congress's war powers just as did the statute initially authorizing the use of military force in Iraq (and not any place the President should choose), even though it, too, identified certain bounds within which the President's authority was to be exercised.

Of equal importance, the proposed restrictions on military operations in Iraq are legally indistinguishable from many other statutory limitations on the scope and duration of war that have been enacted throughout our history, sometimes even in the midst of hostilities. For its part, the Supreme Court has never held a measure imposing such bounds to have crossed whatever constitutional line the concern about micromanagement may set. To the contrary, *Little v. Barreme*, which arose out of the undeclared, so-called

“Quasi-War” with France at the end of the Eighteenth Century, affirmed the congressional power to impose quite specific constraints on the scope and terms of the prosecution of that conflict. In that instance, the Court held unlawful an order from the Commander in Chief to a subordinate military officer concerning what ships could be seized at sea, on the ground that a statutory restriction on such interdiction was controlling.¹⁴

Even during the Civil War, President Lincoln, who can hardly be said to have had a modest view of his powers as Commander in Chief, did not assert a right to act in contravention of the statutory limitations on his conduct of the war that he confronted – and he repeatedly acknowledged Congress’s constitutional authority to check his action through duly enacted statutes. Among the statutes with which he complied were some that intruded far more deeply into tactical judgments than those now being contemplated. These were the so-called Confiscation Acts, which instructed him to have his troops seize enemy property in the midst of battle, notwithstanding his own strategic preference to avoid having them do so.¹⁵

More recently, similar limitations, and some essentially identical to those now being considered, have been enacted in the midst of a number of military conflicts, taking the form of both direct prohibitions and restrictions on the use of appropriated funds.¹⁶ Perhaps the most well known of these are the ones Congress enacted during the Vietnam War to prohibit the expenditure of funds on hostile actions in Laos and Cambodia.¹⁷

¹⁴ 6 U.S. (2 Cranch) 170 (1804).

¹⁵ See 12 Stat. 319 (1861); Act of July 17, 1863, § 5, 12 Stat. 590.

¹⁶ See, e.g., U.S. Public Law No. 93-559, sec. 38 (F) (1)-(2), The Foreign Assistance Act of 1974 (imposing a personnel ceiling of 4000 Americans in Vietnam within six months of enactment and 3000 Americans within one year); U.S. Public Law No. 98-43, sec. 4(a), The Lebanon Emergency Assistance Act of 1983 (mandating that the President return to seek statutory authorization as a condition for expanding the size of the U.S. contingent of the Multinational Force in Lebanon); U.S. Public Law No. 91-652, The Supplemental Foreign Assistance Act of 1971, sec. 8 (prohibiting the use of any funds for the introduction of U.S. troops to Cambodia or provision of military advisors to Cambodian forces without prior notification of the congressional leadership.); U.S. Public Law No. 93-50, sec. 307, The Second Supplemental Appropriations Act of 1973 (“None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purposes.); U.S. Public Law No. 98-215, sec. 108, The Intelligence Authorization Act for Fiscal Year 1984 (Boland Amendment, prohibiting certain covert military assistance in Nicaragua); U.S. Public Law No. 103-139, sec. 8151(b)20(B), The Department of Defense Appropriations Act, 1994 (limiting the use of funding in Somalia for operations of U.S. military personnel only until March 31, 1994, and permitting expenditure of funds for the mission thereafter only if the President sought and Congress provided specific authorization); U.S. Public Law no. 105-85, sec. 1203, The National Defense Authorization Act for Fiscal Year 1998 (prohibiting funding for Bosnia “after June 30, 1998, unless the President, not later than May 15, 1998, and after consultation with the bipartisan leadership of the two Houses of Congress, transmits to Congress a certification— (1) that the continued presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and Herzegovina is required in order to meet the national security interests of the United States; and (2) that after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or be used as, civil police in the Republic of Bosnia and Herzegovina.”).

¹⁷ Pub. L. No. 91-652, § 7(a), 84 Stat. 1943 (1971).

Significantly, then-Assistant Attorney General William Rehnquist, who was later to become the Chief Justice of the United States, issued a legal opinion during the Nixon Administration that endorsed Congress's power to continue to define and establish parameters for military operations under way. He noted that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in the absence of legislation,"¹⁸ citing as a precedent accepted by the executive a restriction that had been enacted in the midst of the Vietnam War.¹⁹ Rehnquist did note that separation-of-powers problems "would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces *already in the field* to supersede the President as Commander in Chief of the armed forces,"²⁰ but that statement was itself carefully limited (and is of course inapplicable here). Rehnquist raised no constitutional objections about measures that would not in any way instruct the chief commander as to how he could use those troops that were actually already in the theater of operations. And, as I have explained, the measures now being considered contain no such instructions.

A conclusion that the Commander in Chief enjoys an illimitable power to escalate or augment a military campaign that was authorized years earlier, and presumably thus to retain the power in connection with it to use, as he sees fit, any of the million persons that may be enlisted in the armed forces at a given time, is simply not consistent with the principles that animated the delineation of war powers set forth in the Constitution's text. The Framers were too concerned about unchecked executive power, especially in times of war, to countenance such a notion. Not surprisingly, therefore, such a conclusion is not supported by either the rulings of the Supreme Court or the more than two centuries of actual practice of the political branches themselves. In consequence, there is no basis for adjudging a restriction on troop increases, a cap on troop levels, or the establishment of a date certain for troop redeployment as being anything other than legitimate and constitutional.

¹⁸ *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970), at 20 http://www.stanford.edu/group/lawreview/content/issue6/bybee_appendix.pdf.

¹⁹ *Id.* at 21.

²⁰ *Id.* at 21.

TESTIMONY OF BRADFORD A. BERENSON

**Former Associate Counsel to the President
Partner, Sidley Austin LLP**

**BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY**

January 30, 2007

Chairman Feingold and Members of the Committee, I appreciate the opportunity to testify before you today. Unlike many of the other members of the panel this morning, I am not primarily a separation of powers scholar or a theorist of presidential power. Instead, although I have had occasion to contemplate these questions in connection with my service in President Bush's White House Counsel's Office from 2001 to 2003, my perspective on these issues derives as much from a practical appreciation of the imperatives of presidential military decisionmaking in a time of crisis as from a deep study of the case law. The period of my service embraced the attacks of September 11 and their aftermath, and that experience left me with an acute sense of the importance of presidential power and flexibility in responding to serious threats to our nation's security.

I would like to address the question before us this morning in two basic parts, corresponding roughly to law and policy. In the first and more extensive part, I will discuss the extent to which I believe Congress has the constitutional authority to control the existence, scope, geographic limits, and duration of an ongoing military conflict, and the proper way in which such authority may be exercised. In the second part, I will briefly address some of the policy considerations that I believe should inform the exercise of that authority. My overall conclusion is that Congress does indeed possess the power to limit the broad outlines of hostilities through legislation but that there are limits on this power imposed by the President's exclusive authority as Commander in Chief of the United States military. Furthermore, given the relative institutional competencies of the Congress and the Executive, Congress should take great care before seeking to limit Executive action in military affairs, even within the constitutionally permissible limits, lest damage be done to our nation's ability to achieve its military objectives.

The exclusive war powers of the Congress and the President

The respective powers of the Congress and the President in relation to warmaking is a difficult and complex area of constitutional law. It is also one of the areas that is least well defined by existing pronouncements of the federal courts. In seeking to understand the constitutional war powers scheme, it is essential both to consider closely the text of the Constitution and the practical realities associated with the effective conduct of military operations, both in the Framers' time and in our own.

A study of the constitutional text reveals that the Framers allocated certain specific powers associated with making war to either the Congress or the President but that it also left vast areas of power undefined. I believe that the overall constitutional scheme creates three analytically distinct categories: there is a category of exclusive congressional power, a category of exclusive presidential power, and a broad category in which power is shared between the branches. In broad outline, the exclusive powers of each branch correspond to those specifically enumerated in the Constitution, while the unenumerated war powers were meant to be shared between Congress and the Executive. In this area of shared power, Congress may legislate and bind the executive if a law is passed and enacted; however, because the boundary lines of the President's Commander in Chief powers are blurry, there are many situations in which such legislation could be subject to reasonable, good faith constitutional doubt if in specific application it would invade the province of military command allocated exclusively to the President by the Constitution.

In my view, the questions whether Congress can require a complete cessation of hostilities, impose a troop ceiling, or limit the geographic scope of warfare in the Middle East falls into the realm of shared powers not specifically addressed by the text of the Constitution.

Thus, as an abstract matter, Congress has, through the Spending Power and the Necessary and Proper Clause, sufficient authority to enact facially and presumptively constitutional legislation restricting the Executive's freedom of action by defining the broad contours of permissible military engagement. In doing so, however, Congress should be mindful that in particular application, such statutes or appropriations restrictions could well unconstitutionally interfere, for example, with the President's ability to protect troops in the field or repel a sudden attack. If such a law were passed, Congress should be under no illusions that the application and analysis will be so straightforward that any future deviation by the President could be automatically criticized as unlawful or unjustified.

Congress's powers. The Constitution famously allocates to Congress the power "to declare war," U.S. Const. art. I, sec. 8, cl. 11, which is to say the power to bring about a set of legal relations associated with formal hostility between nations. It also allocates to Congress other specific powers associated with military affairs. In a clause discussing Congress's general authority to raise revenue, the Constitution gives Congress the power to "provide for the common defence." *Id.* cl. 1. In so doing, Congress is then authorized to raise and support armies and to provide and maintain a navy, *id.* cl. 12 & 13, as well as to "make rules for the government and regulation" of those forces, *id.* cl. 14. Congress's specifically enumerated war powers also include the power to make rules governing captures of enemy combatants, *id.* cl. 11, and to define and punish violations of the law of nations that may be committed by such individuals, *id.* cl. 10. Finally, they include a number of powers associated with the organization and use of domestic militias, which are not directly relevant to the issues at hand. *See id.* cl. 15 & 16.

The specifically enumerated congressional powers fall broadly into two general categories. The first set of powers relates to providing the country the means to wage war.

Thus, the power to raise money and provide for the defense of the nation is specifically defined to include the power to create and maintain the armed forces of the United States and to provide rules for their internal governance and conduct. The second category relates to laying down traditional legislative rules defining the boundaries between appropriate and inappropriate behavior by our forces and those whom we confront on the battlefield. This category includes the power to make rules relating to captures and to define violations of the laws of war, which are traditional exercises of legislative power to make rules of general, prospective application.

In these areas, I believe the power of Congress is exclusive. Thus, the President cannot raise and support an army or navy unless Congress has authorized him to do so and provided the means. This broad democratic control of the armed forces is responsive to Framers' acute concern about the threat to liberty that they believed could arise from having a standing army – surely a dated concern in 21st century America but one that nonetheless loomed large in the late 1700s. The President cannot declare war. And the President cannot generally engage in prospective rulemaking of a legislative type, although post-New Deal accommodations to the administrative state, as well as inherent powers that may exist in the interstices of the congressionally-provided rules may now give the President some more authority in these particular areas than once would have been the case.

The President's powers. On the other side, the President has but one enumerated power directly related to the conduct of warfare: he is made the Commander in Chief of the United States armed forces. U.S. Const., art. II, sec. 2, cl. 1. Although it stands alone, this power is vital and robust. It has always been understood to make the President preeminent in the conduct of warfare. In debating the “declare war” power given to Congress, the drafters of the Constitution explicitly considered and rejected a proposal to vest in the Congress the power to

“make war.” That power was reserved to the President via the Commander in Chief clause. Thus, as Commander in Chief, the President has the authority to make those decisions and undertake those actions necessary to engage and defeat our enemies in arms. As the Supreme Court indicated in *United States v. Sweeney*, 157 U.S. 281 (1895), the purpose of the Commander in Chief clause was to “vest in the President the supreme command over all the military forces – such supreme and undivided command as would be necessary to the prosecution of a successful war.” *Id.* at 284. The Commander in Chief powers thus include responding to sudden attacks or military emergencies; committing America’s armed forces to hostilities to respond to military threats; protecting our civilians at home and our troops in the field from armed violence; controlling the military chain of command; directing the disposition of our forces in the field; defining the rules of engagement; and controlling when, where, and how our forces attack the enemy or defend themselves in a theater of battle in an ongoing military conflict. *See, e.g., Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (“As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . .”).

I believe these powers to be exclusive, just as Congress’s enumerated powers in the field of warfare are exclusive. For reasons both legal and practical, the committee of 535 individuals that is our Congress cannot command our forces any more than the President can raise those forces. Thus, Chief Justice Chase recognized broad power in the Congress to declare war and make laws necessary to carry it on, “except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.” *Ex parte Milligan*, 71 U.S. 2, 139 (1866). And Justice Robert Jackson, whose

opinion in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), is often cited well beyond its purely domestic context for the overly broad proposition that the Congress can impose very nearly any restrictions it likes on the President's exercise of his war powers, stated in that same opinion, "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." *Id.* at 645. Unlike some others, I believe Congress's unenumerated powers in military affairs are not plenary and are limited by the President's Commander in Chief power. It is thus theoretically possible in my view for Congress to legislate restrictions relating to the use of force that would violate Article II of the Constitution and the separation of powers.

In this regard, it is important to recall non-Commander in Chief cases such as *Myers v. United States*, 272 U.S. 52 (1926), in which the Supreme Court invalidated the Tenure of Office Act, which purported to require consent of the Senate before the President could remove certain cabinet officers. President Andrew Johnson had been impeached in part for refusing to comply with the Act on the ground that it was unconstitutional. Yet the Supreme Court ultimately vindicated President Johnson, making clear in the process that despite the breadth of Congress's legislative powers, they are not unlimited and may unconstitutionally invade powers reserved to the President under the Constitution. Although nowhere mentioned in the Constitution, the President's removal power was held to be a necessary incident to his power of appointment, which was essential to its effective exercise and to the proper functioning of the executive branch. Congress acted unlawfully when it attempted to restrict or interfere with that exclusive presidential power.

The same is true of the President's power as Commander in Chief. The Congress cannot legislate in a manner that "impermissibly undermine[s] the powers of the Executive Branch," including the Commander in Chief power, "or disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." *Morrison v. Olson*, 487 U.S. 654, 695 (1986) (internal quotations and citations omitted). The nation has only one Commander in Chief. To the extent Congress were ever to attempt to undermine or interfere with that power by taking for itself authority properly belonging to that Commander, it would act unconstitutionally.

The shared war powers of the Congress and the President

Although the President and the Congress each have important exclusive powers in the field of warfare – Congress primarily as provisioner and rulemaker for the armed forces and the President primarily as wielder of the forces thus created and governed – there are important areas of war power where the Constitution is silent as to which branch is to exercise power. In my view, these include most of the areas in which the Congress is now considering legislation. For example, the Constitution does not specify how an armed conflict is to be terminated. It does not specify who is to decide whether war aims are worth pursuing, or whether the cost of pursuing them at a given moment in time is too high. It does not say whether the President or the Congress is to determine what levels of national military and economic resources may be expended in the pursuit of those aims.

In these areas, I believe the power is shared – that is, both the Congress and the President have legitimate authority to express and give effect to their preferences, and national policy is ultimately set through the interplay between the two branches. *See generally United States v. Curtiss-Wright Export Co.*, 299 U.S. 304 (1936). But the power is shared in a particular

way – the interplay results in a particular balance between Congress and the President – which makes both constitutional and functional sense.

The first principle defining this interplay is that the President is the first mover. This means that, in the absence of contrary legislation, the President is entitled to set policy on these subjects, which fall into spheres where the institutional advantages of the Executive over a deliberative and legislative body such as the Congress make the President presumptively the best choice to guide the nation. *See, e.g.*, The Federalist No. 70 (Hamilton) (“Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks.”); *id.* No. 74 (Hamilton) (“Of all the cares or concerns of government, the direction of war most peculiarly demand those qualities which distinguish the exercise of power by a single hand.”); *see also The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority.”). Unlike Congress, whose powers are limited to those enumerated, the President, through the Vesting Clause, is endowed with the whole of the “Executive power.” U.S. Const., art. II, sec. 1, cl. 1. The Vesting Clause provides the President a vast reserve of implied authority to do whatever may be necessary in executing the laws and governing the nation. *See, e.g. Myers*, 272 U.S. at 118 (“The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate . . .”). This plainly encompasses making the ongoing, critical decisions and judgments necessary to safeguard the national security and guide our relations, friendly or hostile, with foreign nations and foreign powers. Unlike the Congress, which must follow a constitutionally prescribed and somewhat cumbersome procedure for effecting its will, the President may simply decide and act in these spheres of his international

and national security authority. As the Supreme Court has recognized on numerous occasions, the President's inherent authority is especially broad, and his primacy especially clear, in the realm of foreign affairs, military affairs, and intelligence activities. *See, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n. 19 (1982); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948); *Curtiss-Wright Export Co.*, 299 U.S. at 320.

But unlike the President's core Commander in Chief powers, the broader policy decisions relating to military affairs and the nation's overall defense posture are subject to review and, if legislation can be enacted, control by the Congress. Congress derives its authority in these areas from two principal sources: the Necessary and Proper Clause, and the Spending Clause. Through the Necessary and Proper Clause, Congress has general, residual authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers" and all other powers vested in the United States government. U.S. Const., art. I, sec. 8, cl. 18. More than two centuries of constitutional history make clear that this power is not narrowly limited to the specific powers enumerated in Article I but rather extends to any power of the government as a whole, *see, e.g., In re Garnett*, 141 U.S. 1, 12 (1891) (inferring congressional power to legislate in respect of the federal courts' admiralty and maritime jurisdiction), and, more broadly, to furthering by rational means legitimate constitutional ends of government not forbidden to the Congress, *see McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). Congress's power of the purse also gives it an abundant reserve of authority in the realm of military and defense matters. Pursuant to the Spending Clause, U.S. Const., art. I, sec. 8, cl. 1, Congress may generally control the levels of spending on various governmental functions, including military spending, as well as the purposes for which federal tax dollars may be expended. Indeed, Congress's power of the purse is so broad that virtually all military

activities directed by the President are inevitably, if implicitly, authorized by the Congress through its decisions to fund and not interfere with those activities.

The need to enact legislation to override the President's initial policy choices in these areas of shared power informs the second major principle of the interbranch interplay in this arena: when the Congress and the President disagree on important matters of defense or military policy, Congress can only bind the President if it assembles a veto-proof majority in favor of its view. Nothing short of legislation that complies with the presentment requirements of Article I, section 7, clause 2 of the Constitution could require the President to desist from his preferred course and obey that chosen by the Congress. *See generally INS v. Chadha*, 462 U.S. 919 (1983). Thus, where the President disagrees strongly enough with the contrary views of the Congress, he may veto the legislation setting forth those views, obliging the Congress to override his veto by a two-thirds majority of each House.

This produces a functionally sensible process and result. It means that in areas of shared war power where there is substantial interbranch disagreement, the President has strong incentives to engage in a public dialogue and debate with the Congress. He will have every reason to share what he knows with the legislature and explain his thinking and that of his military commanders, and to answer the objections and doubts raised by the Members. If disagreement nonetheless persists, a tie or anything close it goes to the Executive, whose overall constitutional primacy in military matters will therefore be respected. But if the President is unable to convince even a third of a single House of Congress that his position is correct – *i.e.*, if there is a substantial consensus among legislators in both Houses of Congress that the President has chosen the wrong course – then the system will override the normal presumption in favor of the President's views and assume that, despite his institutional advantages, he is incorrect. In

that case, Congress will set policy for the nation, and the President will be obliged to comply with that policy in all its constitutional applications.

This does not mean, of course that the President must obey whatever Congress enacts. As we have seen, it is possible that Congress could overstep its bounds and enact a restriction on military activity that would amount to a usurpation of the President's role as Commander in Chief of the nation's military. Neither the Necessary and Proper Clause nor the Spending Clause gives the Congress any power to contravene otherwise applicable constitutional requirements or to invade spheres of authority reserved to other branches of government. *See, e.g., United States v. Lovett*, 328 U.S. 303 (1946) (invalidating condition on appropriation that constituted a bill of attainder); *United States v. Will*, 449 U.S. 200 (1980) (invalidating appropriation measure that reduced judicial salaries). To take a hypothetical example, if Congress were to enact a law providing that no American soldier could be sent into combat without body armor, there would be a strong argument that such an enactment impermissibly interferes with the Commander in Chief's discretion to order lightly armed or lightly equipped troops to proceed by stealth into battle in appropriate circumstances. Or if Congress purported to forbid the President from sending particular units to Iraq, that, too, would likely be an unconstitutional infringement of the President's power as Commander in Chief. But in my judgment, if the Congress could muster sufficient strength to enact a mandatory termination of the Iraq War over the President's veto, for example through a de-funding of the war effort, such an enactment would be facially constitutional.

Should the Congress attempt to enact restrictions on the President's ability to conduct the Iraq War – whether in the form of a blanket prohibition on continued hostilities or, more likely, through somewhat more limited or nuanced restrictions – careful analysis would be

required to evaluate their constitutionality. Because the outer boundaries of the President's Commander in Chief powers are so poorly defined, it is exceedingly difficult to assess these questions in the abstract. And there may still be considerable uncertainty and room for reasonable, good faith disagreement as to specific proposals.

Moreover, even as to a restriction that all reasonable people could agree was constitutional on its face, it is important to recognize and remember that such a law might be unconstitutional in some of its applications. Precisely because it is impossible to envision all possible developments or events in a field of endeavor as chaotic and fast-moving as warfare, it is essential to retain a degree of humility and flexibility in assessing how the President implements such a law. It would ill serve the national interest for every instance of presidential non-compliance with laws in this area to be decried as presidential "lawbreaking," invoking the familiar tropes about the President not being above the law. I can assure you that the President does not regard himself as being above the law, but he does regard himself, properly, as having an overriding constitutional responsibility to protect our citizens, whether civilian or military. Notwithstanding anything the Congress may enact, the President as Commander in Chief at all times retains authority to direct actions that may be necessary to protect troops in field or to repel sudden attacks or deal with military exigencies.

Thus, even accepting that Congress might constitutionally direct that all combat activities in Iraq cease by December 31, 2007, if our troops were attacked while redeploying out of Iraq on December 30 and the battle raged several days into 2008, or if the President had to rush additional troops back into Iraq to reinforce those attacked, there would be no serious argument in my view that the legislation would be constitutional as applied to that situation or that the President acted unlawfully in doing what was necessary to meet that unexpected

challenge and protect the lives of our troops. Or take the example of a troop ceiling: I believe it would probably be within Congress's constitutional authority to fund only a certain troop level in Iraq, but I do not believe the President could fairly be accused of breaking the law or violating his oath to take care that the laws be faithfully executed if he temporarily airlifted more troops into Iraq from a neighboring country to counter an unexpected assault on a previously peaceful part of Iraq located closer to our troops in that neighboring country than to other available troops already in Iraq. Or to take a final example, if Congress were to forbid the taking of any hostile action against a neighboring country such as Iran, that would not mean that the next day, Iranian forces could with impunity invade Iraq and attack our troops. In that event, the President would be well within his constitutional authority to respond until the situation could be stabilized.

Prudential considerations

These hypothetical examples help to illustrate one final, important principle: just because a particular course of action is within Congress's constitutional authority does not mean that authority should be exercised. Even if the Congress could be convinced that it had the power to limit the scope or duration of our effort in Iraq, that does not mean it would be wise or in the national interest to exercise that power. The policy considerations militating against legislative interference in an ongoing war effort can be (and have been) far better articulated by others, but no discussion of this topic would be complete without at least reminding the Committee that there may be weighty reasons to avoid the rigidity and formality of legislation in attempting to curtail an ongoing military conflict. The one law that would undoubtedly reign supreme in such a formal division between the legislature and the executive is the Law of Unintended Consequences. Whether because such a situation would embolden our enemies, demoralize our troops, limit the President's flexibility, cause other adversaries or potential

adversaries to underestimate our national resolve and will to fight, retard our chances of pursuing a military strategy that might achieve victory, or touch off a refugee or other humanitarian crisis, extreme care should be taken before forswearing efforts to use softer forms of power or persuasion to resolve disagreements with the President over war policy in favor of the blunt instrument of legislation.

* * * *

In closing, I wish to thank the Committee for the opportunity to address this important issue. Although I am broadly in agreement with other witnesses that Congress possesses constitutional authority through the Spending Clause and the Necessary and Proper Clause to enact legislation limiting in broad outline the scope, intensity, or duration of military conflict, I hope I have conveyed the considerable constitutional uncertainty that may attend the application of any such legislation and the need to proceed with caution. In all events, on matters of this seriousness, our system of government would be best served if all sides would commit themselves to ensuring that the discourse is civil, respectful, and high-minded and that partisan political considerations are put to one side. I would be glad to answer any questions the Committee may have.

Center for American Progress



Congressional Limitations and Requirements for Military Deployments and Funding

January 9, 2007

The 110th Congress has an important responsibility to shape the country's national security policy in order to make Americans safer and advance U.S. national security interests more effectively.

In sharp contrast to the 109th Congress, this new Congress will do more to exercise its powers and responsibility as a co-equal branch of government in shaping the future direction of the country's Iraq policy. Such a policy will be successful only if it enjoys the informed consent of the American people. Unlike the previous Congress, the 110th seems to recognize the awesome responsibility they have to perform due diligence on our policy and on the President's request for ever more resources to pursue that policy.

This memorandum outlines way in which previous Congresses have acted to ensure that whatever steps the President has sought to take are taken in a way that maximizes opportunities to strengthen American national security and reflect the concerns and will of the American people.

As the examples below demonstrate, past Congresses have chosen among several different policy levers to guide U.S. national security policy as it relates to the deployment of American troops. Broadly speaking, the Congress can:

- Condition, limit or shape the timing and nature of troop deployments and the missions they are authorized to undertake;
- Cap the size of military deployments; and
- Prohibit funding for existing or prospective deployments.

Since 1970, there have been several instances in which these powers were exercised and passed into law by Congress. Several of these are detailed below. Each of these provisions reflects the basic fact that the founding fathers deliberately created a system of government containing branches that were both interdependent and competitive. Each has a specific role to play and each needs to respect the role of the other branches. While the president is commander-in-chief, Congress retains the power (with the consent of the president) to establish the laws by which we conduct foreign policy and more importantly, must decide whether the activities in which the president is engaged are deserving of the resources from the American people he is requesting to conduct those policies.

Additionally, there have been hundreds of amendments – which did not ultimately become law – where members of Congress sought to shape overseas deployments. These amendments reflect modern congressional understanding of Congress’s power and authority. In particular, there were a series of attempts by Republicans and Democrats throughout the 1990s to influence deployments in the Balkans. Though largely unsuccessful on policy grounds, the provisions – an illustrative list of which appear at the back of this document – were attempted by prominent Republicans and Democrats, many of whom remain involved in today’s debate on Congress’s role in national security policy. What was true then remains true now: Congress has an obligation to remain engaged on shaping national security policy.

Examples of Funding and Authorization Limitations Enacted into Law

January 1991. P.L. 102-1 – A joint resolution authorizing the use of force against Iraq.¹ Congress granted the president the authority to use force in Iraq but conditioned it on him certifying first that means other than war would not result in Iraqi compliance with UN Security Council resolutions.

October 1994. P.L. 103-423 – A joint resolution regarding U.S. Policy Toward Haiti. Congress supported a “prompt and orderly withdrawal of all United States Armed Forces from Haiti as soon as possible.”²

September 2001. P.L. 107-40 – A joint resolution authorizing the use of force in Afghanistan.³ The president initially sought authorization to use force to “deter and preempt any future acts of terrorism or aggression against the United States.” The final resolution authorized “all necessary and appropriate force against those nations, organizations, or persons he determines planned authorized committed or aided” the 9/11 attacks.⁴

October 2002. P.L. 107-243 – A joint resolution authorizing the use of force in Iraq.⁵ Like the Afghanistan resolution a year earlier, the Iraq resolution reflected some changes sought by Congress. For example, the president initially sought authorization to use force “to restore peace and security in the region.” Congress succeeded in striking that provision, and made the exercise of the authority granted in the resolution conditional on the president certifying that Iraq would not harm the war on terrorism, but it failed in attempts to insert other limitations on the president.⁶

Troop Caps Enacted Into Law

December 1974. P.L. 93-559 – Foreign Assistance Act of 1974. The Congress established a personnel ceiling of 4000 Americans in Vietnam within 6 months of enactment and 3000 Americans within one year.⁷

June 1983. P.L. 98-43 – The Lebanon Emergency Assistance Act of 1983. The Congress required the president to return to seek statutory authorization if he sought to expand the size of the U.S. contingent of the Multinational Force in Lebanon.⁸

June 1984. P.L. 98-525 – The Defense Authorization Act. The Congress capped the end strength level of United States forces assigned to permanent duty in European NATO countries at 324,400.⁹

July 2000. P.L. 106-246 – Military Construction Appropriations and For Other Purposes – Personnel Ceiling in Colombia: “funds appropriated or otherwise made available by this or any other Act (including funds described in subsection (c)) may be available for— (A) ... the assignment of any United States military personnel for temporary or permanent duty in Colombia in connection with support of Plan Colombia if that assignment would cause the number of United States military personnel so assigned in Colombia to exceed 500; or (B) the employment of any United States individual civilian retained as a contractor in Colombia if that employment would cause the total number of United States individual civilian contractors employed in Colombia in support of Plan Colombia who are funded by Federal funds to exceed 300.”¹⁰

Funding Restrictions Enacted Into Law

December 1970. P.L. 91-652 – Supplemental Foreign Assistance Law. The Church-Cooper amendment prohibited the use of any funds for the introduction of U.S. troops to Cambodia or provide military advisors to Cambodian forces.¹¹

June 1973. P.L. 93-50 – Supplemental Foreign Assistance, “None of the Funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1974, no other funds heretofore appropriated under any other act may be expended for such purposes.”¹²

December 1982. P.L. 98-215 – Defense Appropriations Act. In what became known as the Boland Amendment, Congress prohibited covert military assistance for Nicaragua.¹³

November 1993. P.L. 103-139. The Congress limited the use of funding in Somalia for operations of U.S. military personnel only until March 31, 1994, permitting expenditure of funds for the mission thereafter only if the president sought and Congress provided specific authorization.¹⁴

September 1994. P.L. 103-335. The Congress declared “no funds provided in this Act are available for United States military participation to continue Operations Restore Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”¹⁵

June 1998. P.L. 105-85 – Defense Authorization Bill. The Congress prohibited funding for Bosnia “after June 30, 1998, unless the President, not later than May 15, 1998, and after consultation with the bipartisan leadership of the two Houses of Congress, transmits to Congress a certification— (1) that the continued presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and Herzegovina is required in order to meet the national security interests of the United States; and (2) that after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or be used as, civil police in the Republic of Bosnia and Herzegovina.”¹⁶

Additional Examples Where Congressional Efforts to Influence Policy Were Not Enacted into Law

- In 1994, Senator Jesse Helms tried unsuccessfully to prohibit funding for any U.S. military operations in Haiti and the House attempted to cut \$1.2 billion in peacekeeping and humanitarian funds for Haiti, Bosnia, Somalia and Iraq.¹⁷
- In 1995, Senator Gregg (R-NH) sought to cap the allowable number of combat troops deployed to Bosnia at 25,000 and House members sought unsuccessfully to prohibit any federal funds from being used for deployment in any peacekeeping operations in Bosnia-Herzegovina.¹⁸
- Similarly in 1998, Senators Warner and Byrd sought to cut off funding for the Kosovo deployment unless the president sought and received explicit congressional authorization and developed a plan to turn the peacekeeping duties over to U.S. allies by July 1, 2001.
- Senators Warner and Byrd also sought to withhold a quarter of FY 2000 supplemental appropriations for operations in Kosovo until the president certified that NATO allies were fulfilling their requirements.¹⁹
- In 1999, in the House, Rep. Souder sought to prohibit funding for military operations in Yugoslavia.²⁰
- Rep. Spratt sought unsuccessfully in 2002 to require the president to seek congressional authority before using military force against Iraq without a UN resolution.²¹
- More recent supplemental bills for the wars in Iraq and Afghanistan also contained several proposed amendments to shape the direction of these military commitments. In 2003, Rep. David Obey sought to require half of all reconstruction aid to Iraq to be in the form of loans and Rep. Henry Waxman sought to reduce Iraqi reconstruction funds by \$250 million.²²

Though they were defeated, those provisions reflect attempts by Congress to shape the president’s policy on military deployments. Taken alongside the several examples listed

above that were enacted into law – demonstrates that the president should expect that Congress can and will shape U.S. policy as it relates to military deployments.

¹ <http://www.milnet.com/public-law-102-1.html>

² P.L. No. 103-423 § 1, 108 Stat. 4358 (1994) (expressing the sense of the Congress).

³ <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html>

⁴ Fisher, *Presidential War Power* (2004), pp. 208-209. The change in the authorization is significant insofar as it reflects a concern in Congress that the President wanted too broad a grant of authority – in this instance a grant of authority so broad as to be timeless in its scope of “any future act ...” – to deploy troops in the aftermath of 9-11.

⁵ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ243.107

⁶ Daschle, *Like No Other Time* (2003), p. 244.

⁷ <http://www.fas.org/man/crs/RS20775.pdf>

⁸ <http://www.opencrs.com/document/RL31693/2006-01-27%2000:00:00>; It appears that President Reagan recognized the limitation as such in his signing statement on the law.

<http://www.presidency.ucsb.edu/ys/print.php?pid=41523>

⁹ Senate Amendment 3266 to S.2723 was a Nunn amendment modified by a Cohen amendment. It was agreed to 94-3 in Roll Call vote #150.

¹⁰ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h4425enr.txt.pdf

¹¹ <http://www.fas.org/man/crs/RS20775.pdf>

¹² The provision was proposed by Senator Eagleton and since it included a prohibition against the funding in that Supplemental bill and all other bills passed to date it was more far-reaching than a provision offered by Rep. Clarence Long and agreed to in the House. Eagleton’s provision was included in the conference report, which was vetoed by President Nixon because it “would cripple or destroy the chances for an effective negotiated settlement in Cambodia and the withdrawal of all North Vietnamese troops.” Attempts to override the veto failed resulting in a scaled back prohibition similar to that proposed by Rep. Long. Fisher, *Presidential War Power* (2004), pp. 142-143.

¹³ See [H.AMDT.461](#) to [H.R.2968](#) to the Defense Appropriations Act of 1983. The Boland Amendment was passed by the House of Representatives 411-0 on December 8, 1982, and was signed by President Ronald Reagan on December 21, 1982.

¹⁴ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:h3116enr.txt.pdf

¹⁵ http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_bills&docid=f:b4650enr.txt.pdf

¹⁶ <http://thomas.loc.gov/cgi-bin/query/F?c105:6::temp/-c105NSW5sK:e980283>.

¹⁷ Mages, Lisa, “U.S. Armed Forces Abroad: Selected Congressional Roll Call Votes Since 1982,” Congressional Research Service, January 27, 2006.

¹⁸ See Congressional Record, 1005, pp. S27050-57 (see, too, Sen. Cohen on need for Congressional action)

¹⁹ http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=106&session=2&vote=00105

²⁰ House Amendment # 160, defeated in Roll Call #187.

²¹ *CQ Weekly*, October 5 and October 12.

²² Mages, pp. 23-24.

CRS Report for Congress

Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches

January 16, 2007

Amy Belasco
Specialist in U.S. Defense Budget
Foreign Affairs, Defense, and Trade

Lynn J. Cunningham and Hannah Fischer
Information Professionals
Knowledge Services Division

Larry A. Nicksch
Specialist in Asian Affairs
Foreign Affairs, Defense, and Trade



**Prepared for Members and
Committees of Congress**

Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches

Summary

The main body of this report is a series of tables and an appendix that summarize and cite bill language that was intended to end or restrict U.S. military operations in Indochina between 1970 and 1973, in Somalia in 1993, and in Kosovo in 1999. The report covers enacted provisions or those where there were roll call votes but the provision was not ultimately enacted. The first table outlines proposals that restrict funding and the second table describes other types of restrictions.

Of 21 proposals to restrict funding for military operations that were considered by Congress, 5 were enacted. In the case of Indochina, a major demarcation was the signing of the Vietnam peace accords and a cease-fire agreement between the United States and North Vietnam in January 1973 that required the total withdrawal of U.S. troops by March 1973. Congress continued to provide funds for U.S. troops as levels fell from a peak of 539,000 in June 1969 to 21,500 in January 1973.

In response to the invasion of Cambodia from April to June 1970, Congress considered and ultimately enacted the Cooper-Church amendment in January 1971 which prohibited using any appropriated funds to introduce ground troops into Cambodia. Legislation enacted in 1973 — after the cease-fire agreement — that cut off funds for combat “in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia” was designed to prevent President Nixon from reintroducing troops or bombing if the North Vietnamese violated the cease-fire.

The legislation described either cut off funding or called on the president to take certain military actions — such as troop withdrawals. The cutoffs generally prohibited the obligation or expenditure of funds that Congress had appropriated, and applied to military activities ranging from combat operations to initial deployments in specified countries. Funds are obligated when the government signs a contract for goods or services or pays military or civilian employees. Those funds are expended (or outlayed) when contractors or personnel are paid.

Some legislative language cut off funding for certain military operations but permitted exceptions, such as the orderly withdrawal of U.S. troops, or was contingent upon meeting certain conditions, such as the release of prisoners or war. Restrictions applied to either funding within the bill, to previous appropriation bills, or to any bill, and went into effect on or after a particular date or set no date. Other language prohibited continued funding unless military operations were authorized.

Congress also considered non-funding approaches that urged the President to withdraw forces, negotiate or terminate military operations, seek congressional authorization for military operations, or set a date for U.S. troop withdrawals. Another approach was congressional repeal of the August 1964 Tonkin Gulf Resolution, which authorized the President to use military force in Vietnam.

Contents

Vietnam War Policy Context for Congressional Legislation	1
Types of Restrictions on Military Activities	3
Prohibiting the Obligation or Expenditure of Funds	3
Where and How Funding Prohibitions Applied	4
Types of Military Activities Covered	4
Non-Funding Restrictions on Military Activities	5
Appendix: Text of Proposed or Enacted Provisions	28
Funding Restrictions on Military Operations	28
Non-Funding Restrictions on Military Operations	34

List of Tables

Table 1. Funding Restrictions on Military Operations	6
Table 2: Non-Funding Restrictions on Military Operations	23

Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches

This report discusses the political context and congressional consideration of various funding and other restrictive legislative language applying to military operations in Indochina between 1970 and 1973. The report also briefly mentions similar congressional actions applying to U.S. military operations in Somalia in 1993 and Kosovo in 1999. This discussion is followed by two tables that summarize provisions that were enacted or considered by Congress and an appendix that cites the specific language for each provision in the tables.

Table 1 includes funding restrictions on military operations and **Table 2** includes other non-funding approaches. Those provisions that were enacted are listed first followed by provisions that were not enacted but where there was a roll call vote in either house. From the legislative history, it appears that funding cutoffs may have been more effective than non-funding approaches in altering executive branch plans for military operations.¹

Vietnam War Policy Context for Congressional Legislation

During the 1970-1973 period, Congress considered a variety of proposals to restrict U.S. military operations in Indochina and require a withdrawal of troops from Vietnam in response to the growing controversy in the United States over U.S. military involvement in Vietnam during the 1965-1969 period. The specific proposals for legislation often were in response to key elements of the Nixon Administration's policies and were intended to influence or force changes in the Administration's policies on U.S. military involvement, particularly in Vietnam and Cambodia.

A main element of the Nixon Administration's policies was the staged withdrawal of U.S. troops from Vietnam from mid-1969 until the end of 1972 as part of the Administration's Vietnamization strategy of turning over the responsibility for ground combat operations in Vietnam to the South Vietnamese government and

¹ For a comparison of funding cutoffs and use of the War Powers Act, see CRS Report RS20775, *Congressional Use of Funding Cutoffs since 1970 Involving U.S. Military Forces and Overseas Deployments*, by Richard F. Grimmett.

army. According to Department of Defense statistics, U.S. troop levels fell from 539,000 in June 1969 to 415,000 in June 1970, 239,000 in June 1971, 47,000 in June 1972, and 21,500 in January 1973.

The Nixon Administration, however, set no goal of a total withdrawal of U.S. forces or a total end of U.S. combat operations in Vietnam. In particular, the Air Force continued bombing operations at a high level. Thus, many of the proposed amendments and bills in Congress in the 1970-1972 period were aimed at requiring the President to withdraw *all* U.S. troops from Vietnam and prohibit U.S. combat operations in Vietnam and Indochina. Several of these came to votes in the full House of Representatives and the Senate, but none was enacted into law.

A second policy element was the incursion of U.S. ground forces into eastern Cambodia that President Nixon ordered on April 30, 1970. U.S. ground troops withdrew by June 30, 1970, but U.S. bombing of North Vietnamese and Khmer Rouge forces in Cambodia continued. Proposed and enacted amendments in Congress were designed to prohibit both the reintroduction of U.S. ground forces into Cambodia after June 30, 1970 and continued U.S. aerial bombing of Cambodia. The "Cooper-Church" amendment, enacted into law in January 1971, prohibited the reintroduction of U.S. ground forces into Cambodia. The restrictive bills passed in June and July 1973 mandated an end to the bombing in Cambodia by August 15, 1973, and bombing stopped on that date.

The incursion into Cambodia had an important impact on congressional attempts to legislate restrictions on U.S. military operations. It triggered congressional amendments aimed at restrictions on U.S. military operations not only in Cambodia but in Vietnam as well.

The third policy element was the negotiation and signing of an "Agreement on Ending the War and Restoring Peace in Vietnam" between the United States and North Vietnam on January 27, 1973. The agreement, in effect a cease-fire agreement with additional political provisions, provided for the withdrawal of all U.S. troops from South Vietnam within 60 days of the signing of the accord. U.S. troops were withdrawn fully by March 1973.

A major problem for President Nixon and Secretary of State Henry Kissinger in negotiating the agreement was securing the support of South Vietnamese President Nguyen Van Thieu. In a November 14, 1972, letter, President Nixon assured President Thieu that "But far more important than what we say in the agreement on this issue is what we do in the event the enemy renews its aggression. You have my absolute assurance that if Hanoi fails to abide by the terms of this agreement it is my intention to take swift and severe retaliatory action."²

President Nixon and other Administration officials hinted publicly in March 1973 that the United States would intervene militarily if North Vietnam violated the cease-fire agreement. On May 3, 1973, President Nixon submitted a report to

² Nixon, Richard. *No More Vietnams*. New York, Arbor House, 1985. P. 155-156. Kissinger, Henry. *Ending the Vietnam War*. New York, Simon & Schuster, 2003. P. 385.

Congress entitled *U.S. Foreign Policy for the 1970s: Shaping a Durable Peace*. In it, he asserted that the United States would not tolerate communist violations of the agreement and that North Vietnam would risk renewed confrontation with the United States if it broke the agreement.³

President Nixon undoubtedly had in mind the renewal of U.S. bombing of North Vietnam and North Vietnamese forces in South Vietnam if Hanoi renewed the war. As the Nixon Administration withdrew U.S. ground forces from Vietnam in 1971 and 1972, it ordered heavy bombing of communist forces and installations, including massive bombing by B-52 bombers. These indications of Nixon's policy intention no doubt influenced the legislation proposed and passed by Congress in mid-1973 to cut off funding for combat operations "in or over or from off the shore of North Vietnam, South Vietnam...."

For a CRS Report that compares Congressional funding cutoffs of U.S. military forces to use of the War Powers Act, see CRS Report RS20775, *Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments*, by Richard F. Grimmett.

Types of Restrictions on Military Activities

The proposals included in **Table 1** adopted funding cutoffs that follow certain patterns. The section that follows describes the types of restrictions and identifies proposals that fall under that category using the number included in both the tables and the appendix that follow.

Prohibiting the Obligation or Expenditure of Funds

The proposals to cut off funds generally prohibit obligating or expending funds in a particular bill or bills after Congress has appropriated the funds. Obligations occur when the government signs a contract to buy goods or services or pays its military or civilian personnel.⁴ Expenditures, or outlays, take place when the contractor or employee is paid.

Generally, funding prohibitions apply as of a certain date, to specific countries, and particular types of military activities (entries 2, 3, 4, 5). In one case, the Department of Defense was prohibited from transferring funds from its regular programs to finance wartime operations (entry 18).

³ Karnow, Stanley. *Vietnam: A History*. New York, The Viking Press, 1983. P. 656. U.S. Congressional Research Service. *U.S. Foreign Policy for the 1970's: An Analysis of the President's 1973 Foreign Policy Report and Congressional Action*. Prepared for the Senate Committee on Foreign Relations. Washington, DC, U.S. Govt. Print. Office, 1973. P. 19.

⁴ Obligations also occur when one of the military services orders goods or services from other DOD organizations that supply parts, repair weapons systems, or provide other services such as providing fuel.

Where and How Funding Prohibitions Applied. In some cases, funding prohibitions applied to certain military operations — such as combat operations — and were absolute (entries 2, 3, 4, 17). In other cases, funding was to be cut off for some military activities (e.g., combat) but permitted for other activities (e.g., the withdrawal of troops or the protection of U.S. civilians) (entries 6, 9, 10, 14).

In other cases, the funding cutoff was contingent upon certain conditions or events taking place, such as the negotiation by the President of a cease-fire, the release of U.S. prisoners of war (POWs), or a presidential determination that personnel can be withdrawn safely (entries 11,12,13,15). In some cases, the President could recommend extending the deadline if certain conditions, such as the safe withdrawal of troops, have not occurred (entries 12,13). The prohibition on obligating or spending funds could also be reversed if Congress authorized the activity (entries 5,7,19,20).

Prohibitions on funding were set to take effect as of or after a particular date or some specified length of time after enactment and applied to the funds included in the bill under consideration, all previous bills of that type, or any bill (entry 2, 3, 7, 16, 19, 24 and 26).⁵ Funding restrictions were placed in various types of bills, often appropriations bills but sometimes authorization or other bills (e.g., amendments to the Selective Service Act).

Types of Military Activities Covered. The range of prohibited military activities included also varied from the specific — “Bomb, rocket, napalm, or otherwise attack by air, any target whatsoever ...”(entry 13) or the “deployment of ground elements” in Yugoslavia (entry 20) to general designations such as combat activities, conducting U.S. military operations (entries 2 and 12) or “to support directly or indirectly combat activities,” (entry 17), or the “involvement United States military forces in hostilities” (entry 19).

The well-known McGovern-Hatfield amendment that was considered in 1970 combined several of the elements above — prohibiting funds for some but not other specified military activities, setting two specific deadlines, one for a ceiling on the number of troops and another for the withdrawal of remaining forces while at the same time giving the President some leeway to propose an alternative.

The amendment prohibited the obligation or expenditure of funds “authorized by this or any other act” to “maintain a troop level of more than 280,000 armed forces” in Vietnam after April 30, 1971, unless the President finds that a 60-day extension is necessary and recommends that to Congress. For a set period — between April 30 and December 31, 1971, the amendment limited the “expenditure of funds” in or over Indochina to the “safe and systematic withdrawal of remaining forces,” or providing asylum to endangered Vietnamese (entry 8). It was rejected in June 1971.

⁵ Prohibitions that apply to any bill including future bills could be challenged on constitutional grounds since one Congress cannot obligate another Congress.

Non-Funding Restrictions on Military Activities

Table 2 describes eight proposals — including four that were enacted — which adopt a variety of non-funding restrictions considered by Congress during the Indochina conflict. Several well-known amendments were introduced by Senator Mansfield including two that required the termination of U.S. military operations in Indochina at “the earliest practicable date” as well as a withdrawal of all troops within either six or nine months. These versions ultimately did not pass (entries 24 and 26).

Two other Mansfield amendments provided for a “prompt and orderly withdrawal” at “the earliest practicable date,” but did not set a time limit (entries 23 and 25). One amendment was a sense of the Congress and the other stated that it was U.S. policy to terminate military operations and withdraw forces. Although both of these amendments were enacted in the fall of 1971, their practical effect is not clear since no deadline was set. All U.S. troops were withdrawn by March 1973 as required by the Paris Peace accords, almost a year and a half after passage of the first Mansfield amendment.

In other cases, such as Somalia in 1993, Congress considered provisions requiring that the President remove forces by January 31, 1994, unless there is a declaration of war or specific Congressional authorization (entry 29).

Congress also considered and passed a repeal of the August 10, 1964, Gulf of Tonkin Resolution that gave congressional approval to “take all necessary measures” to repel an armed attack against the United States in January 1971, but military operations continued in Vietnam for another two years (entry 21).

Table 1. Funding Restrictions on Military Operations

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
ENACTED												
1970	H.R. 19911	Special Foreign Assistance Act of 1971	Cooper-Church	Prohibited using any funds authorized or appropriated in this or any other act to finance the introduction of ground troops or U.S. advisors in Cambodia. Specified that any military or economic assistance given to Cambodia should not be construed as a commitment to defend Cambodia.	S. Rept. 91-1437	H. Rept. 91-1791	H. Adopted voice vote	S. Adopted 41-20	Adopted 72-22 [S. Rpt.]	S-Jan-71	P.L. 91-652 Sec. 7	1
1973	H.J. Res. 636	Making Continuing Appropri. for the Fiscal Year 1974, and for Other Purposes		Prohibited obligation or expenditure of any funds in this or any previous law on or after August 15, 1973 to directly or indirectly finance "combat in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."	S. Rept. 93-277	H. Rept. 93-364	H. Adopted 266-75	S. Adopted by voice vote	Adopted 73-16 [S. Rpt.]	1-Jul-73	P.L. 93-52 Sec. 108	2

CRS-7

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
ENACTED												
1973	H.L.Res. 727	Continuing Approp., 1974		Extended the ban on obligating or expending funds appropriated in this or previous laws for combat activities in or over Cambodia, Laos and North and South Vietnam that was included in the CR for FY74 CR (P.L. 93-52) from August 15, 1973 until the adjournment of the 93rd Congress.	H.L.Rept. 93-519 Adopted 368-7			Adopted 309-99	Adopted 73-2	16-Oct-73	P.L. 93-124 Sec. 1 [Sec. 108 of P.L. 93-52]	3
1973	H.L.R. 9055	Second Supp. Approps. Act, 1973		Prohibited expenditure of funds in this act for reconstruction in North Vietnam; prohibited expenditure of funds in this or any previous act for combat activities "in or over... or off the shores of" Cambodia, Laos, North Vietnam and South Vietnam after August 15, 1973.	H.L.Rept. 93-350			Adopted 278-124	Adopted 72-14	1-Jul-73	P.L. 93-50, Sec. 304 and Sec. 307	4

CRS-8

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
ENACTED												
1973	H.R. 7645	Department of State Approp. Auth. Act of 1973		Prohibited obligation or expenditure of appropriations in previous or any future act on or after August 15, 1973 to "finance the involvement of U.S. military forces in hostilities in or over or from off the shores of" North Vietnam, South Vietnam, Laos or Cambodia or to provide assistance of any kind to North Vietnam unless funds are specifically authorized by Congress.	S.Rept. 93-176	H.Rept. 93-367; 2nd Conf. Rpt. H.Rept. 93-563; [Added August 15, 1973 date to Case-Church amdt.]	H.Rept. 93-367; 2nd Conf. Rpt. by voice	Adopted 1st Conf. Rpt. by voice	Adopted 2nd Conf. Rpt. by voice	18-Oct-73	P.L. 93-126, Sec. 13	5
1993	H.R. 3116	Department of Defense Approp. Act, 1994	Byrd	Prohibited the obligations of funds after March 31, 1994 for military operations in Somalia unless 1) requested by the president and authorized by Congress; 2) necessary to protect U.S. civilians; 3) for U.S. combat forces under the command and control of U.S. commanders; and 4) if the President intensifies efforts, to have UN members deploy additional troops to Somalia to take over U.S. efforts.		H.Rept. 103-339		Adopted conf. rpt. voice vote	Adopted 76-23 conf. rpt., 88-9	11-Nov-93	P.L. 103-139 Sec. 8151	6

CRS-9

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1970	H.R. 15628	To Amend the Foreign Military Sales Act, and for Other Purposes	Cooper-Church	Prohibits expenditure of funds in this Act or any other law after July 1, 1970 to retain U.S. forces in Cambodia, support U.S. personnel or contract for military instruction or conduct combat activities in Cambodia "unless specifically authorized by law hereafter enacted."								7

CRS-10

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1970	H.R. 17123	Military Procurement Authorization Act of FY 1971	McGovern Hatfield	Prohibits the obligation or expenditures of funds authorized by this or any other act to "maintain a troop level of more than 280,000 armed forces" in Vietnam after April 30, 1971 unless the president finds that up to a 60-day extension is needed in case of a clear and present danger to U.S. troops, or the president submits a new date for Congressional approval and informs Congress within 10 days of the extension; between April 30 and December 31, 1971, limits expenditure of funds for U.S. armed forces "in and over Indochina" to "safe and systematic withdrawal of remaining armed forces" and provision of safe asylum for endangered Vietnamese. [As introduced in the Senate and rejected.]						Rejected 39-55		8

CRS-11

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amnd./rpt.			Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate				
FUNDING RESTRICTIONS ON MILITARY OPERATIONS													
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES													
1971	H.R. 6531	Military Service Act of 1967, Amendments	McGovern-Hafield	Prohibits expenditure of any funds after Dec. 31, 1972 that have been authorized or appropriated under this or any other act for deploying U.S. armed forces or conducting military operations "in or over Indochina" except for protecting U.S. forces during a withdrawal, arranging protection for endangered S. Vietnamese, Cambodians, or Laotians, or assisting Indochinese nations as approved by Congress. [As introduced in the Senate and rejected.]							Rejected 42-55		9

CRS-12

Year	Bill #	Legislative Vehicle	Common Name of Amndt.	Brief Description	Committee Reports			Votes on amat./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1971	H.R. 6531	Military Selective Service Act of 1967, Amendments	Chiles	Prohibits expenditure of any funds authorized or appropriated under this or any other act after June 1, 1972 to deploy or maintain U.S. armed forces or conduct military operations "in or over Indochina" except to protect U.S. forces during withdrawal, provide protection for endangered S. Vietnamese, Cambodians, or Laotians, or assist nations of Indochina in amounts approved by Congress. [As introduced in the Senate and rejected.]						Rejected 44-52		10

CRS-13

Year	Bill #	Legislative Vehicle	Common Name of Amnd.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1971	H.R. 6531	Military Selective Service Act of 1967, Amendments	Cook	Prohibits expenditure of funds authorized or appropriated in this or any other law nine months after enactment to support U.S. troops or conduct U.S. military operations "in or over" South Vietnam, Laos, Cambodia, or North Vietnam, subject to a commitment from the N. Vietnamese gov't to release U.S. personnel within 60 days of enactment; requires reporting to Congress and sets up expedited procedures to consider continuation of provisions. [As introduced in the Senate and adopted (later amended by Mansfield amdt. in the nature of a substitute (see # 24)).]						Adopted 61-58 Later amended by Mansfield amdt. in the nature of a substitute (see # 24).		11

CRS-14

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1971	H.R. 8687	Armed Forces, Approp. Authorization in 1972	Nedzi-Whalen	Prohibits expenditures of any funds authorized or appropriated in this Act after December 31, 1971 to deploy U.S. military personnel or conduct military operations in or over South Vietnam, North Vietnam, Cambodia, or Laos; if the President determines that U.S. military personnel cannot be withdrawn safely or prisoners of war cannot be returned, the President shall recommend to Congress another date within the fiscal year. [As introduced in the House and rejected]				Rejected	158-255			12

CRS-15

Year	Bill #	Legislative Vehicle	Common Name of Amndt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1971	H.R. 8687	Armed Forces, Appropriation Authorization in 1972	Gravel	Prohibits expenditure of any funds authorized or appropriated under this or any other law to "bomb, rocket, napalm, or otherwise attack by air any target whatsoever" within Cambodia, Thailand, Vietnam or Laos unless the President determines it necessary to ensure the safety of U.S. forces withdrawing from Indochina. [As introduced in the Senate and rejected.]						Rejected 19-64		13

CRS-16

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1971	H.R. 9910	Foreign Assistance Act of 1971	Cooper-Church	States that the repeal of the Tonkin Gulf Resolution has left the U.S. government without congressional authority for continued participation in the Indochina war. Requires that on or after enactment of this act, funds authorized in this or any other Act can be used only to withdraw U.S. forces from Indochina and may not be used to engage in hostilities in North or South Vietnam, Cambodia or Laos except to protect withdrawing forces. [As reported by the Senate Foreign Relations Committee (later stricken out by the Scott amdt. on the floor)]								14

CRS-17

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1972	H.R. 15495	Armed Forces, Approp. Authorizatio in 1973	Cranston	Requires withdrawal of all troops and states that "No funds shall be authorized, appropriated, or used" to maintain any U.S. military forces in South Vietnam after October 1, 1972. States that U.S. involvement "shall terminate" after a verified ceasefire agreement, the release of U.S. Prisoners of War (POW), and an accounting for all missing POWs. [As introduced in the Senate, adopted, and later amended by the Brooke amdt. (see # 16).]						Adopted 50-47		15

CRS-18

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1972	H.R. 15495	Armed Forces, Approp. Authorization in 1973	Brooke	Limits use of funds authorized or appropriated by this or any other act to withdrawal of protection of withdrawing forces from Vietnam, Cambodia and Laos to be carried out within four months after the enactment provided that all American prisoners of war are released. [As introduced in the Senate, adopted to amend the Cranston amdt. (see # 15) (later stripped out).]			H.Rept. 92-1388			Amended the Cranston amdt. in the nature of a substitute (see # 15). Adopted 49-47. Brooke amdt. then stripped out of H.R. 15495 in conference. House Confers ruled the provision non-germane		16

CRS-19

Year	Bill #	Legislative Vehicle	Common Name of Amtd.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #	
					House	Senate	Conference	House	Senate				
FUNDING RESTRICTIONS ON MILITARY OPERATIONS													
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES													
1973	H.R. 7447	Supp. Appropriations, 1973		Prohibits expenditure of funds appropriated in Act for reconstruction of North Vietnam and prohibits use of funds appropriated in this or past acts to support "directly or indirectly combat activities in, over, or from off the shores of Cambodia or Laos" by U.S. forces. [As reported in S. Rpt 93-160 and included in both Senate and Conference passed versions of H.R. 7447, which was later vetoed by the President.]	S. Rept. 93-160		H. Rept. 93-295 H. Adopted 235-172 S. Adopted 81-11			Adopted as part of H.R. 7447 73-5	Vetoed June 27, 1973 [See # 4, the Second Supp. Approp. Act, 1973 for a similar version that was enacted]		17

CRS-20

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1973	H.R. 7447	Supp. Appropriations, 1973	Addabbo	Prohibits the Defense Department from transferring \$430 million in H.R. 7447 from other defense programs for U.S. military activity in Southeast Asia, including the cost of bombing raids over Cambodia incurred from January through March 1973 and paying for increased costs due to devaluation of the dollar. [As reported in H.Rept. 93-164 and adopted in House, Senate, and Conference passed versions of H.R. 7447, which was later vetoed by the President.]	H.Rept. 93-164	S.Rept. 93-160	H.Rept. 93-295 H. Adopted 235-172 S. Adopted 81-11	Adopted 219-188 Adopted as part of H.R. 7447	Adopted as part of H.R. 73-5 [See # 4, H.R. 7447 284-96]	Vetoed June 27, 1973 [See # 4, the Second Supp. Appropriation Act, 1973]		18

CRS-21

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1973	H.R. 7645	State Department Appropriation Authorization	Case-Church	Prohibits obligation or expenditure of funds "hereinafter or hereafter appropriated" to finance the involvement of U.S. military forces in North Vietnam, South Vietnam, Laos or Cambodia or to provide direct or indirect assistance to North Vietnam, unless specifically authorized hereafter by the Congress. [As reported by the Senate Foreign Relations committee and adopted in the Senate (modified in conference, see #5 for an enacted version of the language).]	S.Rept. 93-176					Adopted as part of H.R. 7645 67-15		19
1999	H.R. 1569	Military Operations in the Federal Republic of Yugoslavia Limitation Act of 1999		Prohibits obligating or expending funds appropriated to the Defense Department for the deployment of "ground elements" of the U.S. Armed Forces in the Federal Republic of Yugoslavia unless that deployment is specifically authorized by law except to rescue U.S. or NATO military personnel or U.S. civilians. [As introduced and passed by the House.]				Adopted 249-180				20

CRS-22

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL-CALL VOTES												
1999	H.R. 1664	Emergency Steel Loan Guarantee and Emergency Oil and Gas Guaranteed Loan Act of 1999	Istook	States that none of the funds appropriated by this act are available to implement "any plan to invade the Federal Republic of Yugoslavia with ground forces" of the U.S. "except in time of war." [As introduced and rejected.]				Rejected				21

Source: *Congressional Record*, Congressional reports and public law, as cited above.

Note: Table prepared by Lynn J. Cunningham and Hannah Fischer.

CRS-23

Table 2: Non-Funding Restrictions on Military Operations

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
NON-FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
ENACTED												
1970	H.R. 15628	To Amend the Foreign Sales Military Act, and for Other Purposes	Repeal of the Gulf of Tonkin Resolution [Introduced by Dole]	Repealed the August 10, 1964 Gulf of Tonkin Resolution which had given congressional approval to the Johnson Administration "to take all necessary measures to repel an armed attack against the forces of the United States and to prevent any further aggression" as of the adjournment of the 91st Congress, January 2, 1971.			H.R. Rept. 91-1805	Adopted, voice vote	Adopted, voice vote	12-Jan-71	P.L. 91-672 Sec. 12	22
1971	H.R. 6531	Military Service Act of 1967, Amendments	Mansfield	Called for the termination of military operations in Indochina at "the earliest practicable date," and for a withdrawal of all forces, subject to the return of all American prisoners of war. Also urged the President to negotiate with North Vietnam a date for the withdrawal of all forces, an immediate cease-fire agreement, and a series of phased and rapid withdrawals of U.S. forces in return for the release of prisoners of war.			H.R. Rept. 92-433	Adopted 298-108 [Conf. Rpt]	Adopted 55-30 [Conf. Rpt.]	28-Sep-71	P.L. 92-129 Sec. 401	23

CRS-24

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
NON-FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
ENACTED												
1971	H.R. 8687	Armed Forces, Approp. Authorization 1972	Mansfield	Called for the termination of military operations in Indochina at "the earliest practicable date," and for a withdrawal of all forces, subject to the return of all American prisoners of war. Also urged the President to set a final date for the withdrawal of all forces, to negotiate a cease-fire agreement with North Vietnam, and to negotiate with North Vietnam a series of phased and rapid withdrawals of U.S. forces in return for the release of prisoners of war.			H.Rept. 92-618	Adopted by voice vote [Conf. Rpt.]	Adopted 65-19 [Conf. Rpt.]	17-Nov-71	P.L. 92-156 Sec. 601	25
1993	H.R. 2401	National Defense Authorization Act for Fiscal Year 1994	Gephardt	Sense of the Congress resolution that the President "should consult closely with the Congress" about U.S. policy in Somalia, particularly the deployment of troops, required the President to report to Congress on the goals, objectives, and "anticipated duration in Somalia" of U.S. forces; Stated that Congress "believes" the President should "seek and receive congressional authorization" for the continued deployment of U.S. forces in Somalia by November 15, 1993.			H.Rept. 103-357	Adopted Gephardt amdt. with this language 405-23 Adopted conf. rpt. 273-135	Adopted Conf. Rpt. 77-22	30-Nov-93	P.L. 103-160 Sec. 1512	27

CRS-25

Year	Bill #	Legislative Vehicle	Common Name of Amdt.	Brief Description	Committee Reports			Date Enacted	Public Law #, Section	Appendix #	
					House	Senate	Conference				
NON-FUNDING RESTRICTIONS ON MILITARY OPERATIONS											
NON-ENACTED AMENDMENTS WITH ROLL CALL VOTES											
1971	H.R. 6531	Military Selective Service Act of 1967, Amendments	Mansfield	Declared it to be U.S. policy to "terminate at the earliest practicable date all military operations of the United States in Indochina," and "provide for a prompt and orderly withdrawal of all" U.S. military forces within nine months of enactment subject to the release of all American prisoners of war. "Urges and directs the President" to set a withdrawal date and negotiate with North Vietnam a cease-fire agreement with "a series of rapid and phased withdrawals" of U.S. forces in return for release of U.S. prisoners of war. [As introduced to amend the Cook amdt. (see #11) (later revised in conference)]							24
									Amended the Cook amdt., in the nature of a substitute (see #11 for the Cook amdt.) Adopted, 57-42 Language revised in conference. See # 23 for revised version that became a public law.		

CRS-26

Year	Bill #	Legislative Vehicle	Common Name of Amtd.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
NON-FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL CALL VOTES												
1971	H.R. 8687	Armed Forces, Approp. Authorization in 1972	Mansfield	Declared it to be U.S. policy to "terminate at the earliest practicable date all military operations of the United States in Indochina," and "provide for a prompt and orderly withdrawal of all" U.S. military forces within six months of enactment subject to the release of all American prisoners of war. "Urges and directs the president" to set a withdrawal date and negotiate with North Vietnam a cease-fire agreement with "a series of rapid and phased withdrawals" of U.S. forces in return for release of U.S. prisoners of war. [As introduced (later revised in conference).]								26
										Adopted 577-38 Language revised in conference. See # 25 for revised version that became a public law.		

CRS-27

Year	Bill #	Legislative Vehicle	Common Name of Amnd.	Brief Description	Committee Reports			Votes on amdt./rpt.		Date Enacted	Public Law #, Section	Appendix #
					House	Senate	Conference	House	Senate			
NON-FUNDING RESTRICTIONS ON MILITARY OPERATIONS												
NON-ENACTED AMENDMENTS WITH ROLL CALL VOTES												
1972	H.R. 16029	Foreign Assistance Act of 1972	Hamilton	Terminates the involvement of U.S. forces in hostilities on or over Indochina and requires withdrawal of those forces by October 1, 1972 if there is a verified cease-fire between the United States and North Vietnam and its allies allowing for a safe withdrawal of U.S. forces, and subject to release of all American prisoners of war and accounting for all Americans missing in action. [As reported in H.Rept. 92-1273 (later stripped out).]	H.Rept. 92-1273							28
1993	H.Con. Res. 170	Department of Defense Approp. Act, 1994	Gilman	Directs the President to remove U.S. armed forces from Somalia by January 31, 1994 citing requirement in the War Powers Act to remove U.S. forces unless there is a declaration of war or specific Congressional authorization if Congress passes a concurrent resolution. [As introduced (later amended to set a March 31, 1994, rather than January 31, 1994, deadline).]								29

Source: *Congressional Record*, Congressional reports and public law, as cited above.
 Notes: Numbers in the Appendix column are not sequential in order to segregate enacted and non-enacted provisions in the Mansfield Amendment, whereas the appendix itself follows the chronological progression of the Mansfield amendment. Table prepared by Lynn J. Cunningham and Hannah Fischer.

Excerpted from The Constitution Project's Report:



DECIDING TO USE FORCE ABROAD:

WAR POWERS in a System of CHECKS AND BALANCES

The Constitution Project
1025 Vermont Avenue, NW, Third Floor
Washington, DC 20005
Phone: 202-580-6920
Fax: 202-580-6929
www.constitutionproject.org
Email: info@constitutionproject.org

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Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress

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Michael Young, President, University of Utah; former Dean of George Washington University Law School

**Affiliations listed for identification purposes only*

INTRODUCTION

The Congress shall have Power... To declare War, and grant Letters of Marque and Reprisal....[U.S. CONST., art. I, § 8, cl. 11]

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....[U.S. CONST., art. II, §. 2, cl. 1]

The framers of our Constitution guarded against the abuse of power by any branch of the federal government by embedding governmental powers in a system of checks and balances. Constitutional war powers are no exception. The framers gave Congress the power to declare war to ensure that the decision to initiate hostilities would not be made by a single person, but instead collectively by a deliberative and politically accountable judgment of the legislature. They gave the President the Commander in Chief power to ensure that our armed forces would not be commanded in the field by committee and that the Commander in Chief could defend the United States from sudden attacks without delay.

Consequently, congressional authorization is required before the President initiates the use of force abroad except when that force is used defensively: to defend against actual

★★ 1 ★★

attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization. Congress cannot dictate to the President the day-to-day tactics he or she must use in commanding the armed forces, but it can enact statutory limits on the use of force that the President is bound to follow, and it alone provides and pays for the armed forces the President is given to command. Moreover, the framers laid the ground for political accountability for war by requiring the President and Congress to make war powers decisions transparently and deliberately by the Article I legislative process of bicameral approval and presentment to the President.

In short, the decision of the United States to use force abroad, except for a limited range of defensive purposes, requires a collective judgment of the political branches; the conduct of hostilities requires undivided command by the Commander in Chief; and the continuation of hostilities ultimately requires continued appropriation by Congress.

Furthermore, the war power does not trump the Constitution's protections at home against unreasonable search and seizure or arbitrary detention, freedom of speech, assembly, association, and the press, or rights to due process and fair trial. The war power must be exercised consistently with these limits and protections, although their scope may be affected by a state of war. Both Congress and the courts must stand ready to check any transgression attempted for "reasons of national security."

Changes in international threats to the national security from 1789 to the present have not dislodged war powers from this carefully wrought system of checks and balances. The evolution of the world order and the emergence of serious threats from terrorists have supplied new labels for the ways in which force is used (i.e., "peace operations," "police actions," "counter-terrorist operations"), and, in some cases, new justifications for pre-authorization of its use. But they have not changed the constitutional necessity for some form of congressional authorization for initiating uses of force abroad except when force is used for a limited range of defensive purposes.

Yet the system of checks and balances is not automatic. Checks are not self-executing. James Madison explained our system as one designed to make "ambition" counteract "ambition"¹ – the ambition of the executive to aggregate power with the ambition of Congress to preserve legislative prerogative and the ambition of the courts to interpret the law. The executive's ambition rarely flags, spurred by every new real and perceived threat. But Congress's ambition has sometimes wavered since the Vietnam War.

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Although Congress has authorized the use of force abroad, it has also sometimes failed to insist on a collective judgment about initiating force abroad, either because it tries to evade political accountability for a decision on war or because it defers to the presumed superior competency of the executive to make that decision. When national security decisions are said to rest on secret information not widely shared with Congress, the temptation to defer to the President only increases. Furthermore, the courts' ambition, too, has flagged, as they have invoked amorphous procedural doctrines to avoid war powers or national security questions properly presented to them. Just as Congress's wavering ambition to exercise its war powers has often left the decision to use force to the President, so the courts' doctrines of avoidance have left the interpretation of war powers to the President as well.

The resulting erosion of checks and balances for war powers is neither steady nor complete. Since the Vietnam War, Congress performed its constitutionally assigned role in authorizing Operation Desert Storm against Iraq in 1991, and military force against the perpetrators of the 9/11 attacks and their protectors in 2001. Congress also authorized war against Iraq in 2002. Even in these cases, however, presidents asserted that they did not need Congress's authorization, in effect denying that this check applies. More frequently since the Vietnam War – Grenada in 1983, Panama in 1989, Haiti in 1994, Kosovo and the Federal Republic of Yugoslavia in 1999 – Congress has evaded its constitutional duty to express clearly its decision about the use of force, and the courts stood aside, leaving the field to the President. Furthermore, confounding the intentions of its sponsors, the 1973 War Powers Resolution contributed to this erosion of the system for war powers insofar as it has been understood to give both political branches a “free pass”: the President to use force for sixty days without prior congressional authorization, and Congress to assume that it could discharge its constitutional duty by doing nothing.

The War Powers Initiative of the Constitution Project was convened to study how the United States should constitutionally and prudently make the decision to initiate the use of force abroad. (We did not discuss whether the United States should have used force in particular cases.) In this report, we make recommendations for improving war powers decision-making and explain the problems that prompted them. After briefly describing changing national security threats, we explore the constitutional role of each branch in the exercise of war powers, as well as the roles of international organizations and international law. We do not try to restate the constitutional law so much as to identify what we – or a majority of us – believe to be the baseline principles of war powers. We then explore questions about the form of congressional authorization of the use of force abroad and its legal effect at home. We next consider how and why the War Powers Resolution has

contributed to the erosion of the system of checks and balances in which war powers must be exercised. Finally, we close with recommendations for how the United States should decide to initiate the use of force abroad.

We did not all agree on each of the conclusions reached in this report. A substantial majority believes that the Constitution requires congressional authorization to initiate the use of force abroad except when force is used for a limited range of defense purposes. The dissenter believes that the President has constitutional authority to initiate the use of force abroad without such authorization whenever the President, in his or her sole judgment, thinks it necessary to defend against a threat to national security. We have, therefore, in some places tried to present both the majority and the dissenting views, and the dissenter has appended his separate views.

But we all agree on this: deciding on war in the 21st century requires no constitutional amendments and no new comprehensive War Powers Resolution (though we recommend what we think would be useful replacement legislation). Deciding on war constitutionally and prudently requires chiefly that Congress consistently perform its constitutional duty to decide whether to initiate the use of force abroad. If Congress does its duty, we all believe that the President will have ample reason to work with it to achieve a political consensus for the use of force, and the courts will have little war powers business outside their traditional and appropriate role of protecting civil and property rights affected by the exercise of war powers.

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THE CONSTITUTIONAL UNDERSTANDING: WAR POWERS IN THE SYSTEM OF CHECKS AND BALANCES

The Constitution provides four major checks on the exercise of war powers: collective judgment, spending limitations, unitary civilian command, and judicial review. The decision to use armed force abroad, except for a limited range of defensive purposes, must be made in advance by the collective judgment of Congress and the President in order to promote deliberation, political consensus, and political accountability for the use of force. Congress at all times controls the power of the purse, which it can use to terminate a use of force, conditioned only by the Commander in Chief's inherent authority to remove our troops safely. As this condition illustrates, Congress's war power cannot intrude on the Commander in Chief's tactical command of the day-to-day operations of the armed forces. Finally, the courts are available to decide the question of authority for use of force, both incidentally to deciding the legal effects of war and uses of force on civil and property rights, and directly when there is no reasonable prospect that further action by either or both of the political branches would avoid the question. The following discussion explores these checks by examining the constitutional role of each branch in turn, as well as the roles of international organizations and international law in the operation of our war powers.

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1. The Congress's Constitutional Role in War Powers

Collective Judgment – The framers shared the view that an absolute monarch would be prone to squandering his subjects' lives and money on reckless military adventures. "Absolute monarchs," John Jay wrote in *The Federalist Papers*, "will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans."⁷

The best precaution against unilateral war-making by the executive was to require a collective decision to go to war. "It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large," James Wilson later explained to the Pennsylvania ratifying convention.⁸ Moreover, vesting this power in the whole Congress meant that the popularly-elected House, the body most directly responsive to the voters, had to act and so helped to assure the widest possible political consensus for war. The Senate — originally chosen by state legislatures — could not alone provide this assurance. Since the people could not be asked directly whether the nation should go to war, requiring the assent of the House as well as the Senate was the next best thing. If presidents bent on war could not persuade the Congress, they presumably could not persuade the people either and would therefore lack the consensus required to assume the costs and risks of war.

In short, the framers insisted on a collective judgment for war because it was likely that a collective judgment would be superior to an individual judgment, would help assure that the United States would not go to war without a political consensus, and, by requiring a President to persuade Congress, would effectively make him or her explain why war was necessary to the public who would ultimately bear its cost. These reasons for insisting on a collective judgment for war are still valid today.

"Declaring War" by Words or Action – For the foregoing reasons, the Constitution assigns to the full Congress the power "[t]o declare War [and] grant Letters of Marque and Reprisal."⁹ According to international law in 1789, a state could declare war *either* by "word or action," as the influential political theorist John Locke put it.¹⁰ A state publicly announced the state of war "by word" by making a formal declaration of war and delivering it to the enemy. A state initiated a state of war "by action" simply by committing an act of war.

Congress is thus empowered to formally declare war, as it has eleven times in five conflicts

(it declared war individually on several foreign states in each world war) with bicameral approval and presentment of the declaration to the President for his signature.¹¹ Although Congress, as a legislative body, cannot itself also commit an act of war, it can authorize the President to act instead. The assignment of the Declaration power to Congress thus gives it not only the power to announce a state of war by formal declaration, but also to pass legislation authorizing the President to initiate war by using force.¹² Furthermore, the Constitution also vests in Congress the authority to grant Letters of Marque and Reprisal to privateers to use force or to seize enemy property in retaliation for an injury to the United States. The Constitution therefore assigns Congress control over a wide spectrum of force — not only the decision for what the framers called “perfect war,” pitting all the nation’s resources and armed forces against an enemy state, but also the decision to commit lesser acts of war as well as acts of reprisal.

While a substantial majority of the War Powers Initiative believe that this authority is exclusively legislative, the dissenter views it as at most concurrent. By the dissenting view, while Congress *can* authorize war by declaration or legislation, its authorization is not necessary for the President to use force against what he or she views as a threat to the vital national security interests of the United States, regardless of how large or long-lasting the use of force and regardless of how much time there is to seek congressional authorization. As Commander in Chief and sole organ for foreign affairs,¹³ presidents have the constitutional authority to identify and respond to such threats, using such force as they deem necessary. Under the dissenting view, the declaration of war clause was intended to require Congress’s consent to certain acts — declaring war or legalizing captures — that had legal implications such as changing the rights of neutrals or the relationships between states; “declare” was not a code word for requiring Congress’s authorization for all uses of force. The framers, after all, voted to change the proposed constitutional text vesting war power in Congress from “make War” to “declare War,”¹⁴ thus reducing the authority of Congress by authorizing the President to defend against sudden attacks without its consent. [James Madison’s notes of the debate on the Declaration Clause in the Constitutional Convention are appended as Appendix A.] By the dissenting view, presidents did not need congressional authorization for the wars against Iraq in 1991 and 2003, even though time permitted seeking such authorization, or for the use of military force in Afghanistan in 2001, because in these cases they were responding to what they considered to be threats to our vital national security interests. By contrast, under the dissenting view, President Clinton did need congressional authorization for the air campaign against the Federal Republic of Yugoslavia (FRY) in 1999, because he had not made the case that the FRY threatened a vital national security interest of the United States.

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The majority of the War Powers Initiative believes that the dissenter's theory of constitutional war powers is inconsistent with the framers' contemporary usage and understanding of "declare war," the system of checks and balances in which war powers must be exercised, and historical practice up until the Korean War. The dissenter's theory would allow precisely what the framers tried to guard against: a single person making the life-or-death decision to use force on a massive and sustained scale even when there has been no attack on us and there is ample time for a collective, deliberative, and accountable decision by the legislature. The dissenter's differentiation of cases adds an additional reason for rejecting his view. President Clinton justified the air campaign against the FRY as essential to preserving the credibility of NATO, "the cornerstone on which our security has rested for 50 years," and to preventing "key U.S. allies [from being] drawn into a wider conflict, a war we would be forced to confront later, only at far greater risk and greater cost."¹⁵ While one can disagree with President Clinton's assessment of the threat to our national security posed by the war in the Balkans, there is no standard for deciding between the President's assessment and the dissenter's contrary assessment, and therefore no basis under the dissenting view for determining when the President's unilateral use of force is authorized. That is why, the majority believes, that the Constitution entrusts the threat assessment in deciding to initiate the use of force abroad to the collective judgment of the political branches, on the premise that, absent any agreed standard, the many are more likely to get it right than just one. The dissenting view rejects the premise and entrusts the threat assessment and resulting decision on force entirely to a single person (unless, apparently, the President's threat assessment is wrong by some subjective and undefined standard).

While the Constitution does not prescribe the form of congressional approval for the use of force abroad, it does require Congress to enact the approval either by formal declaration or statute. The desirability of deliberation, political consensus, and political accountability also suggests that authorization for the use of force should be as specific as a formal declaration. In other words, to achieve the purposes of the Declaration Clause, an authorization must be clear and explicit; authorization by general implication does not achieve these purposes. Joint resolutions or other statutes expressly authorizing the use of force ("use-of-force" statutes) and appropriations specifically earmarked for the use of force meet this standard. General appropriations for military personnel or munitions, or collateral legislation dealing with the draft, military pay, or military procurement often will not, depending on their wording, timing, and legislative history. Congressional actions that do not satisfy the Article I requirements for the enactment of law (bicameral approval and presentment to the President), such as simple or concurrent resolutions (but not joint resolutions), cannot change legal rights and duties outside the legislative

branch, according to the Supreme Court.¹⁶ They cannot therefore operate in place of formal declarations or use-of-force statutes to satisfy the Declaration Clause either.

The dissenting member of the War Powers Initiative agrees that the principles in the foregoing paragraph are prudent, but not that they are constitutionally mandated. Because the President does not need advance congressional authorization to protect vital national security interests in the first place, under the dissenting view, it does not matter what form Congress chooses to express its constitutionally unnecessary, albeit politically desirable, concurrence. The dissenter therefore treats formal declarations, specific use-of-force statutes, and lesser forms of congressional action – including simple and concurrent resolutions – as constitutionally (if not always prudentially) equivalent for purposes of expressing Congress's view about the President's decision to use force to protect vital national interests.

The majority of the War Powers Initiative rejects the dissenting view as inconsistent with the purpose of the Declare War Clause, Article I's process for making law affecting duties and relations outside the legislative branch, and the fundamental constitutional and democratic premises of accountability and transparency. All members of the War Powers Initiative agree that a clear statement rule of authorization is prudent. The majority also believes that the clear statement rule serves the constitutional purposes of legislative deliberation and political accountability in decisions to initiate the use of force abroad and is therefore a logical corollary of the Declare War Clause, fairly construed, and Article I in which it appears.

The country's first war — the Naval War (or "Quasi-War") with France from 1798 to 1800 — illustrates several of the foregoing principles of war authorization. Uneasy about going to war with an erstwhile ally and world-class military power that was still popular with large segments of the population, President John Adams approached Congress cautiously for limited authority to defend against French attacks on American shipping. After lengthy debate on the merits, Congress first passed a statute simply authorizing defensive measures off the coast. When these proved insufficient, and "the temper of the people rose...in resentment of accumulated wrongs,"¹⁷ Congress escalated gradually by enacting a statute authorizing the President to seize armed French vessels on the high seas. As a result, the country was "now in a state of war," as Rep. Edward Livingston (D-N.Y.) said during debates in 1798; "... let no man flatter himself that the vote which he has given [for the use-of-force statute] is not a declaration of war."¹⁸ Though war was never formally declared, the Supreme Court later unanimously found that Congress had lawfully authorized a limited ("imperfect") naval war.¹⁹

The Appropriations Power – The Naval War with France also highlighted another of

Congress's war powers, because Congress had to enact appropriations for naval vessels needed for the effort. The authority "to raise and support Armies" and "to provide and maintain a Navy"²⁰ gives Congress a powerful check on war and the use of force, by giving it sole authority to finance the armed forces and munitions needed to conduct war. As Nathaniel Gorham stressed at the Philadelphia Convention, by these provisions, "the means of carrying on the war would not be in the hands of the President, but of the Legislature."²¹ To the same effect, Thomas Jefferson wrote, "We have already given in example one effectual check to the Dog of War by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."²² The appropriation power not only augmented the prior check of advance authorization by Congress, it also provided a subsequent check by enabling Congress to stop the use of force by cutting off its funding. Today, that check is augmented by the Anti-Deficiency Act²³ which prohibits an expenditure or obligation of funds not appropriated by Congress and by legislation that criminalizes violations of the Act.²⁴

Limits on the Congressional War Power – The congressional war power is not unlimited. It is always subject to other provisions of the Constitution, and cannot, for example, be used to deny rights guaranteed by the Bill of Rights. It cannot be used to assume day-to-day tactical command of the armed forces, which would violate Article II's designation of the President as the Commander in Chief of the armed forces. Furthermore, the congressional war power is also affected by practical and political limits: limits on the information available to Congress in making a decision to use force, limits on the time for deliberation, and limits on the political feasibility of cutting off funds for U.S. troops in the field. Finally, the creation of a huge military capability — ironically the standing army that most of the framers and the members of the First Congress so stoutly resisted — has left the appropriations power as largely an ex post control on the President.

2. The President's Constitutional Role in War Powers

Tactical Command – The core of the President's war power is summarized in a single sentence: he "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...."²⁵ The framers had experienced the dangerous inefficiencies of command by committee during the early years of the Revolutionary War. "The Congress are not a fit Body to act as a Council of war," Samuel Chase wrote. "They are too large, too slow, and their Resolutions can never be kept secret."²⁶

The lesson was clear: a legislative body could declare war, but not make it. Accordingly, the framers voted to change the proposed constitutional text vesting war power in Congress from “make War” to “declare War.”²⁷ Only a commander in chief could make the expeditious and coordinated tactical decisions necessary to “make war” successfully. At the same time, only a civilian commander in chief could assure the civil supremacy and political accountability which the framers hoped would differentiate the American war power from that exercised by monarchs and military despots.

The Commander in Chief Clause therefore impliedly assigns to the President the power to conduct war. The President, not Congress, makes all day-to-day tactical decisions in the combat deployment of armed forces. Indeed, even when it ends a use of force by cutting off funds, Congress cannot constitutionally interfere with the Commander in Chief’s tactical decisions for the safe withdrawal of the armed forces. But as powerful as the command authority is, the framers still intended that the Commander in Chief “would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy...,” as Alexander Hamilton explained in the *Federalist Papers*.²⁸ By making the President the Commander in Chief in Article II, the framers addressed what they recognized as a defect in the conduct of the Revolutionary War. They did not compromise their insistence in Article I on collective judgment in the decision for war.

Nor did they give the Commander in Chief any constitutional right to ignore the terms of a congressional authorization for the use of force. When Congress gives the President the authority to conduct war, he or she must conduct it within that authority, just as the President must follow any law that is constitutionally made. As Justice Paterson said in a case construing the statutory authority for the country’s first war against a foreign state, “[a]s far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations.”²⁹ A year later, Chief Justice John Marshall underscored the point in another case arising out of that war: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.”³⁰ In fact, in the war with France, Congress limited both the kind of force the President could use (the navy only) and the areas where he could use it (our coastal waters, at first, and then the high seas). When a presidential order to the Navy later exceeded the statutory limitations, the Supreme Court unanimously found that the statute controlled.³¹

Defensive War Powers – At the same time, the framers knew that the decision for war is not always ours to make. When foreign states make war against us, the President is

empowered as Commander in Chief to fight it. He must defend, with force if necessary. Indeed, James Madison's notes of the debate accompanying the change from "make" to "declare War" explained that this would "leav[e] to the Executive the power to repel sudden attacks,"³² a power that, in any case, may be implied by his oath to "preserve, protect, and defend the Constitution of the United States."³³ As Commander in Chief, the President must decide what force is necessary to respond to actual attack.³⁴

Historical practice and logic have given meaning to the defensive war power to "repel sudden attacks," inferred from the Commander in Chief clause.³⁵ In addition to repelling attacks, this power extends arguably also to *imminent* attack when there is no time, as a practical matter, for Congress to decide. In addition, Congress has historically acquiesced in the President's use of limited force abroad, without specific prior congressional authorization, to protect and rescue Americans when local authorities cannot or will not protect them. The power of "protective intervention" can be viewed as part of the constitutional common law demarcating the President's defensive war power,³⁶ although Congress has also legislated to regulate the power to rescue hostages.³⁷

The modern overlapping threats of terrorism and the proliferation of weapons of mass destruction (WMD) pose a challenge to our understanding of constitutional war powers because of the nature and sources of these threats. Terrorist attacks usually are launched without warning when it is too late to defend against the actual attack, are intended to produce civilian casualties, and are carried out remotely or by suicide attackers, leaving no identifiable targets for retaliation in either case. The 9/11 attacks demonstrate that even without WMD, terrorists can inflict mass civilian casualties. With WMD, of course, the magnitude of an attack can be even larger. If the source of the attacks or WMD is a traditional functioning state, the state may be vulnerable to traditional diplomatic, economic, and military deterrence and pressure. If the source is a failed or pathological ("rogue") state, however, such deterrence — indeed, even nuclear deterrence — may be less effective. If the source is an international terrorist group such as al Qaeda, or one of its decentralized offshoots, traditional deterrence will fail. When traditional diplomatic, economic, and military deterrence is ineffective, the United States must be proactive, and its best strategy may be to strike first in self-defense.

Proactive counter-terrorist measures range from intelligence collection, covert operations, and clandestine operations, to open military operations. Ordinary counter-terrorist intelligence collection is supported both by the President's inherent foreign affairs powers and by statutory authorization. Covert operations, aimed at influencing "conditions abroad, where it is intended that the role of the United States Government

will not be apparent or acknowledged publicly,³⁸ may involve the use of force against terrorists or their supporters. They are presently conducted under a statutory regime that impliedly authorizes them, subject to statutory requirements for written presidential findings and reports to the congressional intelligence committees.³⁹ Clandestine military operations are secret military operations that are not intended to be plausibly deniable and therefore arguably fall outside this statutory regime. Sometimes characterized as “preparing the battlefield,” they have traditionally been ancillary to or preparatory for open military operations (the Department of Defense has explained that the “focus of [clandestine] activity is primarily in support of military operations, planned or undertaken, or their aftermath”).⁴⁰

If such open military operations are constitutionally authorized, either by statute or under the President’s defensive war power, then so is any clandestine operation that is ancillary to or preparatory for them. Any clandestine deployment of Special Operations forces in Afghanistan in 2001 or in Iraq in 2002 preparatory to military operations, for example, would have been authorized, respectively, by the 2001 and 2002 use-of-force resolutions by Congress. The 2001 joint resolution, however, authorized force only against persons, groups, or states that had participated in or aided the 9/11 attackers.⁴¹ Clandestine operations against other terrorists are not authorized by this resolution. Nor do such clandestine operations fit comfortably under the traditional label, “preparing the battlefield.” First, such operations are not “preparing the battlefield” for future military operations; they are an end in themselves. A targeted killing of a suspected terrorist leader by a Predator missile does not “prepare” any battlefield, nor is it accurately described as somehow ancillary to a war on terrorism. It is at the military heart of that war. Second, clandestine operations need not occur on a “battlefield” as the term has traditionally been understood. In the global war on terror, neither clandestine nor open counter-terrorist operations have any clear geographic or, for that matter, temporal limits.

To the extent that even a clandestine operation without statutory authorization directs armed force at a specific imminent terrorist threat, all members of the War Powers Initiative agree that it falls within the President’s defensive war power. Absent a specific imminent terrorist threat, on the other hand, a majority of the War Powers Initiative conclude that a clandestine operation that uses armed force against a foreign target may constitute a use of force on such a scale that it requires prior congressional approval under our Constitution. Although there is no bright line for determining which clandestine operations fall on this end of the spectrum of counter-terrorist actions, the following factors, among others, are significant in that determination:

★★ 17 ★★

- ▶ the nature of the target and the degree to which the target is identified with a state capable of military response,
- ▶ the scope and duration of the operation,
- ▶ the risk of violent response that the clandestine operation presents,
- ▶ the characterization of the operation under international law,
- ▶ the likely international consequences of the operation,
- ▶ the resources needed for the operation, and
- ▶ the risk of both U.S. and foreign casualties posed by the operation.

Even if these factors suggest that congressional authorization is required for a clandestine counter-terrorist operation, however, the need for secrecy and speed may make specific authorization of clandestine counter-terrorist operations impractical. The majority of the War Powers Initiative therefore believes that Congress may authorize such operations more generally, as it did anti-pirate operations at the start of the nineteenth century,⁴² although it must still follow the rule of clear statement. The dissenter agrees that the President should consider the foregoing factors, but not that the President needs congressional authorization to deploy clandestine force of any size and duration to meet whatever he or she deems a terrorist threat to the national security.

Peacetime Deployments – Finally, the President does not command the armed forces only in war. He or she is authorized to deploy them for peaceful purposes ranging from humanitarian relief, non-violent peacekeeping, and training, to pre-positioning for possible military action, as long as the deployment does not take the decision for initiating the use of force from Congress. Many of these peaceful deployments are expressly authorized by Congress. For example, the “noncombatant assistance” provision of the United Nations Participation Act⁴³ authorizes the President to “detail” to the United Nations up to 1000 members of the U.S. armed forces in a “non-combatant capacity,” and multiple statutes authorize various uses of the armed forces for humanitarian and civic assistance abroad.⁴⁴ Even absent specific advance statutory authorization from Congress, there is an argument that Congress has acquiesced in such uses of the armed forces by the President by adopting collateral facilitating legislation, appropriating funds for such uses after the fact, and not objecting to them when it had the opportunity to do so.⁴⁵

It is more doubtful, however, that Congress can be said to have acquiesced generally in any executive practice of deploying the armed forces abroad for “peace-enforcement” or for other peace or stability operations that expressly contemplate the use of force (other than for force-protection).⁴⁶ For example, Congress responded critically to the President’s use of armed forces in Somalia to track down a local warlord and eventually only authorized

the deployment subject to time limitations and other restrictions. Some of the restrictions adopted were made applicable more generally “to any significant... peacekeeping, or peace-enforcement operations.”⁴⁷

Limits on the President's War Power – In sum, although the President's authority as Commander in Chief is significant, it is also limited. The President may constitutionally use force abroad for a range of defensive purposes, including some counter-terrorist operations, depending on their scope and duration and other factors listed above. But the President otherwise cannot constitutionally conduct war, or preventive war, without obtaining prior congressional authorization. Beyond this range of defensive war powers, the burden lies on the President to obtain the authorization. The constitutional rule is that the President can lawfully fight wars for other than a range of defensive purposes only if Congress has authorized it, not that the President may fight it *until* Congress has stopped it. Moreover, when Congress has authorized the use of force, the President is constitutionally required to abide by the terms of the authorization, as well as the Constitution, laws, and treaties of the United States. Finally, presidents cannot spend money for war except pursuant to appropriation, and they are wholly dependent on Congress for appropriations. Thus, even though the President is constitutionally authorized to repel actual and forestall imminent attacks, the duration and scope of even such defensive operations may be limited by the availability of appropriated funds, as well as by the practical need for political support when the operations are extended.

3. The Courts' Constitutional Role in War Powers

The Judicial War Powers Role – Whether the use of force abroad has been constitutionally authorized, whether the terms of an authorization have been violated, and how the exercise of war powers lawfully affects civil and property rights are questions of constitutional, statutory, common, and treaty law. In a proper case, they are therefore within “[t]he judicial power [which] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority....”⁴⁸ Nothing on the face of Article III makes them “political questions” beyond the judicial power.

The federal courts have therefore properly exercised their power from time to time to decide whether war has been lawfully authorized. The Naval War with France is again instructive. It presented the legal question whether France had lawfully been made “the enemy” in the absence of a formal declaration of war. The Supreme Court, which included a framer of the Constitution, unanimously held that Congress had, without declaring

war, constitutionally authorized the incremental escalation of naval force against French vessels in a “limited” or “imperfect” war, thus making France the enemy.⁴⁹ None of the Justices doubted the suitability of the question for exercise of the judicial power.

Slightly over half a century later, the Supreme Court was asked to decide whether the Civil War constituted a state of war authorizing the President to institute a naval blockade of the Confederacy pursuant to the international law of war.⁵⁰ Although the Court was closely divided, ruling 5-4 that the President had a right under the law of war to institute the blockade, even the dissenters did not find that the question lay beyond the judicial power. They simply decided it the other way, concluding that prior congressional authority was necessary.

A century later, the courts were asked to decide whether the Vietnam War was constitutionally authorized. Holding that “the constitutional delegation of the war-declaring power to the Congress contains a discoverable and manageable standard imposing on the Congress a duty of mutual participation,”⁵¹ the United States Court of Appeals for the Second Circuit found that the standard was satisfied by Congress’s enactment of the Tonkin Gulf Resolution, authorizing the use of force, and of multiple specific appropriations earmarked for conducting military activities in Vietnam.⁵²

Political War Powers Questions – The Vietnam-era cases, however, also help illuminate war powers questions that the courts will not decide. Although the Second Circuit found that Congress had constitutionally authorized the Vietnam War, it held that the choice between authorizing by “an explicit declaration on the one hand and a resolution and war-implementing legislation, on the other,” that is, between the formal declaration and a statutory authorization, presented a political question that is non-justiciable.⁵³ Congress may constitutionally do either, as we noted. That court also held in a later case that whether a “specific military operation constitutes an ‘escalation’ of the war or is merely a new tactical approach within a continuing strategic plan” is a political question that courts lack manageable standards and competency to decide.⁵⁴ It goes without saying that courts have no business deciding *whether* we should go to war, a quintessentially political decision that the Declaration Clause assigns to the political branches alone. Unfortunately, in recent decades, courts have not always taken care to distinguish one war powers question from another, confusing the justiciable question of whether war is constitutionally authorized with the non-justiciable question of whether we should go to war.⁵⁵

The cases arising out of the Naval War with France are instructive for another reason. In them, the Supreme Court decided the legality of the Naval War incidentally to deciding private rights to prize money from vessels captured from the French. It did not directly

adjudicate a clash between the branches. As a prudential matter, courts are unlikely to adjudicate such a dispute as long as there remains a reasonable possibility that further action by either branch or both will moot the question of authority for force. “[A] dispute between Congress and the President is not ready for judicial review,” Justice Powell asserted in *Goldwater v. Carter*,⁵⁶ “unless and until each branch has taken action asserting its constitutional authority.” Therefore, he concluded, the “Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”⁵⁷

In 1990, for example, a federal court rejected the claim that the authority for Operation Desert Storm presented a political question, but declined to decide that authority because, in the court’s view, the political branches had not yet reached an impasse in that neither branch had yet taken final action presenting an unavoidable dispute of authority.⁵⁸ In contrast, the branches are at an impasse when Congress passes a law prohibiting the use of appropriations for a specified combat operation, but the President continues to use appropriated funds for the operation. In *Holtzman v. Schlesinger*,⁵⁹ a member of Congress brought suit for an injunction against the Secretary of Defense in these circumstances, and the district court actually issued an injunction against continued military activities in Cambodia. The Court of Appeals subsequently reversed because the appropriations cutoff date set out in the statute had not yet occurred.

* * *

In sum, the federal courts have the constitutional power to decide whether the use of force has been lawfully authorized. That justiciable question should not be confused with the different non-justiciable political questions whether we *should* go to war or whether Congress must use formal declaration, use-of-force statute, or specific appropriation as the form of authorization. The courts can and have decided the authority question incidentally to deciding the legal effects of the exercise of war powers, especially on civil and property rights. They also have the constitutional authority to decide that question directly in a dispute between the branches, but will not, as a practical matter, while there remains a reasonable possibility that further action by either branch or both will avoid the question.

4. The Role of International Organizations and International Law in War Powers

International Authorization As a Substitute? – The Supremacy Clause of the Constitution asserts that “all Treaties made, or which shall be made, under the Authority of the United

★★ 21 ★★

THE FORM AND EFFECT OF AUTHORIZATIONS FOR THE USE OF FORCE

War powers debates have historically been about whether the President is authorized to use force. But this is the beginning, not the end, of a decision to exercise the war power. Fully informed debate should also address the form and domestic legal effect of authorization. Whether the use of force is based upon the President's inherent defensive war authority, a formal declaration, a use-of-force statute, or an appropriation affects political accountability for the decision to go to war, the scope of the force authorized, and the incidental common law or statutory authorities triggered by the authorization, which we will call "standby" authorities.

1. Declarations of War

The declaration of war against Germany in 1917 is illustrative of 20th century U.S. declarations. After a whereas clause recognizing repeated acts of war by Germany, it provided:

That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby, authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful

★★ 25 ★★

termination all of the resources of the country are hereby pledged by the Congress of the United States.⁷⁰

The declaration leaves no doubt of the decision for war or of Congress's shared responsibility for it. It is also unambiguous about the scope of the force that it authorizes. Declarations have typically authorized the President "to employ the entire land and naval [or military] forces of the United States," "the resources of the Government," and "all of the resources of the country" to "carry the war against the [enemy] Government" to successful termination.⁷¹ A declaration authorizes what we would today call total war, with the full and unlimited range of armed force and national resources, instead of a limited or what the framers called an "imperfect war."

Furthermore, a formal declaration triggers a wide range of standby authorities. These include over thirty statutory authorities keyed to "declared war" or "declaration of war," authorizing troop call-ups and mobilization, trade sanctions, preventive detention of enemy aliens, disposition of defense stockpiles, warrantless surveillance, and conscription, among other powers.⁷² An example is the Alien Enemy Act, which authorizes the President to order the detention of male enemy aliens over the age of fourteen "[w]henver there is a declared war between the United States and any foreign nation or government...."⁷³ Another 140 standby statutes are triggered by "war" alone or "time of war," or "national emergency" associated with war.⁷⁴ Thus, the President, for example, may extend enlistments in the reserves that are in effect "at the beginning of a war or of a national emergency declared by Congress" until six months after the war or emergency has ended.⁷⁵ In addition, a declaration triggers the full breadth of authority under the common law of war. This may include, for example, authority for the military to detain and try enemy combatants.⁷⁶

2. Use-of-Force Statutes

Congress, however, has not formally declared war since World War II. Instead, it used specific use-of-force statutes — joint resolutions approved by both houses of Congress and presented to the President for his signature — to authorize the use of force in Vietnam in 1964, the Persian Gulf in 1991, Afghanistan in 2001, and Iraq in 2002. These and most use-of-force statutes were contemporaneous authorizations for the use of force, but a few pre-authorized a defined use of force against a generic category of targets or in a defined geographic area,⁷⁷ and one ratified a prior use of armed force.⁷⁸

While use-of-force statutes have been no less clear than declarations, they are typically narrower in scope. For example, in the Naval War with France, Congress at first only

★★ 26 ★★

authorized American naval vessels to capture French vessels “found hovering on the coasts of the United States for the purpose of committing depredations on” our shipping.⁷⁹ The 1964 Tonkin Gulf Resolution was far more generous in authorizing “all necessary measures” and “all necessary steps, including the use of armed force.”⁸⁰ It is therefore often cited with regret by members of Congress as the benchmark of excessive authorization. But even this authorization seems to fall short of the declarations’ “entire naval and military force” and “all the resources of the country.” More recently, the 2001 use-of-force statute authorized the President to use

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.⁸¹

Although this use-of-force statute is unusual in that it targets persons and organizations rather than named foreign states, it does not authorize the use of force against terrorist organizations that were not implicated in the 9/11 attacks such as Hamas or Hezbollah, or against Saddam Hussein’s Iraq, unless Iraq aided and abetted or harbored those responsible for the 9/11 attacks.

Not only is the scope of the force authorized by use-of-force statutes typically narrower than that authorized by formal declaration, so is their legal effect. Although presidents as Commander in Chief may draw some powers from international law and the law of war when war is authorized by use-of-force statutes rather than by declaration, the extent of the ancillary power they get is unclear. A declaration of war arguably triggers a full range of common law-of-war authorities as well as all standby statutes keyed to “declared war,” “war,” or “time of war.” Use-of-force statutes, on the other hand, clearly do not trigger the smaller number of standby authorities keyed just to declaration or “declared war.” For example, the President does not acquire power under the Alien Enemy Act⁸² to detain enemy aliens from a use-of-force authorization. Moreover, it is sometimes unclear whether a use-of-force statute triggers standby authorities keyed to “war” or “time of war,”⁸³ because the nature of the ensuing hostilities are unclear. After the “Tanker War” in the Persian Gulf in 1988, for example, a question arose about the availability of a sovereign immunity defense for combatant activities “during time of war” to a claim against the government under the Federal Tort Claims Act. The court found that “during the ‘tanker war’ a ‘time of war’ existed,” even though another court had concluded that it lacked the expertise and evidentiary access to decide whether the same war involved

“hostilities” within the meaning of the War Powers Resolution.⁸⁴

In short, the domestic legal effect of use-of-force statutes may be ambiguous unless Congress spells it out in the authorization or clarifies the triggering event in standby statutes.

3. Appropriations and Other Statutes

Joint resolutions for the use of force are statutes, but so are appropriations. In the early years of the Republic, authorizations for the use of force were sometimes inferred from appropriations for naval construction, “Indian” suppression, and anti-pirate operations.⁸⁵ Much later, courts also inferred authorization for the Vietnam War from appropriations.⁸⁶ For example, a Vietnam-era appropriation specifically stated that it was to be used “upon the determination by the President that such action is necessary in connection with military activities in Southeast Asia.”⁸⁷ Another declared Congress’s “firm intention to provide all necessary support for members of the Armed Forces of the United States fighting in Vietnam.”⁸⁸ A federal court found that these specific appropriations left little doubt that Congress had authorized using force in Vietnam.⁸⁹

In contrast, more general military appropriations leave ambiguous whether and how much force is authorized or whether standby common law or statutory authorities have been triggered. In addition, appropriations provisions are often bundled in a way that makes inferences of use-of-force authorization problematic. They do not necessarily focus legislative deliberation on the need for force in the same way that declarations or use-of-force statutes can, and they are less likely, too, to state the reasons for using force.⁹⁰ The Supreme Court has insisted that an appropriation “plainly show a purpose to bestow the precise authority which is claimed” before it can be construed as an authorization for government curtailment of civil liberties.⁹¹ An equally clear statement in military appropriations should be required before they can be construed to authorize or ratify the use of force that may take lives.⁹² Requiring anything less would defeat the constitutional objective of political accountability and its corollaries of transparency and deliberation.

* * *

In sum, while Congress has the unreviewable discretion to choose among declaration, use-of-force statute, and appropriation or other statute to authorize the use of force abroad, only legislation that “plainly show[s] a purpose to bestow the precise authority which is claimed” can express the collective judgment required by the Constitution. This clear statement rule is essential both to promote Congress’s political accountability for

★★ 28 ★★

the decision to use force and to protect against executive usurpation of the congressional war power by exploiting statutory ambiguity. Declarations of war, use-of-force statutes, and specifically earmarked appropriations meet this clear statement standard. General appropriations and most collateral legislation usually do not.

Even legislation that meets the standard, however, may have unclear “domino” effects because of the ambiguity of haphazardly accumulated standby legislation and the vagaries of the common law of war. Congress has not systematically revisited and clarified the nearly 200 statutory standby authorities triggered variously by declared war, “war” alone, or national emergency, nor codified potentially far-reaching common law of war authorities (for example, for military detention and trial). Consequently, even when Congress decides to authorize the use of force, it leaves the job half-finished if it fails to consider the domestic legal effects of the authorization. The authorization may have unforeseen and unintended domestic legal consequences by the operation of standby authorities.

RECOMMENDATIONS

1. **Congress must perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad except when force is used for a limited range of defensive purposes.**

There is no automaticity in the war power decision-making process intended by the framers, no substitute for the particularized consideration of whether to initiate the use of force abroad. Congress should not wait for the President to ask it for its judgment on initiating a use of force. Instead, it should involve itself early in the decision-making process, demand and acquire relevant information, and reach a collective judgment by a roll call vote after full and public debate.

2. **The President must seek advance authorization from Congress for initiating the use of force abroad except when force is used for a limited range of defensive purposes.**

The Constitution requires the President to obtain the authorization of Congress for initiating the use of force abroad except when it is used for a limited range of defensive purposes: to defend against actual attack on the United States or its armed forces, to forestall a reasonably imminent attack, to protect or rescue Americans abroad, and, in exceptional circumstances, to defend against urgent and severe threats to the United States when time does not permit obtaining advance congressional authorization.

★★ 37 ★★

Even in such a case, the President should seek authorization from Congress as soon as circumstances do permit.

Neither consulting nor notifying Congress is a substitute for its collective judgment expressed in authorizing legislation. In any case, all members of the War Powers Initiative agree that it is in the President's institutional interests and in the national interest for the use of force abroad to be supported by the collective judgment of Congress and the President, because such a judgment reflects a political consensus that makes them jointly responsible for the resulting costs. To persuade a majority of both houses of Congress to make the collective judgment that the use of force is in the national interest, a President must, in effect, persuade the people. If he cannot persuade the people's representatives, he is unlikely to persuade the people who elected them.

3. To obtain the informed collective judgment of Congress on initiating the use of force abroad, the President should supply Congress with timely and complete information about a use of force, when circumstances permit, and Congress should also use its own investigatory tools to determine the reliability and completeness of the information on which it relies to reach a collective judgment.

Congress cannot perform its constitutional war powers duty if it is uninformed. The corollary to the President's constitutional duty to obtain advance authorization from Congress for initiating the use of force abroad is that he must supply Congress with timely and complete information, when circumstances permit, to enable it to reach an informed collective judgment. Such information should include not only the circumstances and specific legal authority for the use of force, but also the anticipated contributions from other nations, the goals of the operation, its anticipated costs, and a plan for funding it.

As soon as time allows, such information should ideally include a timely copy of a formal legal opinion of the Attorney General or the Assistant Attorney General for the Office of Legal Counsel to the President on the authority for the use of force.¹¹⁰ Especially given the paucity of judicial opinions on war powers, the published war powers opinions of the Office of Legal Counsel can form an important body of legal analysis, even if often one-sided, against which to measure the authority for uses of force.

The President should also supply to Congress a copy of a written assessment by the Comptroller of the Department of Defense to the President of the anticipated costs of the military operation and how they will be funded, or its equivalent. Several controversial U.S. military operations abroad have proven the military adage, "Going in is easy; getting out

is the hard part.” Even if detailed statutory specification of an “exit strategy” or schedule is impractical and unwise, an insistence on a good faith estimate of the costs of a proposed use of force may prompt a beneficial exploration of its possible duration and aftermath. It is also a proper exercise of Congress’s appropriations power.

Finally, Congress must not be passive in accepting information from the executive branch to justify initiating the use of force abroad. History shows that such information can be inaccurate, misleadingly incomplete, or even false. Congress should therefore employ its own investigative tools to determine the reliability and completeness of information it uses to decide on initiating the use of force abroad.

4. Congress should authorize initiating use of force abroad only by declaration of war or a specific statute or appropriation, except that it can more generally authorize clandestine counter-terrorist operations that require secrecy and speed provided that such authorization states clearly the purposes and scope of the authorization.

The Declare War Clause gives Congress the choice between authorizing the use of force abroad by declaration of war or by legislation. Public accountability for the decision to use force requires that Congress speak as clearly in legislation as it does in a declaration. Under this constitutionally-derived clear statement rule, which is restated in the WPR, authorization for the use of force abroad should not usually be inferred from a general defense appropriation, let alone from other legislation regarding military procurement, conscription or other collateral subjects.

However, the nature and source of terrorist attacks and threats posed by WMD, and the need for secrecy and speed in clandestine operations against them, may justify more general authorization of some counter-terrorist operations that are not already authorized by the President’s defensive war power. Even in such cases, Congress must always state the purposes and scope of its authorization as clearly as the circumstances permit in order to satisfy the constitutional objectives of legislative deliberation and political accountability.

5. Although Congress can condition its authorization for the use of force on compliance with international law or treaty obligations, or consultation with international organizations, it should not and cannot delegate the use-of-force decision to an international body. Authorization by a treaty organization, international body, or international law is not a constitutional substitute for authorization from Congress.

Although treaties are part of the supreme law of the land, authorization by a treaty organization such as the North Atlantic Treaty Organization or by an international body such as the United Nations Security Council for the use of force to preserve international or regional peace and security is not a constitutional substitute for authorization by Congress. Whether or not initiating the use of force abroad by the United States is lawful under international law or authorized by a treaty to which the United States is a party or by an international organization of which it is a member, under our Constitution only Congress can authorize initiating the use of force abroad except for a limited range of defensive purposes.

Congress can also condition the use of force on compliance with international law or with treaty obligations. Furthermore, it can express its sense that the President should consult with an international organization before he or she orders the use of force abroad. But it cannot delegate to any international body the decision whether to use force.

6. Congress should replace the War Powers Resolution with legislation that fairly acknowledges the President's defensive war powers, omits any arbitrary general time limit on deployments of force, reaffirms the constitutionally-derived clear statement rule for use-of-force bills, and prescribes rules for their privileged and expedited consideration.

The War Powers Resolution is a flawed shortcut for Congress's exercise of its constitutional war powers. Its under-inclusive statement of purpose and policy, coupled with the link of its consultation and reporting provisions to the constitutionally problematical sixty-day clock, have given presidents an excuse to ignore the WPR and Congress an excuse to do nothing. Any war powers bill intended to replace the largely ineffective WPR should align the bill's scope with the President's defensive war powers and eliminate the sixty-day clock.

Such legislation, however, should also preserve and strengthen those elements of the WPR that promote the constitutional objectives of legislative deliberation and political accountability. Although the WPR's consultation and reporting provisions have not worked as intended because of their association with the sixty-day clock, they are elements of the improved information flow between the executive and Congress that is the object of our Recommendation 3. Any new war powers bill should reflect that recommendation. Similarly, the WPR's clear statement rule is consistent with our Recommendation 4. A statutory clear statement requirement is an important reminder to Congress of its obligation of specificity in formulating use-of-force authorizations.

★★ 40 ★★

Finally, the WPR attempts by several largely unused legislative procedures to address the inefficiency of the ordinary legislative process for considering sometimes time-urgent use-of-force bills.¹¹¹ In any war powers bill intended to replace the WPR, Congress should consider adopting expanded statutory requirements and internal rules for privileged and expedited consideration of all use-of-force resolutions.¹¹² These should include automatic committee referral; tight deadlines for committee discharge and reporting to the full house; procedures for privileging a bill to make it the pending business of a house and setting deadlines for a vote; expeditious referral to the other house; and expeditious procedures for resolving disagreements between the houses.

7. Congress should update and clarify the almost 200 standby statutory authorities, triggered variously and often ambiguously by “declared war,” “war” alone, “time of war,” or “national emergency,” and it should codify selected laws of war.

An authorization for the use of force affects not just the foreign target. By virtue of almost 200 statutes providing standby domestic legal authority, each authorization triggers “domino” domestic legal effects. Unfortunately, not all of these are known to or intended by Congress because the domestic standby statutes have accumulated haphazardly over many years and have not been updated or clarified to fit the contemporary congressional preference for using use-of-force authorizations rather than declarations of war. Congress has not codified important aspects of the law of war, especially regarding the scope and procedures for military detention and military trial of enemy combatants – law which has recently been invoked by the President to detain even U.S. citizens in conjunction with the 2001 use-of-force authorization.

In 1976, Congress tackled a similar statutory problem of accumulated national emergencies with unintended domino effects by enacting the National Emergencies Act.¹¹³ That act, however, dealt only with national emergency standby legislation, not all war-related standby legislation. Congress should undertake a comparable inventory and updating of all war-related and national emergency legislation, codify and elaborate those parts of the law of war that have supposed domestic legal effects, clarify the statutory triggers in light of contemporary war powers practice and the ongoing “war on terrorism,” and require notice to it from the executive of selected standby authorities that the President invokes pursuant to an authorization for the use of force. In the alternative, Congress should itself identify and address the chief domino effects of each proposed use-of-force bill as it considers the authorization.

8. Congress does not complete its war powers duties by authorizing a use of force abroad. It should also conduct appropriate and regular oversight of the strategic use of force, monitor the domino domestic legal effects of the authorization, and, when appropriate, revise or rescind the authorization or standby legal authorities the authorization triggers.

While the President makes tactical command decisions in an authorized war, the enactment of the authorization does not end Congress's war power duties. They continue as long as the use of force continues. Congress should not only conduct continuing oversight of the strategic uses of force, but also collect the information necessary to decide on supplemental appropriations and the domino legal effects of the authorization. New information, or changes in the facts on the ground, may require Congress by ordinary legislative process, in fulfillment of its continuing war powers duties, to revise or rescind the original authorization, to restrict appropriations, or to revise or rescind standby legal authorities, leaving the President to modify or end the use of force abroad consistent with his or her duty as Commander in Chief to protect the forces themselves.

9. To preserve the system of checks and balances of which war powers are part, the federal courts should, in appropriate cases, decide whether authority exists for the use of force abroad.

The federal courts have historically, if infrequently, decided the authority for uses of force abroad, as well as the domestic legal effects of war and authorizations for use of force. If courts, on vaguely reasoned claims of non-justiciability, avoid deciding such issues in cases properly before them, they remove a vital check from the constitutional system of war powers. Whether a use of force is constitutionally authorized is not a political question beyond the judicial power. When plaintiffs have standing, the courts should not erect insuperable prudential obstacles to deciding this question incidentally to private rights disputes, or to deciding it directly in the rare case in which there is no reasonable expectation that further action by the political branches will avoid the question.

"Exercising Congress's Constitutional Power to End a War."
United States Senate, Committee on the Judiciary
Testimony of Walter Dellinger
January 30, 2007

I am pleased to address the important subject of this hearing. My views on the power of Congress to end a war or to limit the scope and duration of a war are set out in the statement I submitted with other scholars to the congressional leadership a few weeks ago. See *Letter from Constitutional Law Scholars to Congressional Leaders Concerning Constitutionality of Statutory Limitations on Troop Increase in Iraq, January 17, 2007*. That statement is attached to this testimony.

I would add only the following points. 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 be ready to conclude that a 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.

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:

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 blank check 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.

The opinion, "The President and the War Power: South Vietnam and the Cambodian Sanctuaries" may be found at

http://www.stanford.edu/group/lawreview/content/issue6/bybee_appendix.pdf.

Under the Rehnquist opinion, Congress is not limited to an all or nothing choice. Congress can authorize the use of military force, but place limits on the nature, scope and duration of the task assigned to the military. Assistant Attorney General Rehnquist expressly noted that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander-in-Chief to a narrower scope than it would have had in the absence of legislation." Specifically, Rehnquist noted, "Very recently, Congress has enacted legislation providing that United States forces shall not be dispatched to Laos or Thailand in connection with the Vietnam conflict. This proviso was accepted by the Executive."

As Assistant Attorney General in 1994, I similarly issued opinions that acknowledged the authority of Congress to limit the use of military force. See, for example, 1994 OLC 42, "Deployment of United States Force Into Haiti" which is predicated upon the President's compliance with conditions placed by Congress on the use of force in Haiti.

The suggestion that Congress, if it authorizes the use of military force in a country, cannot place limits on the size of the military contingent deployed to that country is unpersuasive. Suppose a multinational military force were to be assembled to engage in hostilities in the Sudan and the United States were asked to contribute troops to the venture. Congress could surely determine that 20,000 US troops, but no more, could be deployed as part of that force. To conclude otherwise would mean that if Congress authorized any US participation at all, then the President could move the entire world wide armed forces of the United States to the Sudan and there would be nothing Congress could do other than withdraw entirely from the country.

There are of course circumstances in which a congressional limitation of the scope or duration of the use of US military force would be unconstitutional as applied. The examples are familiar. If the protection of US troops from attack urgently required the use of additional forces beyond the limits set by Congress, the President as Commander in Chief could disregard those limits -- but only to the extent necessary to provide for the protection of US forces or to deal with other exigent circumstances.

One final point. The spending power is a source of some confusion. Invocation of that power is not necessary in order for Congress to legislate limits on the use of military force. If a limitation on the use of force is within the authority of Congress, a direct limitation is binding on the executive branch. It need not take the form of a restriction on spending. (Conversely, if a spending limitation did invade the President's authority as Commander in Chief of the armed forces, as would be the case, for example, with limits on his authority to appoint commanders and direct battlefield operations, it is unconstitutional and the President would be justified in not abiding by such limits.)

In the present circumstances, Congress has the authority it needs to legislate limits on the use of force in Iraq. As the scholars' letter of January 17th set out in some detail, the Constitution confers upon Congress numerous powers over national defense and the governance of the armed forces. 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. A president, in our constitutional republic, is obligated to adhere to those limits.

Walter Dellinger
604 East Franklin Street
Chapel Hill, NC 27514

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

Letter to Congressional Leaders

January 17, 2007


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 sets 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,

A handwritten signature in cursive script that reads "Walter Dellinger".

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.

Statement
United States Senate Committee on the Judiciary
Exercising Congress's Constitutional Power to End a War
 January 30, 2007

The Honorable Russ Feingold
 United States Senator, Wisconsin

Opening Statement of U.S. Senator Russ Feingold
 Senate Judiciary Committee Hearing
 Exercising Congress's Constitutional Power to End a War
 January 30, 2007

Good morning, and welcome to this hearing of the Senate Judiciary Committee entitled "Exercising Congress's Constitutional Power to End a War." We are honored to have with us this morning a distinguished panel of legal scholars to share their views on this very important and timely issue.

I thank Chairman Leahy for allowing me to chair this hearing. Let me start by making a few opening remarks, then I will recognize Senator Specter for an opening statement, and then we will turn to our witnesses.

It is often said in this era of ubiquitous public opinion polls that the only poll that really matters is the one held on election day. On November 7, 2006, we had such a poll, and all across this country, the American people expressed their opinion on the war in Iraq in the most significant and meaningful way possible -- they voted. And with those votes, they sent a clear message that they disagree with this war and they want our involvement in it to stop.

The President has chosen to ignore that message. So it is up to Congress to act.

The Constitution gives Congress the explicit power "[to] declare War," "[to] raise and support Armies," "[to] provide and maintain a Navy," and "[to] make Rules for the Government and Regulation of the land and naval Forces." In addition, under Article I, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." These are direct quotes from the Constitution of the United States. Yet to hear some in the Administration talk, it is as if these provisions were written in invisible ink. They were not. These powers are a clear and direct statement from the founders of our republic that Congress has authority to declare, to define, and ultimately, to end a war.

Our founders wisely kept the power to fund a war separate from the power to conduct a war. In their brilliant design of our system of government, Congress got the power of the purse, and the President got the power of the sword. As James Madison wrote, "Those who are to conduct a war cannot in the nature of things, be proper or safe judges, whether a war ought to be commenced, continued or concluded."

The President has made the wrong judgment about Iraq time and again, first by taking us into war on a fraudulent basis, then by keeping our brave troops in Iraq for nearly four years, and now by proceeding despite the opposition of the Congress and the American people to put 21,500 more American troops into harm's way.

If and when Congress acts on the will of the American people by ending our involvement in the Iraq war, Congress will be performing the role assigned it by the founding fathers -- defining the nature of

http://judiciary.senate.gov/print_member_statement.cfm?id=2504&wit_id=4083

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our military commitments and acting as a check on a President whose policies are weakening our nation.

There is little doubt that decisive action from the Congress is needed. Despite the results of the election, and two months of study and supposed consultation -- during which experts and members of Congress from across the political spectrum argued for a new policy -- the President has decided to escalate the war. When asked whether he would persist in this policy despite congressional opposition, he replied: "Frankly, that's not their responsibility."

Last week Vice President Cheney was asked whether the non-binding resolution passed by the Foreign Relations Committee that will soon be considered by the full Senate would deter the President from escalating the war. He replied: "It's not going to stop us."

In the United States of America, the people are sovereign, not the President. It is Congress' responsibility to challenge an administration that persists in a war that is misguided and that the country opposes. We cannot simply wring our hands and complain about the Administration's policy. We cannot just pass resolutions saying "your policy is mistaken." And we can't stand idly by and tell ourselves that it's the President's job to fix the mess he made. It's our job to fix the mess, and if we don't do so we are abdicating our responsibilities.

Tomorrow, I will introduce legislation that will prohibit the use of funds to continue the deployment of U.S. forces in Iraq six months after enactment. By prohibiting funds after a specific deadline, Congress can force the President to bring our forces out of Iraq and out of harm's way.

This legislation will allow the President adequate time to redeploy our troops safely from Iraq, and it will make specific exceptions for a limited number of U.S. troops who must remain in Iraq to conduct targeted counter-terrorism and training missions and protect U.S. personnel. It will not hurt our troops in any way -- they will continue receiving their equipment, training and salaries. It will simply prevent the President from continuing to deploy them to Iraq. By passing this bill, we can finally focus on repairing our military and countering the full range of threats that we face around the world.

There is plenty of precedent for Congress exercising its constitutional authority to stop U.S. involvement in armed conflict.

In late December 1970, Congress prohibited the use of funds to finance the introduction of United States ground combat troops into Cambodia or to provide U.S. advisors to or for Cambodian military forces in Cambodia.

In late June 1973, Congress set a date to cut off funds for combat activities in South East Asia. The provision read, and I quote:

"None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose."

More recently, President Clinton signed into law language that prohibited funding after March 31, 1994, for military operations in Somalia, with certain limited exceptions. And in 1998, Congress passed legislation including a provision that prohibited funding for Bosnia after June 30, 1998, unless the President made certain assurances.

http://judiciary.senate.gov/print_member_statement.cfm?id=2504&wit_id=4083

6/4/2007

Our witnesses today are well aware of this history, and I look forward to hearing their analysis of it as they discuss Congress's power in this area. They are legal scholars, not military or foreign policy experts. We are here to find out from them not what Congress should do, but what Congress can do. Ultimately, it rests with Congress to decide whether to use its constitutional powers to end the war.

The answer should be clear. Since the President is adamant about pursuing his failed policies in Iraq, Congress has the duty to stand up and use its power to stop him. If Congress doesn't stop this war, it's not because it doesn't have the power. It's because it doesn't have the will.

http://judiciary.senate.gov/print_member_statement.cfm?id=2504&wit_id=4083

6/4/2007

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Statement by Louis Fisher
Specialist in Constitutional Law

appearing before the
Senate Committee on the Judiciary

“Exercising Congress’s Constitutional Power to End a War”

January 30, 2007

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Mr. Chairman, thank you for inviting me to offer my views on the constitutional authority of Congress to restrict, redirect, or terminate military operations. In recent years, some commentators have argued that Congress cannot, in time of war, interfere with the President's power as Commander in Chief. Others claim that if Congress decides to exercise the power of the purse it must terminate all funding rather than adopting more selective or focused approaches. These commentators read congressional power far too narrowly and misunderstand the purpose of the Constitution and its commitment to representative (republican) government.

Democratic Principles

Congress is not merely a "coequal" branch of government. The framers vested the decisive and ultimate powers of war and spending in the legislative branch. We start with that basic understanding. American democracy places the sovereign power in the people and entrusts to them the temporary delegation of their power to elected Senators and Representatives. Members of Congress take an oath of office to defend the Constitution, not the President. Their primary allegiance is to the people and the constitutional principles of checks and balances and separation of power.¹ Any interpretation of presidential power that fails to take account of those basic concepts is contrary to the democratic system established in the United States.

The legislative judgment to take the country to war carries with it a duty *throughout the conflict* to decide that military force remains in the national interest. As with any other statute, Congress is responsible for monitoring what it has set in motion. In the midst of war, there are no grounds for believing that the President's judgment for continuing the war is superior to the collective judgment of elected representatives. Congress has both the constitutional authority and the responsibility to retain control and recalibrate national policy whenever necessary.

The breadth of congressional power is evident simply by looking at the text of the Constitution and comparing Article I to Article II. The powers expressly stated give Congress the predominant role in matters of war. However, this purely textual reading misses what the American framers did, why they did it, and how they broke with the reigning British models of executive power. Their study of history led them to place in Congress the sole power to take the country from a state of peace to a state of war. They left with the President, in his capacity as Commander in Chief, certain defensive powers to "repel sudden attacks."

Rejecting Monarchical Power

In 1787, the existing models of government throughout Europe, particularly in England, placed the war power and foreign affairs solely in the hands of the Executive. John Locke, in his *Second Treatise on Civil Government* (1690), vested the "federative" power (what we call foreign policy) with the Executive. Sir William Blackstone, in his *Commentaries*, defined the king's prerogative broadly to include the right to declare war, send and receive ambassadors,

¹ The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* (2005).

make war or peace, make treaties, issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and raise and regulate fleets and armies.

The framers carefully studied this monarchical model and repudiated it in its entirety. Not a single one of Blackstone's prerogatives was granted to the President. They are either assigned entirely to Congress (declare war, issue letters of marque and reprisal, raise and regulate fleets and armies) or shared between the Senate and the President (appointing ambassadors and making treaties). The rejection of the British and monarchical models could not have been more sweeping.

This explains what the framers did. The next question is why they did it. The framers gave Congress the power to initiate war because they concluded — based on the history of other nations — that Executives, in their quest for fame and personal glory, had too great an appetite for war and little care for their subjects or the long-term interests of their country.² John Jay, whose experience in the Continental Congress and the early years of the Republic was generally in foreign affairs, warned in Federalist No. 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.”

Joseph Story, who served on the Supreme Court from 1811 to 1845, similarly wrote about the need to vest in the representative branch the decision to go to war. The power to declare war “is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometime subversive of the great commercial, manufacturing, and agricultural interests.” Story found war as “sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead.”³

Through their study of history and political ambition, the framers came to fear the Executive appetite for war. Human nature has not changed over the years to justify trust in independent and unchecked presidential decisions in war. The record of two centuries in America teaches us that what Jay said in 1788 applies equally well to contemporary times.

² William Michael Treanor, “Fame, The Founding, and the Power to Declare War,” 82 *Corn. L. Rev.* 695 (1997).

³ 3 Joseph Story, *Commentaries on the Constitution of the United States* 60-61 (1833).

Offensive and Defensive Wars

The debates at the Philadelphia Convention in 1787 underscore the framers' intent to keep offensive wars in the hands of Congress while reserving to the President certain actions of a defensive nature. All three branches understood that distinction for 160 years, until President Truman went to war against North Korea by going to the UN Security Council for "authority" instead of to Congress.

Review what the framers said in Philadelphia. On June 1, 1787, Charles Pinckney offered his support for "a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." 1 Farrand 64-65. John Rutledge wanted the executive power placed in a single person, "tho' he was not for giving him the power of war and peace." James Wilson, who also preferred a single executive, "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c." Id. at 65-66.

Edmund Randolph worried about executive power, calling it "the foetus of monarchy." The delegates to the Philadelphia Convention, he said, had "no motive to be governed by the British Governmt. as our prototype." Alexander Hamilton, in a lengthy speech on June 18, strongly supported a vigorous and independent President, but plainly jettisoned the British model of executive prerogatives in foreign affairs and the war power. In discarding the Lockean and Blackstonian doctrines of executive power, he proposed giving the Senate the "sole power of declaring war." The President would be authorized to have "the direction of war when authorized or begun." Id. at 292. In Federalist No. 69, Hamilton explained the break with English precedents. The power of the king "extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies." The delegates decided to place those powers, he said, in Congress.

At the constitutional convention, Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year. James Madison and Elbridge Gerry moved to amend the draft constitution, empowering Congress to "declare war" instead of to "make war." This change in language would leave to the President "the power to repel sudden attacks." Their motion carried. 2 Farrand 318-19.

Reactions to the Madison-Gerry amendment reinforce the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, arguing that he "will have all the requisite qualities, and will not make war but when the Nation will support it." Not a single delegate supported him. Roger Sherman objected: "The Executive shd. be able to repel and not to commence war." Id. at 318. Gerry said he "never expected to hear in a republic a motion to empower the Executive alone to declare war." George Mason spoke "agst giving the power of war to the Executive, because not <safely> to be trusted with it. . . . He was for clogging rather than facilitating war." 2 Farrand 319. His remarks echo what Jay said in Federalist No. 4. At the Pennsylvania ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances "will not hurry us into war; it is

calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large." 2 Elliot 528. The power of initiating war was vested in Congress. To the President was left certain defensive powers "to repel sudden attacks."

This distrust of presidential power in matters of war was expressed frequently after the Philadelphia convention. In 1793, Madison called war "the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace."⁴ Five years later, in a letter to Thomas Jefferson, Madison said that the Constitution "supposes, what the History of all Govts demonstrates, that the Ex. is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legisl."⁵

Separating Purse and Sword

The need to keep the purse and the sword in separate hands was a bedrock principle for the framers. They recalled the efforts of English kings who, denied funds from Parliament, decided to rely on outside sources of revenue for their military expeditions. The result was civil war and the loss of Charles I of both his office and his head.⁶ The growth of democratic government is directly tied to legislative control over all expenditures, including those for foreign and military affairs.

The U.S. Constitution attempted to avoid the British history of civil war and bloodshed by vesting the power of the purse wholly in Congress. Under Article I, Section 9, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." In Federalist No. 48, Madison explained that "the legislative department alone has access to the pockets of the people." The President gained the title of Commander in Chief but Congress retained the power to finance military operations. For Madison, it was a fundamental principle of democratic government that "[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether a war ought to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws."⁷ This understanding of the war power was widely understood. Jefferson praised the

⁴ 6 The Writings of James Madison 174 (Hunt ed. 1900-10).

⁵ *Id.* at 312.

⁶ Paul Einzig, *The Control of the Purse* 57-62, 100-06 (1959). See also Charles Tiefer, "Can Appropriation Riders Speed Our Exit From Iraq?," 42 *Stan. J. Int'l L.* 291, 299 (2006); Richard D. Rosen, "Funding 'Non-Traditional' Military Operations: The Alluring Myth of a Presidential Power of the Purse," 155 *Mil. L. Rev.* 1, 29-44 (1998).

⁷ 6 The Writings of James Madison 146 (emphasis in original).

transfer of the war power “from the executive to the Legislative body, from those who are to spend to those who are to pay.”

Commander in Chief

In recent years, advocates of presidential authority have argued that the title “Commander in Chief” empowers the President to initiate military operations against other countries and to continue unless Congress cut off all funds, presumably by mustering a two-thirds majority in each House to overcome an expected presidential veto. Such a scenario means that a President could start and continue a war so long as he had at least one-third plus one in a single chamber of Congress. Nothing in the writings of the framers, the debates at Philadelphia and the ratifying conventions, or the text of the Constitution supports that theory.

Article II reads: “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.” Here is one constitutional check. Congress, not the President, does the calling. Article I gives to Congress the power to provide “for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” Under Article I, Congress raises and supports armies and provides and maintains a navy. It makes rules for the government and regulation of the land and naval forces. It provides for organizing, arming, and disciplining, the militia.

The Constitution does not empower the President as Commander in Chief to initiate and continue wars. In Federalist No. 74, Hamilton explained part of the purpose for making the President Commander in Chief: unity of command. The direction of war “most peculiarly demands those qualities which distinguish the exercise of power by a single head.” The power of directing war and emphasizing the common strength “forms a usual and essential part in the definition of the executive authority.” The President’s authority to bring unity of purpose in military command does not deprive Congress of its constitutional responsibility to monitor war and decide whether to restrict or terminate military operations.

A third quality attaches to the Commander in Chief Clause. Giving that title to the President represents an important technique for preserving civilian supremacy over the military. The person leading the armed forces would be the civilian President, not a military officer. In 1861, Attorney General Edward Bates explained that the President is Commander in Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He is Commander in Chief for a different reason. Whatever soldier leads U.S. armies to victory against an enemy, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’”⁸ Just as military officers are subject to the direction and command of the President, so is the President subject to the direction and command of Members of Congress, because they are the representative of the sovereign people. To allow a President to conduct a war free of legislative constraints, or free of constraints unless both Houses muster a two-thirds majority to override a veto, would violate fundamental principles of republican government.

⁸ 10 Ops. Att’y Gen. 74, 79 (1861) (emphasis in original).

The Constitution in Practice

The basic distinction between offensive and defensive military actions was understood by all three branches for the first 160 years. President Truman's decision to go to war in 1950 against North Korea marked a fundamental change. He went not to Congress for authority but to the UN Security Council. Korea represented the first of several unconstitutional presidential wars.⁹ Prior to that time it was broadly understood by Congress, Presidents, and the courts that anything of an offensive nature in military operations was reserved strictly to the nation's representatives. Presidents accepted that principle for all wars: declared or undeclared.

When President George Washington took military action against certain Indian tribes, he carefully followed statutory policy and understood that his operations against tribes were to be defensive, not offensive, measures. His Secretary of War, Henry Knox, wrote to governors: "The Congress which possess the powers of declaring War will assemble on the 5th of next Month — Until their judgments shall be known it seems essential to confine all your operations to defensive measures."¹⁰ To Knox, Washington had no authority to "direct offensive operations" against Indian tribes because such measures were reserved to "the decisions of Congress who solely are invested with the powers of War."¹¹

Chief Justice John Marshall, writing for the Court in 1801, spoke expansively about the powers of Congress in war: "The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry."¹² If a presidential proclamation in time of war conflicted with statutory policy enacted by Congress, the statute prevailed over the proclamation.¹³ Similarly, the Neutrality Act of 1794 established a national policy that could not be disregarded by independent presidential judgments over military operations. Ruled a circuit court in 1806: "The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids."¹⁴ Further: "Does [the President] possess the power of making war? That power is exclusively vested in congress."¹⁵ If a nation invaded the United States, the

⁹ Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?," 89 *Am. J. Int'l L.* 21 (1995). For presidential reliance on the UN Security Council and NATO countries for "authority," instead of Congress, see Louis Fisher, "Sidestepping Congress: Presidents Acting Under the UN and NATO," 47 *Case W. Res. L. Rev.* 1239 (1997).

¹⁰ Louis Fisher, *Presidential War Power* 19 (2d ed. 2004).

¹¹ *Id.*

¹² *Talbot v. Seeman*, 5 U.S. 1, 28 (1801).

¹³ *Little v. Barreme*, 6 U.S. (2 Cr.) 169 (1804).

¹⁴ *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

¹⁵ *Id.*

President would have an obligation to resist with force. But there was a “manifest distinction” between going to war with a nation at peace and responding to an actual invasion: “In the former case, it is the exclusive province of congress to change a state of peace into a state of war.”¹⁶

President Jefferson understood the difference between defensive and offensive wars. In 1801, he directed a squadron into the Mediterranean, telling commanders that in the event the Barbary powers declared war on the United States or took any offensive actions against U.S. ships, American commanders were to sink and destroy the attacking vessels. Having issued that order, based on congressional authority in providing for a “naval peace establishment,” he recognized that Congress decided the nation’s military policy: “The real alternative before us is whether to abandon the Mediterranean or to keep up a cruise in it, perhaps in rotation with other powers who would join us as soon as there is peace. But this Congress must decide.”¹⁷ Although the Pasha of Tripoli insisted on a larger tribute from the United States and declared war on America on May 14, 1801, Jefferson looked solely to Congress to decide the nation’s response. On December 8, he informed Congress of the situation and asked for further guidance, stating he was “unauthorized by the Constitution, without the sanctions of Congress, to go beyond the line of defense.” It was up to Congress to authorize “measures of offense also.” He gave to Congress all the documents it needed so that the legislative branch, “in the exercise of this important function confided by the Constitution to the Legislature exclusively,” could act in the manner it considered most appropriate.¹⁸

It is often said during congressional debate and in studies released by the Justice Department that Jefferson took military measures against the Barbary powers without seeking the approval or authority of Congress.¹⁹ In fact, in at least ten statutes, Congress explicitly authorized military action by Presidents Jefferson and Madison against the Barbary pirates.²⁰

Those who promote unilateral and plenary power for the President in matters of war frequently cite the Supreme Court decision in *The Prize Cases* (1863), which upheld President Lincoln’s blockade of rebellious states. However, the Court clearly distinguished between defensive and offensive actions. Justice Robert Grier said that although the President as Commander in Chief had no power to initiate war, in the event of foreign invasion the President was not only authorized “but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for the special legislative authority.”²¹ The

¹⁶ Id.

¹⁷ Fisher, *Presidential War Power*, at 33-34.

¹⁸ Id. at 34.

¹⁹ 4A Ops. O.L.C. 187 (1980); 140 Cong. Rec. 19809 (1994) (statement by Senator McCain, third column). The opinion of the Office of Legal Counsel was placed in the *Congressional Record*: 139 Cong. Rec. 25702-05 (1993).

²⁰ Fisher, *Presidential War Power*, at 35-37.

²¹ *The Prize Cases*, 67 U.S. 635, 668 (1863).

President had no choice but to meet the crisis in the shape it presented itself “without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact.”²²

Yet Justice Grier proceeded to carefully limit the President’s power to defensive actions, noting that he “has no power to initiate or declare a war against either a foreign nation or a domestic State.”²³ The executive branch took exactly the same position. During oral argument, Richard Henry Dana Jr., who was representing the President, acknowledged that Lincoln’s actions had nothing to do with “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.”²⁴

In a case decided by the Supreme Court in 1889, England had called upon the United States to supply naval forces for a military action against China. The Court made it clear that offensive operations had to be authorized by Congress, not the President. The Secretary of State told the English government that “the warmaking power of the United States was not vested in the President but in Congress, and that he had no authority, therefore, to order aggressive hostilities to be undertaken.”²⁵ Significantly, the Court spoke not merely of the congressional power to *declare* war but of a broader power: *war-making*. The decision to spill the nation’s blood and draw funds from the Treasury is reserved to Congress, not the President.

Presidents, in probably more than two hundred instances, have used military force without first receiving congressional authority. Those actions generally fall under the category of “protecting life or property,” including chasing bandits over the Mexican border. None of these actions come close to anything approaching a major war.²⁶

Contemporary Statutory Restrictions

Congress has often enacted legislation to restrict and limit military operations by the President, selecting both appropriations bills and authorizing legislation to impose conditions and constraints. The Congressional Research Service recently prepared a lengthy study that lists these statutory provisions.²⁷ A major cutoff of funds occurred in 1973, when Congress passed legislation to deny funds for the war in Southeast Asia. After President Nixon vetoed the bill,

²² Id. at 669.

²³ Id. at 668.

²⁴ Id. at 660 (emphasis in original).

²⁵ The Chinese Exclusion Case, 130 U.S. 581, 591 (1889).

²⁶ Fisher, Presidential War Power, at 57-66.

²⁷ Congressional Research Service, “Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches,” January 16, 2007, RL33803. See also Tiefer, “Can Appropriation Riders Speed Our Exit From Iraq?,” 42 Stan. J. Int’l L. at 303-17.

the House effort to override failed on a vote of 241 to 173, or 35 votes short of the necessary two-thirds majority.²⁸ A lawsuit by Representative Elizabeth Holtzman asked the courts to determine that President Nixon could not engage in combat operations in Cambodia and elsewhere in Indochina in the absence of congressional authorization. A federal district court held that Congress had not authorized the bombing of Cambodia. Its inability to override the veto and the subsequent adoption of an August 15 deadline for the bombing could not be taken as an affirmative grant of legislative authority: "It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it had not authorized."²⁹ Appellate courts mooted the case because the August 15 compromise settled the dispute between the two branches and terminated funding for the war.³⁰

Through its power to authorize programs and appropriate funds, Congress can define and limit presidential military actions. Some claim that the power of the purse is an ineffective and impractical method of restraining presidential wars. Senator Jacob Javits said that Congress "can hardly cut off appropriations when 500,000 American troops are fighting for their lives, as in Vietnam."³¹ The short answer is that Congress can, and has, used the power of the purse to restrict and terminate presidential wars. If Congress is concerned about the safety of American troops, those lives are not protected by voting additional funds for a war it does not support.

A proper and responsible action, when war has declining value or purpose, is to reevaluate the commitment by placing conditions on appropriations, terminating funding, moving U.S. troops to a more secure location, and taking other legislative steps. There is one central and overriding question: Is the continued use of military force in the nation's interest? If not, then U.S. soldiers need to be safely withdrawn and redeployed. Answering that difficult question is not helped by speculation about whether congressional action might "embolden the enemy."

Other examples of congressional intervention can be cited. In 1976, Congress prohibited the CIA from conducting military or paramilitary operations in Angola and denied any appropriated funds to finance directly or indirectly any type of military assistance to Angola. In 1984, Congress adopted the Boland Amendment to prohibit assistance of any kind to support the Contras in Nicaragua. No constitutional objection to this provision was ever voiced publicly by President Reagan, the White House, the Justice Department, or any other agency of the executive branch.³²

²⁸ 119 Cong. Rec. 21778 (1973).

²⁹ *Holtzman v. Schlesinger*, 361 F.Supp. 553, 565 (E.D. N.Y. 1973).

³⁰ Fisher, *Presidential War Power*, at 143-44.

³¹ Jacob K. Javits, "The War Powers Resolution and the Constitution: A Special Introduction," in *The President's War Powers: From the Federalist to Reagan 3* (Demetrios Caraley, ed. 1984).

³² Fisher, *Presidential War Power*, at 275-76.

Congress has options other than a continuation of funding or a flat cutoff. In 1986, Congress restricted the President's military role in Central America by stipulating that U.S. personnel "may not provide any training or other service, or otherwise participate directly or indirectly in the provision of any assistance, to the Nicaraguan democratic resistance pursuant to this title within those land areas of Honduras and Costa Rica which are within 20 miles of the border with Nicaragua."³³ In 1991, when Congress authorized President George H. W. Bush to use military force against Iraq, the authority was explicitly linked to UN Security Council Resolution 678, which was adopted to expel Iraq from Kuwait.³⁴ Thus, the legislation did not authorize any wider action, such as using U.S. forces to invade and occupy Iraq. In 1993, Congress established a deadline for U.S. troops to leave Somalia. No funds could be used for military action after March 31, 1994, unless the President requested an extension from Congress and received prior legislative authority.³⁵

Conclusions

In debating whether to adopt statutory restrictions on the Iraq War, Members of Congress want to be assured that legislative limitations do not jeopardize the safety and security of U.S. forces. Understandably, every Member wants to respect and honor the performance of dedicated American soldiers. However, the overarching issue for lawmakers is always this: Is a military operation in the nation's interest? If not, placing more U.S. soldiers in harm's way is not a proper response. Members of the House and the Senate cannot avoid the question or defer to the President. Lawmakers always decide the scope of military operations, either by accepting the commitment as it is or by altering its direction and purpose. In a democratic republic, that decision legitimately and constitutionally resides in Congress.

³³ 100 Stat. 3341-307, sec. 216(a) (1986).

³⁴ 105 Stat. 3 (1991).

³⁵ 107 Stat. 1476 sec. 8151(b)(2)(B) (1993). See also my articles and books: "Unchecked Presidential Wars," 148 U. Pa. L. Rev. 1637 (2000); "Presidential Independence and the Power of the Purse," 3 U.C. Davis J. Int'l Law & Pol. 107 (1997); "Congressional Checks on Military Initiatives," 109 Pol. Sci. Q. 739 (1994-95); "How Tightly Can Congress Draw the Purse Strings?," 83 Am. J. Int'l L. 758 (1989); *Presidential Spending Power* (1975).



CRS Report for Congress

Congressional Use of Funding Cutoffs Since 1970 Involving U.S. Military Forces and Overseas Deployments

Richard F. Grimmett
Specialist in National Defense
Foreign Affairs, Defense, and Trade Division

Summary

This report provides background information on major instances, since 1970, when Congress has utilized funding cutoffs to compel the withdrawal of United States military forces from overseas military deployments. It also highlights key efforts by Congress to utilize the War Powers Resolution to force the withdrawal of U.S. military forces from foreign deployments. It will be updated should developments warrant.

Introduction

In cases of significant differences with the President over foreign policy, especially deployments of U.S. military forces abroad, Congress has generally found that use of its Constitutionally-based "power of the purse" to be the most effective way to compel a President to take actions regarding use of U.S. military force overseas that he otherwise might not agree to. Thus, on various occasions since the Vietnam War era, Congress has used funding cutoffs or significant restrictions on the use of funds as a means of ending or circumscribing the use of U.S. military personnel for foreign operations. As the examples set out below indicate, the use of funding cutoffs and restrictions to curtail or terminate the President's use of U.S. military force abroad has proven to be much more efficacious in giving effect to Congress's policy views in this area than has the War Powers Resolution.

Congressional Funding Cutoffs since 1970 Utilized to Compel Withdrawal of U.S. Military Forces from Overseas Deployments

Indochina. During the last years of the Vietnam War, there were a number of efforts in Congress to attach amendments to legislation to restrict military actions by the United States in the Indochina region, as part of a larger effort to compel the withdrawal of U.S. military forces from the area. Nearly all of these proposals did not pass more than

one House of Congress due to vigorous opposition from the President to them. Those that did succeed in enactment into law are as follows:

- On December 22, 1970, Congress cleared the Special Foreign Assistance Act of 1971, H.R. 19911, for the President's signature. P.L. 91-652; 84 Stat. 1942 was signed on January 1, 1971. Section 7(a) of this Act prohibited the use of funds authorized or appropriated by it or any other Act "to finance the introduction of United States ground combat troops into Cambodia or to provide U.S. advisors to or for Cambodian military forces in Cambodia." As part of the compromise between Congress and the President that led to the enactment of H.R. 19911, similar curbs that had been placed in other legislation in 1970 — specifically H.R. 15628, P.L. 91-672 (the Foreign Military Sales Act), and H.R. 19590, P.L. 91-668 (the Department of Defense Appropriations Act), were deleted.
- On July 1, 1973, the President signed H.R. 9055, P.L. 93-50; 87 Stat. 99, the second Supplemental Appropriations Act for FY1973. This legislation contained language cutting off funds for combat activities in Indochina after August 15, 1973. Section 307 of P.L. 93-50 specifically states that "None of the funds herein appropriated under this act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under any other act may be expended for such purpose."
- In a related action, the President signed H.J.Res. 636, P.L. 93-52, 87 Stat. 130, the Continuing Appropriations Resolution for FY1974 on July 1, 1973. This legislation contained language similar to that in H.R. 9055 (P.L. 93-50). Section 108 of P.L. 93-52 specifically states that "Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."¹

On December 30, 1974, S. 3394, P.L. 93-559, 88 Stat 1795, the Foreign Assistance Act of 1974 was signed. Section 38(f)(1) set a total U.S. personnel ceiling for (civilians and

¹ Similar language was included in three authorization bills enacted in the Fall of 1973. Section 13 of the Department of State Authorization Act of 1973, P.L. 93-126; 87 Stat. 451, signed October 18, 1973, stated: "Notwithstanding any other provision of law, on or after August 15, 1973, no funds heretofore or hereafter appropriated may be obligated or expended to finance the involvement of United States military forces in hostilities in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia, unless specifically authorized hereafter by the Congress. Section 806 of the Department of Defense Appropriation Authorization Act, 1974, P.L. 93-155; 87 Stat. 605, signed November 16, 1973, repeated the exact prohibition as in P.L. 93-126, but effective upon its enactment. Section 30 of the Foreign Assistance Act of 1973, P.L. 93-189; 87 Stat. 714, stated that "No funds authorized or appropriated under this or any other law may be expended to finance military or paramilitary operations by the United States in or over Vietnam, Laos or Cambodia." The new restriction here was on "paramilitary" operations.

military) in Vietnam of 4,000 six months after enactment and a total ceiling of 3,000 Americans within one year of enactment.

More recent examples of congressional funding limitations aimed at preventing or reducing U.S. military deployments overseas relate to Somalia and to Rwanda. These enacted limitations are as follows.

Somalia. Section 8151 of the Department of Defense Appropriations Act for FY1994, P.L. 103-139; 107 Stat 1418, signed November 11, 1993, approved the use of U.S. Armed Forces for certain purposes, including combat forces in a security role to protect United Nations units in Somalia, but cut off funding after March 31, 1994, except for a limited number of military personnel to protect American diplomatic personnel and American citizens, unless further authorized by Congress. Additionally, section 8135 of the Department of Defense Appropriations Act for FY1995, P.L. 103-335; 108 Stat. 2599, signed September 30, 1994, stated that "None of the funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994."

Rwanda. Through Title IX of the Department of Defense Appropriations Act for FY1995, P.L. 103-335 108 Stat. 2599, signed September 30, 1994, Congress stipulated that "no funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens."

Congressional Use of the War Powers Resolution to Compel Withdrawal of U.S. Military Forces Deployed Overseas

Since its enactment in 1973, there is no specific instance when the Congress has successfully utilized the War Powers Resolution to compel the withdrawal of U.S. military forces from foreign deployments against the President's will. Every President from President Nixon forward has taken the position that the War Powers Resolution is an unconstitutional infringement on the authority of the President, as Commander-in-Chief, to utilize the Armed Forces of the United States to defend what he determines are the vital national security interests of the United States. It should be noted, however, that through a compromise with the Congress in September 1983, President Reagan agreed to the Multinational Force in Lebanon Resolution, P.L. 98-119, that determined that the requirements of section 4(a)(1) of the War Powers Resolution became operative on August 29, 1983, and that Congress authorized the continued participation of the U.S. Marines in the Lebanon Multinational Force for 18 months. President Reagan signed P.L. 98-119 on October 12, 1983. Soon after enactment of P.L. 98-119, 241 U.S. Marines in Lebanon were killed on October 23, 1983 by a suicide truck bombing. On February 7, 1984, President Reagan announced the Marines would be redeployed and on March 30, 1984, reported to Congress that U.S. participation in the Multinational Force in Lebanon had ended.

It is also important to note that beginning in August 1990, following the Iraqi invasion of Kuwait, President Bush over a period of months deployed a substantial number of U.S. military personnel to Saudi Arabia to defend U.S. friends in the region, and, in an effort to induce Iraq to withdraw its military forces from Kuwait. These actions

were taken without express authorization by Congress under the War Powers Resolution or any other Act of Congress. Months later in January 1991, Congress passed H.J.Res. 77, the Authorization for Use of Military Force Against Iraq Resolution, P.L. 102-1, which President Bush signed on January 14, 1991. In that legislation Congress declared that H.J.Res. 77 constituted specific statutory authorization for the President to use United States Armed Forces to achieve objectives set out in various cited United Nations Resolutions relating to Iraq's aggression against Kuwait, if he made a certification to Congress that such use of force was necessary. Congress also noted in this bill that it constituted the authorization contemplated by section 5(b) of the War Powers Resolution.

However, in his signing statement regarding H.J.Res. 77, President Bush noted the following: "As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution. I am pleased, however, that differences on these issues between the President and many in the Congress have not prevented us from uniting in a common objective." The President, in short, did not characterize a request for "congressional support" for his actions as a request for "congressional authorization" of them. Although, Congress, for its part, characterized its action as a requisite "authorization."

More recently, controversy over U.S. military involvement in Kosovo led to an effort to use the War Powers Resolution as a means to address the question of whether the President could order U.S. combat activity abroad in the absence of Congressional authorization to do so. This debate began in earnest when on March 26, 1999, President Clinton notified the Congress "consistent with the War Powers Resolution", that on March 24, 1999, U.S. military forces, at his direction and in coalition with NATO allies, had commenced air strikes against Yugoslavia in response to the Yugoslav government's campaign of violence and repression against the ethnic Albanian population in Kosovo. The President's action, taken in the absence of Congressional authorization, led to efforts to use the War Powers Resolution as a vehicle to either support or overturn the President's actions. Congress also attempted to use denial of funding for the Kosovo operation. On April 28, 1999, the House of Representatives passed H.R. 1569, by a vote of 249-180. This bill would have prohibited the use of funds appropriated to the Defense Department from being used for the deployment of "ground elements" of the U.S. Armed Forces in the Federal Republic of Yugoslavia unless that deployment was specifically authorized by law. On that same day the House defeated H.Con.Res. 82, by a vote of 139-290. This resolution would have directed the President, pursuant to section 5(c) of the War Powers Resolution, to remove U.S. Armed Forces from their positions in connection with the present operations against the Federal Republic of Yugoslavia. On April 28, 1999, the House also defeated H.J.Res. 44, by a vote of 2-427. This joint resolution would have declared a state of war between the United States and the "Government of the Federal Republic of Yugoslavia." The House on that same day also defeated, on a 213-213 tie vote, S.Con.Res. 21, the Senate resolution passed on March 23, 1999, that supported military air operations and missile strikes against Yugoslavia. On April 30, 1999, Representative Tom Campbell and 17 other members of the House filed suit in Federal District Court for the District of Columbia seeking a ruling requiring the President to obtain authorization from Congress before continuing the air war, or taking other military action against Yugoslavia.

The Senate, on May 4, 1999, by a vote of 78-22, tabled S.J.Res. 20, a joint resolution, sponsored by Senator John McCain, that would authorize the President “to use all necessary force and other means, in concert with United States allies, to accomplish United States and North Atlantic Treaty Organization objectives in the Federal Republic of Yugoslavia (Serbia and Montenegro).” The House, on May 6, 1999, by a vote of 117-301, defeated an amendment by Representative Ernest Istook to H.R. 1664, the FY1999 defense supplemental appropriations bill, that would have prohibited the expenditure of funds in the bill to implement any plan to use U.S. ground forces to invade Yugoslavia, except in time of war. Congress, meanwhile, on May 20, 1999 cleared for the President’s signature, H.R. 1141, an emergency supplemental appropriations bill for FY1999, that provided billions in funding for the existing U.S. Kosovo operation.

On May 25, 1999, the 60th day had passed since the President notified Congress of his actions regarding U.S. participation in military operations in Kosovo. Representative Tom Campbell, and those who joined his suit, noted to the Federal District Court that this was a clear violation of the language of the War Powers Resolution stipulating a withdrawal of U.S. forces from the area of hostilities occur after 60 days in the absence of congressional authorization to continue, or a presidential request to Congress for an extra 30 day period to safely withdraw. The President did not seek such a 30 day extension, noting instead that the War Powers Resolution is constitutionally defective. On June 8, 1999, Federal District Judge Paul L. Friedman dismissed the suit of Representative Campbell and others that sought to have the court rule that President Clinton was in violation of the War Powers Resolution and the Constitution by conducting military activities in Yugoslavia without having received prior authorization from Congress. The judge ruled that Representative Campbell and others lacked legal standing to bring the suit (*Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999)). Representative Campbell appealed the ruling on June 24, 1999, to the U.S. Court of Appeals for the District of Columbia. The appeals court agreed to hear the case. On February 18, 2000, the appeals court affirmed the opinion of the District Court that Representative Campbell and his co-plaintiffs lacked standing to sue the President. (*Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000)). On May 18, 2000, Representative Campbell and 30 other Members of Congress appealed this decision to the United States Supreme Court. On October 2, 2000, the United States Supreme Court, without comment, refused to hear the appeal of Representative Campbell thereby letting stand the holding of the U.S. Court of Appeals. (*Campbell v. Clinton*, *cert. denied*, 69 U.S.L.W. 3294 (U.S. Oct. 2, 2000)(No. 99-1843).

Uses by Congress of Funding Restrictions to Affect Presidential Policy Toward Foreign Military/Paramilitary Operations

Although not directly analogous to efforts to seek withdrawal of American military forces from abroad by use of funding cutoffs, Congress has used funding restrictions to limit or prevent foreign activities of a military or paramilitary nature. As such, these actions represent alternative methods to affect elements of presidentially sanctioned foreign military operations. Representative examples of these actions are in legislation relating to Angola and Nicaragua, which are summarized below.

In 1976, controversy over U.S. covert assistance to paramilitary forces in Angola led to legislative bans on such action. These legislative restrictions are summarized below.

- The Defense Department Appropriations Act for FY1976, P.L. 94-212, signed February 9, 1976, provided that none of the funds “appropriated in this Act may be used for any activities involving Angola other than intelligence gathering....” This funding limitation would expire at the end of this fiscal year. Consequently, Congress provided for a ban in permanent law, which embraced both authorization and appropriations acts, in the International Security Assistance and Arms Export Control Act of 1976.
- Section 404 of the International Security Assistance and Arms Export Control Act of 1976, P.L. 94-329, signed June 30, 1976, stated that “Notwithstanding any other provision of law, no assistance of any kind may be provided for the purpose, or which would have the effect, of promoting, augmenting, directly or indirectly, the capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola, unless and until Congress expressly authorizes such assistance by law enacted after the date of enactment of this section.” This section also permitted the President to provide the prohibited assistance to Angola if he made a detailed, unclassified report to Congress stating the specific amounts and categories of assistance to be provided and the proposed recipients of the aid. He also had to certify that furnishing such aid was “important to the national security interests of the United States.”
- Section 109 of the Foreign Assistance and Related Programs Appropriations Act for FY1976, P.L. 94-330, signed June 30, 1976, provided that “None of the funds appropriated or made available pursuant to this Act shall be obligated to finance directly or indirectly any type of military assistance to Angola.”

In 1984, controversy over U.S. assistance to the opponents of the Nicaraguan government (the anti-Sandinista guerrillas known as the “contras”) led to a prohibition on such assistance in a continuing appropriations bill. This legislative ban is summarized below.

- The continuing appropriations resolution for FY1985, P.L. 98-473, 98 Stat. 1935-1937, signed October 12, 1984, provided that “During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement or individual.” This legislation also provided that after February 28, 1985, if the President made a report to Congress specifying certain criteria, including the need to provide further assistance for “military or paramilitary operations” prohibited by this statute, he could expend \$14 million in funds if Congress passed a joint resolution approving such action.

**Statement of Senator Edward M. Kennedy
Senate Judiciary Committee Subcommittee on the
Constitution Hearing on “Exercising Congress’s
Constitutional
Power to End a War”
January 30, 2007**

I commend Senator Feingold for chairing this very important hearing. The Iraq war is the overarching issue of our time, and Congress’s power to shape and, if necessary, end the war is a subject of critical importance.

For four long years, the President’s assertion of unprecedented power has gone unchecked by Congress. Today is a welcome first step in reclaiming our responsibility under the Constitution as a co-equal branch of government, with specific powers of our own in matters of war and peace.

We also intend to renew the exercise of our oversight responsibility. For too long, the Administration was allowed to operate in secrecy. Not just in Iraq, but also here at home—detentions in defiance of the Geneva Conventions, eavesdropping on people’s telephone calls, reading their mail, and reviewing their financial records, all without judicial authorization.

President Bush has made clear that he intends to move ahead with his misguided plan to escalate the war. That's the hallmark of his presidency—to go it alone and ignore contrary opinions. The American people spoke out against the war at the ballot box in November. Our generals opposed the escalation. They do not believe adding more American troops can end a civil war or encourage the transfer of responsibility to the Iraqis, but their warnings have gone unheeded. Now, Congress is about to consider a non-binding resolution of no confidence in the President's reckless last-ditch effort to salvage his strategy.

Passage of the non-binding resolution will send an important message about the need for a different course in Iraq, but it's only a first step. The President has made clear that he intends to ignore non-binding resolutions. If we disagree with the President's failed course, it will take stronger action to stop him. We cannot stand by as the President sends more of our sons and daughters into a civil war.

I've introduced legislation to prohibit the President from raising the level of U.S. troops in Iraq unless he obtains specific new authorization from Congress for the escalation. The initial authorization bears no relevance to the current hostilities in Iraq. There were no weapons of mass destruction and no alliance with al Qaeda, and Saddam Hussein is no more. The President should not be permitted to escalate our involvement unless Congress grants its approval.

Others have introduced similar bills to prevent the President from deepening our involvement in Iraq. We have all been met with the charge that Congress is exceeding its constitutional powers by limiting the actions of the Commander-in-Chief. That ill-considered charge reflects how accustomed people have become to a government dominated by the Executive Branch, unchecked by a compliant Congress.

That's not the constitutional system established by the framers for dealing with matters of war and peace. They gave specific powers and responsibilities to Congress to define the shape and scope of a war. Article I, Section 8 of the Constitution gives Congress authority to collect taxes to provide for the common defense, declare war, raise and maintain the army and navy, make rules concerning the government and regulation of the armed forces, and provide for calling out the militia. It also gives Congress all powers necessary and proper to carry out these responsibilities. The framers made the President the Commander-in-Chief. They contemplated, in broad terms, that Congress would make the determination to go to war, define its parameters and provide the resources that it determined appropriate. The President as Commander-in-Chief would have operational authority to execute those instructions and to defend the nation in the absence of congressional action.

In the Steel Seizure Cases in 1952, the Supreme Court invalidated President Truman's attempt to take control of the steel industry during the Korean War. As James Madison wrote to Thomas Jefferson in 1798: "the constitution supposes what the History of all Gov[ernments] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ative branch]."

According to a letter sent to the leaders of Congress last week by twenty-three of the nation's most eminent constitutional scholars (two of whom are here today), Congress can exercise its authority to redirect or terminate an ongoing conflict in two ways. It can enact specific limits on the scope of the conflict, and it can use the power of the purse to deny funding for all or parts of a conflict.

Congress has followed both paths in prior wars. During the Vietnam War, Congress repealed the Gulf of Tonkin Resolution of 1964, which many of us felt had been misused to justify the escalation of America's involvement in Vietnam. Congress also prohibited the reintroduction of troops into Cambodia after President Nixon's escalation. We went on to cap the number of American troops in Vietnam and, eventually, cut off funding for the war when the White House left us no alternative.

In 1983, Congress required President Reagan to "obtain statutory authorization from Congress with respect to any substantial expansion in the number or role" of U.S. forces in Lebanon.

A decade later, Congress passed legislation prohibiting President Clinton from using funds for military operations in Somalia without specific authorization by Congress.

Exasperated by the action of successive Presidents on the Vietnam War, Congress enacted the War Powers Act in 1973 over President Nixon's veto. The Act requires Presidents to consult with Congress before placing troops in harm's way, seek authorization to keep them there, and continue consultation as the conflict progresses. This congressional assertion of power in matters of war and peace resonates loudly today.

Opponents of congressional power have mischaracterized any use of it as an abandonment of our soldiers on the battlefield. Nothing could be further from the truth. No responsible legislator would take any action that endangers our troops. In fact, using congressional authority to force a change of course in Iraq is the best way to protect our troops. Requiring a change of course by using the "power of the purse" or taking other action will not mean taking equipment and supplies away from our troops. We will avoid the mistake that the President made in sending our troops into Iraq without adequate armor and without a plan to win the peace. There is no reason for Congress now to shy away from exercising the full range of its constitutional powers.

For too long, Congress has given President Bush a blank check to pursue his disastrous policy in Iraq. He should not be permitted to take the desperate step of sending even more troops to die in the quagmire of civil war, without convincing Congress why this escalation can succeed where others have failed. As the constitutional scholars concluded in their recent letter to leaders of Congress: "Far from an invasion of presidential power, it would be an abdication of its own constitutional role if Congress were to fail to inquire, debate, and legislate, as it sees fit, regarding the best way forward in Iraq." We must not abdicate that responsibility any longer.

PEPPERDINE UNIVERSITY
School of Law

Douglas W. Kmiec
Caruso Chair & Professor of Constitutional Law
(310) 506-4255

DKmiec@pepperdine.edu
Fax (310) 506-4063

January 25, 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:

You have asked for my views of two thoughtful letters addressed to the Senate and House leadership of the Judiciary Committees regarding the scope of Congress' authority to limit the ongoing war in Iraq. The first letter is from a number of academic scholars and it is dated January 17, 2007 (herein "joint letter") and the second letter is authored by former acting Solicitor General, Mr. Walter Dellinger, also of the same date. While I would take issue with a number of the statements in the joint letter – most specifically, that the long list of powers in Article I, section 8 permits direct regulatory limitation of the commander in chief – I am in basic agreement with the letter of Walter Dellinger that the principal congressional control is the appropriations power and that it is fully constitutional to use the appropriations power to limit the

24255 Pacific Coast Highway, Malibu, California 90263-4611 • 310-506-4611 Fax: 310-506-4266

Congressional Leaders
January 25, 2007
page 2

breadth and scope of military deployment.¹

There are difficult questions of exactly how specific Congress can be in these “breadth and scope” limitations and footnote 23 of the joint letter does not give guidance or answer these difficulties. Based on my study of the materials cited herein and the history of the matter, it is my judgment that a proposed cap on the number of troops or a limitation precluding their deployment outside of Iraq would be constitutionally permissible.² Even these general

¹ As will be apparent by the discussion, in the context of military matters, some power is exclusively allocated by the Constitution to the president, some held concurrently, and some exclusively the province of the legislature. The president has exclusive authority as commander in chief to control and direct military *operations*. The president has concurrent authority with the Congress to make *administrative* rules for the government and regulation of the armed forces (including rules outlining the command-and-control structure of the military and the qualifications for the selection of commanders), but must observe congressional limitation where it is inconsistent. *United States v. Eliason*, 16 Pet. 291 (1842) (“the power of the executive to establish rules and regulations for the government and the army is undoubted” in the absence of congressional enactment.) Of course, Congress has exclusive authority over appropriations. Using its appropriation authority, as supplemented by the regulatory provisions in Article I, Congress may set the general qualifications for selecting personnel such as commanding officers, establish conditions for using forces (for example, in authorizing and setting general limitations on the detailing of forces), and create governing structures and relations for personnel. Neither appropriations authority nor the power to regulate in Article I, however, permits Congress to require the president to select a particular person to exercise operational and tactical control over US forces; to dictate the ways in which US forces are conducted in military operations; direct the specific movement, employment, or disposition of US forces or to impair what could reasonably be understood as the President’s core command functions as they have been exercised throughout our history. Military lawyers often make reference to the treatise of G. Norman Lieber, the Judge Advocate General of the Army in the late 19th century for the following proposition: “in speaking of the power of Congress over the administration of the affairs of the Army, it is of course, not intended to include what would properly, under the head of the direction of military movements. This belongs to command, and neither the power of Congress to raise and support armies, nor the power to make rules for the government and regulation of the land and naval forces, nor the power to declare war, gives it command over the Army. Here the constitutional power of the president as commander in chief is exclusive.”G. Norman Lieber, remarks on the Army regulations 18 (1898).

² There are numerous examples of Congress using its appropriations power to place limits on military engagements. For example, several appropriations riders brought an end to US combat activities in Southeast Asia by prohibiting the expenditure of funds for such activities after August 15, 1973. PL 93 – 50 section 307 (July 1, 1973); PL 93 – 52 section 106 (July 1,

Congressional Leaders
 January 25, 2007
 page 3

limitations, however, must be carefully phrased and could be unconstitutionally applied were they employed to deny the president needed flexibility to address emergency circumstance confronting existing troops in the already authorized theater of war. In short, the joint letter misleads Congress if its intent in citing to Congress' list of regulatory powers in Article I is meant to suggest that somehow this list avoids the difficult question of where constitutional appropriation limit ends and necessary presidential flexibility and inherent authority begins, and must remain – at least absent a total repeal of the authorization to use military force in Iraq.

Relatedly, it is especially mistaken to characterize the commander in chief authority of the president as merely consisting of “certain interstitial or inherent powers to act in the absence of congressional legislation.” It is true, as the joint letter indicates, that this power includes the ability to defend the nation absent congressional authorization, but it is more than that. Most importantly with respect to the present concerns of Congress, and the American people, it does not authorize or permit superintendence of the tactical or strategic conduct of the war, except as the denial of appropriation may make it impossible to undertake a given level of military activity.³ The list of powers recited in the joint letter, as ample as they are, do not in fact envision – as the joint letter asserts – an extensive role for Congress of “an ongoing regulatory nature.”⁴ As the late John Hart Ely noted after considerable study: “a declaration of war [doesn't] tell the president how to fight the enemy, or how vigorously, or even when to begin; all it [does] is declare that we were at war with one or more enemies and leave the 'how' up to him.

1973); similarly legislation restricted the use of funds for US military involvement in Somalia, PL 103 – 139, section 8151 (b) (November 11, 1993).

³ Long-standing definition defines “command” as including “the authority and responsibility for effectively using available resources and for planning the employment of, organizing, directing, coordinating, and controlling military forces for the accomplishment of assigned missions.” U.S. Department of Defense, *Dictionary of Military Terms* (1984). So too “operational control” is inherent in combatant command and is the authority to perform those functions involving organizing and employing commands and forces, assigning tasks, designating objectives, and giving authoritative direction necessary to accomplish the mission.” *Id.* Continuing, “tactical control” is “the detailed and usually local direction and control of movements or maneuvers necessary to accomplish missions or tasks assigned.” Matters of command, operational control, and tactical control are the exclusive province of the president.

⁴ Indeed, early commentary by the venerable Joseph Story understood most of these powers, including the “make rules” clause as principally concerned with “military crimes and punishments.” Joseph Story, *2 Commentaries on the Constitution of the United States*, sections 1196-1197 (5th ed. 1891). Modernly, more than military justice may be incorporated, but the focus is still upon decisions related to the composition, training, equipping of the military. See generally, *Gilligan v. Morgan*, 413 U.S. 1 (1973).

Congressional Leaders
 January 25, 2007
 page 4

Indeed had it done more than that it would at least have flirted with unconstitutionality, as it was the point of the Commander-in-Chief clause to keep Congress out of day to day combat decisions once it had authorized the war in question.” John Hart Ely, *War and Responsibility – Constitutional Lessons of Vietnam and its Aftermath* 25 (1993).

The late Dean Ely’s conclusion is solidly based in the historical documentation. In 1793 James Madison made the same point by admonishing that we carefully distinguish the power that a commander in chief has “to conduct a war” from the very different power of deciding “whether a war ought to be commenced, continued, or concluded.”⁶ *The Writings of James Madison* 148 (G. Hunt ed. 1906). Likewise Alexander Hamilton in presenting his plan for the Constitution on June 18, 1787 provided that the Senate was to be “the sole power of declaring war,” while the chief executive would have “direction of the war when authorized or begun.”¹ *The Records of the Federal Convention of 1787* 258, 292 (M. Farrand ed. 1911). And, of course, once the Constitution was adopted in somewhat different form, Hamilton, perhaps the strongest advocate of executive power, would write in *Federalist* 69: “the President is to be Commander-in-Chief of the Army and Navy of the United States. [This] would amount to . . . the supreme command and direction of the military and naval forces, as first general and Admiral of the Confederacy; . . .” Hamilton was writing in *Federalist* 69 to specifically deny that the president was given war making authority equivalent to that of the British monarch; he was not denying the specific command responsibilities of the commander in chief.

Again, I do not wish to overstate the guidance of the history. Knowing precisely where the line is between a fully constitutional appropriations limit and an unconstitutional regulatory direction of the president’s command authority is not something settled definitively by judicial precedent or constitutional text.⁵ Dean Ely noted, for example that “the Commander-in-Chief power has expanded in some directions plainly not contemplated at the beginning, most notably to encompass authority to decide where to deploy troops in peace time, . . .” And Ely “did not propose to try to settle . . . the point at which congressional limitation of the parameters of war that is previously authorized becomes a violation of the Commander-in-Chief clause.” This is a genuine legislative uncertainty.⁶ But the historical record suggests this much: Congress can

⁵ Even those who exhibit in their writing a strong preference for congressional authority acknowledge, however, that “it would be unthinkable for Congress to attempt detailed, tactical decision, or supervision, and as to these the president’s authority is effectively supreme.” Louis Henkin, *Foreign Affairs and the U.S. Constitution* 103 – 04 (2d ed.1996)

⁶ The Supreme Court in *Ex Parte Milligan* put it this way: “Congress has the power not only to raise and to support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation and it is essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the

Congressional Leaders
January 25, 2007
page 5

avoid these pitfalls and uncertainties of this delicate issue by maintaining its focus on a suitably general appropriation limit.

In my judgment, this same caution was similarly evident in Mr. Dellinger's 1996 memorandum for the office of legal counsel (OLC). Memorandum for Alan J. Kreczko special assistant to the President and legal adviser to the National Security Council from Walter E. Dellinger (May 8, 1996). As Mr. Dellinger writes in his most recent January 17 letter, the 1996 opinion was not intended to suggest a negative answer to the question: "Does Congress have the authority to determine the scope and duration of the war?" It does, however, suggest avoiding impairing the president's operational command responsibilities. Consistent with the historical differentiation between appropriation limit and an interference with presidential command authority, the 1996 OLC memorandum cautions that Congress cannot elevate form over substance. Specifically, Congress must avoid legislating command restrictions either through its general regulatory authority over the military or by framing such command restrictions on the obligation or expenditure of appropriated funds. Mr. Dellinger reasoned in 1996, and I agree, "that [were] Congress . . . to invade the president's authority indirectly, through a condition on appropriation, rather than through a direct mandate, [would be] immaterial. Broad as Congress' spending power undoubtedly is, it is clear that Congress may not employ it to accomplish unconstitutional ends." Mr. Dellinger notes in particular the unconstitutionality of attaching conditions to executive branch appropriations that would require the president to relinquish "his discretion in foreign affairs."

What is the scope of this presidential discretion? Article II section 2 of the Constitution declares that the president "shall be Commander-in-Chief of the Army and Navy of the United States" and there is no doubt but that this designation commits to the President alone operational and tactical control over U.S. forces.⁷ See *Fleming v. Page*, 50 U.S. 603, 615 (1850) ("as

president as commander in chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions." 71 US 2, 139 – 40 (1866). Cf. *Youngstown*, 343 US at 644, "While Congress cannot deprive the president of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the 'Government and regulation of the land and naval forces,' in which it may, to some unknown extent, impinge upon even command functions."

⁷ The commander in chief provision was absent from the Articles of Confederation as there was no executive. In the 1787 Constitutional Convention, the terminology originated with Charles Pinckney. Pinckney provided that instead of the Commander-in-Chief being an agent of the Congress serving at the order and direction of the Congress, the Commander-in-Chief function would be incorporated independently into the office of the President. Thus, the power to direct military operations was removed as one of Congress' named powers and cannot be

Congressional Leaders
 January 25, 2007
 page 6

commander in chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he made the most effectual. . . ."). The major object of the Commander-in-Chief responsibility is to fasten upon "the president the supreme command over all military forces, – such supreme and undivided command as would be necessary to the prosecution of a successful war." *United States v. Sweeney*, 157 U.S. 281, 284 (1895). As William Howard Taft expounded, the Commander-in-Chief clause precludes Congress from "order[ing] battles to be fought on a certain plan" or "direct [ing] parts of the Army to be moved from one part of the country to another." William Howard Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of Government*, 25 *Yale L.J.* 599, 610 (1916). As Attorney General (later Justice) Robert Jackson explained, "the president's responsibility as Commander-in-Chief embraces the authority to command and direct the Armed Forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States....this authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country." 40 *Op. A.G.* 58, 61-62 (1941).

Justice Jackson, of course is famous, as the joint letter notes, for his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* 343 U.S. 579 (1952) (finding a presidential seizure of domestic property not to be justified by an expansive conception of the theater of war during the Korean conflict). Justice Jackson did not opine, however, that the Commander-in-Chief responsibility in a foreign war could be similarly regulated or limited. (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.") Noting the difficulty of construing the President's constitutional authority as Commander-in-Chief ("These cryptic words [of the Commander in Chief Clause] have given rise to some of the most persistent controversies in our constitutional history."), he nevertheless confirmed that Courts have been understandably reluctant to address the scope of that constitutional authority, especially during wartime, when the consequences of a constitutional error are potentially enormous. This appropriate judicial reticence has been coupled with the historical understanding that in a foreign war, the president's day-to-day command judgments are to be governing and not countermanded by the Congress through regulatory limits. See Clarence A. Berdahl, *War Powers of the Executive in the United States* 121-22 (photo. reprint 1970) (1921) at 121-22 ("[T]here has never been any serious doubt as to the President's constitutional power to order the regular forces wherever he may think best in the conduct of a war, whether

found among Congress' Article I, section 8 list of other military powers discussed in the joint letter. The absence of the power of direction from the Congressional list is significant, especially when juxtaposed against shared authority over appointments, for example.

Congressional Leaders
 January 25, 2007
 page 7

within or without the limits of the United States, nor has any President hesitated to make use of that power in any foreign war in which the United States has been engaged.").

These judicial and scholarly statements fully reflect the drafting of the Constitution at the Constitutional Convention of 1787, and the subsequent discussions in the ratifying debates of the several states. James Iredell, for example, in the context of the North Carolina ratification stated the general view that the conduct of hostilities was appropriately an executive function. Iredell stressed the advantage of a single commander: "In almost every country, the executive has the command of the military forces. In the nature of the thing, the command of armies ought to be delegated to one person only. The secrecy, despatch, and decision, which are necessary in military operations, can only be expected from one person. The president, therefore, is to command the military forces of the United States, and this power I think a proper one; at the same time it will be found to be sufficiently guarded." Similarly, Hamilton in Federalist 74 would write: "the propriety of this provision is so evident in itself; . . . Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms an unusual and essential part in the definition of the executive authority."

The list of regulatory power recited in the joint letter cannot be used to betray these fundamental principles. In his extraordinary lectures on the law in 1790-91, James Wilson noted the same list of powers – including that to provide and maintain a Navy, to make rules for its government, to grant letters of Marque and reprisal, to make rules concerning captures, to raise and support armies, to establish rules for their regulation and so forth. Wilson derived from this that the war power was "Congressional." However, most specifically, neither this listing nor the appellation could deny that the president as commander in chief "has authority to lead the Army." It was by the power of the purse that presidential war making would be limited. As Thomas Jefferson would confirm in a letter to James Madison in 1789, "we have already given an example of one effectual check to the dog of war by transferring the power of letting him loose from the executive to the legislative body, from those who are to spend to those who are to pay." 15 *The Papers of Thomas Jefferson* 397 (J. Boyd ed. 1958). As delegate Spaight in the North Carolina ratifying convention likewise made plain, there was no dispute over the President's function. Said Spaight: "he was surprised that any objection should be made to giving the command of the army to one man; that it was well-known that the direction of an army could not be properly exercised by a numerous body of men; that Congress had, in the last war, given the exclusive command of the army to the Commander-in-Chief, and that if they had not done so, perhaps the independence of America would not have been established." 4 Elliot 114-115.

Congress' ability to check the President's conduct of the Iraq war by means of appropriation limit is well established. It will be effectual if Congress chooses to exercise it.

Congressional Leaders
January 25, 2007
page 8

Congress, however, lacks authority to displace the day-to-day tactical and strategic decision-making of the Commander-in-Chief. If the founding generation thought the distinction important to the very independence of our own nation, it is no less important to observe today.

Thank you for permitting me the opportunity to comment upon the correspondence sent to the committee. I would ask that this letter opinion be made part of the record, and it is my hope, that it is of assistance to your deliberations.

Respectfully,



Douglas W. Kmiec
Chair and Professor of Constitutional Law,
Pepperdine University School of Law
Former head of the Office of Legal Counsel
For Presidents Reagan and George H. W. Bush
U.S. Department of Justice

**Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on "Exercising Congress's Constitutional Power to End a War"
January 30, 2007**

Today, this Committee holds a hearing on the constitutional powers of the Congress with respect to war.

Of course, the Constitution reserves to the Congress the power to "declare war" in Article I, section 8. In addition to the so-called power of the purse, the Constitution provides a number of specific powers to Congress. In particular, the Constitution provides that Congress shall have the power to "provide for the common Defence," "to define and punish . . . Offenses against the Law of Nations," "to make Rules concerning Captures on Land and Water," "to raise and support Armies," "to provide and maintain a Navy," "to make Rules for the Government and Regulation of the land and naval Forces," "to provide for calling forth the Militia to execute the Laws of the Union . . . and repel Invasions," "to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States," and "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."

Contrast these extensive provisions and powers with that of the President, who is designated the "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." Indeed, Senator Specter made the point over the weekend that the express congressional power to "raise and support Armies" and to appropriate funds for their use is further circumscribed by the Constitution in order to require congressional action periodically by limiting such funding to no longer than two years.

Last week the Senate Majority Leader moved to proceed to a resolution reported by the Senate Foreign Relations Committee regarding the President's plan to send more Americans into the conflicts in Iraq. When Republican objections to proceeding to consideration of the Senate resolution of disapproval for escalating the war are overcome, the Senate will proceed to that debate. Congressional authority with respect to war is part of this debate. Today, the Senate Judiciary Committee is holding a hearing on these legal and constitutional matters.

Today, Senator Specter and I are writing the Attorney General asking for the Bush-Cheney Administration's views on these legal and constitutional issues. We ask: What constitutional authority do you recognize resides with the Congress with respect to war? How do you believe Congress can exercise its authorities? What limits do you believe exist on those authorities? We also request legal analyses and the opinions of the Office of Legal Counsel, which represent the official legal position of the Executive, on these matters. We look forward to the Attorney General's prompt and thorough response. As the Republican Leader has said, there is no more important issue than the Iraq war.

In a recent column in *The New York Times*, Adam Cohen recalled the observation of James Madison that “the Executive is the branch of power most interested in war, and most prone to it” and that it was to counteract this danger that the Constitution “with studied care, vested the question of war in the Legislature.” Mr. Cohen goes on to recall the case of the Flying Fish in 1799, the Steel Seizure case in 1952, and the Hamdan case in 2006, all of which circumscribed presidential action. He recalls the capping of the number of American military personnel in South Vietnam in the Foreign Assistance Act of 1974 and the provisions of the Lebanon Emergency Assistance Act of 1983. He concludes: “The Constitution’s text, Supreme Court cases and history show, however, that Congress can instead pass laws that set the terms of military engagement.”

Almost two years ago, during this Committee’s hearing on the nomination of John Roberts to be Chief Justice of the United States, my first questions to the nominee were about these very matters. I posed the hypothetical whether there was any doubt that Congress could declare the end to war by enacting a law doing so, and overriding a presidential veto if necessary. Ours is a constitutional government in which the Constitution vests lawmaking power in the Congress. The President is not above the law but is commanded by the Constitution to “take Care that the Laws be faithfully executed.”

I thank and commend Senator Feingold, the Chairman of the Constitution Subcommittee, for organizing and chairing this important hearing. I join him in welcoming our distinguished panel of witnesses and thank them for sharing their insights with us and the Senate.

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PATRICK J. LEAHY, VERMONT, CHAIRMAN	
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MICHAEL O'NEILL, Republican Chief Counsel and Staff Director

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

January 30, 2007

The Honorable Alberto Gonzales
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

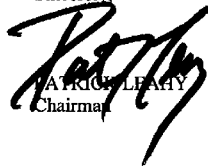
Dear Attorney General Gonzales:

Last week the Senate Majority Leader moved to proceed to a resolution reported by the Senate Foreign Relations Committee regarding the President's plan to send more Americans into the conflicts in Iraq. Congressional authority with respect to war is part of this debate. Today the Senate Judiciary Committee held a hearing on these legal and constitutional matters.

We write to ask the Administration's views. What constitutional authority do you recognize resides with the Congress with respect to war? How do you believe Congress can exercise its authorities? What limits do you believe exist on those authorities?

We would appreciate your prompt reply and legal analysis. We also request legal analyses and opinions of the Office of Legal Counsel on these matters.

Sincerely,



PATRICK J. LEAHY
Chairman



ARLEN SPECTER
Ranking Member

ARLEN SPECTER
PENNSYLVANIACOMMITTEES:
JUDICIARY
APPROPRIATIONS
VETERANS' AFFAIRS

United States Senate

WASHINGTON, DC 20510-3802
specter.senate.gov

January 26, 2007

Honorable Alberto R. Gonzales
Attorney General
Department of Justice
Washington, DC

Dear Attorney General Gonzales:

Since I have been unable to reach you on the telephone, I am writing to express my deep concern about the New York Times story today about extraordinary procedures taken by the Department of Justice in pending cases in the Sixth Circuit and in the United States District Court in Oregon concerning the Terrorist Surveillance Program.

I have been unable to reach Senator Leahy, who is out of the country on Senate business, to get his joinder, which I believe he would authorize, to get an immediate explanation from the Department of Justice about what is going on.

If the Times story is correct, the Department of Justice may have a conflict of interest in limiting access to key evidence on national security grounds as a means of controlling the outcome of these cases and obstructing the federal courts in their adjudications.

I would like to meet with you on Monday at your earliest convenience, as a matter of Judiciary Committee oversight, to find out what is happening in these cases.

Sincerely,



Arlen Specter

AS/ph

Via Facsimile

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530
January 29, 2007

The Honorable Arlen Specter
United States Senate
Washington, D.C. 20510

Dear Senator Specter:

I am writing in response to your letter of January 26, 2007, to the Attorney General concerning last week's New York Times story about the handling of classified information in cases challenging alleged surveillance by the National Security Agency (NSA).

Despite the contrary suggestions of the Times story, please be assured that, in litigating the NSA cases, the Department of Justice has done nothing other than follow longstanding practices and security requirements regarding the filing of briefs and other materials containing classified information. Although courts understandably have asked for explanations regarding the procedures we have utilized and for assurances regarding the preservation of classified filings (explanations and assurances that we have readily given), the judges in these cases have not objected to the procedures. In fact, while many of the plaintiffs in the NSA cases have objected to the government's practice of filing of *ex parte* classified materials, every judge to consider such an objection has overruled it and has held that secret filings are completely appropriate in this context.

In particular, as it has done for many years in other cases involving classified materials, the government has made classified filings in the NSA cases by lodging the documents with Court Security Officers of the Department of Justice's Litigation Security Section. As described in the attached Declaration of Joan B. Kennedy, Associate Director of the Litigation Security Section, which was filed in the United States Court of Appeals for the Sixth Circuit, the Litigation Security Section is a separate office located within the Department's administrative component, the Justice Management Division, and the role of the Court Security Officers is distinct from the role of litigation counsel for the government in these cases. Since the enactment of the Classified Information Procedures Act in 1980, the Litigation Security Section has been providing neutral assistance to courts and litigants in criminal cases regarding the proper handling of classified information. In civil cases like the NSA litigation and others involving classified materials, the Justice Department often utilizes the services of Court Security Officers to provide for the secure physical storage and transport of classified materials to courts.

The Honorable Arlen Specter
Page Two

Once a classified document is lodged with the Court Security Officers, it is stored securely by the Litigation Security Section and made available to the judge in the particular case at that judge's convenience. The judge may access the document at any time, although it must be
The Honorable Arlen Specter
Page Two

transported, handled, and stored in accordance with security regulations. In some cases this may require the Court Security Officers to maintain storage of the documents at a location outside of the courthouse, and to transport the documents to the court each time the judge wishes to view them. In fact, this is one of the reasons we must use these procedures: particular courts often do not have requisite facilities to hold and store Sensitive Compartmented Information (which the NSA submissions contain), and court administrative personnel (including those in the clerk's office) often do not have the level of security clearance necessary to handle the information. These procedures therefore are designed solely to ensure the appropriate safeguarding of classified information, as required by law. At no point has a judge in any of these cases been denied access to a classified document filed by any party. Quite the opposite, the Court Security Officers have worked closely with the judges to accommodate their schedules and requests.

To ensure the integrity of the record in the NSA cases, the classified filings are stored and preserved without alteration by the Litigation Security Section in self-contained case-specific files and are made available to reviewing courts in the event of an appeal. In addition, the government has filed public notices in these cases indicating when classified submissions have been filed, so that the fact and dates of such filings are reflected on the public docket. And in the event that a judge wishes to write a classified order or opinion, the Court Security Officers provide the support and secure equipment necessary to do so.

These were the security procedures explained to the Sixth Circuit at the conference referenced in the Times article. In response to the Judges' questions, moreover, the government provided in writing additional information regarding the integrity of the classified record in the case. That information was given in the form of the Kennedy Declaration, referenced above, as well as a single public list noting in one place the dates of all of the classified filings made in the case.

As for the case brought in Oregon by the Al-Haramain Islamic Foundation, a designated terrorist entity, the Times article contains significant inaccuracies or omissions. For example, the article suggests that government lawyers sent FBI agents to seize from the judge a classified document that had been inadvertently disclosed to a limited number of people by the Treasury Department and filed under seal by the plaintiffs at the outset of the case. That is false. It was a Regional Security Officer in Oregon (working in conjunction with the Litigation Security Section), not the FBI, that, with the judge's permission, retrieved the document for the sole purpose of storing it in a secure facility that could be accessed by the judge whenever he wished. The judge not only agreed that the document should be stored in that manner, but later ruled in a written opinion that the document remained classified despite its inadvertent disclosure and ordered the plaintiffs and their counsel to return all copies of the document in their possession to the court. Moreover, when the government argued in connection with its motion to dismiss that the document should be "removed from the case," it was referring to the effect of the state secrets

The Honorable Arlen Specter
Page Three

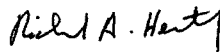
privilege on the access of the plaintiffs, not the judge, to the document. Not only did the government provide the judge continued access to that particular document, it also provided him with additional and extensive classified information so that he could determine for himself the validity of the government's argument that the continued litigation of the case risked the disclosure of sensitive national security information.

Finally, the statement in the article, repeated in a Times editorial on January 27, that the government tried in the Oregon case to seize computers from plaintiffs' attorneys is entirely false. At no point in the litigation has the government demanded access to the computers of plaintiffs or their attorneys. Rather, after the plaintiffs for the third time in the litigation failed to follow security procedures when handling classified information (despite being given repeated notice of such procedures by the government), the government brought its serious concerns about the matter to the Court's attention. The Court suggested that the parties work together to resolve the issues—including how to secure any classified information that had been processed on unsecure equipment—and the parties have been doing just that. The government is acutely aware of, and very sensitive to, issues concerning the attorney-client privilege, and government counsel are actively working with plaintiffs' counsel in an effort to ensure that the classified information at issue is adequately protected without any intrusion on the attorney-client privilege.

In sum, it should come as no surprise that cases challenging highly classified intelligence activities involve the filing of classified information. In order to protect such information, as required by law, the government has followed longstanding practices and regulations concerning security. Those procedures have not precluded any judge in an NSA case from accessing any document submitted by any party. To the contrary, the government in these cases has made a determined effort to provide courts with even more information than the Supreme Court has required in state secrets cases, so that the courts can be as informed as possible when making their decisions.

We appreciate your concerns and thank you for your inquiry. Please do not hesitate to contact this office if we may be of further assistance on this, or any other matter.

Sincerely,



Richard A. Hertling
Acting Assistant Attorney General

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION;)	
AMERICAN CIVIL LIBERTIES UNION)	
FOUNDATION; AMERICAN CIVIL LIBERTIES)	
UNION OF MICHIGAN; COUNCIL ON)	
AMERICAN-ISLAMIC RELATIONS;)	
COUNCIL ON AMERICAN-ISLAMIC)	
RELATIONS MICHIGAN; GREENPEACE, INC.;)	
NATIONAL ASSOCIATION OF CRIMINAL)	
DEFENSE LAWYERS; JAMES BAMFORD;)	
LARRY DIAMOND; CHRISTOPHER)	
HITCHENS; TARA MCKELVEY; and)	
BARNETT R. RUBIN,)	
)	
Plaintiffs/Appellees-)	Nos. 06-2095, 06-2140
Cross-Appellants,)	
)	
v.)	
)	
NATIONAL SECURITY AGENCY/CENTRAL)	
SECURITY SERVICE; and LIEUTENANT)	
GENERAL KEITH B. ALEXANDER, in his)	
official capacity as Director of the National)	
Security Agency/Central Security Service,)	
)	
Defendants/Appellants-)	
Cross-Appellees.)	

**NOTICE OF FILING OF DECLARATION OF
JOAN B. KENNEDY**

PAUL D. CLEMENT Solicitor General	PETER D. KEISLER Assistant Attorney General
GREGORY G. GARRE Deputy Solicitor General	DOUGLAS N. LETTER THOMAS M. BONDY ANTHONY A. YANG Attorneys, Appellate Staff Civil Division, Room 7513 U.S. Department of Justice 950 Pennsylvania Ave., N.W. Washington, D.C. 20530 Telephone: (202) 514-3602
DARYL JOSEFFER Assistant to the Solicitor General	

Pursuant to this Court's request, Defendants-Appellants, the National Security Agency, et al., hereby submit for filing the attached Declaration of Joan B. Kennedy, Associate Director of the Litigation Security Section of the Security and Emergency Planning Staff at the United States Department of Justice.

Respectfully submitted,

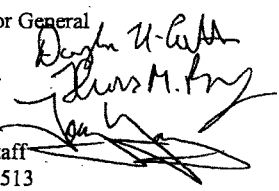
PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
THOMAS M. BONDY
ANTHONY A. YANG
Attorneys, Appellate Staff
Civil Division, Room 7513
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 514-3602



JANUARY 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN CIVIL LIBERTIES UNION;)	
AMERICAN CIVIL LIBERTIES UNION)	
FOUNDATION; AMERICAN CIVIL LIBERTIES)	
UNION OF MICHIGAN; COUNCIL ON)	
AMERICAN-ISLAMIC RELATIONS;)	
COUNCIL ON AMERICAN-ISLAMIC)	
RELATIONS MICHIGAN; GREENPEACE, INC.;)	
NATIONAL ASSOCIATION OF CRIMINAL)	
DEFENSE LAWYERS; JAMES BAMFORD;)	
LARRY DIAMOND; CHRISTOPHER)	No. 06-2095, 06-2140
HITCHENS; TARA MCKELVEY; and)	
BARNETT R. RUBIN,)	
)	
Plaintiffs - Appellees/Cross-Appellants,)	
)	
v.)	
)	
NATIONAL SECURITY AGENCY/CENTRAL)	
SECURITY SERVICE; and LIEUTENANT)	
GENERAL KEITH B. ALEXANDER, in his)	
official capacity as Director of the National)	
Security Agency/Central Security Service,)	
)	
Defendants - Appellants/Cross-Appellees.)	

DECLARATION OF JOAN B. KENNEDY

I, Joan B. Kennedy, hereby declare:

1. I am the Associate Director of the Litigation Security Section (LSS), a component of the Department of Justice's Security & Emergency Planning Staff (SEPS). The SEPS is responsible for developing policies, methods, and procedures

for the implementation of security programs for the Department, and provides advice, technical assistance, and support to executive offices and personnel throughout the Department. The LSS comprises Security Specialists who work with federal Judges at all levels to serve as Court Security Officers (CSOs), assisting in criminal and civil matters involving classified information.

2. I make this declaration to explain: (i) the process by which classified materials filed in this action by the United States are lodged with the LSS for secure storage and secure transmission to the Judges assigned to this case; (ii) how the integrity of those materials has been and continues to be maintained; and (iii) how LSS may provide other assistance to protect classified information in judicial proceedings, including in this case.

Background on CSOs

3. The CSOs assigned to the LSS assist the courts primarily in connection with criminal cases where the Classified Information Procedures Act (CIPA) is applicable. *See* 18 U.S.C. App. III, § 9. However, CSOs also provide assistance to the Department's litigating divisions and offices in connection with the secure use, storage, and transmission of classified information in non-criminal judicial proceedings. For example, where, as in this case, the Government seeks to submit classified information to a court, the information is securely lodged with a CSO, who

then is responsible for arranging procedures for those classified materials to be transmitted securely to the Court and reviewed in a secure fashion by the assigned Judge or Judges. CSOs may also assist courts by providing secure equipment for the preparation and processing of classified orders and opinions.

LSS Storage and Preservation of Classified Information

4. *LSS Storage of Classified Materials:* The LSS serves a variety of functions in this case. First, the LSS has acted and continues to act as the custodian for all classified filings made by the Government. Specifically, when LSS is advised by Department attorneys that the Government intends to file a classified brief, classified declaration or other classified submission in this case, the LSS makes arrangements to take physical custody of the final, original document. Upon receipt, the LSS date-stamps each document provided to it by the Department attorney handling the case. The LSS then stores these original, final documents in a self-contained case file containing classified submissions limited to this case, located in a secure facility for classified materials at its offices in Washington, D.C.

5. After the LSS assumes custody of a classified document for submission to a Judge or Judges in this case, it is responsible for physical custody of the document, and for providing the documents to the Judge or Judges assigned to the case. The integrity of the case file is fully maintained and preserved. The above procedures

were followed throughout the district court proceedings in this case, and have been and will continue to be followed in the proceedings in this Court. We would expect that the same procedures would also be followed if and when this case were to become the subject of further review.

6. *Required Storage Facilities:* Depending on the level of the classification of a particular document, it may be necessary to store it in a "SCIF"—which stands for Sensitive Compartmented Information Facility. Storage in a SCIF is required for documents that contain highly sensitive classified information designated as Sensitive Compartmented Information ("SCI"). SCI is classified information concerning or derived from intelligence sources, methods, or analytical processes requiring handling exclusively within formal access control systems authorized by the Director of National Intelligence ("DNI"). *See* Director of Central Intelligence Directive No. 1/14, *Personnel Security Standards and Procedures Governing Eligibility for Access to Sensitive Compartmented Information (SCI)*; *see also, e.g.,* 50 U.S.C. § 403-1(i). A SCIF is a specially constructed facility that must comport with standards and requirements set forth in a directive by the head of the Intelligence Community. *See* Director of Central Intelligence Directive No. 6/9, *Physical Security Standards for*

Sensitive Compartmented Information Facilities, November 18, 2002.^{1/}

7. By virtue of their inclusion of SCI, the Government's classified filings in this case are and will continue to be stored in a SCIF in LSS's offices. In its SCIF, the LSS has maintained and continues to maintain custody of each of the classified submissions listed in the notice filed by the government contemporaneously with this declaration. *See Listing of Classified Items Filed To Date In This Case (January 19, 2007)*. All of these materials are being kept together in the separate case file mentioned above, such that the integrity of the record is being protected. Through the procedures described herein, the integrity of all of these materials in their original form has been and continues to be securely safeguarded and preserved.

8. *LSS Secure Transmission of Classified Information*: In addition to maintaining custody of the classified materials and storing them in a SCIF, the LSS, through one of its CSOs, has made arrangements for the transportation of these materials in a secure fashion for review by the Judges assigned to this case, including District Judge Anna Diggs Taylor and designated Judges of this Court. In connection

^{1/} After Congress established the DNI in 2005, to replace the Director of Central Intelligence ("DCI") as head of the Intelligence Community, *see* 50 U.S.C. § 403(b)(1), the DNI directed that DCI Directives in effect on April 21, 2005 would continue to remain in force until canceled or superseded by an Intelligence Community Directive issued by the DNI. *See Intelligence Community Directive 2005-1, at ¶ D.1, April 21, 2005.*

with the district court proceedings, a CSO transported the classified submissions to the federal courthouse in Detroit, Michigan, and arranged for Judge Taylor to review the materials in an appropriate, secure manner. Upon completion of the Judge's review, the CSO then transported the materials back to the LSS offices in Washington, D.C., where they were redeposited in the LSS's SCIF for continued secure storage. The documents reviewed by the Court have not been altered and will not be altered. In addition, these documents will be preserved securely as part of the record of this case. I expect that essentially the same procedures will continue to apply with respect to review of the classified documents by the Judges of this Court who are assigned to this case.

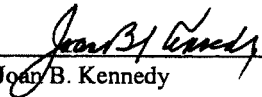
Other LSS Functions

9. *Restrictions on Access to Classified Information:* In addition to storing and transporting classified materials in connection with their use in judicial proceedings, other functions of CSOs include advising Judges as to the specific procedures to be utilized in the handling of classified materials, and as to the strict limitations on who may have access to such materials. Court personnel (such as Clerk's Office personnel and law clerks) who have been not been granted a security clearance and who have not been granted special access to the specific SCI information at issue may not see or possess any of the classified filings in this case. Only assigned Article III federal

Judges may examine and review the classified filings in this case, subject to the secure procedures discussed herein.

10. *Classified Orders or Decisions:* In addition, CSOs advise courts as to the appropriate and secure methods for preparing orders or decisions that may contain classified information, including by providing assigned Judges with secure computer equipment that is necessary for the processing of classified and SCI information. CSOs also work with courts to ensure that a decision or order intended to be made public does not contain classified information and can properly be made public. CSOs provide as well for the secure storage, preservation and transmission of classified orders and decisions, including, as appropriate, for review by other courts.

I declare under penalty of perjury that the foregoing is true and correct.

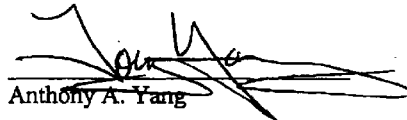

Joan B. Kennedy

1-19-07
Date

CERTIFICATE OF SERVICE

I certify that on this 19th day of January, 2007, I served one copy of the foregoing notice and attached declaration by electronic mail, and by FedEx next-day courier, upon the following counsel:

Ann Beeson, Esq. (annb@aclu.org)
Jameel Jaffer, Esq. (JJaffer@aclu.org)
American Civil Liberties Union Foundation
Legal Department
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500


Anthony A. Yang



**EXERCISING CONGRESS'S CONSTITUTIONAL
POWER TO END A WAR
(Without in the Process
Breaking the Law)**

prepared statement of

Professor Robert F. Turner, S.J.D.

CENTER FOR NATIONAL SECURITY LAW
University of Virginia School of law

before the

**United States Senate
Committee on the Judiciary**

Hart Senate Office Building • Room 807

January 30, 2007

About the Witness

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for many years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.



A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying legal and policy issues related to war and peace. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner wrote the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law*, which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution*, has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left twenty years ago to return to the University of Virginia.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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Contents

Introduction 4

The Original Understanding 5

Dean Koh’s Paradigm 18

“Unchecked” Presidential Discretion 27

Congressional and Senate “Negatives” 28

Reconciling Congressional and Executive Powers 30

Senator William Borah 31

The Power of the Purse 36

Why British Precedents Are Not Relevant 40

Congressional “Lawbreaking” 40

Prudential Considerations 55

Mr. Chairman and members of the Committee. It is a great pleasure to appear before you once again this morning. The issue before us is one of great importance to the nation and to the principle of the rule of law. As this hearing will demonstrate, it is also an issue about which honest and able scholars can profoundly disagree.

Introduction

Because I think it is so critical to these issues, I will spend a few minutes at the start addressing the original understanding of the constitutional paradigm regarding the separation of powers between Congress and the President related to war and foreign affairs. Secondly, on the basis of that understanding, I will argue that the Constitution gave the President a considerable amount of discretion in these areas that was *not intended to be checked* by either Congress or the Judiciary — including what John Jay described as ‘the business of intelligence’¹ and the conduct of war and diplomacy.

This is not to suggest that Congress and the Senate don’t have important roles relative to these areas. The commander-in-chief power² itself is a conditional authority, and until Congress “raises and supports” an army³ or “provides and maintains” a navy,⁴ the President has no military force to “command.” One-third-plus-one of the Senate can exercise a “negative” over presidential ratification of a treaty,⁵ and a majority can block the appointment of diplomats and military officers.⁶ The President can spend no money from the Treasury without “Appropriations made by law.”⁷ Each of these powers is, and was intended by the Founding Fathers to be, important. So my third point is that, in virtually any large-scale and sustained military operation, the Constitution effectively vests Congress with the constitutional power to end a war—as the title of today’s hearing suggests. By refusing new appropriations and rejecting requests for new troops and supplies, Congress can virtually assure that American military forces and/or allies who rely upon our assurances will be defeated and our enemies will prevail on the battlefield.

¹ As I discussed during my testimony before this Committee on February 28 and March 31 of last year, in *Federalist* No. 64 John Jay explained that because Congress could not be trusted to keep secrets, the new Constitution had left the President “able to manage the business of intelligence as prudence may suggest.”

² U.S. CONST., Art. II, Sect. 2.

³ *Id.* Art. I, § 8, Cl. 12.

⁴ *Id.* Cl. 13.

⁵ *Id.* Art. II, § 2, Cl. 2.

⁶ *Id.*

⁷ *Id.*, Art. I, § 9, Cl. 7.

My fourth point is that the Founding Fathers viewed the powers of Congress and the Senate related to war and foreign affairs as “exceptions” to the general grant of “executive Power” vested in the President; and, as such, these powers were intended to be strictly construed. Neither Congress nor the President may properly exercise their own powers in a manner that usurps the constitutional authorities of the other, and when Congress attempts to control decisions vested by the people in the discretion of the President it becomes a “lawbreaker.” In candor, in recent decades I have witnessed far more lawbreaking by Congress in the national security realm than by the President.

My final point, Mr. Chairman, may be the most important one: *Consider the consequences.* Even if Congress has the constitutional power to cut off food and ammunition to our forces at war and ultimately guarantee a victory in Iraq for those who have been killing our forces and engaging in the wholesale and brutal slaughter of the people of Iraq – be they members of al Qaeda in Iraq, followers of pro-Iranian factions, or other radical groups – I beseech you to *think through the wisdom* of taking such action. There is a reason the Framers vested considerable discretion in the President in this area, and unconstitutional efforts by Congress to usurp that discretion since 1970 have led to the unnecessary slaughter of millions, the consignment to totalitarian tyranny of tens of millions, the needless deaths of large numbers of our own military forces, and quite possibly contributed to the slaughter of 3000 innocent people on September 11, 2001.

I recognize that these are strong and serious charges, but they are not hyperbole. I hope you will bear with me as I add some substance to this outline and endeavor to document the points I have made.

The Original Understanding of the War/Foreign Affairs Constitutional Paradigm

I submit it is important to start this inquiry by examining the original understanding of the Constitution and its interpretation between 1787 and about 1970, when—during the heated national debate over the war in Vietnam—America virtually suffered a hard drive crash here at home. Understandings about constitutional separations of powers that had historically been embraced by all three branches of government were suddenly forgotten by almost everyone, and a new generation of scholars and politicians began looking anew at the constitutional text in search of new theories and paradigms.

Seeking to ascertain the original understanding is hardly the *only* step in constitutional interpretation, but it is nevertheless an important part of the

process. Words are an imperfect instrument for conveying ideas, and sometimes outside of context words can be ambiguous. Even more important, some words used by the Framers of our Constitution have over the years lost all or part of their original meaning. Thus, if we were to learn that a prominent supporter of the Constitution in 1787 later declared that it was an “awful” document, our understanding of his sentiments would be furthered by the knowledge that in the eighteenth century the word “awful” meant something that filled one with awe or was awe inspiring.⁸

Terms like “declare War”⁹ and “executive Power”¹⁰ had clear meanings to the authors of our Constitution, who as a group were remarkably well-read men and were familiar with the writings of Grotius, Vattel, Lock, Montesquieu, and Blackstone. And when we seek to understand such language without comprehending those meanings we run a great risk of going astray. To the authors of our Constitution, the term “militia” referred to the able-bodied men of military age in each state who were subject to being called up to perform their civic duty in the event of foreign invasion, rebellion, or a similar contingency. Yet how many “experts” today, in ignorance of that reality, contend that the Second Amendment’s guarantee of a “well-regulated militia” was intended merely to permit states to maintain an armory for use by its “national guard”?

So I hope you will bear with me a bit while I rewind the clock to the late eighteenth century and examine some of the writings of men like Thomas Jefferson, George Washington, John Marshall, and the three authors of the *Federalist Papers* to help us understand the constitutional text. In particular, it is imperative that we understand that they interpreted the term “executive Power” in Article II, Section 1, as that term was used by writers like John Locke, Montesquieu, and William Blackstone.

My academic interest in these subjects was first sparked more than four decades ago, when as an undergraduate I heard a lecture by the great Quincy Wright. Professor Wright, as you may know, served as President of the American Society of International Law and both the American and the International Political Science Association. His 1922 treatise on *The*

⁸ I found a number of Web sites that discuss this change in meaning. See, e.g., <http://www.bethel.edu/~dhoward/resources/WORDSTUDIESMETHOD.htm>.

(“Similarly, English *awful* comes from *awe* and *full*, i.e., ‘full of awe.’ The word’s history is meaningful in a phrase such as ‘the awful presence of God’: here, the idea is that God’s presence is of such a nature that it calls forth a response of awe when it is experienced. However, *awful* usually does not have this meaning [today] in English usage. Rather, it means ‘terrible, horrible,’ as in ‘The train wreck was an *awful* catastrophe.’ To appeal to the etymology of *awful* in this case would result in little understanding of what happened.”)

⁹ U. S. CONST., Art. I, Sec. 8, Cl. 11.

¹⁰ *Id.* Art. II, Sec. 1.

Control of American Foreign Policy remains a classic in the field. And in that volume he observed that “when the constitutional convention gave ‘executive power’ to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto.”¹¹

Fifty years later, writing in *Foreign Affairs and the Constitution*, Columbia Law School Professor Louis Henkin added: “The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone.”¹² But that observation doesn’t tell us very much unless we are familiar with the separation-of-powers writings of those great scholars.

Let us look first at John Locke, who a century before our Constitution went into force coined the term “federative power” in his *Second Treatise on Civil Government* to denote the control of decisions involving “war, peace, leagues, and alliances.” Locke placed the federative power in the same hands as the “executive” power. The gist of his arguments was that the successful management of war and foreign affairs required the attributes of unity of plan, secrecy, and speed and dispatch. And since large, deliberative legislative assemblies are inherently lacking in those competencies, and further are unable to anticipate all of the developments that might occur on a battlefield or in foreign negotiations, these matters must of necessity be entrusted to the prudence of the executive to be managed for the common good. Consider this excerpt:

These two Powers, Executive and Federative, though they be really distinct in themselves, yet one comprehending the Execution of the Municipal Laws of the Society within its self, upon all that are parts of it; the other **the management of the security and interest of the publick** [*sic*] **without**, with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative Power in the well or ill management of it be of great moment to the commonwealth, yet it is **much less capable to be directed by antecedent, standing, positive Laws, than [by] the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick** [*sic*] **good**. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them,

¹¹ QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 147 (1922).

¹² LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 43 (1972).

to be managed by the best of their Skill, for the advantage of the Commonwealth.¹³

Other publicists whose writings were highly influential on the Founding Fathers characterized foreign affairs (including war) as a component of the “executive” power. In 1748, Montesquieu — characterized by James Madison in *Federalist* No. 47 as “[t]he oracle who is always consulted and cited” on the subject of separation of powers¹⁴ — reasoned that “[i]n every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law.” He explained that by the first of these “executive” powers, the prince or magistrate “makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion.”¹⁵

Similarly, in the late 1760s, Sir William Blackstone published his four-volume *Commentaries on the Laws of England*, and observed that the King of England “is and ought to be absolute” in his “executive” prerogative with respect to “this nation’s intercourse with foreign nations,” adding that with respect to treaties, pardons, and “this nation’s intercourse with foreign nations” there is “no legal authority that can either delay or resist him” save as expressed in the Constitution.

[T]he executive part of government . . . is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government: and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. . . . *What is done by the*

¹³ JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §147 (1689) (bold emphasis added).

¹⁴ THE FEDERALIST NO. 47 at 324 (Jacob E. Cooke, ed. 1961) (Madison).

¹⁵ 1 BARON DE MONTESQUIEU (CHARLES DE SECONDAT), SPIRIT OF THE LAWS 151 (Thomas Nugent, ed. 1900).

*royal authority, with regard to foreign powers, is the act of the whole nation*¹⁶

And if you think such a description has nothing to do with the American Executive, consider this 1800 statement by Representative John Marshall (Fed.-Va.) “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power. . . . *In this respect the President expresses constitutionally the will of the nation.*”¹⁷

One of the many myths that we often hear about the American Revolution is that our ancestors were rejecting the British constitutional system. But when Thomas Jefferson wrote his powerful *Summary View of the Rights of British America*¹⁸ in 1774, his complaint was not that the British Constitution was inherently bad, but rather that it had been corrupted and abused by both King and Parliament so as to deny the colonial subjects their fundamental rights. Few, if any, American leaders were more hostile to Great Britain than Jefferson. Yet, in a letter to John Adams written shortly after the Federal Convention had adjourned, Jefferson acknowledged that the English Constitution was “better than all which have proceeded it”¹⁹ Pulitzer Prize-winning historian Professor Gordon S. Wood, of Brown University, observed in *The Creation of the American Republic 1776-1787* that the American colonists “revolted not against the English constitution but on behalf of it.”²⁰

Why am I so certain the Founding Fathers viewed foreign affairs as a component of the “executive Power” vested in the President in Article II, Section 1, of their new Constitution? Because they discussed it repeatedly. During the First Session of the First Congress, Representative James Madison introduced a bill to establish a Department of Foreign Affairs. It was a very simple bill that could fit on a single page, essentially declaring that the department was hereby established and was to be headed by a Secretary who was to conduct the business of said department as directed by the President. As Johns Hopkins scholar Charles Thach explained in his 1922 classic, *The Creation of the Presidency 1775-1789*:

¹⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242-45 (1765) (emphasis added).

¹⁷ 10 ANNALS OF CONG. 613-15 (1800) (emphasis added).

¹⁸ 1 THE PAPERS OF THOMAS JEFFERSON 121 (Julian P. Boyd, ed., 1950). This classic summary of the causes of the American Revolution is also available on line at <http://www.yale.edu/lawweb/avalon/jeffsumm.htm>.

¹⁹ *Jefferson to Adams*, Sept. 28, 1787, in 12 PAPERS OF THOMAS JEFFERSON 189 (Julian Boyd, ed. 1955).

²⁰ GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 10 (1969).

The sole purpose of that organization was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the ‘presidential’ departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done. ...**Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.**²¹

During the debate on Madison’s bill, a question arose about who could remove the Secretary once appointed by the President with the advice and consent of the Senate. Madison carried the day by observing that the Constitution has vested the nation’s “executive power” in the President, the appointment or removal of an executive officer was by nature “executive” business, and the Senate had only been joined in the *appointment* and not the removal part of that process. As Madison explained his view (which prevailed in both the House and the Senate) to a colleague from the Philadelphia Convention in reporting on the important debate: “[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department. . . .”²²

I would submit that this is an important precedent, and that the same logic that narrowly construed the Senate’s role in executive appointments might also have relevance in the debate on the scope of the congressional power “to *declare* War.” For, as I will demonstrate, that power was also recognized as an “exception” to the President’s general grant of executive power.

John Jay was by far America’s most experienced diplomat, and not surprisingly George Washington tapped him to be the new nation’s first Secretary of Foreign Affairs. But Jay had also served as Chief Justice of New York, and he persuaded the President to appoint him Chief Justice of the United States – a move that opened the way for Thomas Jefferson, who was just returning from his post as U.S. Minister to France, to be named Secretary of Foreign Affairs. (The department was soon renamed “Department of State” when additional duties, like keeping the national seal and issuing commissions to executive officers and judges, were attached to the job.)

²¹ CHARLES C. THACH, *THE CREATION OF THE PRESIDENCY 1775-1789* at 160 (bold emphasis added).

²² *Madison to Edmund Pendleton*, 21 June 1789, in 5 *WRITINGS OF JAMES MADISON* 405-06 n. (Gaillard Hunt, ed. 1904).

Soon after taking office, Jefferson was asked by President Washington where the Constitution has vested all of the decisions regarding foreign affairs that were not expressly addressed in the text of the document. Jefferson provided this response:

The Constitution . . . has declared that “the Executive power shall be vested in the President,” submitting only special articles of it to a negative by the Senate . . .

The transaction of business with foreign nations is executive altogether; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.²³

One week later, President Washington made this entry in his diary:

“Tuesday, 27th [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay’s and Mr. Jefferson’s—to wit—that **they have no Constitutional right to interfere** with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being **Executive** and vested in the President by the Constitution.²⁴

So we have Thomas Jefferson, George Washington, America’s first Chief Justice, and two of the three authors of the *Federalist Papers* clearly on record as believing that the business of foreign affairs was vested *exclusively* in the President as part of the “executive Power” contained in Article II, Section 1, save for those narrowly construed “exceptions” clearly vested in Congress or the Senate. But, obviously, there were sharp differences of opinion among the Founding Fathers on many issues, so it is useful to consider the views of Jefferson’s key rival at the time and the third contributor to the *Federalists*. Alexander Hamilton, too, addressed this issue – most clearly in his first *Pacificus* essay in 1793:

The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the

²³ *Jefferson’s Opinion on the powers of the Senate Respecting Diplomatic Appointments*, April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (bold italics added).

²⁴ 4 DIARIES OF GEORGE WASHINGTON 122 (Regents’ Ed. 1925) (bold emphasis added).

exceptions and qualifications which are expressed in the instrument . . .

It deserves to be remarked, that as the participation of the Senate in the making of treaties, and **the power of the Legislature to declare war**, are **exceptions out of the general “executive power” vested in the President**, they are **to be construed strictly**, and ought to be extended no further than is essential to their execution.

While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the “executive power” to do whatever else the law of nations . . . enjoin in the intercourse of the United States with foreign Powers.²⁵

This might be an appropriate time to make another observation. On August 17, 1787, James Madison and Elbridge Gerry (who later served as Madison’s Vice President) moved during the Constitutional Convention to deny Congress the power to “make” war and substitute instead the power to “declare” war.²⁶ There are some differences in the surviving notes on this debate (which was conducted under rules of strict secrecy), but the final vote appears to have been 8-to-1 in favor of the Madison-Gerry motion, with only New Hampshire in the end voting in the negative. And a key argument in the debate for denying Congress the power to “make” war was made by Rufus King — that “‘make’ war might be understood to ‘conduct’ it which was an *Executive* function.”²⁷ As I will discuss below, it is significant that a motion to take from the President the executive power “of peace” — that is, to give Congress the power to *end* a war — was considered and then *rejected* by a vote of 0 to 10 states. This is not to suggest that Congress lacks the power to end a war merely by refusing to appropriate new funds or to raise military forces. But from this record it is difficult to make a case that the Framers intended to give Congress the power to simply direct that the President end a war.

Accepting that the power to “declare War” was an exception to the President’s general grant of “executive” power, and thus was to be construed “strictly,” it is worth noting that “declare War” was a term of art from the law of nations that had a well understood and rather narrow meaning at the time the Constitution was written. The Framers understood the concept of “force short of war,” and the leading publicists of the era associated formal declarations of war only with what today we would call all-out “aggressive” wars. In the eighteenth century, every sovereign State had the right to resort to self-help measures to protect itself as well as to

²⁵ 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) (bold emphasis added).

²⁶ 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 318 (1966).

²⁷ *Id.* at 319 n*.

blatant armed international aggression to further its perceived self-interest. The sovereign State was the supreme entity, there being no international legislature to establish rules, executive to enforce them, or judiciary to resolve disputes among nations. States were therefore only constrained by the treaties and customary practices to which they voluntarily consented to be bound.

There is some confusion inherent in the term “offensive,” as in *jus ad bellum* it is distinguished from going to war for “defensive” purposes (i.e., in today’s parlance, a State had to declare war before launching an “aggressive” war), while under *jus in bello* it includes offensive counter-attacks like Douglas MacArthur’s 1950 Inchon Landing in Korea or Norman Schwarzkopf’s brilliant “left hook” in the early days of Operation Desert Storm. Neither of those “offensive” maneuvers changed the UN Security Council-authorized forces led by American generals into the “aggressors” for purposes of establishing the lawfulness of the conflict. The point I am making is that when the term “offensive” is used in a *jus ad bellum* context, it is synonymous with “aggressive” – and such military operations have been *illegal* in theory since the 1922 Kellogg-Briand Treaty and in reality since the adoption of the UN Charter in 1945.

Thus, I would submit that, in terms of international law, the kinds of conflicts historically associated with formal declarations of war are now blatantly unlawful. No country has clearly issued a “declaration of war” since the 1940s, and in that sense the congressional power to “declare War” may today be as much an anachronism as the power conveyed in the same clause of Article I, Section 8, of the Constitution empowering Congress to “grant Letters of Marque and Reprisal”²⁸

²⁸ U.S. CONST., Art. I, Sec. 8, Cl. 11. “Letters of Marque and Reprisal” were a means by which sovereign States issued legal authority to private ship owners (“privateers”) to seize ships belonging to a foreign State against whom the issuing government had a claim for wrongful conduct under the law of nations. Vessels seized under this authority were then taken to prize courts, where the authorization was examined and facts were established. If the prize court found the seizure to be proper, the ship and its cargo were ordered sold and the proceeds were divided according to an established formula, giving the ship owner a large chunk of the proceeds, the ship captain a somewhat smaller piece, the first mate still less, on down to the cabin boy who would get some small trinket. But Letters of Marque and Reprisal were declared illegal by the 1856 Declaration of Paris, and within a few decades the United States — which had not signed the 1856 Declaration — accepted this as reflecting binding customary international law. This is not to suggest that if an American President elected to launch an aggressive war against another State today the Constitution would not still give Congress its negative over the decision, but merely to note that the kinds of “war” with which formal declarations were associated are now illegal and the instruments have ceased to be used in international relations. If one accepts the view that this power of Congress was to be strictly construed, it may today be as much an anachronism as the power to grant Letters of Marque and Reprisal. That is not to suggest that getting Congress formally “on board” before sending large numbers of American forces into combat is not an excellent idea for prudential reasons, or that other

In discussing the meaning of a “declaration of war” in his 1620 classic, *De Jure Belli ac Pacis*, Hugo Grotius – often described as the “father” of modern international law, explained “no declaration is required when one is repelling an invasion, or seeking to punish the actual author of some crime.”²⁹ This was consistent with the writings of sixteenth century Italian jurist Alberico Gentili, who reasoned: “when war is undertaken for the purpose of necessary defence, the declaration is not at all required.”³⁰ The most influential international law publicist at the time of the Federal Convention was certainly Switzerland’s Emmerich de Vattel, whose writings were often cited by Jefferson and by Hamilton and John Marshall as well.³¹ In discussing formal declarations of war, Vattel asserted “[h]e who is attacked and only wages defensive war, needs not to make any hostile declaration”³²

Advocates of broad congressional war power are fond of quoting a September 1789 letter from Thomas Jefferson to James Madison, of which there are two extant versions. In the copy actually sent to Madison, Jefferson wrote: “We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.”³³ A slightly different version is found in Jefferson’s own files – presumably the original³⁴ – in which the power “of letting him loose” is replaced by “of declaring war.”

What the champions of legislative war powers miss here is that Jefferson is *conceding* that, by its nature, the power to “declare war” is “executive” in character. Why else would he speak of “transferring” this power to Congress? Under the Articles of Confederation, there was no national executive and the Continental Congress was invested with the full power “to make war.” So the most logical explanation for Jefferson’s wording is that, like Locke, Montesquieu, and other writers of the time, he recognized that the entire business of “war” was by nature “executive” in character. Assuming this is true, then his maxim (widely shared by others at the time) that “exceptions” to the President’s grant of the nation’s “executive”

constitutional provisions do not give Congress very important powers relative to armed conflict that only a very foolish President would ignore.

²⁹ HUGO GROTIUS, *DE JURE BELLI AC PACIS*, bk. III, Ch. 3.

³⁰ 2 ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* 140 (1620 [1933 ed.]).

³¹ See Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT’L L. 903, 906-10 (1994).

³² Quoted in *id.*, 909.

³³ *Jefferson to Madison*, Sept. 6, 1789, in 15 PAPERS OF THOMAS JEFFERSON 397.

³⁴ Prior to acquiring his polygraph machine to make simultaneous duplicate copies of his letters, it was Jefferson’s practice to copy important letters to retain a copy for his own files and often again to send to others. In making such a copy he would often think of a more eloquent way to make his point, and save the original for his own records while sending the improved version to his correspondent.

power that were vested in the Senate or Congress were to be construed strictly should be applied.

This leads to yet another important separation of powers issue. Both the Philadelphia debates and the state ratification debates are replete with concerns that the power of the “sword” and the power of the “purse” must be kept separate.³⁵ Yet if Congress usurps the President’s executive and commander-in-chief power to control the movement of troops (the “sword”), it will violate that fundamental principle because it already possesses the power of the “purse.”

There is yet another greatly misunderstood statement by Jefferson that is cherished by scholars who seek authority for a broad interpretation of the “declare War” clause. In his first state-of-the-union address in December 1801, President Jefferson reported on an encounter between the American schooner *Enterprise* and a Tripolitan cruiser in the Mediterranean. He told Congress that, because Congress had not authorized war, the American ship was only permitted to defend itself when attacked and then had to let the enemy ship go free. I don’t have time to dwell on the details of this incident here, beyond noting that Jefferson grossly misstated the facts of the case and referring interested readers elsewhere for a detailed discussion.³⁶ We now have both a valuable compilation of historical naval records on the Barbary Wars and Jefferson’s hand-written notes from his first cabinet meeting, and it is absolutely clear that Jefferson and his cabinet agreed on March 15, 1801, to send two-thirds of the new American Navy to the Mediterranean with instructions that — if upon arrival at Gibraltar they confirmed the rumors that Barbary Pirates had declared war on America — they were to “distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence—by **sinking, burning or destroying their ships & Vessels wherever you shall find them.**”³⁷ I would add that Jefferson does not appear to have even informed Congress of this decision (although the deployment was reported in the newspapers and there was no effort to keep it secret), and when he did finally refer to the deployment more than six months after the ships had departed Norfolk there appear to have been no expressions of concern from Congress.

That early Congresses shared the understanding that the conduct of war and the business of diplomacy and intelligence were the exclusive province of the Executive is clear from the deference they showed in these areas. Thus, the first appropriations bill for foreign intercourse – enacted by Congress on July 1, 1790 – provided that:

³⁵ See, e.g., 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 139, 144, 146.

³⁶ I discuss this incident at some length in Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT’L L. at 910-915 (1994).

³⁷ Quoted in *id.* at 911.

[T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually.³⁸

This broad congressional deference to the President during the early years of our history was captured by President Jefferson in a February 19, 1804, letter to Treasury Secretary Albert Gallatin:

The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . . From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.³⁹

Until about the time of World War II, there were very few statutes that even arguably constrained the President's discretion in foreign affairs or the conduct of war. As America began playing a greater role on the world stage, more powers of Congress involving things like foreign trade and assistance came into play and the number of statutes increased – most of which were largely drafted by the Executive Branch. But the basic understanding that the Constitution entrusted not only the execution of foreign policy to the President, but the *formulation* of that policy as well – subject to the Senate's negative over a completed treaty – continued until the time of the Vietnam War. Thus, in a speech at Cornell Law School in 1959, Senate Foreign Relations Committee Chairman J. William Fulbright explained:

The pre-eminent *responsibility* of the President for the **formulation and conduct of American foreign policy** is clear and **unalterable**. He has, as Alexander Hamilton defined it, all powers in international affairs “which the Constitution does not vest elsewhere in clear terms.” He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, **which can be moved by his will alone—the armed forces**, the diplomatic corps, the Central

³⁸ U.S. STATUTES AT LARGE, vol. 1, p. 129 (1790).

³⁹ 11 THE WRITINGS OF THOMAS JEFFERSON 5, 10 (Mem. ed. 1903).

Intelligence Agency, and all of the vast executive apparatus.⁴⁰

Let me close this first section by observing that the Supreme Court has also recognized the President's special responsibilities in these areas. Consider, for example, Chief Justice William Howard Taft's lengthy discussion of early views of the "executive Power" in *Myers v. United States* in 1926, striking down the Tenure in Office Act that had led to the 1868 impeachment of President Andrew Johnson:

Washington's first proclamation of neutrality in the war between France and Great Britain . . . was at first criticized as an abuse of executive authority. It has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration, and has been often followed by succeeding Presidents. Hamilton's argument was that the Constitution, by vesting the executive power in the President, gave him the right, as the organ of intercourse between the Nation and foreign nations, to interpret national treaties and to declare neutrality. He deduced this from Article II of the Constitution on the executive power, and followed exactly the reasoning of Madison and his associates as to the executive power upon which the legislative decision of the First Congress as to Presidential removals depends, and he cites it as authority. . .

Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, . . . [and]; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed, and not to be extended by implication . . .⁴¹

Certainly the most cited foreign affairs case is *United States v. Curtiss-Wright Export Corp.*, in which the Supreme Court declared:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast

⁴⁰ J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961) (bold emphasis added).

⁴¹ *Myers v. United States*, 272 U.S. 52, 137, 163-64 (1926) (Taft, C.J.).

external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. **Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.** As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." . . .

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, **plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations** -- a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.⁴²

Dean Harold Koh's "Shared Powers" Paradigm and the Effect of *Youngstown on Curtiss-Wright*

Before leaving this theoretical section, let me briefly address the very popular views of Yale Law School Dean Harold Hongju Koh – an old and able friend with whom I have shared many platforms over the years on these issues – in his prize-winning 1990 volume *The National Security Constitution*. (I have recently written on this issue at greater length elsewhere.⁴³)

Like Lou Fisher and many others, Harold favors the "shared powers" concept of foreign affairs. I'm not fond of the term, not because I don't agree that many decisions in foreign affairs ultimately require the participation of more than one branch but because the specific role of each branch tends to be unique. The President "nominates" and "appoints," while the Senate may either consent or veto the person nominated. The President has the exclusive power to speak to foreign governments on behalf of the nation, but before a treaty he has negotiated may bind the

⁴² *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936) (bold emphasis added).

⁴³ Robert F. Turner, *Executive Power in Wartime*, THE CHRONICLE REV., Sept. 15, 2006 at B9.

United States as conventional international law it must be approved by two-thirds of those Senators present and voting. I think it best not to merge these distinct roles with language that might suggest that the actual functions of each branch are interchangeable or “shared” in some way. It is not that Harold and Lou are necessarily *wrong* in this explanation, but rather that I fear the use of the term “shared powers” may promote sloppy thinking by readers less knowledgeable about the actual workings of government.

My real quarrel with Harold’s scholarship involves his suggestion that there is some struggle going on between the Supreme Court’s landmark 1936 *Curtiss-Wright* opinion and the concurring opinion of Justice Robert Jackson in the 1952 Steel-Seizure case (*Youngstown Sheet & Tube Co. v. Sawyer*). Candidly, I think this argument is silly. The two opinions when properly understood are not at all in conflict. But before turning to that, let me put the issue on context by quoting from Harold’s highly-acclaimed volume:

At the Republic’s birth, the Framers deliberately drafted a Constitution of shared powers and balanced institutional participation, fully aware of the risks that arrangement posed to the nation’s international well-being. By mandating that separated institutions share powers in foreign as well as domestic affairs, the Framers determined that we must sacrifice some short-term gains for speed, secrecy, and efficiency in favor of the longer-term consensus that derives from reasoned interbranch consultation and participatory decision making. Although in the early years of the Republic, all three branches condoned a de facto transformation of the original National Security Constitution from a scheme of congressional primacy to one of executive primacy, they never rejected the concept of power sharing and institutional participation⁴⁴

He then goes on to explain how *Curtiss-Wright* radically changed the historic paradigm:

In 1936, *Curtiss-Wright’s* dicta boldly asserted the alternative vision of unfettered presidential management. But even as the Cold War raged, the 1947 National Security Act, *Youngstown*, and finally the post-Vietnam era framework statutes (e.g., War Powers Resolution) definitively rejected that vision as America’s constitutional model for dealing with the outside world. Vietnam (and

⁴⁴ HAROLD HONGKU KOH, *THE NATIONAL SECURITY CONSTITUTION* 211 (1990).

Watergate, as well, to the extent that it arose from Vietnam) then taught that even in a nuclear age, America would not conduct globalism at the price of constitutionalism. It is therefore ironic that the *Curtiss-Wright* model should now resurface⁴⁵

In reality, throughout the Cold War the Supreme Court routinely relied upon *Curtiss-Wright* as the established foreign affairs paradigm, as it does today. If its status was weakened in any way by *Youngstown*, someone clearly forgot to tell the Court, which continues to cite *Curtiss-Wright* more than any other case dealing with foreign affairs.⁴⁶

I was particularly amused by this passage of the Koh book:

Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the *Youngstown* vision in favor of *Curtiss-Wright*. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.⁴⁷

I think what I enjoyed the most was that, of the ten or so “[c]ritics on the right” he footnotes to this passage, he listed me *first* – well ahead of such far more distinguished scholars as former Yale Law School Dean Eugene Rostow and my University of Virginia colleague and mentor John Norton Moore. But, flattery aside, I’ve never been able to get Harold to come up with statements from men like Washington, Jefferson, Madison, Hamilton, or Jay supporting his theory that foreign and domestic affairs involved the same basic “sharing of powers.” I hope I’ve demonstrated in some detail the broad consensus among these key Founders that Congress and the Senate were to be excluded from many decisions in the foreign affairs realm, and the powers they were given that were exceptions to the broad grant of “executive Power” to the President were intended to be construed strictly. In contrast, without any effort to document his assertion, Harold simply tells his reader “the first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role.”⁴⁸ And

⁴⁵ *Id.* at 211-12.

⁴⁶ A WestLaw search reveals that *Curtiss-Wright* has been relied upon in Supreme Court cases in five of the last seven years. See, e.g., *Pasquantino v. United States*, 544 U.S. 349, 369 (2005) (“In our system of government, the Executive is “the sole organ of the federal government in the field of international relations,” *United States v. Curtiss-Wright*”)

⁴⁷ *Id.* at 225.

⁴⁸ *Id.* at 75.

sadly, in the post-Vietnam era, this is the prevailing paradigm being taught in our universities and law schools.

Elsewhere in the volume, Professor Koh writes:

This structural vision of a foreign affairs power shared through balanced institutional participation has inspired the National Security Constitution since the beginning of the Republic, receiving its most cogent expression in Justice Robert Jackson's famous 1952 concurring opinion in *Youngstown*. Yet throughout our constitutional history, what I call the *Youngstown* vision has done battle with a radically different constitutional paradigm. This counter image of *unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in *United States v. Curtiss-Wright Export Corp.* As construed by proponents of executive power, the *Curtiss-Wright* vision rejects two of *Youngstown's* central tenets, that the National Security Constitution requires congressional concurrence in most decision on foreign affairs and that the courts must play an important role in examining and constraining executive branch judgments in foreign affairs.⁴⁹

One wonders if Harold has carefully *read* Justice Jackson's *Youngstown* concurrence, or the majority opinion in the case by Justice Black. For both went to considerable lengths to emphasize that they were not endeavoring to constrain the powers of the President in dealing with the external world. At issue in that case was whether the President's "war powers" authorized him to order the Secretary of the Interior to seize domestic steel mills – the *private property* of American citizens – in order to prevent a labor strike that might affect the availability of steel for the Korean War. (And keep in mind that the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of . . . property, without due process of law . . .")

There is no reason to believe that Justice Jackson was in any way hostile to *Curtiss-Wright* as the appropriate foreign policy paradigm. On the contrary, just two years before *Youngstown*, he wrote for the majority in *Johnson v. Eisentrager*:

⁴⁹ *Id.* at 72.

Certainly it is not the function of the Judiciary to entertain private litigation - even by a citizen - which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. . . . The issue . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. *United States v. Curtiss-Wright Corp* . . .⁵⁰

And consider this excerpt from Justice Black's majority opinion in *Youngstown*:

The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces had the ultimate power as such to take possession of **private property** in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.⁵¹

Similarly, Justice Jackson in *Youngstown* was very deferential to presidential power with respect to the external world:

[N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that a **President whose conduct of foreign affairs is so largely uncontrolled, and often is even unknown**, can vastly enlarge his mastery over the **internal affairs** of the country by his own commitment of the Nation's armed forces to some foreign adventure. . . .

That military powers of the Commander in Chief were not to supersede representative government of **internal affairs** seems obvious from the Constitution and from elementary American history. . . . Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the

⁵⁰ 339 U.S. 763 (1950).

⁵¹ 343 U.S. 579, 587 (1952) (bold emphasis added).

Executive, should control utilization of the war power as an instrument of **domestic** policy

We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his **exclusive** function to command the instruments of national force, at least **when turned against the outside world for the security of our society**. But, when it is turned **inward**, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize person or property because they are important or even essential for the military or naval establishment.⁵²

Even more fundamentally, in *Youngstown* Justice Jackson actually cited *Curtiss-Wright* as authority, but then explained: “**That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories**”⁵³ And as both Justice Black and Jackson repeatedly emphasized, *Youngstown* was an “internal affairs” case.

That is also the consensus of scholars like Professor Louis Henkin, who in *Foreign Affairs and the Constitution* noted:

Youngstown has not been considered a “foreign affairs case”. The President claimed to be acting within “the aggregate of his constitutional powers,” but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.⁵⁴

Consider also the reaction of Justice Rehnquist, joined by Chief Justice Burger and two other members of the Court, in the 1979 dispute over President Carter’s constitutional power to terminate the mutual security treaty between the United States and Taiwan. Senator Goldwater had urged the Court to decide the case on *Youngstown*, but Rehnquist wrote:

⁵² *Id.* at 642, 644, 645.

⁵³ *Id.* at 637 n.2 (bold emphasis added).

⁵⁴ HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 341 n.11.

The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable **domestic** impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely **external** to the United States, and [falls] within the category of **foreign affairs**."⁵⁵

This is not to say that the *Youngstown* case offers no insights into the current controversy over the power of Congress to end a war. One of the arguments used by Justice Black in rejecting President Truman's claim that he had authority to seize the steel mills was that Congress had considered and rejected a proposal to delegate that power to the President in 1947:

Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances.⁵⁶

I have already shown that the power to "declare War" was an "exception" to the general grant of "executive power" to the President, and thus was to be "construed strictly." For that reason, the First Session of the First Congress rejected the argument that in giving the Senate a negative over the *appointment* by the President of the Secretary of Foreign Affairs, the Founding Fathers included within that power a role in decisions to *remove* that officer. Add to that the fact that, on August 17, 1787 – in connection with the decision to narrow the power given to Congress from the authority to "make War" to the power "to declare War" – the Constitutional Convention considered an amendment to "give the Legislature power of peace, as they were to have that of war."⁵⁷ In other

⁵⁵ *Goldwater v. Carter* 444 U.S. 996 (1979) (bold emphasis added).

⁵⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952).

⁵⁷ 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 319.

words, the proposal was to give Congress not only a “negative” over the *commencement* of the kind of major war that was associated with formal declarations of war at the time, but also the power of bringing a war to an end by legislation or vetoing any executive agreement intended to terminate a war. (Part of the concern here was that peace might be obtained by conceding territory or other valuable consideration to an enemy that Congress might find excessive.) After a brief debate, this proposal to give Congress a role in ending a war was *unanimously rejected* by a vote of 0 to 10.⁵⁸ (But, again, this does not affect the clear power of Congress to indirectly compel the end of a war by refusing new appropriations to raise and equip military forces.)

Harold Koh (and others) often seek to reinforce their contention that Congress was intended by the Founding Fathers to be the senior branch in foreign affairs and war by citing cases like *Little v. Bareme*,⁵⁹ the 1804 admiralty case in which the Supreme Court held that the captain of the U.S. Navy frigate *Boston* had exceeded his authority by seizing *The Flying Fish*, a Danish ship bound *from* a French port during the quasi-war with France in 1799. In enacting the relevant statute, Congress had authorized the President:

to stop and examine any ship or vessel of the United States on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is **bound, or sailing to**, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.⁶⁰

Since *The Flying Fish* had been seized while bound *from* (rather than “to”) a French port, Chief Justice Marshall declared the seizure to have been improper. He reasoned:

It is by no means clear that the president of the United States, whose high duty it is to “take care that the laws be faithfully executed,” and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But

⁵⁸ *Id.*

⁵⁹ *Little v. Bareme*, 6 U.S. (2 Cranch) 170 (1804).

⁶⁰ *Id.* (Bold italics added.)

when it is observed that the general clause of the first section of the “act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made,” obviously contemplates a seizure within the United States; and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, **the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port.**⁶¹

So at first glance it certainly does appear that Chief Justice Marshall recognized a superior power in Congress to direct the day-to-day conduct of military operations. However, if you will examine the text of the Constitution, the actual basis for this holding becomes apparent. Article I, Section 8, Clause 11 of the Constitution gives to Congress the power ““To declare War, grant Letters of Marque and Reprisal, and **make Rules concerning Captures on Land and Water . . .**” In reality, *Little v. Bareme* addressed a rather narrow situation in which Congress had passed a law establishing rules concerning captures on water – one of the expressed “exceptions” in the Constitution to the President’s general grant of the “executive” and “Commander in Chief” powers. While Congress was apparently not thrilled with the Court’s decision (it promptly voted to indemnify Captain Little for his losses in the case), it is as clear that Congress has the power to place limitations on “captures” on the high seas as it is that this narrow power does not authorize Congress to direct the general conduct of military operations during periods of authorized war. I would add that there are two or three other cases advocates of congressional primacy like to cite, but when carefully examined they usually involve either a narrow exception to presidential power that has been clearly vested in Congress by the Constitution or presidential efforts to seize private property within the United States during wartime without the “due process of law” mandated by the Fifth Amendment (as in the *Youngstown* case).

Others may disagree, but my own sense is that *The National Security Constitution* is not a particularly useful contribution to the literature in this highly-specialized field. Indeed, my strong sense is that when the book was written Harold was totally unaware of the materials I have cited above from Washington, Jefferson, and all three authors of the *Federalist* papers.

⁶¹ *Id.* at 177-78 (bold italics added).

**“Unchecked” Presidential Discretion
in the Conduct of War and Foreign Affairs**

I have already noted John Jay’s explanation in *Federalist* No. 64 that the new Constitution had left the President “able to manage the business of intelligence as prudence may suggest,” and the Supreme Court’s 1936 declaration that “Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.” These are clear references to *exclusive* and *unchecked* presidential power.

One of the great myths in the post-Vietnam separation-of-powers debates is the idea that Congress and the Judiciary are supposed to be able to “oversee” and “check” every presidential power in a democracy. I sometimes wonder if modern legislators paid attention in law school during the discussion of the most famous of all cases, *Marbury v. Madison*. There, Chief Justice Marshall referred to the President’s unchecked constitutional discretion, and used his control over the Department of Foreign Affairs as an example:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd **whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.** The subjects are political. They respect the nation, not individual rights, and **being entrusted to the executive, the decision of the executive is conclusive.** The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.⁶²

It is certainly true, as many have observed, that if neither Congress nor the Judiciary has a check or “negative” over presidential decisions, the risks of abuse of power and the exercise of poor judgment increase. If we allow the President to authorize the military to detain enemy combatants for the duration of hostilities without charging them with a crime or giving them a

⁶² *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165-66 (1803).

trial (both of which are permitted by the Law of Armed Conflict, recognized by the Geneva Convention Relative to the Treatment of Prisoners of War, and acknowledged as lawful by the Supreme Court in the *Hamdi* case), some innocent people may suffer. But it is even more obvious that by allowing the President to authorize the military to empower an Army private to use lethal force against someone believed to be an enemy combatant on the battlefield, there is a *greater* risk of mistakes that could on occasion lead to the tragic loss of innocent life. Similarly, occasions arise where the military launches missiles or other high-explosive ordinance against buildings or other structures based entirely upon intelligence information that those structures are being used to house enemy forces — and sometimes that information is inaccurate and innocent people lose their lives. Those lives might be spared if we required the private, or the captain who is about to authorize the firing of a cruise missile or the launching of a Hellfire missile from a Predator drone, to come before Congress or prove beyond reasonable doubt in a court of law that the intelligence information is reliable and no innocent people will be harmed. Yet few serious people would prohibit our military from making battlefield decisions with the speed and dispatch long recognized to be essential for operational success.

The Founding Fathers understood that success in war, intelligence gathering, and diplomacy depended on unity of design, secrecy, and speed and dispatch; and they vested authority to make the necessary decisions exclusively in the President save for those limitations clearly expressed in the Constitution itself — including the power of Congress to control expenditures from the Treasury and the creation of military forces, and a variety of other checks expressly vested in Congress or the Senate.

Congressional and Senate “Negatives” and Other Powers in these Areas

Others in this hearing will no doubt provide a complete list of all of the powers related to war and foreign affairs that are expressly vested in the Congress or the Senate in Article I, Section 8, and Article II, Section 2, of the Constitution. As I have already acknowledged, many of these are powers of tremendous importance.

I think it is also true that on occasion the Executive Branch fails to recognize some of the more esoteric “exceptions” to the President’s general grant of executive power over foreign affairs. To mention one example, I have no serious doubt that Congress has the constitutional power to pass legislation mandating the humane treatment of detainees during armed conflict. The Constitution expressly gives Congress the power to “define and punish Piracies and Felonies committed on the high

Seas, and Offences against the Law of Nations,”⁶³ and to “make Rules concerning Captures on Land and Water”⁶⁴ Yes, those are “exceptions” out of the general “executive” and “Commander in Chief” powers vested in the President, and thus, as already discussed, are to be construed strictly. But I can’t image the Supreme Court not recognizing this power even with a strict construction.

By refusing to “raise” new military forces and rejecting appropriations requests for supplies and equipment for existing forces, Congress clearly has the power to bring any major armed conflict to an end. The Constitution prohibits the President from spending Treasury funds without appropriations,⁶⁵ and wars generally require a great deal of money.

I trust no one in this room would argue that the President may lawfully use the “power” he arguably possesses as Commander in Chief of the Army to order the First Armored Division to seize the gold from the Bullion Depository at Fort Knox and deliver it to the White House for the purpose of converting it to cash on international markets to fund the war in Iraq. One might contend that he has the raw “power” to accomplish that end, in the sense that – unaware of the ultimate purpose – military officers might well carry out apparently lawful orders to make it happen. (Military officers might be told the move was necessary to thwart an impending terrorist plot to seize the gold.)

I mention this example, because it is certainly clear that Congress has the “power” – at least until the courts step in – to abuse its control over the nation’s purse strings to deny the President even his salary. To be sure, the Constitution provides that the President “shall receive” a compensation for his services which shall neither be increased nor decreased during his term of office,⁶⁶ but before that compensation may be paid there must be an appropriation. And refusing to appropriate money to pay the President’s salary would be an abuse of power and a violation of the oath of office each of you took to support the Constitution.⁶⁷ Nothing in the Constitution even arguably gives Congress the power to interfere with decisions involving, to quote Chief Justice Chase again, “the conduct of

⁶³ U.S. Const., Art. I, Sec. 8, Cl. 10.

⁶⁴ *Id.* Cl. 11.

⁶⁵ *Id.*, Art. I, Sec. 9, Cl. 7 (“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.”)

⁶⁶ U.S. CONST., Art. II, Sec. 1, Cl. 9 (“The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.”)

⁶⁷ *Id.*, Art. VI, Cl. 3 (“The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution”)

campaigns,” and deciding how many troops from among those forces “raised” by Congress are necessary to fight a war authorized by Congress⁶⁸ – and where and how those forces should be deployed – is at the heart of the President’s constitutional power. This proposition in my view is not arguable.

Reconciling Congressional and Executive Powers Pertaining to War

As the Supreme Court noted in *Curtiss-Wright* and many other cases, all constitutional powers “must be exercised in subordination to the applicable provisions of the Constitution.”⁶⁹ So one of the issues we need to address this morning is how do we draw the line between the constitutional powers of Congress and those of the President.

Last June in the *Hamdan* decision, the Supreme Court quoted⁷⁰ with favor a portion of Chief Justice Salmon P. Chase’s concurring opinion in what it described as “the seminal case of *Ex parte Milligan*.” Speaking for the majority, Justice Stevens was primarily concerned with presidential power over tribunals, so for our purposes it is useful to include some language that was only partly quoted in *Hamdan*. Chief Justice Chase wrote:

Congress has the power not only to raise and support and

⁶⁸ Obviously, the Authorization for the Use of Military Force enacted by Congress in October 2002, 116 Stat. 1498, Pub. L. 107-243, pursuant to the (flagrantly unconstitutional) War Powers Resolution, was the constitutional equivalent to a formal declaration of war. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); and *Talbot v. Seeman*, 5 U.S. (1 Cranch 1, (1801).

⁶⁹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁷⁰ In Part IV of the majority opinion, Justice Stevens wrote:

The Constitution makes the President the “Commander in Chief” of the Armed Forces, Art. II, §2, cl. 1, but vests in Congress the powers to “declare War ... and make Rules concerning Captures on Land and Water,” Art. I, §8, cl. 11, to “raise and support Armies,” *id.*, cl. 12, to “define and punish ... Offences against the Law of Nations,” *id.*, cl. 10, and “To make Rules for the Government and Regulation of the land and naval Forces,” *id.*, cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan*:

“The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns”

govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, **except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.** Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But **neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.** Both are servants of the people, whose will is expressed in the fundamental law. **Congress cannot direct the conduct of campaigns**⁷¹

I believe Chief Justice Chase correctly reconciled the relevant powers in this case, and it is certainly not a “shared powers” paradigm. And from this, it seems obvious that Congress has no power to tell the President he cannot send another 20,000 or 100,000 troops to Iraq. Any effort to do so in a legally binding manner would be futile⁷² and a further act of congressional lawbreaking.

Senator William Borah on the Power of Congress to Usurp Constitutional Authority of the President

On the second floor of the Senate corridor to the U.S. Capitol Building there is a statue of Senator William E. Borah, the “Lion of Idaho” who was elected to six terms in the Senate and chaired the Foreign Relations Committee for eight years. A progressive Republican who biographers say was “known for his integrity” and independence, Borah is perhaps best known today for his leading role in blocking Senate consent to the ratification of the Versailles Treaty in 1917 that would have brought America into the League of Nations. The official Senate biography of Senator Borah notes that *Time* magazine once referred to him as the “most

⁷¹ *Ex parte Milligan*, 71 U.S. 2, 139-40 (1866).

⁷² I say “futile” because it would be so clearly unconstitutional that the President would quite properly ignore it and the courts would refuse to enforce it. As Chief Justice John Marshall noted in *Marbury*, “an act of the legislature, repugnant to the constitution, is void” *Marbury v. Madison*, 5 U.S. at 177 (Marshall, C.J.).

famed Senator of the century.”⁷³ And his views are particularly relevant to today’s hearing, because he was such a strong isolationist and a champion of the constitutional prerogatives of the Senate. He understood that the Senate had a constitutional negative over a presidential decision to ratify a treaty, and in 1917 no Senator was more instrumental in exercising that power. But he also understood that the President had important national security powers that were not subject to congressional veto, and time and again he stood firm on principle.

Consider this excerpt from the *Congressional Record* of an exchange Senator Borah had on December 27, 1922, with Senator James Reed of Missouri. To place it in context, following the end of World War I President Wilson elected to keep many American troops in Germany to help maintain the peace. President Harding kept them there, and legislators here in Washington were getting angry letters from parents who wanted their sons home now that the war had been won. Both Senator Reed and Senator Borah shared that goal, and this colloquy occurred on the Senate floor:

MR. REED of Missouri. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?

Mr. BORAH. I do.

Mr. REED of Missouri. So do I . . . Would it not be easier to bring the troops home than it would be to have the proposed [disarmament] conference?

Mr. BORAH. You can not bring them home, nor can I.

Mr. REED of Missouri. We could make the President do it.

Mr. BORAH. We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.

Mr. REED of Missouri. I wish to change my statement. We can not make him bring them home . . . , but I think if there were a resolution passed asking the President to bring the

⁷³http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_BorahWilliam.htm.

troops home, where they belong, the President would recognize that request from Congress.⁷⁴

An even more illuminating exchange occurred six years later, during consideration of a naval appropriations bill, when the Foreign Relations Committee chairman had this exchange with Senator John Blaine, a newly-elected member from Wisconsin:

Mr. BORAH. Mr. President, the Constitution of the United States has delegated certain powers to the President; it has delegated certain powers to Congress and certain powers to the judiciary. Congress can not exercise judicial powers or take them away from the courts. Congress can not exercise executive power specifically granted or take it away from the President. The President's powers are defined by the Constitution. **Whatever power belongs to the President by virtue of constitutional provisions, Congress can not take away from him. In other words, Congress can not take away from the President the power to command the Army and the Navy of the United States.** . . . Those are powers delegated to the President by the Constitution of the United States, and the Congress is bound by the terms of the Constitution.

Mr. BLAINE. Another question. All that the Senator has said in a general way is sound constitutional law, but before there can be any action on the part of any Government unit requiring the expenditure of funds that are in the Public Treasury, or that may be placed in the Public Treasury, Congress must first act and make an appropriation for every essential purpose. That money so appropriated can be used for no other purpose than that designated by Congress, and there is no power that can coerce Congress into making an appropriation. Therefore, Congress's power over matters respecting the making of war unlawfully, beyond the power of the President outside of the Constitution or within the Constitution, or conducting hostilities in the nature of the war during peace time, can be limited and regulated under the power of Congress to appropriate money.

Mr. BORAH. Of course, I do not disagree with the proposition that if Congress does not create an army, or does not provide for an army, or create a navy, the President can not exercise his control or command over an

⁷⁴ 64 CONG. REC. 993 (1922).

army or navy which does not exist. **But once an army is created, once a navy is in existence, the right to command belongs to the President, and the Congress can not take the power away from him.**

After some additional discussion involving other participants, Senator Blaine returned again to his contention that Congress could control the President's conduct as Commander-in-Chief by using its power over the purse:

Mr. BLAINE. Mr. President, just one other question of the distinguished Senator from Idaho [Senator Borah]. I know that ordinarily he does not hedge. I want to press him just once more to give us the value of his training as a constitutional lawyer. I repeat, assuming that Congress has created an army and has created a navy, after that is all done, then may Congress not limit the uses to which money may be put by the President as Commander in Chief in the operation and in the command of the Army and Navy?

The Senator has said that, of course, if we do not create an army and navy, then there is nothing over which the President has command. But we have an Army and a Navy. **Can not Congress limit, by legislation, under its appropriation acts, the purpose of which money may be used by the President as Commander in Chief of the Army and Navy?**

Mr. BORAH. I do not know what the Senator means by "purposes for which it may be used." Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the **Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.**

The debate continued, and shortly thereafter, in response to another question, Senator Borah said:

[I]f the Army is in existence, if the Navy is in existence, if it is subject to command, he may send it where he will in the discharge of his duty to protect the life and property of American citizens. Undoubtedly he could send it, although the money were not in the Treasury. What the result would be in the future as to appropriations would be another thing.

I do not challenge the proposition that by refusing to appropriate, the President may be affected in the exercise of his power to command. The Congress might also refuse to appropriate for the Supreme Court for marshals, but why speculate about fanciful things?

Finally, this exchange occurred between Senator Borah and Senator Henrik Shipstead, a first-term Senator from Minnesota:

Mr. SHIPSTEAD. I agree with the Senator in that and I do not want to take away from the President the power to use the troops to protect American life and property.

Mr. BORAH. The Senator could not take it away from the President even if he wanted to do so. It is a power which belongs to him. We can not take it away from him.⁷⁵

In my doctoral dissertation on “National Security and the Constitution” I demonstrate that this was the prevailing paradigm in all three branches throughout most of our history, but things changed in response to “Vietnam.” I put the word in quotes, because much of the public and congressional reaction to the war in Indochina had little to do with the realities of that conflict and far more to do with misperceptions, myths, and in some cases lies that were spread to turn the American people and our Congress against the war.

This is an issue of more than casual interest to me, not only because I served twice in Vietnam as an Army officer, but because even prior to that I wrote my undergraduate honors thesis on the war and since leaving the Army more than thirty-five years ago I have written or edited a number of books on the issue. I have taught seminars on the war for undergraduates at Virginia and for military officers at the Naval War College, and I suspect the interdisciplinary graduate seminar on “Legal and Policy Issues of the Indochina War” that I have co-taught with my colleague Professor John Norton Moore at the Law School for the past fifteen years or so is the only offering of its kind at any American law school. But before turning to the issue of post-Vietnam congressional “lawbreaking,” let me briefly address the alarming belief that it is lawful for Congress to usurp presidential discretion merely by placing “riders” on appropriations bills declaring in detail how the money may or may not be used.

⁷⁵ 69 CONG. REC. 6759-60 (1928) (bold emphasis added).

The “Power of the Purse”

One of the most alarming techniques for congressional lawbreaking in the post-Vietnam era has been the abuse of the appropriations power. I addressed this issue at length decades ago,⁷⁶ and in the interest of time will only briefly summarize the issue here.

The basic issue is a simple one. May Congress use one of its legitimate powers in such a way as to indirectly exercise discretion vested by the Constitution in another branch of the government? The issue is not a new one, and the consistent answer has always been a resounding “NO!”

I want to be careful here in my choice of words. Obviously, if Congress refuses to raise an army, this act will have the effect of denying the President any army to command. There is nothing inconsistent with the Constitution in such a decision (although it may leave the country vulnerable to its enemies). What I’m addressing is an effort by Congress not to simply refuse to approve appropriations requests, but rather to appropriate money and then attach “conditions” designed to usurp discretion vested exclusively in the President by the Constitution.

In the above-mentioned April 1790 memorandum from Secretary of Foreign Affairs Thomas Jefferson to President Washington, Jefferson noted there was a theoretical possibility that the Senate might try to control the President’s discretion to select ambassadors by simply refusing to consent to the appointment of anyone until the President submits and nominates their choice. But Jefferson concluded that such behavior would be an abuse of process of which the Senate cannot be assumed capable.

Earlier I raised the hypothetical of Congress trying to coerce the President into surrendering his powers by simply refusing to appropriate money to pay his salary. I trust most of you would recognize that would be unconstitutional and wrong. Nor would it be proper for Congress to condition appropriations for the Department of Defense upon the President’s agreement that he would nominate and appoint the spouse of the Speaker of the House to that position.

If such behavior were permissible, might not the President engage in the same sorts of coercive behavior? As the nation’s chief executive officer, he possesses a certain amount of prosecutorial discretion in deciding which criminals to focus resources on. Would anyone argue it would be proper for the President to inform the Senators from New York that if they

⁷⁶ Robert F. Turner, *The Power of the Purse*, in THE CONSTITUTION AND NATIONAL SECURITY 73-96 (Howard E. Shuman & Walter R. Thomas, eds. 1990). This book chapter was based upon a presentation made at a 1987 conference celebrating the Bicentennial of the U.S. Constitution at the National Defense University.

did not cast certain votes as directed, he would instruct the U.S. Attorney in New York City to spend less effort prosecuting drug dealers or members of organized criminal enterprises — and would have the most effective FBI agents reassigned to other states or detailed to Washington, DC, for extended specialized training? He might add that in the spirit of keeping the public fully informed and the “people’s right to know,” he was going to experiment by having all federal law enforcement agencies in New York to publish all of their plans and activities on the Internet, including the names of future targets for wiretaps and the addresses of locations to be raided by authorities.

Perhaps the voters of New York would cast their ballots differently if they believed that their physical safety and quality of life were at risk (although I have my doubts). My point is that neither political branch may properly abuse its legitimate constitutional discretion for the purpose of usurping the independent constitutional authority of the other – and it doesn’t make any difference whether this is done directly or through intimidation by threats to abuse power.

And this is true as well for the powers of the people. During World War II, a powerful member of the House Appropriations Committee inserted a rider in the Urgent Deficiency Appropriation Act of 1943 barring expenditure of any appropriated funds to pay the salaries of three named government employees. The bill provided emergency funds for food and ammunition for U.S. forces on the front lines of Europe and the Pacific, and President Roosevelt wisely decided not to endanger the security of American forces – and perhaps the war effort itself – by vetoing the bill to protect the constitutional rights of three individuals. In a signing statement, Roosevelt denounced the provision as “unconstitutional,” declaring it was “thus not binding on the Executive or Judicial branches.”

While the Constitution clearly prohibits Congress from enacting bills of attainder,⁷⁷ when the victims of this appropriations rider made their way to the Supreme Court the Congress asserted that the “power of the purse” was a non-justiciable political question that the Court could not examine. But in *United States v. Lovett*, the Supreme Court decided otherwise:

We...cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure’s constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say. . . . We hold that [the section] falls precisely within the category of congressional actions

⁷⁷ “No Bill of Attainder . . . shall be passed.” U.S. CONST., Art. I, Sec. 9, Cl. 3.

which the Constitution barred by providing that “No Bill of Attainder or ex post facto Law shall be passed.”⁷⁸

Yes, the power of the purse is an important power and was intended by the Founding Fathers to be so. It was given to Congress in the best traditions of the British Constitution, and a key concern for denying it to the President was that he was to have command of the “sword,” and tyranny threatened when these two great powers were consigned to the same hands.

I will touch on some of the abuses of the power of the purse in a moment, but first let me make an important point. If Congress may properly seize the independent powers vested by the people in the President through the Constitution merely by predicating their acts with “no money herein or hereafter appropriated may be expended unless the President . . .,” then the system of separation of powers that Madison and his colleagues felt was essential to preserving the people’s freedom is *dead*. The fears of Madison and Jefferson about the “tyranny of the legislature” will have come true. This was one of the great fears in the Federal Convention of 1787. Noting the tendency of state legislatures to abuse their powers so as to usurp the authority of the governors, Madison remarked in Philadelphia:

Experience has proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable.⁷⁹

The following year, in *Federalist* No. 48, Madison lamented that the authors of most state constitutions had given too little attention to the dangers of legislative abuse. He wrote: “They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpation.”⁸⁰ In a “representative republic,” Madison warned, it is “against the enterprising ambition” of the Legislative department “that the people ought to indulge all their jealousy and exhaust all their precautions.”⁸¹ The Supreme Court observed in 1976 that “the debates of the Constitutional Convention, and the *Federalist* Papers, are replete with expressions of fear that the Legislative Branch of

⁷⁸ *United States v. Lovett*, 328 U.S. 303, 313, 315, (1946).

⁷⁹ 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 35.

⁸⁰ *Federalist* No. 48 at 333.

⁸¹ *Id.* at 334.

the National Government will aggrandize itself at the expense of the other two branches.”⁸²

If Congress can use conditions on its power of the purse to usurp the Commander-in-Chief power that is expressly spelled out in Article II, Section 2, of the Constitution, what chance has the *implied* power of judicial review that we trace back to *Marbury v. Madison*? What is to stop the current Congress from conditioning appropriations for the Judiciary on a proviso that “no funds shall be available” if the Supreme Court overturns *Roe v. Wade*? And if *this* Congress can properly enact that appropriations rider, obviously all the foes of abortion need to do is secure a bare majority in both houses of Congress and then attach a rider conditioning funds for the Judiciary upon a *reversal* of *Roe v. Wade* to a veto-proof bill. It certainly would be a convenient arrangement for the congressional majority. The next logical step might be to deny funds to the courts if *any* statute is overturned on constitutional grounds, or if the Supreme Court seeks to enforce any of the Bill of Rights. But it is not a power permitted to Congress by our Constitution, and — whether the target is the power of the President, the Judiciary, or the people — each time it is exercised those Members who vote in the affirmative become part to *lawbreaking*.

There is a long line of Supreme Court cases declaring that Congress may not use conditional appropriations to accomplish an end that it would be prohibited from accomplishing directly. Columbia Law School Professor Louis Henkin, in his *Foreign Affairs and the Constitution*, reasoned:

Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. So, should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation, as he has “riders” purporting to instruct delegations to international conferences.⁸³

Examine the list of powers enumerated in Article I, Section 8, and — keeping in mind that those that relate to war and foreign affairs were intended to be construed strictly — find one that authorizes the Congress to pass a law telling the President on what hill each soldier shall be deployed or limiting the number that can be assigned to a specific location in time of war. I don’t think such a power exists. Nor does Congress have the power to compel the Commander in Chief to order reserve forces into

⁸² *Buckley v. Valeo*, 424 U.S. 1, 129 (1976).

⁸³ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 113 (1972).

battle at a given time, or prohibiting him from using those forces as he deems best to carry out an authorized war. This is not a close issue.

**Why British Constitutional Precedents
Involving the Power of the Purse Are Not Relevant**

It is true that the history of the British Constitution is replete with instances in which Parliament has used its control over the purse to coerce the King into making concessions. But I submit those precedents are of no relevance to the American political system. England started out as a monarchy in which all powers were vested in the King. Little by little, those powers were challenged and concessions were begrudgingly made. In the end, most would agree Great Britain is a better, and certainly a more free, country.

But the United States has a written Constitution that was authored by remarkably wise men and approved through democratic processes by the representatives of the people in the several states. It is a Constitution that may be altered without resort to force by those same democratic processes, and the manner in which amendments may be approved is set forth clearly in Article V. Extortion, coercion, and intimidation are not mentioned. British lords struggled for centuries to compel the monarchy to change. That is simply *not* part of the American system of government.

**Congressional “Lawbreaking”
Through the Usurpation of Executive Power
And the Abuse of Legitimate Powers
of Congress and the Senate**

I have already addressed several examples where Congress has “broken the law” of the Constitution. This is not the occasion to try to prepare a laundry list of unconstitutional statutes, but were one inclined to do so it might be useful to start with the congressional reaction to the 1983 *Chadha* case. My good friend Lou Fisher has observed that in the two year period after the Supreme Court declared that “legislative vetoes” were unconstitutional, Congress enacted more than 200 *new* legislative vetoes. I am told by friends who follow legislation closely that it is rare for a major appropriations bill to be enacted without at least one legislative veto.

I’ve written two books and numerous articles addressing the constitutional infirmities of the 1973 War Powers Resolution, and I sense there is a growing consensus today that in its anger over Vietnam Congress clearly

usurped presidential authority in that statute. In a May 19, 1988, colloquy on the Senate floor involving Senators Robert Byrd, Sam Nunn, John Warner, George Mitchell, and perhaps others, the shortcomings of that statute were hit time and again. To provide but one example, Senator Mitchell remarked:

Although portrayed as an effort “to fulfill”—not to alter, amend or adjust—“the intent of the framers of the U.S. Constitution,” the War Powers Resolution actually expands Congress’ authority beyond the power to declare war to the power to limit troop deployment in situations short of war. . .

By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief. . . .

[T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress’ power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.

The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America’s ability to effectively defend our national security.⁸⁴

I am pleased that Dr. Louis Fisher is testifying at this hearing, for in my view he is probably the most able scholar in the land on these issues who supports congressional supremacy. For many years, Lou engaged in an exchange of letters with our mutual friend Eugene Rostow, the former Dean of Yale Law School. Gene asked me to substitute for him in the exchanges, and Lou and I exchanged a letter or two before I was called upon to testify before the House International Relations Committee about twenty years ago on the origins of the War Powers Resolution. I tried to carefully prepare a detailed presentation of the congressional role in getting America into the Vietnam War; and, to my surprise, a few days after the hearing I received a letter from Lou telling me he had been in the audience and was finally persuaded that Congress was a full partner in the Vietnam commitment. But there was still the Korean War, so the “imperial president” concern would go on. (That led me to research that issue, and to discover that Harry Truman consulted carefully with Congress and had Secretary of State Acheson put his “best people” to work drafting legislation for Congress to consider should it become necessary to commit U.S. forces, and repeatedly expressed a desire to go before a joint session of Congress. But everywhere he turned,

⁸⁴ CONG. REC. 6177-78 (daily ed., May 19, 1988).

congressional leaders assured Truman that he had ample authority under the Constitution and the UN Charter to act. So Truman acquiesced to the will of Congress, and as soon as the war became unpopular conservative Republicans like Karl Mundt and Richard Nixon branded it "Truman's War" and accused him of violating the Constitution.⁸⁵

Vietnam was of more than academic interest to me. I spent a good deal of time there between 1968 and coming out during the final evacuation at the end of April 1975, and I lost some good friends there. So much of the debate about Iraq has centered on the alleged "mistakes" of Vietnam that it might be useful to pause for a moment and review that history.

The initial commitment to defend Indochina was made when the Senate in 1955 consented to the ratification of the SEATO Treaty by a vote of 82-1. That treaty pledged us to defend the protocol states (Laos, Cambodia, and South Vietnam) from communist aggression. And when it became clear that South Vietnam was facing such aggression, Congress pushed Lyndon Johnson to "do something" about the problem. A former Senate Majority Leader who had watched what Korea did to Harry Truman, LBJ was not going to do anything without getting Congress formally on board. So when North Vietnamese boats attacked the *U.S.S. Maddox* in international waters on August 2, 1964 (a fact Hanoi has admitted), Johnson sought statutory authorization from Congress. The Southeast Asia Resolution provided in part:

Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

In case there was any doubt that Congress was formally authorizing the President to go to war, this colloquy took place on the Senate floor during the debate between Senate Foreign Relations Committee Chairman J. William Fulbright and the Ranking Republican, John Sherman Cooper:

Mr. Cooper. Does the Senator consider that in enacting this resolution we are satisfying that requirement [the

⁸⁵ See, Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*. 19 HARV. J. L. & PUB. POL. 533 (1996).

“constitutional processes” requirement] of Article IV of the Southeast Asia Collective Defense treaty? In other words, are we not giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

Mr. Fulbright. I think that is correct.

Mr. Cooper. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into **war**, we will give that authority by this resolution?

Mr. Fulbright. That is the way I would interpret it.⁸⁶

Congress went on to approve that statute by a 99.6% majority, more than tripling Johnson’s appropriations request in the process. Looking back on this three years later in connection with the National Commitments Resolution, the Senate Foreign Relations Committee declared in its report: “The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to . . . the Gulf of Tonkin are a proper method of granting authority.”⁸⁷

In the early years, Congress approved large appropriations for the war by 90 percent majorities in both houses. But then the anti-war movement began having an effect, and legislators started picking up the charge that LBJ had “lied” to Congress when he accused Hanoi of “Aggression from the North.” I remember as a Senate staff member as late as 1974 sitting on the couch in the back of the Senate chamber and listening as a current member of this Committee asserted that the government was not telling the truth about the National Liberation Front, which he assured his colleagues was *independent* of Hanoi. Having just completed writing a 500-page book on the history of *Vietnamese Communism*,⁸⁸ I knew then he was mistaken. And after the war ended, Hanoi repeatedly bragged about the *Lao Dong* Party’s success in deceiving Americans and told the story of the May 1959 Politburo decision to open the Ho Chi Minh Trail and liberate South Vietnam by force.⁸⁹

The charge that LBJ had illegally gone to war without a formal “declaration of war” was picked up by legislators as well, although some had the integrity to acknowledge Congress has in fact been a full partner in the decision. Senator Jacob Javits, for example – who was one of my

⁸⁶ 110 CONG. REC. 18049 (1964) (bold emphasis added).

⁸⁷ Sen. Rep’t No. 90-797 (1967).

⁸⁸ ROBERT F. TURNER, *VIETNAMESE COMMUNISM: ITS ORIGINS AND DEVELOPMENT* (1975).

⁸⁹ See, e.g., *Opening the Trail*, *VIETNAM COURIER* 9 (Hanoi, May 1984).

favorites during my years as a Senate staff member – asserted in March 1966: “It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy.”⁹⁰ Yet in 1973 Javits explained the need for the War Powers Resolution by arguing that it was “a bill to end the practice of presidential war and thus to prevent future Vietnams. . . . The War Powers Act would assure that any further decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.”⁹¹

In reality, it is absolutely clear that the War Powers Resolution would not have affected the decision to go to war in Indochina. Section 2(c)(2) of that statute expressly recognizes the “constitutional power of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . pursuant to . . . specific statutory authorization,” which is exactly what the August 1964 Southeast Asia Resolution was. And that joint resolution authorized the President not only to assist South Vietnam, but all of the SEATO Treaty protocol states, including Cambodia. (So much for the demands that President Nixon be impeached for extending the war into Cambodia in 1970.⁹²)

As I hear people talk about Iraq being an “unwinnable” war, I am reminded of similar allegations about the war in Vietnam many decades ago (and still today). I don’t know how closely any of you have been following the literature, but Yale University’s distinguished Professor John Lewis Gaddis was certainly correct two years ago writing in *Foreign Affairs* when he observed that “Historians now acknowledge that American counterinsurgency operations in Vietnam were succeeding during the final years of that conflict”⁹³ One of the best early recognitions of this reality was by my late friend Bill Colby in his excellent book *Lost Victory*. Lewis Sorley’s highly-regarded *A Better War* makes the same point, as have many other recent volumes. Even more interesting, there have now been several accounts from former North Vietnamese⁹⁴ and Viet Cong⁹⁵ leaders who concede we had them on the

⁹⁰ Quoted in ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY* 33-34 (1991).

⁹¹ *Id.* 34.

⁹² Particularly good on the issue of the legality of the war in Cambodia is the late John Hart Ely’s *War and Responsibility*, which notes that FDR did not seek additional congressional authority to invade North Africa to do battle with German military forces there.

⁹³ John Lewis Gaddis, *Grand Strategy in the Second Term*, FOREIGN AFFAIRS, Jan-Feb. 2005, available on line at: <http://www.foreignaffairs.org/20050101faessay84101-p30/john-lewis-gaddis/grand-strategy-in-the-second-term.html>.

⁹⁴ See for example the interview with former North Vietnamese Army Col. Bui Tin, who accepted the surrender of South Vietnam on April 30, 1975, and later served as Editor of the Party daily, *Nhan Dan*, in Hanoi, in *How North Vietnam Won the War*, WALL STREET JOURNAL, August 3, 1995 at 8.

⁹⁵ See TRUONG NHU TANG, *A VIET CONG MEMOIR* 58, 142-47.

ropes by the early 1970s and their only chance was that the anti-war movement would pressure Congress to throw in the towel.

Between 1968 and 1975 I visited 42 of South Vietnam's 44 provinces plus Laos and Cambodia, and the improvement in security between 1968 and 1971 was dramatic. Despite press reports to the contrary, the 1968 Tet Offensive was a dramatic defeat for the Communists and combined with the May offensive virtually destroyed the Viet Cong as a fighting force. By the early 1970s the overwhelming number of enemy troops were North Vietnamese regulars. And when they launched their 1972 Spring Offensive (what we sometimes called the "Easter Offensive"), they were driven back with tremendous casualties by South Vietnamese units with only American air support. Many view that as the test that showed South Vietnam could make it on its own without U.S. ground forces.

A few months later, the *Linebacker II* bombing campaign against the Hanoi-Haiphong area left Hanoi totally vulnerable (after its entire supply of SAM-2 missiles had been depleted) and compelled to return to the Paris talks and sign the peace agreement on January 27, 1973. At that point, things looked pretty good to many of us who knew the situation in country and had been following the war closely for many years.

But Congress was angry, and a new class had been elected in 1972 with a pledge to end the war. Protesters said that was the way to "stop the killing" and promote "human rights," and few on the Hill were even interested in listening to people like Bill Colby who really understood what was going on.

So in May 1973, Congress decided to exercise its "power of the purse" to end that war by enacting a rider to a continuing appropriations act that provided:

Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.⁹⁶

The rest, as they say, is history. Both Moscow and Beijing had reduced aid to Hanoi and pressured the Vietnamese Communists to scale back their efforts to conquer their southern neighbor. But as my late friend and colleague Douglas Pike observed, Congress then "snatched defeat from the jaws of victory," Soviet and Chinese aid to Hanoi increased dramatically, and Premier Pham Van Dong told his Politburo comrades

⁹⁶ Pub. L. 93-52, 87 Stat. 130.

that the Americans would not come back now, “even if we offered them candy.” So in flagrant violation of the UN Charter, North Vietnam sent virtually its entire Army (leaving behind only the 325th Division to protect the Hanoi area) to conquer its neighbors behind columns of Soviet-made tanks that would have been easy prey for American airpower had Congress not by statute prevented us from fulfilling John F. Kennedy’s solemn pledge that America would “oppose any foe” for the cause of freedom.

I still remember listening on a couch in the back of the Senate chamber as war critics opposed further aid to our allies, pointing out (correctly) that South Vietnam had billions of dollars worth of aircraft, tanks, and artillery they weren’t even using. (They didn’t explain that the reason was because the U.S. Congress had cut aid so drastically that the South Vietnamese didn’t have fuel for their tanks, spare parts to keep aircraft flyable, or ammunition for their artillery. Amazingly, a more than two-ton 105 mm howitzer is seldom decisive in battle when you are out of ammo.) It was a sad time, and during the final weeks I returned to Vietnam in an effort to help rescue orphans.

Most Americans seem to have turned off their TVs after April 30, 1975, when any reference to “Vietnam” was made; and I wonder how many members of this Committee are aware of what soon happened. In the first three years after the Communists seized control of tiny Cambodia, more people were slaughtered than were killed in combat throughout Indochina during the previous 14 years of war. The Yale University Cambodia Genocide Project⁹⁷ estimates that 1.7 million people were slaughtered by Pol Pot and his comrades, or slightly more than 20 percent of the entire population of Cambodia. Hundreds of thousands of others were killed in Vietnam, and hundreds of thousands more died indirectly as they tried to flee the country in small boats and fell victim to pirates, rough waters, or starvation.

When I watch the anti-Iraq demonstrations on television, I can’t help but recall the indignant protesters who were certain that if we just brought our troops home and cut off aid to the victims of totalitarian aggression there would be “peace” and “human rights” throughout Indochina. And I wonder how many of the old veterans from the Vietnam protest days may have read the story of the “killing fields” in *National Geographic Today* a few years ago, which reported: “Guides explain that bullets were too precious to use for executions. Axes, knives and bamboo sticks were far more common. **As for children, their murderers simply battered them against trees.**”⁹⁸ And the critics were no more accurate in their

⁹⁷ See <http://www.yale.edu/cgp/>.

⁹⁸ “*Killing Fields*” *Lure Tourists to Cambodia*, NATIONAL GEOGRAPHIC TODAY, Jan. 10, 2003, available on line at:

assurances that an American abandonment of our allies would promote “human rights” than they were that it would “stop the killing.” Thirty years after the conquest of South Vietnam, Freedom House continued to rank Communist Vietnam and Laos among the “Worst of the Worst” human rights violators in the world.⁹⁹

None of this had to happen. More than 58,000 Americans gave their lives to try to keep it from happening. And it would *not* have happened had not Congress seized the helm and legislated a Communist victory. And it didn’t stop there.

In 1975 I drafted the “Griffin Amendment” that was designed to keep the Clark Amendment from prohibiting our government from spending appropriated funds to assist the non-Communist forces in Angola resist a Soviet and Cuban intervention designed to seize control of the country. But we could not overcome the warnings of “no more Vietnams.” Nine years later, I was serving as Principal Deputy Assistant Secretary of State for Legislative and Intergovernmental Affairs when we started receiving questions from Capitol Hill about why the Administration wasn’t doing anything about the tens of thousands of Cuban forces in Angola and neighboring states. When we explained that by enacting the Clark Amendment in 1975 Congress had made that unlawful, they were shocked and quickly moved to repeal the (in my view unconstitutional) statute. But as a result of congressional intervention, another half-million or so people lost their lives.¹⁰⁰ Senator Clark, who had assured his colleagues that he had a better understanding of the situation in Angola than did the State Department, lost his bid for reelection in 1978 and left no clear successor on the Hill to manage that particular problem. (I still recall watching in shock when not a single Senator on either side of the aisle so much as raised an eyebrow when Senator Clark, having returned from a three-day junket to Africa, told his colleagues of the lunch he had shared with “Roberto Holden” while there. Apparently, no one else on the floor even realized that the Senate’s “Africa expert” had reversed the name of FNLA leader Holden Roberto.

So if we try to keep score of the harm done by Congress in using conditional appropriations to “stop wars,” we have 1.7 to 2 million in Cambodia, well over half-a-million in South Vietnam, about half-a-million in Angola And let’s not forget the Boland Amendment, which weakened President Reagan’s efforts to stop Communist aggression in Central America and contributed to tens of thousands deaths throughout the region in various guerrilla conflicts.

http://news.nationalgeographic.com/news/2003/01/0110_030110_tvCambodia.html.

(Bold emphasis added.)

⁹⁹ See: <http://www.freedomhouse.org/template.cfm?page=70&release=255>.

¹⁰⁰ For a collection of estimates, see: <http://users.erols.com/mwhite28/warstat3.htm>.

Then there was Beirut in 1982-1983. My friend Fred Tipson, who served as Chief Counsel to the Senate Foreign Relations Committee at the time, told me he had never seen better “consultation” with Congress than occurred prior to joining the multinational force that entered Beirut to promote stability and give the various factions a chance to try to negotiate peace. Every country in the region and every armed faction involved had approved the multinational force, and there was no intention on anyone’s part in Washington to start a “war.”

And to the best of my recollection, not a single member of Congress openly opposed the deployment on the merits. But what many did do – especially members of the opposition party – was demand that the President “comply with the War Powers Resolution” by declaring that he was sending forces “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances” under Section 4(a)(1). By not doing so, House Foreign Affairs Committee Chairman Clement Zablocki declared the President was “eroding the integrity of the law” and threatening to precipitate a “constitutional crisis.”¹⁰¹

Early in the deployment, two Americans had been accidentally killed while trying to defuse a booby-trapped artillery round that had been left behind when the Israelis withdrew from Beirut. That didn’t violate the power of Congress to “declare War” (or any other legislative power), and – despite predictions to the contrary by legislators – it was nearly a year before the first American actually died as a result of hostile fire. This was an understood risk, but hardly evidence President Reagan was sending the Marines “into hostilities.”

It soon became clear that there might be political mileage to be gained from the Beirut controversy, especially if they could portray the President as a “crook” for “violating the law” and there were further casualties. (In fact, Reagan had fully complied with the War Powers Resolution.) The *Washington Post* noted that the “prominent involvement” of Senator Lloyd Bentsen, the chair of the Senate Democratic Campaign Committee, in the dispute “suggest[ed] that the Democrats are doing push-ups for 1984.”¹⁰²

While President Reagan was trying to promote peace in Lebanon, the Senate Democratic Caucus unanimously declared that, as a matter of law, affirmative congressional authorization was necessary for the deployment to continue. (While there were risks involved, the deployment did not even arguably constitute the initiation of a “war” in violation of

¹⁰¹ WASH. POST, Oct 3, 1982 at B7.

¹⁰² TURNER, REPEALING THE WAR POWERS RESOLUTION 141.

congressional power.) Hearings were held in the Foreign Relations Committee, and for the first time to my recollection, the final Committee report included "Minority Views of all Democratic Committee Members."¹⁰³

General P.X. Kelley,¹⁰⁴ at the time Commandant of the Marine Corps, pleaded with Senators during his Foreign Relations Committee testimony that their vocal and partisan efforts to place time limits on the deployment were endangering the lives of his Marines in Beirut; but he was ignored. When an unnamed White House official repeated the argument, Senator Tom Eagleton angrily declared: "To suggest . . . that congressional insistence that the law be lived up to is somehow giving aid and comfort to the enemy is totally unacceptable."¹⁰⁵

In the end, in what the *Washington Post* characterized as a "highly partisan debate" in which "Democrats labeled it a possible first step toward another Vietnam,"¹⁰⁶ only two Democrats voted in favor of continuing the deployment to promote peace in Lebanon and a shift of only four votes would have defeated the 18-month reauthorization. And even then, Republican Senator Charles Percy, Chairman of the Foreign Relations Committee, suggested that if there were further casualties the issue could be revisited at any time.¹⁰⁷ The *Christian Science Monitor* noted "Congressional hesitation, reservations, and fears are such . . . that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support."¹⁰⁸

At some point, I submit, someone should have been asking what message Congress was sending to our enemies around the world. The answer, of course, was clear. Syrian Foreign Minister Abdel Halim Khaddam told American diplomats that Syria had concluded the United States was "short of breath" and would give up and leave before Syria did.¹⁰⁹ And, shortly after the congressional vote, U.S. intelligence intercepted a message between two radical Muslim groups that said: "If we kill 14 Marines, the rest will leave."¹¹⁰

Without intending to, Congress had virtually placed a bounty on the lives of those Marines. It had told our enemies that we were sharply divided and would likely fold our tents if we suffered more casualties. At dawn

¹⁰³ *Id.*

¹⁰⁴ See P.X. Kelley & Robert F. Turner, *Out of Harm's Way: From Beirut to Haiti, Congress Protects Itself Instead of Our Troops*, WASH. POST, Oct. 23, 1994 at C2.

¹⁰⁵ TURNER, REPEALING THE WAR POWERS RESOLUTION 142.

¹⁰⁶ *Id.* at 141.

¹⁰⁷ *Id.* at 141-42.

¹⁰⁸ *Id.* at 143.

¹⁰⁹ *Id.* at 143-44.

¹¹⁰ *Id.* at 144.

on the morning of October 23, 1983, a terrorist truck bomb broke through the gate the Battalion Landing Team Headquarters and detonated, killing 241 sleeping Marines, soldiers, and sailors. Certainly no one in Congress intended for that to happen. But I don't think it would have happened had not a highly-partisan Congress sent a clear message that America had lost its will and could be driven out if more Marines were killed. One of those enemies who has acknowledged he was influenced by what happened in Beirut was Osama bin Laden, who in 1998 told ABC News that America's retreat following the Beirut bombing proved we were "paper tigers." A 2003 Knight Ridder account observed: "**The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation.**"¹¹¹ I don't think it is an overstatement to conclude that the highly-partisan war powers debate of September 1983 contributed significantly to bin Laden's decision to attack the United States on September 11, 2001.

Mr. Chairman, I only had two days to prepare my testimony and thus cannot possibly go into the kind of detail that might be warranted on this issue. Let me just mention one other example of what I view as congressional "lawbreaking." As I explained in some detail when I testified before this Committee on February 28 and March 31 of last year, until Vietnam it was understood by both Congress and the Executive that – to quote John Jay in *Federalist* No. 64 – the Constitution had left the President "able to manage the business of intelligence as prudence may suggest." I noted that in 1818, the great Henry Clay and others as well observed during a House floor debate that expenditures from the President's "secret service" account "would not be a proper subject for inquiry" by Congress. But as Congress began usurping the constitutional powers of the Commander in Chief, it is perhaps not surprising that it also sought to control the Intelligence Community.

As a Senate staff member, I sat through some of the 1975 hearings of the Church Committee, but I'm not certain where the idea originated for Congress to usurp presidential power in this area. The earliest reference I have found is in a 1969 book by radical activist Richard Barnet, who wrote:

Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their

¹¹¹ Scott Dodd & Peter Smolowitz, *1983 Beirut Bomb Began Era of Terror*, DESERET NEWS, Oct. 19, 2003, available on line at: <http://deseretnews.com/dn/view/0,1249,515039782,00.html> (bold italics added). See also, Brad Smith, *1983 Bombing Marked Turning Point In Terror: The U.S. reaction to the Beirut attack set off a chain of events, some say*, TAMPA TRIB., October 23, 2003.

constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing congressional committee to review the classification system and to monitor secret activities of the government such as the CIA.¹¹²

Whatever the origins of the idea, after a number of successful raids on presidential power in other areas, and with the White House in the hands of a man who had not even been elected as Vice President,¹¹³ the Church and Pike committees delighted in compelling DCI Bill Colby to make public some of the most secret records of the CIA.

Perhaps the most sensational exposés pertained to the CIA's "assassination" program, which resulted in a massive volume from the Church Committee. Of course, if anyone actually bothered to *read* the volume, they would learn that the Church Committee could not document a *single* instance in which anyone employed by or working on behalf of the CIA had ever "assassinated" anyone. Most of the alleged incidents they investigated led them to conclude the charge was false. There were two situations in which the CIA had made plans to kill foreign political leaders, including several attempts to kill Fidel Castro. A plot to kill Patrice Lumumba had also been in the works, but before anything could be done Lumumba was arrested by his own government, escaped from prison, and while trying to flee was captured and murdered by a rival leftist group. The Church report acknowledged that the Castro plots had been carried out at the direction of the White House, and that both DCI Colby and his predecessor at CIA, Richard Helms, had on their own issued internal regulations prohibiting any CIA involvement with "assassination."

When the Supreme Court in the 1967 *Katz* case held that telephone wiretaps were a constitutional "seizure" under the Fourth Amendment, it included a footnote *excluding* national security wiretaps ordered by the President from its holding. The following year, when Congress enacted the Omnibus Safe Streets and Crime Control Act of 1968 and in Title III established rules governing wiretaps, it emphasized that:

Nothing contained in this chapter . . . shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation

¹¹² RICHARD J. BARNET, *THE ECONOMY OF DEATH* 178-789 (1969).

¹¹³ Lest I be misunderstood, I had the greatest respect for President Ford and believe he showed uncommon courage in trying to stand up to some of the congressional power grabs, particularly in the area of war powers. But even he knew that his power base was weakened by the fact that he had been appointed Vice President and then became President only upon the resignation of President Nixon. I was deeply honored when he agreed to write the foreword to my 1991 book, *Repealing the War Powers Resolution*.

against actual or potential attack or other hostile acts of a foreign power, **to obtain foreign intelligence information** deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.¹¹⁴

In the 1972 *Keith* case, the Supreme Court did hold that national security wiretaps of purely *domestic* targets, having no connection with a foreign power, did require search warrants; but it repeatedly emphasized that its holding did not apply to national security wiretaps involving foreign powers or their agents in this country. The Court also noted that national security domestic wiretaps might warrant a different standard than that used for warrants in criminal investigations, and it suggested that Congress might wish to consider enacting new legislation governing national security wiretaps for purely *domestic* targets.

Congress didn't do that. Instead, it pretended that the Court had "invited" it to constrain the President's constitutional authority to wiretap agents of *foreign powers* inside the United States, and in 1978 it enacted the Foreign Intelligence Surveillance Act. I was in the Senate at the time. Attorney General Griffin Bell came to the Senate, and noted that a mere statute could not deprive the President of a power conferred on the Executive by the Constitution. But Congress did not find it desirable to acknowledge that point in the new statute.

In addition to creating the Foreign Intelligence Surveillance Court, the FISA statute also created a FISA Court of Review consisting of U.S. Court of Appeals judges to review appeals from the FISA Court. That special appeals chamber has only issued one opinion to date, in 2002. And in that opinion the Court of Review noted:

[A]ll the other courts to have decided the issue held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.

One might have thought that with the Attorney General and several federal appeals courts – even the appeals court established by the FISA statute itself – asserting that Congress had usurped the President's constitutional power in this area, at least *someone* in Congress might have suggested that the issue be revisited. But nothing was done.

¹¹⁴ 18 USC § 2511(3) (1970) (bold emphasis added).

In the meantime, acting in response to the abuses reported by the Church Committee (most of which had already been discovered and made public by the Attorney General), President Carter and his new Director of Central Intelligence decided that America didn't really *need* a vigorous human intelligence (HUMINT) capability, because space-based platforms could eavesdrop on all sorts of interesting sources for intelligence without the risks inherent in having to deal with the kinds of people who can have ready access to the inner circles of tyranny around the globe. So major cutbacks were made in the CIA's Directorate of Operations, quite possibly setting the stage for some of the intelligence failures associated with the 9/11 attacks. It turns out that for some things there is no good alternative to having agents on the ground.

While serving as Counsel to the President's Intelligence Oversight Board in the 1980s I visited one trouble spot in Latin America that was facing a serious guerrilla threat. While meeting with the CIA Station Chief, I was shocked to learn that the Carter Administration had *shut down* his station in the 1970s on the assumption that we probably really wouldn't need to know what was going on there in the foreseeable future. He lamented the difficulties he had faced in trying to start up a new station from scratch and make new intelligence contacts.

We have all heard about the "risk-avoidance culture" in the Intelligence Community, but few have traced it to a major cause. Both during the Church and Pike hearings in 1975, and later during the Iran-Contra investigations, some legislators seemed to take personal pleasure in searching out and trying to destroy the careers of particularly effective intelligence officers who had carried out the missions assigned by the President with particular skill and dedication. What message did Congress send others in the Intelligence Community in so doing?

Following the Church and Pike hearings, the Carter Administration decided to prosecute the top FBI counter-terrorism officer and the Deputy Director as well, and as a result both received felony prison terms and incurred hundreds-of-thousands of dollars in debt for legal fees. My friend Buck Revell, who later ran FBI counter-terrorism for several years, told me that after those convictions he could not get a single FBI agent to volunteer for counter-intelligence duty.

I'm sure you all remember FBI Special Agent Coleen Rowley, who shared the honor of being *Time* magazine's "Person of the Year" in 2002 with two other female "whistleblowers" because of the scathing memorandum she had written to FBI Director Robert Mueller. According to Ms. Rowley, agents in the Minneapolis FBI office had identified Zacharias Moussaoui as a potential terrorist because he had taken flying lessons without any interest in learning how to land his plane. So she immediately

sought a FISA warrant from the National Security Law Unit at the FBI, and the incompetent bureaucrats in Washington had not even bothered to submit her request to the FISA Court. Understandably, Congress and the American people were outraged at those incompetent FBI lawyers – for if Rowley had received her warrant perhaps the 9/11 attacks could have been prevented. Or so the story went.

In reality, the problem was much different. When Congress in 1978 elected to usurp the President's constitutional authority to wiretap foreign terrorists and their agents in this country, it made it a *felony* for anyone to engage in national security surveillance in this country outside the scope of the FISA statute. And Congress in its wisdom didn't consider the possibility that it might someday be useful to be able to monitor the communications, or conduct other searches or seizures, of foreign terrorists in this country who had no formal connection with any foreign power or terrorist organization. So, yes, the FBI National Security Law Unit did refuse to forward Ms. Rowley's FISA request, but that was because there was no lawful basis to obtain such a warrant. Moussaoui was a nasty character and a clear threat to American national security, but he took neither money nor orders from al Qaeda or any other foreign terrorist organization. He was what we call a "lone wolf," and Congress neglected to consider the need to permit surveillance of that category of terrorists. (Brings to mind Locke's warning that the legislature could not foresee every eventuality by "antecedent, positive, standing law," doesn't it?)

Now, had the FBI lawyers in Washington elected to violate the FISA statute (becoming felons in the process), or merely to submit Rowley's request and see what happened, it would certainly have been rejected by the Office of Intelligence Policy and Review at the Justice Department. And if the lawyers there had ignored the law and sent it forward, the FISA Court would certainly have turned it down. This was not a close call. Finally, in 2003, Congress quietly amended FISA to permit surveillance of lone-wolf terrorists like Moussaoui. But by then, another 3,000 people had died. Is anyone keeping track of the figures?

Is there any reason to believe that our government would have discovered the 9/11 plot if the unconstitutional FISA statute had not made it a felony to act outside its terms? Well, we do have the statement by General Michael Hayden, who served as Director of the National Security Agency from 1999-2005, while discussing the NSA terrorist surveillance program that was disclosed by the *New York Times* in December 2005, that: "Had this program been in effect prior to 9/11, it is my professional judgment

that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such.”¹¹⁵

After the fall of the Soviet empire, a group of left-wing intellectuals in Paris began trying to calculate the total death toll of international Communism in the twentieth century. In the *Black Book of Communism*, as I recall, they agreed on an estimate of between 80 and 100 million. That was the movement we were trying to stop in places like Indochina, Angola, and Central America when Congress grabbed for the helm and ran the ship of state against the rocks.

I wonder if at some point someone ought to do a similar count of the lives lost because members of Congress broke the law and seized critically important powers the American people had to the exclusive discretion of their President so that he might keep them safe. I’m not just talking about 241 Marines in Beirut and perhaps 3,000 victims of the 9/11 attacks, but also the millions killed in Indochina when Congress snatched defeat from the jaws of victory, another half-million in Angola, how many tens-of-thousands in Central America, and perhaps other places as well where signals of weakness and a lack of resolve undermined deterrence and led tyrants to take their chances. Would the Soviets and Cubans have gone into Afghanistan had not Congress gutted our defense budget and undercut our commitments in the 1970s? I don’t know. Would the Iranians have seized our Embassy in Tehran? I don’t know the answer to that one, either. But they might be worth exploring.

**Prudential Considerations:
Do You Really Want Our Enemies to Win
and Have You Forgotten Recent History?**

Like the overwhelming majority of Vietnam veterans, I continue to believe that our commitment to resist Communist aggression there was a noble and important one. By holding out from 1964 to 1973, we bought time for countries like Thailand and Indonesia to strengthen themselves against possible Communist insurgencies. More importantly, during that period China went through a dramatic internal transformation during the Great Proletarian Cultural Revolution. When it emerged, the fraternal socialist duty to promote armed struggle around the globe was no longer high on the agenda. Central Committee Vice Chairman Lin Biao — who had preached this internationalist duty and overseen Chinese assistance to guerrilla movements in Indochina, Thailand, Indonesia, the Philippines,

¹¹⁵ Gen. Michael Hayden, Remarks at National Press Club, Jan. 23, 2006, available on line at: <http://www.fas.org/irp/news/2006/01/hayden012306.html>.

and as far away as Mozambique — was dead. So was Ché Guevara, who had declared that the outcome of Vietnam would determine the future of revolution in the Americas. I think a credible case can be made that, had we simply walked away from Vietnam in 1964, we would quickly have found ourselves facing a dozen or more “Vietnams” throughout the Third World. And we could not have won a dozen such wars. Ike’s threat of “massive retaliation” was credible in 1954, but who would believe we would use nuclear weapons against Moscow after the Soviets acquired the ability to deliver similar weapons against New York and Washington, DC? An early defeat in Indochina could have led to the choice of losing the Cold War one small nation at a time or resorting to nuclear war.

I was less confident about the wisdom of going in to Iraq. Indeed, I commented to friends at the time that I was glad I was a schoolteacher and not back in the policy cluster of the Pentagon, where someone might have honestly cared about my opinions. When the decision was made to go in, I did the best job I could to defend it. In humanitarian terms, that was not hard to do so. And the legal case was far stronger than many recognized.

The very first principle set forth in the first article of the UN Charter is to take effective collective action for the “removal” of “threats to the peace.” Was Saddam Hussein’s regime such a threat? The UN Security Council declared it to be a “threat to the peace” time and again over more than a decade. Like many, I hoped the Security Council would have the courage to follow up on its threats and deal seriously with Saddam. But he was funneling money to important figures in Russia and France, and leaders of both countries had other economic and political reasons to block effective action. So the clear choice became to continue the *status quo* indefinitely, or for other UN members to act collectively outside the framework of the Charter.

I don’t know how many of you read the human rights reports on Iraq put out by the United Nations, or by NGOs like Amnesty International and Human Rights Watch. The UN experts reported that the mortality rate of children under five years of age in the parts of Iraq controlled by Saddam had more than doubled during the 1990s – in no small part, of course, because he refused to take advantage of the oil-for-food program to get humanitarian supplies to his people. Amnesty International estimate that these civilian deaths of under-five children exceeded half-a-million children. And that was just one part of the human rights crisis under Saddam.

As the war was beginning, I wrote a 15,000-word book chapter providing a legal justification for Operation Iraqi Freedom.¹¹⁶ I don’t think there

¹¹⁶ See, Robert F. Turner, *Was Operation Iraqi Freedom Legal?*, in LAURIE MYLROIE, BUSH VS. THE BELTWAY (2003).

was a full paragraph discussing Weapons of Mass Destruction. (Although, like everyone else, I assumed that he had them.) I spoke of the importance of upholding the rule of law, and noted the human consequences when world leaders in Munich in 1938 failed to enforce the prohibition against aggressive war embodied in the Kellogg-Briand Treaty a decade earlier. I wrote of humanitarian intervention, of the rape and torture by Saddam and his thugs, and of the disappearances, refugees and mass graves.

Perhaps I am wrong, but I see some horrible parallels between Iran and Vietnam. As in Vietnam, we went to war in Iraq with the overwhelming approval of the public and strong support from both houses of Congress. In terms of our Constitution, it is a lawful war, fully authorized by Congress.

But as in Vietnam, I hear the lies. "LBJ tricked us into going to war." "George W. Bush invented the idea that Saddam had WMDs in order to carry out a neo-con conspiracy and avenge his father, who Saddam tried to assassinate." Does anyone here truly *believe* that the idea that Saddam Hussein had WMDs, or that he should be removed from power, first came from George W. Bush? Have you forgotten that every senior national security official in the Clinton Administration warned about Saddam's WMDs while George W. Bush was still Governor of Texas? Have you forgotten about the Iraq Liberation Act, unanimously approved by the Senate and passed by a 90 percent majority in the House in 1998 – more than two years before President Bush even moved to Washington – that made reference to the WMD threat and declared it should be U.S. policy to promote the removal of Saddam from power? These allegations clearly have political benefits, but they come at the expense of the security of our country.

As in the later stages of Vietnam, the public is angry and wants something done about the war and the President they have been told has been "lying" and "breaking the law." The President apparently believes he can improve the military situation in Iraq by sending in more troops, and under our Constitution that is without the slightest doubt his prerogative. You may refuse to raise new troops, and even refuse to fund the Department of Defense. As in Vietnam, you can pretty much guarantee that our forces lose the war and that the forces of darkness have a very good chance to prevail. But have you truly considered the consequences?

The issue of somehow rewinding the clock and reconsidering the decision to send troops into Iraq is not an option. Those forces are there. The issue now is what we do in our current situation. We have sent our soldiers into Iraq with the strong authorization of Congress and the support of the American people to deal with a world-class tyrant who had been repeatedly branded a "threat to the peace" by the United Nations Security

Council and this Congress. Saddam was supporting terrorists groups in the Middle East and providing a safe haven to key terrorists who had attacked this country in the past, and we had good reason to believe that he was planning terrorist attacks inside the United States.¹¹⁷ Saddam has been brought to justice¹¹⁸ and is now dead. But the President in seeking authority, and Congress in granting that authority (by a vote of 77-23 in this chamber), also embraced the goal of promoting democracy and the rule of law in Iraq. The 2002 Authorization for the Use of Force in Iraq provided in part: "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.**"¹¹⁹ As I have discussed earlier, such efforts to determine U.S. foreign policy infringe the constitutional authority of the President. And I would add that Congress declared this policy years before George W. Bush even moved to Washington, so all the outrage about Bush leading the country into this war and deceiving Congress about it being desirable to remove Saddam from power doesn't really pass the straight-face test.

To date, we have gone to rescue an endangered neighbor, helped them destroy the rogue tiger that was eating their children, and in the process knocked every hornet and wasp nest in the neighborhood to the ground. The environment is not a good one, and some in Congress have lost their will and want to abandon the commitment – leaving the people of Iraq to

¹¹⁷ See, e.g., *Putin Claims Bush Was Personally Informed*, PRAVDA, June 18, 2004, available on line at: http://english.pravda.ru/main/18/88/350/13132_Putin.html. ("After the events of September 11th and prior to the military operations in Iraq Russian special services were informed several times about the fact that official body of Saddam regime was planning terrorist acts in the United States and beyond the country's borders, stated Russian president Vladimir Putin Friday. . . . According to him, our American colleagues have been supplied with this information, reports RIA "Novosti". "American president George Bush had an opportunity . . . to personally thank head of one of the Russian special services for this information, which he regarded as very important," stated Russian president.)

¹¹⁸ I take some pride in having been the first (in an article co-authored by a colleague) to propose that Saddam Hussein be tried as a war criminal following his invasion of Kuwait, and as Chairman of the ABA Standing Committee on Law and National Security I wrote the first resolution ever approved by the American Bar Association endorsing a war crimes trial. See, John Norton Moore & Robert F. Turner, *Apply the Rule of Law*, INT'L HERALD TRIB., Sept. 12, 1990. Our proposal was that the Security Council authorize such a tribunal. I was delighted with the outcome of the Iraqi trial of Saddam, and believe justice was certainly done. But I was saddened by certain procedural shortcomings in the trial itself and appalled over the manner in which the sentence was carried out.

¹¹⁹ Authorization for the Use of Force in Iraq, H.J. Res. 114, Pub. L. 107-40 (bold emphasis added).

suffer the consequences and sending very clear signals to the rest of the world about American resolve and reliability.

The President wants to try to win. By that, I gather, he means he wants to help the people of Iraq get control over their territory, restore order, and hopefully move in the direction of a democratic government based on the rule of law and recognizing certain fundamental rights of even minorities. It is an uphill struggle, but I think the stakes are worth it if we can prevail.

One of the most important developments that affected our military success in Vietnam was the change in command from General William Westmoreland to General Creighton Abrams. Westmoreland believed in “search and destroy,” which permitted the Viet Cong to reenter villages where we had operated and extract revenge on any who had cooperated with us. Abrams favored “clear and hold,” and along with people like Bill Colby set up an effective system in Vietnam to protect the people that worked. By 1972, with the exception of Quang Tri province in the north, Communist forces in South Vietnam had been driven from the populated areas and were hiding in the mountains of the Central Highlands or the swamps of the Mekong Delta – or camping across the border in Cambodia or Laos.

I’ve never met General Petraeus, but friends who know him well tell me he is a brilliant and creative commander. His Princeton Ph.D. doctoral dissertation, I am told, was on the lessons of Vietnam. He may be our Creighton Abrams for Iraq, and if we can stand united behind him he may yet produce a good outcome from a very difficult situation. But he can’t do it alone. And as in Vietnam, Congress is critically important.

Every sane person today understands that the United States military is the most powerful military force in the history of mankind. In interviewing defectors and prisoners of war in Vietnam, it became clear to me that they never had the slightest expectation that they could beat us on the battlefield. And they never did – not in a *single* major battle during the entire war. Their game plan from the start was to tie us down, inflict casualties, and rely on the “peace movement” and “progressive forces of the world” to sap our will and persuade us to abandon our cause.

I knew a great deal about our enemies in Vietnam, but far less today in Iraq. But surely they perceive that they have no chance in direct combat with our military. They can blow up an IED or a suicide car bomb here and there and kill some of our troops and lots of Iraqi civilians, but when given a chance to engage an American unit in combat they run and hide.

Their one chance of prevailing is if we lose our *will*. And the more it appears to them that our will is failing, the harder they will fight and the

more American troops they will try to kill. I don't question anyone's constitutional right to speak openly and honestly about points of policy disagreement. But I hope you will understand that the current congressional debate over the "surge" deployment not only seeks to usurp powers clearly vested by the Constitution in the President; it also signals our enemies that we have *lost our* will. And if Congress passes any legislation or even a resolution opposing the President's exercise of his constitutional powers, you will make it far more difficult for General Petraeus to accomplish the mission we have given him.

Is the expectation among critics here that if we will simply bring our troops home all will be well in the Middle East? When Congress undermined President Reagan in Lebanon in 1983, we emboldened Syria and Islamic fundamentalists in the process. Do you expect a different result if we are seen as having been driven out of Iraq tomorrow?

I suspect I was one of few Americans who was not shocked at the 9/11 attacks. They did it better than I expected, but I had been giving speeches for years warning that we were going to be hit hard, and the only issue was *when*. But I have been very surprised that they have failed to follow up with new attacks inside this country. I gather the FBI and our Intelligence Community have had successes stopping planned attacks. But I've wondered if one of the reasons we weren't hit again was that, immediately after the 2001 attacks, we stood united as a country and took the war to our enemies. That must have shocked them, and the smart ones must have realized they had awakened a sleeping giant.

The Middle East is filled with frustrated and angry young men, often with decent educations, who see no future for themselves because of the corrupt systems in which they live. They are angry that their countries, with their great heritage as the cradle of civilization, are not taken very seriously by most of the world today and are economically well behind the more developed West. Perhaps not surprisingly, they find it easy to blame the west – and especially the United States – for their plight. We are so militarily strong, so economically rich, and so evidently happy, that it just doesn't seem fair.

Right now, many of them volunteer to sacrifice their lives for their cause and their religion, seeking out Americans in Iraq to try to kill. And do you think that if we bring those Americans home, angry Islamic radicals will decide they have run out of targets and take up golf? Or might they be so inspired by the great victory over the Infidels that the Shia will flock to Iran or its agents in Iraq and the Suni will line up to join al Qaeda and its ilk? The perceived defeat of the United States could do more to swell the ranks of radical Islam than anything else I can imagine. And if we withdraw the current crop of potential "targets" – trained soldiers

protected by body armor and armored vehicles – is there any serious reason to assume our enemies will decide that one great victory is enough and abandon their cause?

My own guess is they will spend some time training the hundreds of thousand if not millions of new recruits who join up, and then look for new targets. The first goal might be to drive Americans out of Jordan, or perhaps Egypt or Saudi Arabia – with the destruction of Israel being a key interim target. American diplomats, oil workers, teachers, and even tourists will become new targets – not only in the Middle East, but in Europe as well. And if we follow the logic that leads some to want us to run from danger in Iraq and pull back to a Fortress America, will our enemies have great difficulty finding volunteers to sneak into this country (or simply come in on student visas) to sacrifice themselves for their victorious cause as suicide bombers in our schools, churches, and shopping centers?

I've been to war. I understand that almost every American who has died in Iraq has left family, and many of them were parents with spouses and children of their own. Each loss is a tragedy. And for each one killed, many more are horribly wounded and disfigured. But the terrible price we are paying might easily be quickly dwarfed if Congress in its wisdom decides to usurp the President's constitutional discretion or even uses its own legitimate powers to tie the hands of our soldiers and their commanders.

By all means, as the protesters say, let us resolve that there shall be "no more Vietnams." But let us first understand what really happened in Vietnam, and why it went wrong. Mistakes are made in all wars, tragic mistakes that often unnecessarily cost the lives of innocent and good people. We've made our share of them in Iraq. But the goal of removing Saddam Hussein from power was not a bad idea, not was it some sort of neo-con "conspiracy." We went to war against an evil man to end his tyranny and give the people of Iraq a chance at human freedom.

I think it is fair to say we have achieved our primary objective. The war to remove Saddam from power has been won. Saddam is dead. His regime is out of power. But new threats have emerged, and the stakes are not merely the safety and freedom of the Iraqi people but the credibility of the United States as well. One of the unusual things about our legal system is that we recognize no "duty to rescue" in the absence of a special relationship (e.g., parent-child) imposing such a duty. But once one elects to undertake a rescue, there is a moral – and in our system a legal – duty to exercise due care, and not to leave the victim in a worst position than you initially found him. Walking away is not going to solve the problem in

Iraq, and it may very well make the situation in the entire Middle East far worse.

In *The Art of War*, the great Chinese military theorist Sun Tzu counsels that “To win 100 victories in 100 battles is not the acme of skill. To subdue the enemy without fighting is the acme of skill.” Deterrence ought to be our goal, and deterrence is founded on two perceptions: *strength* and *will*. No one doubts America’s strength (although we would be stronger had Congress not weakened our Intelligence Community over the past three decades). But our *will* is now very much in question. And unless we can persuade those who wish us harm – be they in Iraq, Iran, North Korea, China, or elsewhere – that we have the will to prevail, our ability to deter will be greatly limited.

In the short run, the President has the constitutional power to decide how to fight this war – and that certainly include the right to redeploy whatever military forces Congress has provided for him to command so as to most effectively protect our interests and do battle with the enemy. That power can not constitutionally be taken away by Congress — directly or indirectly.

In the long run, the President will need new money, new supplies, and probably new forces. Those resources will not come into being without the affirmative action of both houses of Congress. So you will have an opportunity to lawfully guarantee an American defeat in Iraq if that is you wish. You may undermine the sacrifices of the men and women who have given their lives for this cause, and those who have paid other prices as well.

But, before you take that step, I hope you will reflect a bit on the history I have presented this morning and ask yourselves whether you really *want* to do that. My own sense, as an outsider, is that while there are partisan considerations on both sides of the aisle, a major cause of the anger in this matter is an honest perception that the President is refusing to submit to the authority of Congress and a belief that unchecked Executive power is a manifestation of monarchies and not republics. In both hearings at which I testified last year on the NSA terrorist surveillance program, I did not hear a single member argue that we ought not be trying to listen in when al Qaeda members talk to people in this country. The entire issue was rather one of principle – the President is not above the law. As I argued then and have tried to reaffirm this morning, that perception – honest as it may be – is wrong as a matter of constitutional law. It is *Congress* that has been the lawbreaker.

You have succeeded in intimidating the President to subordinate his long-established independent constitutional power to “manage the business of

intelligence as prudence may suggest.” As a result, an additional element of delay has been introduced into our efforts to fight the war against terror. The White House has concluded that this extra delay is acceptable in return for ending the charges that he is a lawbreaker. Were I a betting man, I would suspect that this delay probably won’t make the difference in terms of stopping a catastrophic terrorist attack. But it *could*. And usurping the constitutional powers of the President is, even if no harmful consequences otherwise occur, an unlawful act.

I agree with the conclusion that the President must “obey the law.” But would go one step further. *Congress*, too, must obey the law. And in this country, the supreme law is the *Constitution*. Having spent four decades studying the separation of powers in this area, it is my honest judgment that John Marshall was correct – as were Washington, Jefferson, Madison, Jay, and Hamilton – in noting that the Constitution has given the President a great deal of independent discretion in these matters concerning which neither Congress nor the courts are empowered to act. And when Congress seeks to usurp these powers, as by passing a statute or using conditional appropriations to prevent the President from deciding where to place troops in fighting a war authorized by Congress, *it* becomes the *lawbreaker*.

Thank you, Mr. Chairman. That concludes my prepared statement. I will be pleased to answer questions at the appropriate time.

February 4, 2007
THE WAY WE LIVE NOW

Whose War Powers?

By NOAH FELDMAN

For weeks, Congress has immersed itself in drafting a nonbinding Congressional resolution condemning the president's plan to secure Baghdad by sending 21,500 additional troops to Iraq. Although Democrats and some Republicans have chosen the expedient route of impugning the surge without actually blocking it, some heavy hitters have hinted that Congress could use the power of the purse to force the president to follow its will. Senator Ted Kennedy has introduced legislation that would block the president from adding more troops without specific Congressional authorization.

The president, as usual, is having none of it. In an interview with "60 Minutes," he asserted that Congress had no authority to interfere with his troop deployments. If President Bush sticks to his guns, the question of how far Congress can go to control his war plans is not going to go away. A constitutional conflict is brewing.

Who's right? Lots of ink has been spilled over the relative powers of the president and Congress to begin wars. The War Powers Act of 1973 — whose authority presidents of both parties have been loath to acknowledge — demands that a president terminate use of force after 90 days unless Congress has authorized him to continue. On the question of winding down hostilities, though, almost nothing has been said. The Constitution gives Congress the power to declare war; but does that include the power to undeclare it? If the Iraq conflict were to end with a peace treaty, it would need to be submitted by the president and ratified by two-thirds of the Senate. Our war in Iraq, though, is not likely to end with a treaty of surrender. So far we don't even have an enemy we can talk to.

Constitutional tradition does not clearly resolve this question. Once Congress has authorized a war, as it did the war in Iraq, the president's

power as commander in chief surely allows him to conduct the war without being micromanaged from Capitol Hill. No one believes Congress could legitimately pass a law ordering the Army to take one hill instead of another. During the Civil War, Congress created the Joint Committee on the Conduct of the War, which exercised oversight with a vengeance, debriefing generals after battles and questioning specific tactical choices. But Lincoln struggled fiercely to preserve his decision-making independence, and since then, Congress has mostly avoided this sort of thing in wartime.

From the president's perspective, requiring him not to send more troops to Baghdad is just the kind of armchair quarterbacking that the Constitution prohibits. When it comes to deciding how many troops should be sent where, there is reason to think he's right. Yet Congress commonly attaches riders to appropriation bills saying that funds may not be used for one purpose or another. In theory, Congress could command that no funds appropriated by a certain bill may be used to increase the total number of troops in Iraq. Even if the president moved troops from another front, or used other, unrestricted funds to pay for the troops, such a provision might eventually block the increase of troop numbers or even require a drawdown.

Congress has used the appropriation power to limit combat before — but only to end wars. In 1970, Congress barred use of any funds for troops in Cambodia. And in 1973, after President Nixon agreed to withdraw U.S. troops from Vietnam, Congress set a date after which no funds at all could be used to support combat in Southeast Asia.

Given this historical precedent, there is strong reason to think that the president is within his powers as commander in chief — and beyond the reach of Congress — when he allocates troops. Congress would be on much firmer ground if it exerted its power to pull financing for all troops in Iraq than it would be if it tried to dictate precise troop numbers.

This may sound strange: after all, if Congress can bring all our soldiers home, why can't it stop the president from sending more over? Yet the

paradox is more apparent than real. The constitutional structure of divided powers is designed to discourage Congressional intervention in particular tactical decisions. Congress is the ideal body for expressing the people's will that a war as a whole should be over, but its 535 members are very poorly suited to laying out the order of battle. For that task, a single supreme commander is necessary. Even the War Powers Act treats Congress's decision about going to war as an on-off toggle, not a dimmer switch.

Congress, though, is not yet prepared to demand an immediate and total pullout from Iraq. Neither are the American people, who seem to understand that precipitate withdrawal could turn the present civil war into a conflict of international scope. The Democratic unwillingness to push the president all the way to the wall reflects the broader political will — at least for the moment.

Declining to go for broke leaves Congress in the awkward position of objecting to how the president is fighting the war, not to the fact that he is still fighting it. There is nothing wrong with that stance, of course; there are still some of us who believe that the greatest problem for the United States in Iraq has always been incompetent management. In any case, so long as Congress does not want to end the war outright, it should stick to oversight and not try to dictate tactics.

Noah Feldman, a contributing writer, is a law professor at New York University and adjunct senior fellow at the Council on Foreign Relations.

