

**APPLYING THE WAR POWERS RESOLUTION TO  
THE WAR ON TERRORISM**

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**HEARING**

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION,  
FEDERALISM, AND PROPERTY RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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## **APPLYING THE WAR POWERS RESOLUTION TO THE WAR ON TERRORISM**

**WEDNESDAY, APRIL 17, 2002**

UNITED STATES SENATE,  
SUBCOMMITTEE ON THE CONSTITUTION,  
COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 2:00 p.m., in Room SD-216, Dirksen Senate Office Building, Hon. Russ Feingold, chairman of the subcommittee, presiding.

Present: Senator Feingold.

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

Chairman FEINGOLD. The subcommittee will come to order.

And I would like to start by thanking all the witnesses here for joining us. I will introduce each witness in just a few minutes.

But in general, I must say that I am very pleased to have this opportunity to discuss constitutional war powers with such a very distinguished group of legal commentators.

Today the Constitution Subcommittee will focus on one of the most complicated but ultimately one of the most important constitutional questions confronting the country as we respond to the atrocities of September 11th. We will consider the balance of war powers authority under the Constitution as it relates to our fight against terrorism. We will consider, in short, who decides under our Constitution when the United States will go to war.

This is no easy issue, but it is one that I think Congress is duty-bound to address.

This discussion begins with a remarkable example of cooperation and respect between the two branches of government in exercising shared war powers authority. Before President Bush ordered U.S. military troops into armed conflict to respond to the attacks of September 11th, he took an important and constitutionally mandated step: He asked for and received the consent of Congress. And I supported that resolution.

Senate Joint Resolution 23, which was passed by both houses of Congress and signed into law by the President, provides the President with statutory authorization to prevent future acts of terrorism by responding with all necessary and appropriate force against those responsible for the September 11th attacks on the United States.

In signing the Use of Force Resolution, the President stated that Congress “acted wisely, decisively, and in the finest traditions of our country.” And I could not agree more.

The resolution demonstrated that Congress still has the capacity and the dedication to fulfill its constitutionally mandated responsibility and in so doing to unify the Nation in a time of national crisis.

In fact, I was very proud to have had the opportunity to support that resolution. And on September 14th, I commended the President on the floor of the Senate for recognizing the constitutional role of Congress in authorizing a military response to September 11th.

I also noted that it was particularly important that the resolution explicitly abided by and invoked the 1973 War Powers Resolution.

Through this hearing now we will have an opportunity to explore in more concrete legal terms how the War Powers Resolution applies to the use of force authorization. Specifically, we will consider how the War Powers Resolution must shape our national decision-making process as Congress and the President make tough choices about our future military priorities in responding to terrorist threats.

The War Powers Resolution recognizes the shared constitutional responsibilities of both President and the Congress to make critical decisions concerning the introduction of U.S. armed forces into hostilities. The War Powers Resolution calls for more than just a one-time authorization from Congress to send our forces into battle. By recognizing Congress as custodian of the authority to declare war or otherwise to provide statutory authority to send our troops into harm’s way, the War Powers Resolution also demands regular and meaningful consultations between the two branches of government, both to begin and to sustain our military engagements.

As our founders and many subsequent commentators have recognized, the separation of powers in this area wisely forces us to develop a broad national consensus before placing our fellow citizens in harm’s way.

And as we have seen time and again, the United States is indeed the most formidable military force on this planet, provided our forces and soldiers are entrusted with a clear military goal and through required congressional authorization with a popular mandate to back them up.

The effectiveness to date of our military campaign to respond to the attacks of September 11th demonstrates that our Nation and our military operate at the zenith of moral, political, and military might, when acting under constitutional authority and with a defined, democratic mandate.

Now the President has suggested that the military campaign may one day expand to other theaters of operation. Indeed the news is rife with speculation about future U.S. military targets. Given the complex nature of the threat that confronts us, more expansive responses may well be necessary.

But this hearing will not respond to speculation about any future operations. Instead this hearing is meant to consider how these decisions will be made.

Let me be clear here. We need not consider today the relative merits or risks of any current or future military operation. Such policy discussions are important. But this hearing will consider as a first principle the constitutional framework by which all major war powers decisions must ultimately be made if we are to respect the Constitution and maintain our unity of purpose in our ongoing response to terrorism.

I would ask our witnesses therefore to focus their attention on two overarching questions as we proceed with this discussion.

First, I would ask our witnesses to reflect on the requirements of the standing congressional use of force authorization for the events of September 11th and when, within the limits of the Constitution and War Powers Resolution, new authorizations or consultations would be required as we expand our military operations.

Second, I would also ask the witnesses here to consider how Congress and the administration might implement a system of more meaningful consultations as we move forward in what could become a long and complicated conflict waged on a variety of fronts in a number of countries.

The War Powers Resolution has been set in motion in our present response to terrorism. And Congress has taken an important step to reassert its constitutional responsibility in this area. Now Congress and the President have a chance to balance the power to wage war in the way that the War Powers Resolution dictates and in the way that the Framers of the Constitution intended.

Such cooperation preserves our constitutional structure. It also increases the moral authority of the United States to act forcefully. Given the unprecedented nature of the threat confronting us, a powerful and constitutional unified response remains essential.

And I look forward to the guidance that our witnesses today will give us.

[The prepared statement of Chairman Feingold follows:]

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE  
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the dedication to fulfill its constitutionally mandated responsibility, and in so doing to unify the Nation in a time of national crisis.

I was very proud to have had the opportunity to support that resolution, and on September 14, I commended the President on the floor of the Senate for recognizing the constitutional role of Congress in authorizing a military response to September 11. I also noted that it was particularly important that the resolution explicitly abided by and invoked the 1973 War Powers Resolution. Through this hearing, we now have an opportunity to explore in more concrete legal terms how the War Powers Resolution applies to the use-of-force authorization. Specifically, we will consider how the War Powers Resolution must shape our national decisionmaking process as Congress and the President make tough choices about our future military priorities in responding to terrorist threats.

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As our founders and many subsequent commentators have recognized, the separation of powers in this area wisely forces us to develop a broad national consensus before placing our fellow citizens in harm's way. And as we have seen time and again, the United States is indeed the most formidable military force on this planet, provided our soldiers are entrusted with a clear military goal, and through required Congressional authorization, with a popular mandate to back them up. The effectiveness to date of our military campaign to respond to the attacks of September 11 demonstrates that our Nation and our military operate at the zenith of moral, political, and military might when acting under Constitutional authority and with a defined democratic mandate.

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Chairman FEINGOLD. I certainly would look forward to a statement by a member of the other party, when they come for introductory remarks at the appropriate time.

But at this point I would simply place in the record, without objection, Senator Thurmond's statement that he wanted included in the record.

Senator Thurmond also requested that an article be inserted in the record by John Yoo, one of our witnesses, from the Harvard Journal of Law and Public Policy. Without objection.

[The information referred to is being retained in Committee files:]

Chairman FEINGOLD. And I would ask, without objection, for written testimony of the ACLU to be submitted into the record at this time.

[The prepared statement of the ACLU follows:]

STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION, SUBMITTED BY  
TIMOTHY H. EDGAR, LEGISLATIVE COUNSEL, WASHINGTON, D.C.

Mr. Chairman, Senator Thurmond and members of the Subcommittee:

We commend you for holding this important oversight hearing on applying the War Powers Act to the “war on terrorism.” The War Powers Act provides the framework to ensure that future decisions about whether to use military force will be made not by the President acting alone, but by the President acting with the consent of Congress, as the framers of the Constitution intended. The American Civil Liberties Union is a non-profit, non-partisan organization with almost 300,000 members, dedicating to preserving our civil liberties and our constitutional freedoms even in times of crisis.

The ACLU has been steadfast in its insistence that any decision to use military force must, under our Constitution, receive Congressional approval either through a declaration of war or a joint resolution pursuant to the War Powers Act. These principles apply with equal force to the current “war on terrorism.” The ACLU does not, as a matter of longstanding policy, support or oppose any particular decision to use military force, but does insist that such important decisions involving the lives of American troops require not only consultation with Congress, but approval from the people’s elected representatives.

CONGRESS MUST CONTINUE TO INSIST ON ITS CONSTITUTIONAL ROLE

We strongly urge members of this subcommittee to safeguard Congress’s constitutional role by insisting on respect for the limits of Pub. L. No. 107-40, a joint resolution adopted on September 14, 2001. This measure approves the use of military force in response to terrorist attacks against the World Trade Center and the Pentagon. We think it is important for Congress to be clear about what the resolution does and does not do.

By its express terms, the joint resolution authorizes the President to use 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. . . .” During the past few months, United States military forces in Afghanistan, acting with other nations and pursuant to the joint resolution, have destroyed or captured fighters for Al Qaeda, the organization the President has determined were responsible for the attacks of September 11, and toppled the Taliban; the regime which harbored them.

However, President Bush has also announced, during his State of the Union address, that “[w]hile the most visible military action is in Afghanistan, America is acting elsewhere.” The President announced that military initiatives against terrorism were being undertaken in the Philippines, Bosnia, and off the coast of Africa. The President also issued a warning to the governments of Iran, Iraq and North Korea, whom he termed an “axis of evil,” hinting at possible military action if those governments do not discontinue their efforts to acquire weapons of mass destruction.

On November 13, 2001, President Bush issued a “Military Order” authorizing indefinite detention, and possible trial by military tribunal of non-citizens “in the war on terrorism,” citing the authority of the joint resolution. He did so despite the fact that such military tribunals were last used at a time of declared war. The joint resolution did not declare war, nor had the Congress even hinted it intended to authorize military trials by adopting the resolution.

Congress should set the Administration straight about the limits of the joint resolution. The joint resolution is not a declaration of war, nor is it a *carte blanche* to use military force without further Congressional authorization whenever the President invokes the “war on terrorism.”

## THE AUTHORIZATION OF FORCE RESOLUTION IS NOT A DECLARATION OF WAR

Under the Constitution, only Congress can declare the existence of a “state of war,” a decision with important consequences for civil liberties. In this instance, Congress has chosen not to declare war but has acted instead under the War Powers Act. Congress is permitted to authorize “limited hostilities,” rather than declare a general war. *Talbot v. Seeman*, 5 U.S. 1, 28 (1801). When Congress does so, as it did on September 14, the President is not given all of the authority to wage war that the Constitution permits; instead, he is limited to the authority Congress has given him by statute. As Justice Chase explained:

If a general war is declared, its extent and operation are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal [domestic] laws.

*Bas v. Tingy*, 4 U.S. 37, 43 (1800). In *Little v. Barreme*, 6 U.S. 170 (1804), the Supreme Court struck down, during a “limited war,” a President proclamation allowing the seizure of French vessels sailing “from or to” France, reasoning that Congress had only authorized by statute the seizure of vessels “to” France. *Id.* at 177.

For this reason, among others, we do not believe that the joint resolution gives the President the authority to use military tribunals to indefinitely detain terrorism suspects, try “enemy belligerents” for “law of war” violations,<sup>1</sup> to suspend other important constitutional rights. The joint resolution nowhere mentions the creation of military tribunals or other suspensions of civil and constitutional rights, nor does the debate on the joint resolution indicate that such tribunals were intended or even contemplated by those who voted in its favor.

## THE AUTHORIZATION OF FORCE RESOLUTION CONTAINS IMPORTANT LIMITS

While the resolution of September 14 does not declare war, it does authorize the use of military force. Still, even in this area it cannot and should not be construed by either the President or Congress as a *carte blanche*. Rather, Congress must continue to play an important role in the national debate as the size and scope of any possible military engagement evolves over time. The resolution does not authorize military force against targets which were not involved in the attacks on September 11, or for objectives other than preventing acts of terrorism. The use of military force in such instances would—and should—require additional congressional authorization, and should be considered on their own merits.

The War Powers Act was adopted in 1973, only 9 years after the 1964 Gulf of Tonkin resolution had authorized the President to “take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression” in Southeast Asia. Pub. L. No. 88–408. Having seen Presidents Johnson and Nixon rely on this vague language as a basis for escalating the Vietnam conflict without any further legislative action, Congress passed the War Powers Act as one means of reasserting its vital constitutional role in the decision to commit American forces to battle.

As you know, the War Powers Act contains three basic requirements. First, it requires regular consultation with Congress whenever military action is contemplated: 50 U.S.C. § 1542. Second, the Act requires the President to file a report within 48 hours of when armed forces are introduced “into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstance.” 50 U.S.C. § 1543(1). The report must outline, among other things, “the estimated scope and duration of the hostilities or involvement,” 50 U.S.C. § 1544(a).

Finally, the Act requires Congress to give its consent, either through a declaration of war or “specific statutory authorization,” such as a joint resolution that references the Act. If Congress does not consent within 60 days of the time the report is, or should have been filed, the President must withdraw American forces within 30 days. 50 U.S.C. § 1544(b). The joint resolution adopted by Congress expressly states that it is intended to constitute the “specific statutory authorization” required by the War Powers Act. The resolution also states that it is not intended to supercede any requirement of the War Powers Act.

The War Powers Act gives Congress the means to assert its proper constitutional role with respect to any use of American military force abroad to combat terrorism in the weeks, months, perhaps years ahead. Such use of military force will require

<sup>1</sup> In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court permitted a military commission to be used, during a time of declared war, against “unlawful belligerents” who are “acting under the direction of the armed forces of the enemy.” *Id.* at 37. This authority, the Supreme Court held, gave military commissions the sanction of Congress, but that sanction lasted only “from [war’s] declaration until peace is declared.” *In re Yamashita*, 327 U.S. 1, 11–12 (1946).

difficult and profound moral and foreign policy choices on which the public may well disagree. Through the joint resolution, Congress authorized an initial military response against the perpetrators and those who harbored them. It did not, and under the Constitution it could not, cede its war powers to the President.

#### CONCLUSION

Consistent with the constitutional design of the framers and the language of the War Powers Act, we urge Congress to insist that any Presidential decision to expand the scope or duration of military involvement into a "wider war" involving other nations comply with the strictures of the War Powers Act, including the requirements of consultation, reporting and consent within 60 days of the initiation of hostilities or the deployment of troops where hostilities are likely.

We welcome your continued oversight of the war on terrorism, and we pledge to work with you to ensure against erosion of the War Powers Act and the Constitution's checks and balances. In this time of continued danger from terrorism, the country will be faced with a series of critical decisions regarding the scope and duration of our military commitment. Under both the Constitution and the War Powers Act, those decisions must be made with the concurrence of the people's representatives and not by the President acting alone.

Chairman FEINGOLD. As I said, we have an outstanding panel of witnesses here today, so let me make these introductions brief to give us more time to discuss the important questions before us.

Let us start with John Yoo. John Yoo is a Deputy Assistant Attorney General in the Office of Legal Counsel of the United States Department of Justice. He is on leave from a position as professor of law at the University of California at Berkeley, having joined the faculty there in 1993. He has clerked for Justice Clarence Thomas of the U.S. Supreme Court and also served for a time as general counsel of the Senate Judiciary Committee.

Mr. Yoo has written extensively on war powers issues.

And before you begin, I want to thank you personally and thank the Department of Justice for allowing you to appear today as a part of this distinguished panel.

And you may proceed.

#### **STATEMENT OF JOHN C. YOO, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

Mr. YOO. Thank you, Mr. Chairman. And I want to, on behalf of the department, thank you for having these hearings, or, given the stellar quality of the witnesses, you might call it a faculty meeting. And I will keep referring to you as "Mr. Chairman," although my inclination is to call you "Dean Feingold" for the rest of the afternoon.

Chairman FEINGOLD. Great.

[Laughter.]

Mr. YOO. It is my honor and pleasure to come before you today to testify on the War Powers Resolution of 1973 and the question of presidential war powers under the Constitution. As a former general counsel of the Judiciary Committee, I have long held a deep and abiding respect for this committee and its members. And I look forward to another chance to exchange ideas with members of the committee today on this most important matter.

As you know, the Office of Legal Counsel in which I serve helps the Attorney General fulfill his role as legal adviser to the President, particularly in areas of constitutional law and presidential power.

As this committee is aware, legal scholars have long debated the constitutional allocation of war powers between the President and the Congress and the effect of the War Powers Resolution on that allocation.

This administration follows the course of administrations before us, both Democratic and Republican, in the view that the President's power to engage U.S. armed forces in military hostilities is not limited by the War Powers Resolution. The sources of presidential power can be found in the Constitution itself. And I shall discuss both the War Powers Resolution and the Constitution in today's hearing.

In doing so, I will explain in particular how the President's conduct of the war against terrorism is authorized under the Constitution and consistent with the War Powers Resolution.

First, the War Powers Resolution of 1973. Section 2 of that resolution recognizes that the President may "introduce United States armed forces into hostilities" pursuant to, one, a declaration of war; two, specific statutory authorization or, three, "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."

Section 2 of that resolution, therefore, recognizes the President's power in the current circumstances. The President's decision to use armed forces to combat terrorism and respond to the attacks of September 11th followed in two of the resolution's enumerated provisions for using military force.

First, the United States was viciously attacked on September 11th by members of an international network of terrorists. That attack unequivocally placed the United States in a state of armed conflict justifying a military response, as recognized by Congress, while NATO and the United Nations recognized United States exercise of its right to self-defense.

In response to the September 11th attack, the President immediately issued Proclamation 7463, declaring the existence of a state of national emergency. Thus the conditions recognized by Section 2 of the resolution as justifying the use of force without any further action whatsoever from Congress, an attack on the United States and a resulting national emergency, have each been satisfied.

In addition, the President has specific statutory authorization in the form of Senate Joint Resolution 23. That resolution, which this body approved unanimously last September, states that the President may use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The resolution thus recognizes that the President determines what military actions are necessary to combat those who are associated with the organizations and individuals responsible for September 11th. Thus the President's authority to conduct the war against terrorism is recognized by Section 2 of the War Powers Resolution; Congress has specifically expressed a support for the use of the armed forces; and the United States has suffered an attack.

Moreover, the War Powers Resolution specifically provides, as it must, that “nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President.” This important language recognizes the President’s constitutional authority separate and apart from the War Powers Resolution to engage U.S. armed forces in hostilities.

That brings us to the question: What is the scope of the President’s constitutional power expressly recognized by the resolution? Congress provided an answer when it overwhelmingly approved S.J. Res. 23. That resolution expressly states that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”

As you accurately explained on the Senate floor, this language plainly recognizes “that the President has existing constitutional powers.” This is quite plainly a correct interpretation of the President’s war power under the Constitution.

As I explained in greater detail in my written testimony, that I have submitted for the record, under Article 2, Section 1 of the Constitution, the President is a locus of the entire executive power of the United States and thus, in the Supreme Court’s words, is the sole organ of the Federal Government in the field of international relations. Under Article 2, Section 2, he is the Commander in Chief of the armed forces.

These two provisions give the President the constitutional authority to introduce U.S. armed forces into hostilities when appropriate, with or without specific congressional authorization.

Notably, nothing in the text of the Constitution requires the advice and consent of the Senate or the authorization of Congress before the President may exercise the executive power and his authority as Commander in Chief.

Thus in 1999 the Clinton administration relied on the President’s constitutional authority to use force in Kosovo. Assistant Secretary of State Barbara Larkin testified before Congress that April that, “There is no need for a declaration of war. Every use of U.S. armed forces since World War II has been undertaken pursuant to the President’s constitutional authority. This administration, like previous administrations, takes a view that the President has broad authority as Commander in Chief and, under his authority to conduct foreign relations, to authorize the use of force in the national interest.”

That said, although the last administration, like its predecessors, questioned the wisdom and the constitutionality of the War Powers Resolution, it is this administration’s belief that government works best when the two branches cooperate in matters concerning the use of U.S. armed forces. Accordingly, we are committed to close consultation with Congress whenever possible regarding the need to use force to combat terrorism and to protect our national interests whenever possible.

We value the views of Congress regarding the appropriate use of military force, as evidenced by our close and meaningful consultations with Congress after the attacks of September 11th and before the introduction of U.S. armed forces into Afghanistan on October 7th, 2001.

In addition to the President himself addressing a joint session of Congress on September 20th, senior members of the administration briefed Members of Congress and their staffs on over 10 occasions in that short time period. One result of these consultations was the enactment of S.J. Res. 23, which the President welcomed.

At the same time, however, we must recognize that we are in a war against—again to use your words—“a loose network of terrorists,” and not “a state with clearly defined borders.” When fighting—again to use your words—“a highly mobile, diffuse enemy that operates largely beyond the reach of our conventional war-fighting techniques,” extensive congressional discussion will often be a luxury we cannot afford. Our enemy hides in the civilian populations of the nations of the world.

As you pointed out, “There can be no peace treaty with such an enemy.” Likewise, sometimes there can be no formal public declaration of war against such an enemy.

The attacks of September 11th introduced the United States into an unprecedented military situation. This administration is confident that the allocation of war powers contemplated by the founders of our Constitution is fully adequate to address the dangers of the 21 century and that armed with the war powers conferred upon him by the Constitution and recognized by the resolution, the President will be able to work effectively with this committee and with Congress to assure the protection of the United States from an additional terrorist attack.

Thank you, Mr. Chairman, for this opportunity to discuss these important issues with the committee. And I am happy to respond to any questions that you may have.

[The prepared statement of Mr. Yoo follows:]

STATEMENT OF JOHN C. YOO, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF  
LEGAL COUNSEL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman and Members of this Subcommittee:

It is my honor and pleasure to come before you today, to testify on the war powers resolution of 1973 and presidential war powers under the constitution. As a former general counsel of the Senate Judiciary Committee, I have long held a deep and abiding respect for this Committee and all of its Members. I look forward to another thoughtful exchange of ideas with the Members of the Committee today on this most important matter.

I currently serve as Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice. As you know, that office helps the Attorney General fulfill his role as legal advisor to the President, particularly in areas of constitutional law and presidential power.

As this Committee is aware, legal scholars have long debated the constitutional allocation of war powers between the President and the Congress, and the effect of the war powers resolution on that allocation. This administration follows the course of administrations before us, both Democratic and Republican, in the view that the President’s power to engage U.S. Armed Forces in military hostilities is not limited by the War Powers Resolution. The sources of presidential power can be found in the Constitution itself. I shall discuss both the war Powers Resolution and the Constitution today. In doing so, I will explain in particular how the President’s conduct of the war against terrorism is authorized under the Constitution and consistent with the War Powers Resolution.

First, the War Powers Resolution of 1973. Section 2 of that resolution recognizes that the President may “introduce United States Armed Forces into hostilities” Pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) “a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”

Section 2 of the resolution recognizes the president’s broad power in the current circumstances. The president’s decision to use armed forces to combat terrorism and

respond to the attacks of September 11 fall within two of the resolution's enumerated provisions for using military force. First, the United States was attacked on September 11 by members of an international network of terrorists. That attack unequivocally placed the United States in a state of armed conflict, justifying a military response, as recognized by Congress, while NATO and the United Nations recognized the U.S.' exercise of its right to self defense. In response to the September 11 attack, the President immediately issued proclamation 7463, declaring the existence of a state of national emergency. Thus, the conditions recognized by section 2 of the resolution as justifying the use of force without any action whatsoever from Congress—an attack on the United States, and a resulting national emergency—have each been satisfied.

In addition, the President has specific statutory authorization, in the form of S.J. Res. 23 (Pub. L. 107-40). That resolution, which this body approved unanimously last September, states that the President may “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The resolution thus recognizes that the President determines what military actions are necessary to combat those who are associated with the organizations and individuals responsible for September 11.

Thus, the President's authority to conduct the war against terrorism is recognized by section 2 of the War Powers Resolution. Congress has specifically expressed its support for the use of the armed forces, and the United States has suffered an attack.

Moreover, the War Powers Resolution specifically provides, as it must, that “nothing in this joint resolution is intended to alter the constitutional authority of the Congress or of the President.” This important language recognizes the President's constitutional authority, separate and apart from the War Powers Resolution, to engage U.S. Armed Forces in hostilities. That brings us to the question: what is the scope of the President's constitutional power, expressly recognized by the resolution?

Congress provided an answer when it overwhelmingly approved S.J. Res. 23. That resolution expressly states “that the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.” As Chairman Feingold accurately explained on the Senate floor, this language plainly recognizes “that the President has existing constitutional powers.”

This is quite plainly a correct interpretation of the President's war power under the Constitution. The relevant scholarly works could fill this entire room, but I will try to summarize the argument briefly here. Under Article II, Section 1 of the Constitution, the President is the locus of the entire “executive power” of the United States and, thus, in the Supreme Court's words, “the sole organ of the Federal Government in the field of international relations.” Under Article II, Section 2, he is the “commander in chief” of the armed forces of the United States. These two provisions make clear that the President has the constitutional authority to introduce U.S. Armed Forces into hostilities when appropriate, with or without specific congressional authorization.

Notably, nothing in the text of the Constitution requires the advice and consent of the Senate, or the authorization of Congress, before the President may exercise the executive power and his authority as commander in chief. By contrast, Article II requires the President to seek the advice and consent of Senate before entering into treaties or appointing ambassadors. Article I, Section 10 denies states the power to “engage” in war, except with congressional authorization or in case of actual invasion or imminent danger. Article III describes the offense of treason as the act of levying war against the United States. Moreover, founding documents prior to the U.S. Constitution, such as the South Carolina Constitution of 1778, expressly prohibited the executive from commencing war or concluding peace without legislative approval. The founders of the Constitution thus knew how to constrain the President's power to exercise his authority as commander in chief to engage U.S. Armed Forces in hostilities, and decided not to do so.

Of course, as the President has the constitutional authority to engage U.S. Armed Forces in hostilities, Congress has a broad range of war powers as well. Congress has the power to tax and to spend. Congress has the power to raise and support armies and to provide and maintain a navy. And Congress has the power to call forth the militia, and to make rules for the Government and regulation of the armed forces. In other words, although the President has the power of the sword, Congress has the power of the purse. As James Madison explained during the critical constitutional ratifying convention of Virginia, “the sword is in the hands of the British King; the purse in the hands of the Parliament. It is so in America, as far as any

analogy can exist.” The President is commander in chief, but he commands only those military forces which Congress has provided.

Congress also has the power to declare war. This power to declare a legal state of war and to notify other nations of that status once had an important effect under the law of nations, and continues to trigger significant domestic statutory powers as well, such as under the Alien Enemy Act of 1798 (50 U.S.C. §21) and Federal surveillance laws (50 U.S.C. §§ 1811, 1829, 1844). But this power has seldom been used. Although U.S. Armed Forces have, by conservative estimates, been deployed well over a hundred times in our Nation’s history, Congress has declared war just five times. This long practice of U.S. engagement in military hostilities without a declaration of war demonstrates that previous Presidents and Congresses have interpreted the Constitution as we do today.

As the United States rose to global prominence in the post-World War II era, Congress has provided the President with a large and powerful peacetime military force. Presidents of both parties have long used that military force to protect the national interest, even though Congress has not declared war since World War II. President Truman introduced U.S. Armed Forces into Korea in 1950 without prior congressional approval. President Kennedy claimed constitutional authority to act alone in response to the Cuban missile crisis by deploying a naval quarantine around Cuba. Presidents Kennedy and Johnson dramatically expanded the U.S. military commitment in Vietnam absent a declaration of war.

In response to President Nixon’s expansion of the Vietnam War into Laos and Cambodia, Congress approved the War Powers Resolution, but that resolution expressly disclaimed any intrusion into the President’s constitutional war power. Accordingly, Presidents Ford, Carter, Reagan, and the first President Bush have committed U.S. Armed Forces on a number of occasions. In these cases, the administration has generally consulted with, notified, and reported to Congress, consistent with the War Powers Resolution.

President Clinton deployed U.S. Armed forces in Somalia, Haiti, and Bosnia—all without prior congressional authorization. In 1999, the Clinton administration relied on the President’s constitutional authority to use force in Kosovo. Assistant Secretary of State Barbara Larkin testified before Congress that April that “there is no need for a declaration of war. Every use of U.S. Armed Forces, since World War II, has been undertaken pursuant to the President’s constitutional authority. . . . This administration, like previous administrations, takes the view that the President has broad authority as commander in chief and under his authority to conduct foreign relations, to authorize the use of force in the national interest.”

In short, Presidents throughout U.S. history have exercised broad unilateral power to engage U.S. Armed Forces in hostilities. Congress has repeatedly recognized the existence of presidential constitutional war power, in the War Powers Resolution of 1973, and more recently in S.J. Res. 23, and the courts have supported this view as well. As the Supreme Court noted in *Hamilton v. Dillin* (1874), it is “the President alone, who is constitutionally invested with the entire charge of hostile operations.” significantly, the Courts have never stopped the President from deploying U.S. Armed Forces or engaging them in hostilities—most recently, in the case of *Campbell v. Clinton*.

That said, although the last administration, like its predecessors, questioned the wisdom and the constitutionality of the War Powers Resolution, it is our belief that Government works best when the two branches cooperate in matters concerning the use of U.S. Armed Forces. Accordingly, We are committed to close consultations with Congress whenever possible regarding the need to use force to combat terrorism and to protect our national interest, whenever possible. We value the views of Congress regarding the appropriate use of military force, as evidenced by our close and meaningful consultations with Congress after the attacks of September 11, and before the introduction of U.S. Armed Forces into combat action in Afghanistan on October 7, 2001. In addition to The President himself addressing a joint session of Congress on September 20, senior members of the Administration briefed Members of Congress and their staffs on over 10 occasions in that short time period. One result of these consultations was the enactment of S.J. Res 23, which the President welcomed.

At the same time, however, we must recognize that we are in a war against, to use Chairman Feingold’s words again, “a loose network of terrorists,” and not “a state with clearly defined borders.” when fighting “a highly mobile, diffuse enemy that operates largely beyond the reach of our conventional war-fighting techniques,” extensive congressional discussion will often be a luxury we cannot afford. Our enemy hides in The civilian populations of the nations of the world. As Chairman Feingold pointed out, “there can be no peace treaty with such an enemy.” Likewise, there can be no formal, public declaration of war against such an enemy.

The attacks of September 11 introduced the United States into an unprecedented military situation. This administration is confident that the allocation of war powers contemplated by the founders of our Constitution is fully adequate to address the dangers of the twenty-first century, and that, armed with the war powers conferred upon him by the Constitution and recognized by the War Powers Resolution, the President will be able to work effectively with this Committee and with Congress to ensure the protection of the United States from additional terrorist attack.

Thank you, Mr. Chairman and Members, for this opportunity to discuss these important issues with the Committee. I am happy to respond to any questions which you may have.

Chairman FEINGOLD. Thank you again, Mr. Yoo, very much for appearing before us. And we will have the opportunity to raise some questions with you.

But now we will go to our second witness, Louis Fisher, who is a senior specialist in separation of powers with the Congressional Research Service of the Library of Congress. He began his work with CRS in 1970, and he served as research director of the House Iran–Contra committee in 1987.

He has also written extensively on the topic of war powers and has co-edited a four-volume encyclopedia of the American presidency.

He received his doctorate in political science from the New School for Social Research and has taught at a number of colleges and universities.

And it is a pleasure to welcome you here. I have quoted you frequently. It is good to see you. You may proceed.

**STATEMENT OF LOUIS FISHER, SENIOR SPECIALIST IN SEPARATION OF POWERS, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WASHINGTON, D.C.**

Mr. FISHER. Thank you very much.

And thank you for holding a hearing with the big question of how a democracy goes to war. Is that done unilaterally by the President, or is it done in concert with the elected representatives? And on the second question you raised, about consultation devices that might be used to improve relationships between the two branches.

It is my own view that the Constitution contemplates that, in initiating war against another country, the two branches shall not just consult but that the President shall obtain in advance authority from Congress, as was done regularly from 1789 to 1950. Of course, President Truman's action in Korea changed that fundamentally. And I will talk about that.

But even since that time, there have been a number of occasions, Iraq in January 1991 and last year, where authorization was obtained in advance.

On consultation, that has been debated at least for three decades to my knowledge with different techniques. And whatever is done through consultation does not, for me, become a substitute for authorization. That is, if the President met with Members of Congress every week and shared every piece of confidential, classified information, it is not a substitute for what the Constitution requires.

“Collective judgment” are the words in the War Powers Resolution. And by putting those two words in, in 1973, Members of the Congress reflected the Framers' decision to break with the model

of the 1780s that put all of foreign affairs, all of war powers, all of external affairs in the executive. And that was the model developed by John Locke, the model developed by William Blackstone.

And I do not think there could be a clearer repudiation of it than just to read the Constitution and see that those prerogatives in foreign affairs that had been placed in the executive are either placed in Article 1 under Congress or they are placed jointly with the Senate and the President on treaties and appointing ambassadors.

For over 160 years, Members of Congress, people in the executive branch and the federal courts all recognized consistently that when the country goes from the state of peace to a state of war, the President comes to Congress for authority in advance. There are certain defensive actions that a President may take.

And you and I are both familiar, over those years, 160 years, there were examples where Presidents used military force without authority from Congress. But those are fairly small-scale actions, chasing bandits over the borders and doing various things, certainly not major military actions.

All the military major actions were done either by declaration of war or by an authorization. There is confusion at times. Even the Barbary pirates people think that Jefferson and Madison acted unilaterally. Of course, they did not. They came to Congress. And there were 10 statutes authorizing even those actions.

There is power of the purse, of course, but I do not think that is the check that Congress wants to rely on. Otherwise, it would mean that a President could initiate war and continue war, and the burden would be on you to pass in an appropriations bill restrictive language. Of course, that most likely would be vetoed. And now you need two-thirds in each house.

That means the President could start a war and continue with it so long as he had one-third plus one in one house. And that is exactly, as you remember, what the Congress ran into in 1973 when it tried to cut off funds. President Nixon vetoed it.

And there is an interesting case in New York that I talk about in my statement where the judge said it cannot be the meaning that a President can start a war and continue it so long as he has one-third plus one in one chamber.

What led to the War Powers Resolution? Why do we have this thrust of power to the President? I talk in my statement about two enormous contributions to that, the UN Charter and mutual security pacts, particularly NATO, where we are now in the pattern of Presidents not coming to Congress for authority but going to the Security Council for "authority" or going to NATO members for "authority."

The record is quite dramatic that in the Senate, adopting the UN Charter and adopting those mutual security pacts never intended the President to act unilaterally. In fact, Truman from Potsdam called the Senate and said that: Any time that I enter into a special agreement with the Security Council, I will come to Congress first and get approval, get authority. And the U.N. Participation Act also provides expressly for authority.

Nevertheless, Presidents have been doing this, and Congress has not provided a check or confrontation on this.

But those are two large reasons why power has gravitated to the President.

I talk about Eisenhower's model. Eisenhower thought that President Truman made a mistake going into Korea unilaterally, a political mistake, a constitutional mistake. And it was Eisenhower's practice to work jointly, not just through consultation but by getting authority from Congress for area resolutions.

And when it was suggested that he go into Indochina, he said he would never do that unless he has the authority of Congress first. So that was the model, I think a good sound model, reflecting constitutional values.

I speak about other developments of the War Powers Resolution. The War Powers Resolution tried to marry what came out of the House, a very liberal grant of power, and what came out of the Senate, very restrictive. And of course what came out in conference is a compromise between the two. That should be no problem in most cases. This time I think it compromised the Constitution by recognizing that Presidents can go to war for 60 to 90 days on their own judgment without any involvement of Congress.

The Use of Force Act of last year can be read. It is a very short act. You can look at different words in there, that it talks about not nation, but plural "nations." It talks about "he determines." But I think in interpreting that act, the guidance has to be the Constitution, not trying to parse a statute that was passed in a very short amount of time, trying to give adequate authority to the President.

My own judgment is that any future action militarily against another country, a second or third country, requires congressional authority and cannot be done under what Congress passed last year.

Thank you very much.

[The prepared statement of Mr. Fisher follows:]

STATEMENT OF LOUIS FISHER, SENIOR SPECIALIST IN SEPARATION OF POWER,  
CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, WASHINGTON, D.C.

Mr. Chairman, thank you for inviting me to testify on a most important issue: how Congress and the President commit the Nation to war. Events of September 11 and the war against terrorism have brought this issue again into sharp focus. The Use of Force Act of September 18, 2001, authorized military action against the terrorist network involved in the terrorist attacks of September 11. In my judgment, however, military operations against countries other than Afghanistan can be appropriately initiated only with additional authorization from Congress. Moreover, whatever mechanisms are devised to improve consultation between the two branches will not satisfy the constitutional need for congressional authorization. The reasons for these conclusions are set forth below.

We debate the constitutionality of war power actions because of a rock-bottom belief held by the framers: It is possible to structure government in such a way to protect individual liberties and freedoms. We refer to this concept in different ways: separation of powers, checks and balances, pitting ambition against ambition. To the framers, it meant that the clash between institutions is the safest and best way of formulating national policy, whether domestic or foreign. The War Powers Resolution (WPR) relies on this same concept but uses different words: "collective judgment."

#### COLLECTIVE JUDGMENT

Section 2(a) of the WPR states that it is "the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,

and to the continued use of such forces in hostilities or in such situations.” 87 Stat. 555, § 2(a) (1973).

Why the emphasis on “collective judgment”? Why not let the President initiate war without congressional authority? 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), placed 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 send and receive Ambassadors, to make war or peace, to make treaties, to issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and to raise and regulate fleets and armies.

The framers studied this monarchical model and repudiated it in its entirety. They placed Locke’s federative powers and Blackstone’s royal prerogatives either exclusively in Congress or as a shared power between the Senate and the President (appointing Ambassadors and making treaties). The rejection of the British model and monarchy could not have been more complete.

While the “original intent” of many constitutional provisions is debatable, there is no doubt about the framers’ determination to vest in Congress the sole authority to take the country from a State of peace to a State of war. From 1789 to 1950, lawmakers, the courts, and the executive branch understood that only Congress could initiate offensive actions against other nations.<sup>1</sup> As I will explain later, matters changed fundamentally in 1950 when President Harry Truman took the country to war in Korea without seeking congressional authority.

Admittedly, some scholars—particularly John Yoo—argue that the framers designed a system to “encourage Presidential initiative in war” and that the Constitution’s provisions “did not break with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps.”<sup>2</sup> This is not the place to analyze Yoo’s work in detail, for that has been done elsewhere.<sup>3</sup> Suffice it to say that had the framers adopted the English model, they wouldn’t have written Articles I and II the way they did. Here it is unnecessary to debate the framers’ intent. It is enough to look at the plain text of the Constitution. If the framers had indeed adopted “the traditional British approach to war powers,”<sup>4</sup> they would have written Article II to give the President the power to declare war, to issue letters of marque and reprisal, and to raise armies, along with other powers of external affairs that are reserved to Congress.

I won’t repeat here the many statements of framers who believed that they had stripped the Executive of the power to take the country to war. At the Philadelphia convention, George Mason said he was “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 318–19. 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.” 2 Farrand 318.

The framers gave Congress the power to initiate war because they believed that Presidents, in their search for fame and personal glory, would have too great an appetite for war.<sup>5</sup> John Jay, generally supportive of executive power, 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.”

In studying history and politics, the framers came to fear the Executive’s potential appetite for war. Has human nature changed in recent decades to permit us to trust

<sup>1</sup>Louis Fisher, *Presidential War Power* (1995); John Hart Ely, *War and Responsibility* (1993); David Gray Adler, “The Constitution and Presidential Warmaking: The Enduring Debate,” 103 *Pol. Sci. Q.* 1 (1998); Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War* (1986).

<sup>2</sup>John C. Yoo, “The Continuation of Politics by Other Means: The Original Understanding of War Powers,” 84 *Cal. L. Rev.* 167, 174, 197 (1996).

<sup>3</sup>Louis Fisher, “Unchecked Presidential Wars,” 148 *U. Pa. L. Rev.* 1637, 1658–68 (2000).

<sup>4</sup>Yoo, “The Continuation of Politics by Other Means,” at 242.

<sup>5</sup>William Michael Treanor, “Fame, The Founding, and the Power to Declare War,” 82 *Corn. L. Rev.* 695 (1997).

independent Presidential decisions in war? The historical record tells us that what Jay said in 1788 applies equally well to contemporary times.

#### POWER OF THE PURSE

John Yoo recognizes that Congress has the constitutional power to check Presidential wars: It can withhold appropriations. Congress “could express its opposition to executive war decisions only by exercising its powers over funding and impeachment.”<sup>6</sup> The spending power, he writes, “may be the only means for legislative control over war.”<sup>7</sup> Constitutionally, this kind of analysis puts Congress in the back seat. Yoo allows Presidents to initiate wars and continue them until Congress is able to cutoff funds. The advantage to the President is striking. Executive wars may persist so long as the President has one-third plus one in a single chamber to prevent Congress from overriding his veto of a funding-cutoff.

This general issue took real form in 1973 when Congress passed legislation to deny funds for the war in Southeast Asia. After President Nixon vetoed the bill, the House effort to override failed on a vote of 241 to 173, or 35 votes short of the necessary two-thirds majority. 119 Cong. Rec. 21778 (1973). A lawsuit filed by Representative Elizabeth Holtzman (D-N.Y.) 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. District Judge Judd 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 has not authorized.”<sup>8</sup> Appellate courts mooted the case because the August 15 compromise resolved the dispute between the two branches.<sup>9</sup>

#### THE ROAD TO THE WAR POWERS RESOLUTION

How have Presidents acquired so much independent power to take the country to war, contrary to what the framers intended? It may be tempting to say that the reason lies in the worldwide responsibilities that moved to the United States in the twentieth century. Yet the two greatest conflagrations—World Wars I and II—were both declared by Congress pursuant to the Constitution. Other conflicts, including Iraq in 1991 and the war against terrorism in 2001, were authorized by Congress.

In 1973, lawmakers decided that a statute was necessary to curb Presidential wars and protect legislative prerogatives. What created the impetus for the War Powers Resolution? At the top of the list I would put the U.N. Charter and several mutual security pacts, particularly NATO. Although it was not the intent at the time, both treaties have in practice led to unilateral executive wars. Presidents sought authority not from Congress but from international and regional bodies. I have covered this development elsewhere,<sup>10</sup> but will identify the main points here.

Truman in Korea, Bush in Iraq, Clinton in Haiti, Bosnia, and Kosovo—in each instance a President acted independently of Congress by relying either on the U.N. or NATO. Nothing in the history of the U.N. or NATO implies that Congress gave the President unilateral power to wage war. The legislative histories of those treaties show no such intent.

#### UN CHARTER

Those who drafted the U.N. Charter did so against the backdrop of the disaster of the Versailles Treaty and President Woodrow Wilson’s determination to make international commitments without Congress. One of the “reservations” he objected to was by Senator Henry Cabot Lodge, who insisted on prohibiting the use of American troops by the League of Nations unless Congress, “which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall by act or joint resolution so provide.” 58 Cong. Rec. 8777 (1919).

<sup>6</sup>Yoo, “The Continuation of Politics by Other Means,” at 174.

<sup>7</sup>Id. at 197, n.158 (emphasis in original).

<sup>8</sup>*Holtzman v. Schlesinger*, 361 F.Supp. 553, 565 (E.D. N.Y. 1973).

<sup>9</sup>Louis Fisher, Presidential Spending Power 118–19 (1975).

<sup>10</sup>Louis Fisher, “Sidestepping Congress: Presidents Acting Under the UN and NATO,” 47 Case W. Res. L. Rev. 1237 (1997); Louis Fisher, “The Korean War On What Legal Basis Did Truman Act?,” 89 Am. J. Int’l L. 21 (1995).

Wilson opposed the Lodge reservations, claiming that they “cut out the heart of the Covenant” and represented “nullification” of the treaty.<sup>11</sup> However, Wilson did not disagree with the substance of Lodge’s language on the war power. In a letter to Senator Gilbert Monell Hitchcock on March 8, 1920, Wilson acknowledged the broad scope of congressional authority over the initiation of war: “There can be no objection to explaining again what our constitutional method is and that our Congress alone can declare war or determine the causes or occasions for war, and that it alone can authorize the use of the armed forces of the United States on land or on the sea. But to make such a declaration would certainly be a work of supererogation.”<sup>12</sup> In other words, Wilson objected to Lodge’s language not because of its content but because it was superfluous. Both branches understood that congressional authorization was needed.

The rejection of the Versailles Treaty and Wilson’s battle with Lodge remained part of the collective memory. In the meetings that led to the United Nations, the predominant view was that any commitment of U.S. forces to a world body needed prior authorization by both Houses of Congress. That attitude is reflected in the debates over the U.N. Charter, the U.N. Participation Act of 1945, and the 1949 amendments to the UN Participation Act.

During Senate debate on the U.N. Charter, President Truman sent a cable from Potsdam, stating that all agreements involving U.S. troop commitments to the U.N. would first have to be approved by both Houses of Congress. Without any equivocation he pledged: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.” 91 Cong. Rec. 8185 (1945). Backed by his reassurance, the Senate supported the U.N. Charter by a vote of 89 to 2. This understanding was later incorporated in the U.N. Participation Act of 1945. Without the slightest ambiguity, Section 6 states that the agreements “shall be subject to the approval of the Congress by appropriate act or joint resolution.” 59 Stat. 621, § 6 (1945).

How was it possible for Truman, 5 years later, to send U.S. troops to Korea without seeking or obtaining congressional authority? His Administration claimed to be acting pursuant to U.N. authority. On June 29, 1950, Secretary of State Dean Acheson claimed that all U.S. actions taken in Korea “have been under the aegis of the United Nations.”<sup>13</sup> At a news conference, Truman agreed with a reporter’s description of the war in Korea as “a police action under the United Nations.”<sup>14</sup> If this was a U.N. military action, how could Truman circumvent the clear language of the U.N. Participation Act? The answer: The Administration chose not to enter into a “special agreement.” In fact, there has never been a special agreement. The very procedure enacted to protect legislative prerogatives became a nullity.

#### MUTUAL SECURITY PACTS

In addition to citing the U.N. Charter and Security Council resolutions as grounds for using American troops in military operations, Presidents regard mutual security treaties as another source of authority. Treaties such as NATO and SEATO stipulate that provisions shall be “carried out by the Parties in accordance with their respective constitutional processes.” Nothing in the legislative histories of these treaties suggests that the President has unilateral authority to act in the event of an attack. Military action by the United States would have to be consistent with “constitutional processes.”

To argue that NATO and other mutual security treaties confer upon the President the authority to use military force without congressional approval would allow the President and the Senate, through the treaty process, to amend the Constitution by stripping the House of Representatives of its prerogatives over the use of military force. Scholars who examined NATO after its adoption concluded that the language about constitutional processes was “intended to ensure that the executive branch of the Government should come back to the Congress when decisions were required in which the Congress has a constitutional responsibility.” The NATO treaty “does not transfer to the President the Congressional power to make war.”<sup>15</sup>

Senator Walter George said this about SEATO: “The treaty does not call for automatic action; it calls for consultation. If any course of action shall be agreed upon or decided upon, then that course of action must have the approval of Congress, be-

<sup>11</sup> 63 The Papers of Woodrow Wilson 451 (Arthur S. Link ed., 1990); 64 id. 47, 51.

<sup>12</sup> 65 id. 68.

<sup>13</sup> 23 Dep’t State Bull. 43 (1950).

<sup>14</sup> Public Papers of the Presidents, 1950, at 504.

<sup>15</sup> Richard H. Heindel et al., “The North Atlantic Treaty in the United States Senate,” 43 Am. J. Int’l L. 633, 649, 650 (1949).

cause the constitutional process is provided for." 101 Cong. Rec. 1051 (1955). Nevertheless, the Lyndon Johnson Administration cited SEATO as one legal justification for the Vietnam War.<sup>16</sup>

The War Powers Resolution attempted to limit the effect of mutual security treaties. Authority to introduce U.S. forces into hostilities shall not be inferred "from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing" the introduction of American troops. 87 Stat. 558, § 8(a) (1973). The Senate Foreign Relations Committee explained that this provision ensured that both Houses of Congress "must be affirmatively involved in any decision of the United States to engage in hostilities pursuant to a treaty." S. Rept. No. 93-220, at 26 (1973). These understandings had zero impact on requiring congressional approval for the use of U.S. forces operating in conjunction with NATO in Bosnia and Kosovo.

#### EISENHOWER'S MODEL OF JOINT ACTION

President Dwight D. Eisenhower thought that Truman's initiative in Korea was a mistake, both constitutionally and politically. In 1954, when Eisenhower was pressured to intervene in Indochina, he told reporters at a news conference: "I will say this: there is going to be no involvement of America in war unless it is a result of the constitutional process that is placed upon Congress to declare it. Now, let us have that clear; and that is the answer."<sup>17</sup>

His theory of government and international relations invited Congress to enact "area resolutions" to authorize Presidential action in such trouble spots as the Formosa Straits and the Middle East.<sup>18</sup> He wanted other nations—friend and foe—to understand that Congress and the President were united in their foreign policy. His chief of staff, Sherman Adams, later recalled that Eisenhower was determined "not to resort to any kind of military action without the approval of Congress."<sup>19</sup>

Eisenhower emphasized the importance of executive-legislative coordination when using military force: "I deem it necessary to seek the cooperation of the Congress. Only with that cooperation can we give the reassurance needed to deter aggression."<sup>20</sup> Effective policy meant not unilateral decisions by the President but "joint action by the Congress and the Executive."<sup>21</sup> In his memoirs, he explained the choice between invoking executive prerogatives and seeking congressional authority. On New Year's Day, in 1957, he met with Secretary of State Dulles and congressional leaders of both parties. House Majority Leader John McCormack (D-Mass.) asked Eisenhower whether he, as Commander in Chief, already possessed authority to carry out military actions in the Middle East without congressional action. Eisenhower replied that "greater effect could be had from a consensus of Executive and Legislative opinion. . . . Near the end of this meeting I reminded the legislators that the Constitution assumes that our two branches of government should get along together."<sup>22</sup>

#### KENNEDY AND JOHNSON INITIATIVES

Unlike Eisenhower, President John F. Kennedy was prepared to act during the Cuban missile crisis solely on what he considered to be his constitutional authority. Instead of acting under a joint resolution, he claimed "full authority" as Commander in Chief.<sup>23</sup> Congress did pass a Cuba Resolution, but the resolution did not authorize Presidential action. It merely expressed the sentiments of Congress.<sup>24</sup>

In August 1964, President Lyndon B. Johnson asked Congress to pass the Tonkin Gulf Resolution. The resolution, authorizing military action against North Vietnam, passed the House 416 to 0 and the Senate 88 to 2. Because of the speed with which Congress debated the resolution (acting over a 2-day period) and controversies as to whether the second attack in the Tonkin Gulf actually occurred,<sup>25</sup> many Members of Congress came to regret their votes and support a reassertion of legislative au-

<sup>16</sup> Lyndon Baines Johnson, *The Vantage Point* 42, 48–50, 356 (1971); "The Legality of United States Participation in the Defense of Viet-Nam," 54 Dep't State Bull. 474, 480–81, 485 (1966).

<sup>17</sup> Public Papers of the President, 1954, 306.

<sup>18</sup> Fisher, *Presidential War Power*, at 104–11.

<sup>19</sup> Sherman Adams, *First-Hand Report* 109 (1962).

<sup>20</sup> Public Papers of the Presidents, 1957, 11.

<sup>21</sup> *Id.* at 12.

<sup>22</sup> Dwight D. Eisenhower, *Waging Peace* 179 (1965).

<sup>23</sup> Public Papers of the Presidents, 1962, 674, 679.

<sup>24</sup> Fisher, *Presidential War Power*, at 111–13.

<sup>25</sup> *Id.* at 115–17.

thority. Out of this activity came the National Commitments Resolution of 1969 and the War Powers Resolution of 1973.

#### NATIONAL COMMITMENTS RESOLUTION

Hearings by the Senate Foreign Relations Committee in 1967 highlighted its concern for a “marked constitutional imbalance” between Congress and the President in determining foreign policy over the past 25 years. Chairman J. William Fulbright said that the President “has acquired virtually unrestricted power to commit the United States abroad politically and militarily.” 1969 CQ Almanac 946. Two years later the Senate passed a resolution to challenge the Presidential power to commit the Nation without first receiving congressional authorization.

The National Commitments Resolution marked a return to Eisenhower’s philosophy of interbranch cooperation and joint action. Passing the Senate by a vote of 70 to 16, the resolution defined a national commitment as the use of U.S. armed forces on foreign territory or a promise to assist a foreign country by using U.S. armed forces or financial resources “either immediately or upon the happening of certain events.” The resolution provides that “it is the sense of the Senate that a national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States government by means of a treaty, statute, or concurrent resolution of both Houses specifically providing for such commitment.” 115 Cong. Rec. 17245 (1969). As a Senate resolution, it has no legal effect, but it represents an important expression of constitutional principles by a bipartisan Senate.

#### THE WAR POWERS RESOLUTION

The stated purpose of the War Powers Resolution in Section 2(a) is “to fulfill the intent of the framers of the Constitution” and to “insure that the collective judgment” of Congress and the President will apply to the introduction of U.S. troops to combat. However, both in language and implementation, the resolution has been criticized for undermining the intent of the framers and failing to insure collective judgment.

Part of the controversy associated with the War Powers Resolution stems from the incompatible versions developed by the House and the Senate. The House was prepared to recognize that the President could use military force without prior authorization from Congress, at least for 120 days. Senators, unwilling to give the President such unilateral authority, attempted to spell out the particular conditions under which Presidents could act singlehandedly. Armed force could be used in three situations: (1) to repel an armed attack upon the United States, its territories and possessions, retaliate in the event of such an attack, and forestall the direct and imminent threat of such an attack; (2) to repel an armed attack against U.S. armed forces located outside the United States, and its territories and possessions, and forestall the direct and imminent threat of such an attack; and (3) to rescue endangered American citizens and nationals in foreign countries or at sea. The first situation (except for the final clause) conforms to understandings developed by the framers. The other situations reflect the changes that have occurred in the concept of defensive war and life-and-property actions.

Pressured to produce a bill, House and Senate conferees fashioned a compromise that ended up widening Presidential power. Sections 4 and 5 allowed the President to act unilaterally with military force for 60 to 90 days. He could go to war at any time, in any place, for any reason. The resolution merely required the President to report to Congress on occasion and to consult with lawmakers “in every possible instance.” It is difficult to see how the breadth of that power can be squared with the framers’ intent.

When the bill came out of conference committee, some Members of Congress commented on the extent to which military power was tilted toward the President. Rep. William Green (D-Pa.), after supporting the resolution because it would limit Presidential power, objected that it “is actually an expansion of Presidential warmaking power, rather than a limitation.” 119 Cong. Rec. 36204 (1973). Rep. Vernon Thomson (R-Wis.) said that the “clear meaning” of the bill pointed to “a diminution rather than an enhancement of the role of Congress in the critical decisions whether the country will or will not go to war.” *Id.* at 36207. To Rep. Bob Eckhardt (D-Tex.), the resolution provided “the color of authority to the President to exercise a warmaking power which I find the Constitution has exclusively assigned to the Congress.” *Id.* at 36208.

Senator Tom Eagleton (D-Mo.), having been a principal sponsor of the resolution, denounced the version that emerged from conference. Although the media continued to describe the bill as a constraint on Presidential war power, Eagleton said that

the bill gave the President “unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 to 90 days.” *Id.* at 36177.

Beyond these issues of statutory language, implementation further expanded Presidential power because of a peculiar feature in the bill: the 60–90 day clock begins to tick only if the President reports under Section 4(a)(1). Not surprisingly, Presidents do not report under 4(a)(1). They report “consistent with” the WPR. The only President to report under 4(a)(1) was President Gerald Ford in the Mayaguez capture, but his report had no substantive importance because it was released after the operation was over. In its operation, the WPR allows Presidents to use military force against other countries until Congress adopts some kind of statutory constraint. Federal courts are a potential check, but thus far the judiciary has decided that war power cases lack standing, ripeness, or have other qualities that place them outside judicial scrutiny.<sup>26</sup>

#### NATO’S MILITARY OPERATIONS

President Clinton twice relied on NATO to authorize military action, the first in Bosnia in 1994–95, and the second in Kosovo in 1999. On neither occasion did he seek authority from Congress, even though in 1993 he suggested that before using air power in Bosnia he might ask for “authority” or “agreement” from Congress.<sup>27</sup> Toward the end of 1993, however, he repeatedly objected to legislative efforts to restrict his military options.<sup>28</sup> His decision in 1994 to use air strikes against Serbian militias was taken without congressional authorization. Instead, the decision came in response to U.N. Security Council resolutions, operating through NATO’s military command. He explained: “the authority under which air strikes can proceed, NATO acting out of area pursuant to U.N. authority, requires the common agreement of our NATO allies.”<sup>29</sup> In other words, he needed agreement from England, France, Italy, and other NATO allies, but not from Congress.

NATO air strikes began in February 1994 and continued into 1995. On September 1, 1995, President Clinton explained to congressional leaders the procedures used to order air strikes in Bosnia. The North Atlantic Council “approved” a number of measures and “agreed” that any direct attacks against remaining safe areas would justify air operations as determined “by the common judgment of NATO and U.N. military commanders.”<sup>30</sup> On September 12, he said the bombing attacks were “authorized by the United Nations.”<sup>31</sup>

In 1995, President Clinton ordered the deployment of 20,000 American ground troops to Bosnia without obtaining authority from Congress. He approved NATO’s operation plan for sending ground troops to Bosnia (IFOR), and followed that with the successor plan, Stabilization Force (SFOR). He welcomed NATO’s decision to approve the plan and the “Activation Order that will authorize the start of SFOR’s mission.”<sup>32</sup> Authority would come from allies, not from Congress.

Actions in Bosnia combined Security Council resolutions and NATO. When President Clinton did not have U.N. support for military action in Kosovo, he relied entirely on NATO. At a news conference on October 8, 1998, he stated: “Yesterday I decided that the United States would vote to give NATO the authority to carry out military strikes against Serbia if President Milosevic continues to defy the international community.”<sup>33</sup> The decision to go to war against another country was in the hands of one person, exactly what the framers thought they had prevented. The war against Yugoslavia began on March 24, 1999.

#### CONTINUED MILITARY ACTION IN IRAQ

In June 1993, September 1996, and December 1998, President Clinton ordered military operations against Iraq. U.S. military strikes in Iraq continued from 1999 to the present day.<sup>34</sup> There have been no legal analyses from the Administration to justify this use of force against Iraq, but it can be argued that when Congress

<sup>26</sup> For further details, see Louis Fisher & David Gray Adler, “The War Powers Resolution: Time to Say Goodbye,” 113 *Pol. Sci. Q.* 1 (1998).

<sup>27</sup> Public Papers of the Presidents, 1993, I, 594; Public Papers of the Presidents, 1993, II, 1455, 1781.

<sup>28</sup> Public Papers of the Presidents, 1993, II, 1763, 1764, 1768, 1770.

<sup>29</sup> Public Papers of the Presidents, 1994, I, 186.

<sup>30</sup> Public Papers of the Presidents, 1995, II, 1280.

<sup>31</sup> *Id.* at 1353.

<sup>32</sup> Public Papers of the Presidents, 1996, II, 2220 (emphasis added).

<sup>33</sup> Public Papers of the Presidents, 1998, II, 1765.

<sup>34</sup> Fisher, *Congressional Abdication on War and Spending*, at 80–82, 105–08.

passed the authorization bill in January 1991, it simultaneously sanctioned future military operations authorized by the U.N. Security Council. Such a claim can mean: (1) delegating the war power in perpetuity, and (2) surrendering congressional power to an international body.

Here are the specifics. On January 14, 1991, in P.L. 102-1, Congress authorized the use of U.S. armed force against Iraq. Congress authorized President George Bush to use armed force pursuant to U.N. Security Council resolution 678 (1990) "in order to achieve implementation of Security Council Resolutions 660, 661, 662, 664, 665, 666, 667, 669, 670, 674, and 677." This statute is usually interpreted as congressional authority to drive Iraq out of Kuwait, which was the purpose of resolution 678, adopted on November 29, 1990. All earlier resolutions set the stage for 678. Resolution 660, passed on August 2, 1990, condemned Iraq's invasion of Iraq and demanded immediate withdrawal. Resolution 661 imposed economic sanctions. Resolutions 662 to 677 reinforced resolutions 660 and 661 and added other restrictions.

How can one argue that Congress transferred its constitutional power to the Security Council? It depends on the interpretation of resolution 678, which authorized member states to use all necessary means "to uphold and implement 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area." Could the phrase "all subsequent relevant resolutions" mean that whatever the Security Council promulgated after January 14, 1991, is automatically sanctioned by P.L. 102-1?

What is the meaning of subsequent? Any resolution issued after 678, or any resolution issued after 660 but before 678? It can be read either way. The most natural reading, in terms of the purpose of P.L. 102-1, is to refer to the resolutions from 660 to 678. The statutory objective was to oust Iraq from Kuwait. President Bush did not have authority to send ground troops north to Baghdad in an effort to remove Saddam Hussein. Such an operation would have exceeded his statutory authority and fractured the alliance that joined in support.

The broadest reading is to conclude that Congress, on January 14, 1991, transferred its constitutional powers to the Security Council, and that the future scope of American military commitments is determined by UN resolutions, not congressional statutes. From this theory, whatever the Security Council decided would apparently compel Congress to vote the necessary appropriations to cover the expenses of additional military actions. There is no evidence that Congress intended such a result, or could intend such a result.

#### THE USE OF FORCE ACT (2001)

The joint resolution passed by Congress on September 18, 2001, authorized President George W. Bush to use all "necessary and appropriate force" against nations, organizations, or persons that he determines planned, authorized, committed, or aided the terrorist attacks of 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." 115 Stat. 224. No doubt the statute authorized military action against the terrorist structure in Afghanistan. Does it also authorize military operations against terrorist units in other countries?

There seems to be little constitutional objection to using U.S. forces to help train anti-terrorist organizations in other countries, such as the Philippines, Georgia, and Yemen. That kind of assistance does not represent war on those countries. U.S. troops are there at the invitation and request of the three nations.

Quite different is the use of military force against another country. That is especially so when force is used in a region that is so politically unstable that military conflict has the potential to spread beyond the target nation. The magnitude of another military operation involving a second or third country raises not merely practical but constitutional concerns, both in terms of (1) the legislative prerogative to take the country from a State of peace to a State of war, and (2) the legislative power of the purse. The principles announced by President Eisenhower and the National Commitments Resolution, calling for joint action by Congress and the President, are more than guides for good policy. They represent efforts to honor constitutional government.

#### THE VALUE OF CONSULTATION

Policymaking by the Federal Government works better when the President and executive officials consult regularly with Members of Congress on domestic issues as well as matters of foreign affairs and national security. However, consultation is not a substitute for receiving congressional authority. Congress is a legislative body

and discharges its constitutional duties by passing statutes that authorize and define national policy. Congress exists to legislate and legitimate, including military and financial commitments. Consultation is a technique for improving executive-legislative relations, but authority incorporated in a public law is the act that satisfies the Constitution.

Chairman FEINGOLD. Thank you very much, Mr. Fisher.

Now we will here from Douglas Kmiec, who is the dean and St. Thomas Moore professor at the Catholic University of America, Columbus School of Law. He is an expert in constitutional law and has taught constitutional law at a number of law schools.

Dean Kmiec has authored or co-authored numerous books and articles on constitutional issues and the role of the U.S. Supreme Court.

From 1985 to 1989, he served in the Reagan and Bush administrations and headed the Office of Legal Counsel in the United States Department of Justice.

We welcome you, Dean, and you may proceed.

**STATEMENT OF DOUGLAS KMIEC, DEAN OF THE COLUMBUS SCHOOL OF LAW, CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.**

Mr. KMIEC. Senator, it is good to be here. And I join the others in thanking you for this inquiry into this important question.

I also ask that my written testimony be included in its entirety.

Chairman FEINGOLD. Without objection.

Mr. KMIEC. I will just briefly make seven points or outline seven points that are stated therein.

First and foremost, it is my judgment that the President is constitutionally authorized as Commander in Chief to introduce troops into hostilities without prior congressional enactment. No President to my knowledge has ever conceded otherwise. No Congress to my knowledge has ever fully disputed this point, as even the highly controverted and largely admonitory War Powers Resolution necessarily concedes the President's constitutional assignment to introduce troops without prior congressional authority.

Second, the power to declare war is not a condition predicate to the duties of military self-defense imposed upon the President by the Constitution. I disagree with my colleague Dr. Fisher on the question of when presidential action began without congressional authorization. In my judgment, the historical record supports the proposition that no President from George Washington onward has ever construed the Constitution to require prior congressional authority for military action.

I think it is largely modern academic commentary that has obscured this point and misstated it. The purpose of a declaration of war is largely to define its international effect. And something declares when it refers to something that is preexisting, like the Declaration of Independence, which refers to the preexisting rights that we have by virtue of our creation.

A declaration of war as well refers back either to a conflict that has been thrust upon us, like the conflict of September 11th, or the President's actions that might be properly characterized as anticipatory self-defense.

In the present war—and this is my third point—the Congress by joint resolution has confirmed the President's constitutional author-

ity. And it has done so expressly. The resolution, when construed together with the President's Article 2 power, is ample and plenary, allowing the President, together with his military, national security, and homeland defense advisers, to determine the timing, scope, and appropriateness for military intervention.

Now, the fourth point is that the Constitution does not leave the Congress of the United States without a check upon this executive behavior. We know that the Framers of the Constitution were very careful to check ambition with ambition. The check that I think they largely envisioned in this circumstance was indeed the appropriations power.

No Congress should give a blank check to a President, nor is it constitutionally obligated to do so. And no President can legitimately expect one.

That said, Congress oversteps its constitutionally determined role if it uses monetary conditions to usurp or impede the tactical decisions that only a President can make, given the information that he possesses.

The fifth point assumes the prior four. And it also makes the simple proposition that I think is evident to us all. If those four earlier points were not true, then most of American history and practice would simply be unexplainable. Congress has declared war only five times in its history. And yet American Presidents have undertaken several hundred military engagements without advanced congressional authorization, including, of course, extended military interventions in Korea and Vietnam and elsewhere.

The sixth point is that the constitutionality of the War Powers Resolution has never been conceded by any President nor pressed by any Congress. The War Powers Resolution is, in any event, fully satisfied by the force resolution of last September. Or the actions that the President has taken, as Professor Yoo has already articulated, fall well within the terms of the War Powers Resolution itself.

But I would like to just simply emphasize that in my judgment the primary infirmity of the resolution lies in a faulty assumption; namely, that the Constitution envisioned a collective judgment on the introduction of armed forces.

Respectfully, it does not. It envisions a President capable of responding with energy and dispatch to immediate threat, and a Congress that can then deliberate on the actions taken and through judicious resource choices influence others yet to be taken.

Congress I believe, Mr. Chairman, recognized this relationship when it wrote the War Powers Resolution, at least in part. If one looks at Section 3, it modified its statutory language, recognizing that consultation would often not be possible or at least not possible in every instance. In Section 4, it admits the possibility of presidential deployment with notification after the fact.

My seventh and final point is this: The war on terrorism does not alter the constitutional design, nor do I believe you want it to or the President wants it to alter that design.

We are indeed at war.

But as others have advised you and as you have said on the Senate floor, it is a far different war than others that have gone before. It is a dispersed enemy, a dispersed enemy needing to be con-

stantly addressed and combated. And this type of enemy is ill-met by a historically mistaken if academically commonplace understanding of the declare war clause.

Our national interests are equally ill-served, I believe, by a wooden interpretation of a likely unconstitutional War Powers Resolution that even when enacted largely accommodated conventional warfare or deployments on the scale of World War II rather than what you yourself have acknowledged is needed now; namely, a swifter, often covert joint military and law enforcement response to a far more insidious and diffuse enemy that is the nature of modern terrorism.

I thank you. And I would be delighted to answer questions.  
[The prepared statement of Mr. Kmiec follows:]

STATEMENT OF DOUGLAS W. KMIEC<sup>1</sup>, DEAN OF THE COLUMBUS SCHOOL OF LAW,  
CATHOLIC UNIVERSITY OF AMERICA, WASHINGTON, D.C.

Mr. Chairman and members of the Committee:

Thank you for this invitation to appear before you to address the respective authority of the President and Congress in the present War on Terrorism.

The President is constitutionally authorized as Commander in Chief to introduce troops into hostilities without prior congressional enactment. No President has ever conceded otherwise; no Congress has ever disputed this point, as even the highly controverted (and largely admonitory) War Powers Resolution necessarily concedes the President's constitutional assignment. Today, there are unprecedented terrorist dangers aimed directly at the civilian populations of our Nation and its allies. Congress shares this concern, rightly so. However, a shared concern must not become an occasion to undermine the well settled constitutional responsibility of the President. Rather, with great respect for the important deliberations of this body, Congress should direct its legislative efforts at determining how best the President can be supported with the people's resources; not how cleverly the President's military judgment can be second-guessed or hampered.

The power to declare war is not a condition predicate to the duties of military self-defense imposed by the Constitution upon the President. No President from Washington onward has ever construed it to be so, and it is largely modern academic commentary that has obscured or misstated this crucial aspect of constitutional understanding. Rather, the purpose of a declaration of war is to define the international effect of military actions undertaken by direction of the President.

In the present War, the Congress by joint resolution has confirmed the President's constitutional authority. That resolution, when construed together with the President's Article II power, is ample and plenary, allowing the President, together with his military, national security and homeland defense advisors, to determine the timing, scope, and appropriateness for military intervention.

Congress's role is one of material support, not tactical judgment. As the representative of the people, Congress is obliged to provide this support if it determines that our lives, safety and security justify the actions being taken by the President. Of course, this appropriations-related authority is a well-considered check upon presidential action. Prudentially and practically, both the President and Congress must necessarily collaborate if wartime efforts are to succeed. No Congress should give a blank check to a President, nor is it constitutionally obligated to do so, and no President should expect one. That said, Congress oversteps its constitutionally determined role if it uses monetary conditions to usurp or impede the tactical decisions that only the President can make.

The President has determined that terrorism is worldwide. It exists in networks or cells of individuals driven by religious or political fanaticism and supported by an international network of drug dealers and other shadowy criminal enterprises, not infrequently disguised as NGO's and charities. Unfortunately, no credible intelligence suggests that the War is confined to one nefarious leader or a single country. The successful military campaign in Afghanistan is a start, not a finish of this War. Congress, of course, has the formal power—as the holder of the Nation's purse—to refuse to adequately support the further military efforts to confront what the President has properly called an "axis of evil." It can discount the noncompliance of Iraq

<sup>1</sup> Former U.S. Assistant Attorney General, Office of Legal Counsel in the Reagan and George H. W. Bush administrations.

with U.N. sanction and its willingness to use biological weapons on its own people; it can turn a blind eye to the terrorist renegades in Somalia and the Philippines. At the farthest extreme, the legislature is constitutionally empowered even to defund our military and intelligence communities. I doubt that few Americans would think the exercise of congressional powers in this peremptory way to be responsible. In doing so, Congress will have indulged a calculus or risk assessment far different from the President, and perhaps, saved money. In the President's judgment, the Congress very likely will not have saved lives.

Ultimately in our democratic republic, it is the people who either affirm or dispute the policy choices made by their President and the Congress. It will then be up to the people to decide which was the better course—that of the sword aimed at those who hate the responsible exercise of freedom or that of the purse aimed at restraining the sword in this mission. Neither the President nor the Congress can avoid making its respective judgments. Certainly, neither can (or should) use the Constitution as a cover plane for its failure to decide.

The actions being taken by President Bush are well within the parameters of the authority given to him by the Constitution. I am confident that the U.S. Supreme Court would not say otherwise. Congress may decide not to support these actions with the people's money. That is its prerogative, and it is one for which it will be held accountable.

#### THE PRESIDENT'S ROLE

The President's power to use military force to respond to terrorist and other attack is clear. Article II, Section 2 provides that 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 actual Service of the United States." Beyond this, the President is fully vested with all executive power and the authority to "take care" that the laws are faithfully executed.

Constitutional practice dating to our first president removes any doubt that wars were, and can be, fought without congressional authorization. During the first 5 years of his administration, Washington engaged in a prolonged Indian war in the Ohio Valley. This was not a small skirmish, as President Washington himself proclaimed "we are involved in an actual war!"—one, by the way, that went badly initially for the standing army in 1791. Similarly, John Adams fought a naval war with France, known as the Quasi-War that erupted in 1798 out of France's interference with our commercial relations with Britain. Congress provided the funding, and set the rules for naval engagement, but did not declare war, even as the historical record demonstrates that one was being fought.

Many cases affirm the scope of the President's war power, but it is particularly well affirmed in *The Prize Cases*, where the Supreme Court opined that it was for Abraham Lincoln, as Commander in Chief to determine what necessary means could be used to respond to belligerents, for such questions under the Constitution, are "to be decided by [the President]."<sup>2</sup> In this century, Attorney General (later Justice) Robert Jackson put the matter equally forcefully:

"[The President] shall be Commander in Chief. . . . By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in times of peace as well as in time of war. . . . [T]his 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."<sup>3</sup>

In writing in these terms, Attorney General Jackson was reflecting an unbroken line of undisturbed Federal interpretation that properly places both the burden and authority upon the President to preserve "our territorial integrity and the protection of our foreign interests" as a matter of constitutional provision, [and not] "the enforcement of specific acts of Congress."<sup>4</sup>

The framers justified this grant of authority to the President by the need for military and executive action to be taken with "secrecy and dispatch."<sup>5</sup> Without the quality of what Hamilton referred to as "energy in the executive," the community would be unable to protect itself "against foreign attacks."<sup>6</sup> These were not merely the sentiments of those who favored a strong national government. Thomas Jeffer-

<sup>2</sup>The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862).

<sup>3</sup>40 Op. Att'y Gen. 58, 61–62 (1941).

<sup>4</sup>22 Op. Att'y Gen. 13, 25–26 (1898) (Acting General John Richards).

<sup>5</sup>Federalist No. 70 (Alexander Hamilton).

<sup>6</sup>Id.

son, serving as George Washington's Secretary of State, observed that "[t]he transactions 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. [And what's more] [e]xceptions are to be construed strictly."<sup>7</sup>

This exercise of presidential power has been bi-partisan. For example, on August 20, 1998, President Clinton launched an air strike against terrorist activity (the African embassy bombings) traced to Osama bin Laden. The President acted without congressional authorization, and he did so for reasons that are directly applicable and similar to the present War on Terrorism: intelligence information that traced the bombings to terrorist groups that have acted against U.S. interests in the past, and suggested planning for additional attacks in the future. These groups were employing or seeking weapons of mass destruction, including chemical and dangerous weapons.

As scholars have pointed out, President Clinton's actions have much in common with President Reagan's April 14, 1986 air strike against Libya in response to that nation's involvement with the killing of Americans and others in Berlin. Like the Clinton actions, the Reagan strike was necessary not only in retaliation, but also as a defensive and preventative response to a terrorist attack on U.S. military personnel and her citizens.

#### THE CONGRESS' POWER TO DECLARE WAR

The Congress' power to declare war is not the power to make war, as should be obvious to every American who has lived through both Pearl Harbor and September 11. War can be made upon us. As was noted expressly in the Constitutional convention, the executive must have the power to repel sudden attacks without prior Congressional authorization.<sup>8</sup> The drafters of our Constitution knew how to use precise language, and indeed, as careful scholarship has since pointed out, "[i]f the Framers had wanted to require congressional consent before the initiation of military hostilities, they would have used such language."<sup>9</sup>

The power to declare war, rather than the power to initiate one, was a power to confirm—for international and domestic law purposes—the existence of hostilities between two sovereigns. This was how Blackstone understood the phraseology, and in historical context, how it was understood by the framers as well. In the decades leading up to constitutional drafting and ratification, declaring war meant not authorizing a proper executive response to attack, but to defining the relationship between the citizens of warring nations as to, for example, the seizure or expropriation, of assets.<sup>10</sup> Even the use of the word "declare" in the context of the framing suggests not authorization, but recognition of that which pre-exists. This, for example, is the usage in the Declaration of Independence, recognizing rights that are not created by the government, but pre-exist by virtue of human creation. Professor John Yoo (now of the Office of Legal Counsel) has ably canvassed this area writing that the declare war clause was meant largely to bolster the exclusion of the individual states from the question. He summarizes the historical evidence this way: "a declaration of war was understood as what its name suggests: a declaration. Like a declaratory judgment, a declaration of war represented the judgment of Congress, acting in a [quasi-judicial capacity (as it does in impeachments)], that a State of war existed between the United States and another nation. Such a declaration could take place either before or after hostilities had commenced."<sup>11</sup>

If military activity could only occur upon congressional declaration, this proposition would leave most of American history unexplained, such as American intervention in Korea, Vietnam, Iran, Grenada, Libya, and Panama. Congress has declared war only five times: the War of 1812; the Mexican American War of 1848, the Spanish-American War of 1898, and World War I (1914) and World War II (1941).

Some have disputed this account of the declare war clause, arguing in support of a congressional pre-condition by reference to Article I, Section 8, Clause 11 which

<sup>7</sup> Thomas Jefferson, Opinion on the Powers of the Senate (April 24, 1790), reprinted in 5 The Writings of Thomas Jefferson 161 (Paul L. Ford ed., 1895).

<sup>8</sup> 2 The Records of the Federal Convention of 1787, at 318–19 (Max Farrand ed. rev. ed. 1966).

<sup>9</sup> Robert J. Delahunty and John C. Yoo, The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them, 25 Harvard J. Of Law & Puyn. Pol. 488, 491 (2002).

<sup>10</sup> See, e.g., *Little v. Bareme*, 6 U.S. (2 Cranch) 170 (1804); if war is properly declared, the property of belligerents may be seized by citizens and sold. If there is no proper declaration, then the property must be returned and damages paid.

<sup>11</sup> John C. Yoo, The Continuation of Politics By Other Means: The Original Understanding of War Powers, 84 Calif. L. Rev. 167, 242 (1996).

gives Congress the power to “grant Letters of Marque and Reprisal, . . .” This somewhat arcane aspect of constitutional text, however, cannot bear the weight of the claim. Letters of Marque and Reprisal are grants of authority from Congress to private citizens, not the President. Their purpose is to expressly authorize seizure and forfeiture of goods by such citizens in the context of undeclared hostilities. Without such authorization, the citizen could be treated under international law as a pirate. Occasions where one’s citizens undertake hostile activity can often entangle the larger sovereignty, and therefore, it was sensible for Congress to desire to have a regulatory check upon it. Authorizing Congress to moderate or oversee private action, however, says absolutely nothing about the President’s responsibilities under the Constitution.

The drafters of the American Constitution knew how to express themselves. They were familiar with State constitutional provisions, such as that in South Carolina, which directly stated that the “Governor and commander-in-chief shall have no power to commence war, or conclude peace” without legislative approval. Article I, Section 10 expressly prohibits states, without the consent of Congress, from keeping troops or ships of war in time of peace, or engaging in war, unless actually invaded, or in such imminent danger that delay would not be warranted. There is no parallel provision reciting that the President as commander in chief shall not, without the Consent of Congress, exercise his military responsibility.

That the power to declare war is not a power of prior authorization does not leave Congress without check upon executive abuse. That check, however, is anchored in Congress’ control of the purse, and, of course, impeachment. When challenged by the anti-federalists, most notably Patrick Henry, to explain how tyranny would not result unless the sword and purse were held by different governments, Madison responded that no efficient government could exist without both, but security is to be found in “that the sword and pursue are not to be given to the same member.”<sup>12</sup> No reference was made to the declare war clause or marque and reprisal letters.

How great a role can Congress play in the funding process? Here, the historical record would suggest that Congress is as free as the people they represent. It may explore and evaluate the military mission as the President has outlined it. Congress can refuse to fund the continuation of tactical decisions that it believes unsound; Congress, however, cannot dictate a particular course of engagement or so fetter the President’s judgment as to preclude its exercise.

#### THE WAR POWERS ACT

It is facetious to suggest that the War Powers Act or Resolution [WPR] limits constitutional authority, something which it expressly proclaims not to do. (Section 8(d) of the WPR states that “nothing in the Resolution is intended to alter the constitutional authority of either the Congress or the President.”) In any event, insofar as the WPR presumes to limit the extent of operations already undertaken by a president, it “makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress.”<sup>13</sup> After surveying comprehensively the large number of occasions where the President has deployed troops without legislative involvement, the Office of Legal Counsel concluded:

“Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval. . . . Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power.”<sup>14</sup>

Even if the WPR could be construed to statutorily amend constitutional text (which it cannot), by its express terms the WPR acknowledges presidential power to introduce Armed Forces into hostilities as a result of an “attack upon the United States, its territories or possessions, or its armed forces.”<sup>15</sup> Certainly, that was September 11th. In any event, no president has ever accepted the limiting provisions of the WPR.<sup>16</sup>

No president has ever formally complied with the WPR, even as Presidents have used the vehicle to accomplish consultation with Congress. For example, both the first President Bush and President Clinton sent reports to Congress that were described carefully as “consistent with the Resolution,” but not pursuant to, or re-

<sup>12</sup>3 Jonathan Elliott, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* at 393 (1836).

<sup>13</sup>18 Op. Off. Legal Counsel 173, 175–76 (1994).

<sup>14</sup>4A Op. Off. Legal Counsel 185, 187 (1980).

<sup>15</sup>50 U.S.C. 154(c) (1994).

<sup>16</sup>8 Op. Off. Legal Counsel 271, 274 (1984).

quired by, the WPR. Congress has not sought to use the enforcement mechanism under the WPR, though it has occasionally been referenced or advocated by individual members.

Of course, proponents of the WPR take a different view; a view that posits the need for specific authorization. As mentioned, this view is contrary to constitutional text, history and practice, but in the present circumstance, even this objection is superseded by Congress' own legislative action.

#### THE EFFECT OF THE JOINT RESOLUTION

If presidential power apart from congressional authorization was somehow questionable as a general matter, it is not open to doubt in the present War on Terrorism which Congress has specifically authorized. (S.J. Res. 25) [hereinafter "force resolution"]. The force resolution recites that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism." While this recital might be argued to concede that the force resolution, itself, was unnecessary, the better construction is one that the force resolution acknowledges the contending views over the legality of the WPR and removes all doubt in the present instance. The President thus has full legal authority with respect to either responding with "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons," and with respect to the steps necessary "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In my judgment, the force resolution must be read consistently with the President's authority. Some have commented that it relates only to "individuals, groups or states that [are] determined to have links to the September 11 attacks."<sup>17</sup> Yet, Congress clearly intended to authorize the President to address terrorist threats of the future, and therefore, it is highly reasonable to construe the linkage to "nations, organizations, or persons" broadly, especially as we are practically discovering that the terrorist network has manifold capacity to direct and aid cells in multiple guises and distant parts of the world.

#### WHETHER A WAR IS PROPERLY WAGED IS NOT FOR THE COURTS

The Supreme Court has consistently avoided passing upon the legality of particular military engagements, such as Vietnam and Korea. Lower Federal courts have also regularly dismissed these matters as political questions and non-justifiable. The Persian Gulf War yielded two variants on this theme in *Dellums v. Bush*<sup>18</sup> and *Ange v. Bush*.<sup>19</sup> Unusually, in *Dellums*, the trial court decided that Congress possessed sole authority to declare war, and that troop movements authorized without congressional approval by the first President Bush might be challenged if a majority of Congress or the Congress in its entirety joined the litigation. That was not to be, and the suit was dismissed as unripe. By contrast, and far more in keeping with past decision, Judge Lamberth decided in *Ange*, the parallel case brought by a deployed member of the military, that determining whether the President had exceeded either his constitutional authority or violated the WPR was a nonjusticiable political question.

The judicial branch has consistently found any disagreement between the President and Congress to be a political question, not susceptible to judicial resolution. Common sense and the absence of public measures or standards of judgment readily explains why courts would abstain. Neither the President nor Congress have that luxury. Both must make their constitutionally separate choices. A President who endangers the lives of his military unnecessarily (or for a purpose that is contrary to the first principles in the Declaration of Independence and implemented by the Constitution) or a Congress that obdurately refuses to support those engaged in necessary combat will be accountable to the people.

#### CONCLUSION

##### DOES THE WAR ON TERRORISM CHANGE THE CONSTITUTIONAL ORDER?

The short answer is, no. Yet, as General Joulwan, the former NATO Supreme Allied Commander, reflected before the Senate Foreign Relations Committee (Feb-

<sup>17</sup> Delahunty and Yoo, *supra* at 516.

<sup>18</sup> 752 F. Supp. 1141 (D.D.C. 1990)

<sup>19</sup> 752 F. Supp. 509 (D.D.C. 1990).

ruary 7, 2002): “we are at war. But it is a different war than those we fought in the past. There are no front lines. The enemy is dispersed and operates in small cells. The underpinnings of this threat are in its religious radicalism and its hatred of the United States and the civilization that embraces freedom, tolerance and human dignity. It is an enemy willing to commit suicide of its young to achieve its aims and with little regard for human life. While the enemy may be small in number it would be wrong to underestimate the threat—or the depth of their convictions.”

Samuel Berger, former National Security Advisor, echoed the same sentiment at the same hearing: “we must continue to take down al Qaeda cells, and hunt down al Qaeda operatives elsewhere—in Asia, Europe, Africa, here and elsewhere in this Hemisphere. Disruption will be an ongoing enterprise—a priority that will require international intelligence, law enforcement and military cooperation for the foreseeable future. These cells of fanatics will reconstitute themselves. We must treat this as a chronic illness that must be aggressively managed, while never assuming it has been completely cured.”

A dispersed enemy needing to be constantly addressed and combated is ill-met by a historically mistaken, if mistakenly commonplace, understanding of the declare war clause. Our national interests are equally ill-served by a wooden interpretation of a likely unconstitutional war powers resolution that even when enacted largely accommodated conventional warfare or deployments on the scale of World War II, rather than the needed (and often covert) responses to the smaller, yet more insidious and diffused nature of modern terrorism.

From 1975 through October 2001, Presidents—without conceding the constitutional validity of the WPR—submitted some 92 reports under the Resolution. In the same period, there were no declarations of war. One can argue that the resolution has fostered dialog between the legislative and executive departments. So long as that dialog did not compromise classified information or strategy and facilitated Congress’ appropriations role in war making, constitutional purposes were well served. Yet, the primary infirmity of the resolution lies in its faulty assumption: namely, that the Constitution envisions a “collective judgment” on the *introduction* of armed forces. Section 2. It does not. It envisions a President capable of responding with energy and dispatch to immediate threat, and a Congress that can deliberate on the actions already taken, and through judicious resource choices, influence others. Congress, itself, recognized this in Section 3, when it modified the statutory consultation to “in every possible instance” and in Section 4 when it admits the possibility of presidential deployment without advance reporting and only reporting “within 48 hours, in the absence of a declaration of war or congressional authorization.”

Wisely, Congress by its September 2001 force resolution has authorized the President to respond to the terrorist threat, as it exists—dispersed, chronic and global. In my judgment, the force resolution fully satisfies Section 5(b)(1) of the WPR and therefore exempts the President’s deployment from termination by Congress under the controversial time clock set-out in the WPR. Section 5(c)’s provision for termination by concurrent resolution is also unconstitutional under Supreme Court precedent. *INS v. Chadha*.<sup>20</sup> While Congress has attempted to address the gap created by the decision in *Chadha* which held legislative veto devices to be unconstitutional, other far more serious constitutional questions would be raised if the subsequent 1983 amendment to section 601(b) of the International Security and Arms Control Act of 1976 (P.L. 94–329) fixing the WPR legislative veto failing is construed to empower Congress to countermand the President’s military judgment and “direct” the withdrawal of troops. As suggested above, Congress properly speaks in its allocation of funds; the Constitution does not envision that Congress would determine the deployment of troops or related law enforcement and intelligence personnel—that is for the President.

Chairman FEINGOLD. Thank you very much, Dean.

And now, Alton Frye is a presidential senior fellow at the Council on Foreign Relations. He has held a number of positions within the council, including that of president in 1993. And he currently serves as the director of the council’s program on Congress and U.S. foreign policy.

<sup>20</sup> 462 U.S. 919 (1983).

He has also served as a visiting faculty member at a number of universities and is a consultant to both legislative and executive branches of government.

Mr. Frye has a doctorate degree from Yale University and an undergraduate degree from St. Louis University.

Welcome, Mr. Frye.

**STATEMENT OF ALTON FRYE, PRESIDENTIAL SENIOR FELLOW  
AND DIRECTOR, PROGRAM ON CONGRESS ON FOREIGN POLICY,  
COUNCIL ON FOREIGN RELATIONS, WASHINGTON, D.C.**

Mr. FRYE. Mr. Chairman, thank you.

Brevity discourages diplomacy, so let me be blunt. The President is doing his constitutional duty. Congress should do its.

In launching the counterattack on terrorism, President Bush has shown leadership of historic caliber. He has blended deliberation with energetic action. The administration has made a good beginning in a struggle whose contours and duration are not yet knowable.

Congress has also made a good beginning. The broad authorization in Senate Joint Resolution 23 clearly targeted those responsible for the September 11th massacre. It explicitly provided for Congress' continuing engagement in future decisions.

Now the question is how to make that engagement meaningful. I offer four observations.

First, get the premise right. Contrary to many assertions, the War Powers Resolution was not conceived as an assault on presidential prerogatives. Its prime author, Senator Jacob Javits, was deeply committed to a vigorous American role in the world. That role requires vigor in both the executive and the Congress.

For complex reasons, Congress had evaded hard choices during the Vietnam war. The War Powers Resolution was designed to constrain Congress, compelling members to decide whether or not to commit the Nation's blood and treasure. The premise of the law is to assert and accept the policy burden that the Constitution assigns to Congress.

Second, separate the Congress' policy judgment from mandatory implementation. The War Powers Act has worked imperfectly. It often breeds tension between the branches. A key reason lies in the linkage of congressional judgment on a particular use of force with firm deadlines for termination.

Without abandoning the War Powers Resolution, it may be prudent to establish a separate parallel procedure enabling Congress to reach the high policy issue in pristine form. A concurrent resolution could provide for both houses to vote on the basic question: does the Congress authorize the use of American military power in the specified situation and for the purposes recommended by the President?

As courts often separate verdict from sentencing, Congress may find it wise to separate policy verdict from pragmatic consequences. Doing so would create a clear political context, either aligning the two branches or facilitating later decisions to enforce legislative will. Anticipating such a policy vote should induce greater discipline in the executive.

Third, keep Congress connected to evolving conflicts. Uncertain terrain lies ahead in the war on terrorism. Given the nature of this conflict, it is neither constitutionally sound nor politically reasonable for Congress to limit itself to a single decision point. Rather than allowing inferences from other legislation, a concurrent resolution procedure should provide for frequent, explicit, overt tests of Congress' collective judgment about the commitment of U.S. forces.

These expressions could take the form of votes to accept or reject presidential reports of the sort that President Bush has been filing consistent with the War Powers Resolution. Those reports relate to current or perhaps planned deployments.

The expression of congressional collective verdicts could also take the form of expedited votes on privileged resolutions presented by any of several committees, Armed Services, Foreign Relations, or perhaps Intelligence.

Fourth, if there is to be consensus in a prolonged conflict, Congress must be its engine. This is vital to the men and women called on to do violence on our behalf. As former Army Chief of Staff General Edward Meyer has written, it is essential for "the people's representatives, the Congress, to take a position and not leave the troops dangling on the threads of definition and interpretation."

Furthermore, recruiting foreign allies in the war on terrorism will depend importantly on their confidence that American power is governed by an attentive Congress. Thus, the enduring necessity is to balance executive potency with the legislative review that conveys democratic legitimacy. The Constitution seeks not to constrain the presidency but to harness both branches to common purpose.

In approaching the war on terrorism, Congress will need imagination to invent effective procedures and courage to use them.

[The prepared statement of Mr. Frye follows:]

STATEMENT OF ALTON FRYE, PRESIDENTIAL SENIOR FELLOW AND DIRECTOR,  
PROGRAM ON CONGRESS AND FOREIGN POLICY, COUNCIL ON FOREIGN RELATIONS

Mr. Chairman and members of the Committee:

Thank you for inviting my views on the perennial constitutional dilemmas related to the use of force by the American government. Those dilemmas become particularly acute when the Nation is faced with so grave and ill-defined a threat as the protracted war on terrorism that lies ahead. Because no one can map the precise contours of the unfolding campaign against terrorism, it is all the more important to design a sound process for engaging both Congress and the executive branch in a dependable, continuing partnership to guide our path.

The preface to this discussion must be an appreciation for the prompt and yet deliberate way in which the two branches came together in the aftermath of September 11. The nation's righteous anger under-girded an extraordinary political consensus. President Bush has shown exemplary leadership in pursuing the terrorist Al Qaeda network and its supporters. Yet the most difficult tasks lie ahead, and sustaining the national consensus will depend on effective collaboration between Congress and the President.

An indefinite stream of decisions regarding the use of American forces will arise in the coming months and years, and it behooves a responsible Congress to make sure that it is prepared to participate in them. That objective is important not only as a matter of institutional interest in preserving the Congress's constitutional powers, but as a prerequisite to shaping, refining, guiding and sustaining the difficult actions that President Bush and his successors will surely have to undertake.

Operating in the terra incognita of war against non-state actors and sometimes their State sponsors, in a zone where law enforcement and military power must be blended, in fields where constitutional concerns about civil liberties mingle with complex considerations of national security, where the pursuit of American national interest requires the enlistment of other governments with interests of their own—the President will need and should welcome the active collaboration of Congress.

May I offer two preliminary points:

First, if not carefully and regularly reconsidered in the context of future phases of the war on terrorism, the broad authority conveyed to the President by Senate Joint Resolution 23, even after refinement in the Senate, could lead to considerable friction between the branches over interpretation.

Second, unless there is continuing consultation in good faith between Congress and the Executive, the unity that marks the beginning of the campaign against terrorism could degenerate into the profound disunity that scarred American politics thirty years ago. One doubts that meaningful consultation can be mandated; it must flow from mutual sensitivity between leaders in both branches. Nevertheless, the incentives for such consultation would certainly be enhanced by a firm assertion of congressional prerogatives, not as a challenge to the President but as a commitment by the House and Senate to perform their own constitutional duties.

These considerations lend urgency to the subcommittee's inquiry into the relevance of the War Powers Resolution to the manifold operations likely to arise in the war against terrorism. If the inquiry is to be fruitful, however, I believe it must simultaneously understand the long-running legislative-executive arguments over war powers and strive to move beyond them to invent some fresh approaches. The modern debate over war powers is an exceedingly cluttered one, far different from the clarity that marked early constitutional history. Amid the clutter, in the public debates and the scholarly literature, one will find insight and wisdom, but no ready foundation for a viable policy. If the Congress and the Executive are to restore a healthy balance to managing the war powers they share under the Constitution, they must rise above the clutter that litters the political landscape of the last thirty years. Both branches are going to have to avoid rigid postures and rhetorical poses.

#### 1. GET THE PREMISE RIGHT

To begin with, let us return to first purposes. From the beginning, I would argue, the War Powers Resolution has been widely misunderstood. Far from being an assault on Presidential power, the Resolution was at its inception a *mea culpa* by legislators, a recognition that Congress had failed to meet its constitutional obligations by losing effective control of the Vietnam War. As Professor Alexander Bickel lamented in 1973, a war powers bill became necessary because "Congress must declare its own responsibilities to itself and assume them in principle before the country, if it is ever to exercise them in practice in particular situations."

Among the many contributors to that legislation in the Senate and the House—and it is worth remembering that it won the support of more than two-thirds of the members in both chambers—no one was more central than Senator Jacob Javits. Senator Javits was deeply committed to a vigorous and effective Executive as America's agent in foreign affairs. He was equally committed to a vigorous and effective Congress. For Javits both were indispensable to a potent American role in the world. The balance that he and his colleagues sought to fashion was intended to invigorate American foreign policy by insuring that Congress met its obligations to share in fateful decisions on the use of force. Javits thought it was essential, politically and constitutionally, to create a procedure that made it difficult, if not impossible, for Congress to evade hard choices on the high policy issues of war and peace.

Thus, *the War Powers Resolution was designed primarily to constrain Congress*, compelling members to face within a predictable period and under specified procedures the fundamental question regarding military action by the United States: Does the Congress endorse or oppose the commitment of American blood and treasure to a particular mission? To portray the War Powers Resolution as inimical to the President's constitutional authority is to misperceive its premise. That premise is to assert and to accept the burden of responsible policymaking that the Constitution assigns to the Congress.

#### 2. SEPARATE POLICY JUDGMENT FROM CONSEQUENCES

Three decades' experience under the War Powers Act has been mixed, but on balance disappointing. Senator Javits had hoped that the measure would provide the basis for orderly cooperation between the branches on decisions regarding the use of force. The resistance of every President to the law, beginning with President Nixon's unsuccessful veto, and the Supreme Court's refusal to provide a definitive ruling on the law's constitutionality have left a worrisome cloud over legislative-executive relations in this crucial field. Rather than leaving this unwholesome situation to fester and to hamper future interbranch cooperation in the war on terrorism or other military crises, there is evidently a need to try a new approach. In the spirit of brainstorming I would offer a preliminary suggestion.

Focusing on the initial premise that animated Senator Javits, Senator Stennis and others, is there a way to make certain that Congress reaches the high policy questions in a timely and appropriate way? Perhaps the course of wisdom lies in doing less than the War Powers Resolution attempted. By and large the executive has complied with the reporting requirements set forth in the 1973 Act, although it has played word games by filing such reports as “consistent with” rather than “in compliance with” the resolution. Those reports could be the basis for a different response by the Congress.

Instead of linking the congressional determination on the wisdom of a particular use of force with mandated deadlines for withdrawal or other stipulations of executive actions, Congress could address the basic policy question in pristine form: Does the Congress authorize the use of American military power in this situation and for purposes recommended by the President? Using expedited procedures similar to those in the War Powers Resolution and possibly framing the issue in concurrent resolution form, Congress could deal with that question as a distinct one, reserving for separate consideration whether and how to apply its power of the purse or other authority to enforce its verdict. Even when not connected directly to legal mandates, constraints or budgets, freestanding policy resolutions can establish the political context and the practical premise for implementing and enforcing the policy decision. As courts often separate verdict from sentencing, Congress may find it wise to separate policy verdict from pragmatic consequences.

As a technical matter, a concurrent resolution approved by simple majorities could establish parallel procedures in the House and Senate to expedite presentation of and voting on such a policy declaration. This need not mean repeal or amendment of the War Powers Resolution, for there may be occasions when its binding provisions would be most appropriate. For the subtle and shifting possibilities in the war on terrorism, however, it could be useful to add the option of timely legislative declarations focused exclusively on the high policy regarding use of American forces, whether one thought to be imminent or one already initiated by the President. Depending on the need to receive and assess sensitive information or other factors, Congress might wish to debate such a policy resolution in executive session.

Why would isolating the policy issue in this way be worthwhile? Far from being merely hortatory, a clean congressional vote to support or oppose the policy of military action in the instant case would provide a *political* context for subsequent decisions by both the President and the Congress. The prospect of facing such a vote should induce a degree of self-discipline in the executive, discouraging it from assuming that it has unfettered discretion to launch an attack and heightening awareness that it must frame its plans with an eye to persuading Congress.

Anticipating that such a vote will occur, even without direct and immediate connection to fixed timetables for withdrawal, defense appropriations or other implications, a prudent executive would know that its capacity to sustain a military engagement would be affected significantly by the congressional pronouncement on the high policy involved. Furthermore, unless the President was confident of winning congressional endorsement of the policy, he would have to contemplate dire international implications of a negative legislative verdict. A division with Congress over such a matter would augur poorly for winning support from other governments. Affirmation of the policy, however, would strengthen the President’s hand in pursuing such action, offering the signal of national resolve that is the first desideratum whenever the Nation goes to war.

From the congressional standpoint there are several virtues to isolating a vote on the high policy question from the specific requirements of the War Powers Resolution. A positive vote would maximize American power in the coming engagements by demonstrating beyond doubt that the political branches are in accord. Where they are not, setting the policy benchmark in this way would create a wholly different political context for congressional action to govern further military operations. Having made the policy judgment, Congress would retain flexibility for fine-tuning the requirements to be levied on the executive to meet the legislative policy preference. To be sure, a determined president would be expected to fight further on proposed legislative provisions to enforce the policy choice.

But the momentum toward restraint or disengagement would be established and the majority that had expressed reservations or opposition toward the use of force would be in position to set a timetable, phase down or terminate expenditures, or otherwise move the government out of the conflict. History makes it apparent that Congress will not undercut forces in the field by precipitate withdrawal of support, but the direction of policy would obviously place the burden on the President to arrange an orderly conclusion to the deployments. To put real teeth in the congressional policy verdict, one could even imagine subjecting later proposals for expenditures in support of a disapproved policy to a point of order in the House or Senate.

In short there is considerable promise in establishing a procedure for Congress to deal with high policy on the use of force as a discrete decision, reserving implementation or enforcement for other legislative processes.

### 3. KEEP CONGRESS CONNECTED TO EVOLVING CONFLICTS

Steadiness and perseverance are indispensable in warfare, and committing the United States to use force carries an inevitable implication that the effort will be sustained until the mission is successful. Some would argue that too frequent involvement of the Congress will risk weakening or qualifying the resolve necessary to carry out the military tasks. Popular anxieties percolating through the Congress may encourage adversaries to persist in hopes that American will and stamina may falter.

Against those concerns one must weigh other truths. Wars often go wrong. Costs in lives or resources prove excessive. New dangers arise that may justify a change of course and reallocation of military capabilities. Presidents, as well as Congress, can make mistakes—and find great difficulty in extracting themselves from commitments gone awry. Unless the people and their representatives in Congress give sustained support to military action, such action cannot continue indefinitely. Just as the executive branch will have to adapt its military strategy to changing circumstances in the field, Congress needs to retain the ability to adapt and refresh its policy stance in light of those changing circumstances.

For those reasons it is neither constitutionally sound nor politically reasonable for Congress to limit itself to a single decision point in these matters. Relying on the power of the purse or other devices to adjust policy in an ongoing conflict has proven generally unworkable, partly because Members of Congress are often trapped in a catch 22 dilemma: Cutting off the dollars appears to be abandoning troops in the field, but approving the funds may mean keeping them there long after Congress has concluded that a change of course is needed. To escape from this policy box, it makes sense for Congress to provide itself with recurrent opportunities to express its verdict directly on the central policy issue of whether to continue the military effort or to conclude it. Leaving the congressional position to be inferred from votes on other budget authorizations or appropriations is a recipe for repeated contention with the executive.

This problem is bound to be especially acute in the war on terrorism. As President Bush said in redeploying U.S. forces last fall, “it is not now possible to predict the scope and duration of these deployments, and the actions necessary to counter the terrorist threat to the United States.” There will be many branch points in such an endeavor. More than a few may involve decisions to take military action in additional countries or in different intensity against one or another enemy. A blanket authorization—to paraphrase Senator Richard Russell on another subject—for the executive “to go anywhere and do any thing” is hardly in keeping with constitutional values.

President Bush and his administration have served our country magnificently in mounting the action against those responsible for last September’s massacres in New York and Washington. The Senate also served the Nation well by anchoring the President’s authority to act against those responsible for the September 11 attacks in the context of congressional war powers. Senate Joint Resolution 23 wisely limits the authorization to the perpetrators and sponsors of the September 11 attacks. That formulation correctly foresees that other decisions lie ahead and that Congress must be party to them explicitly, not passively or inferentially.

To play its constitutional role constructively in these circumstances, it makes sense for Congress to adopt a two-track approach to its ongoing policy assessments of the war on terrorism. In keeping with the theory set forth earlier, I would look to devices that permit Congress to articulate its policy verdict without linking that verdict to immediate legal constraints on the president’s action.

First, noting that President Bush has now filed two reports “consistent with the War Powers Resolution,” such reports can be a suitable trigger for an expression of congressional judgment regarding the policy. I would recommend that in the future each such report should be the occasion for priority debate in both Houses and for an appropriate policy resolution by each chamber. A standard formula for such a resolution, perhaps in language simply accepting the executive’s report, could build on the presumption that the President’s policy enjoys legislative support. Approval of such a resolution would reaffirm the alignment of Congress with the President. Rejecting or tabling such a resolution would signal an altered political context in the relationship with implications for subsequent action in Congress, a fact that should influence Presidential management of the particular military engagement.

Second, since not every key decision point in the war on terrorism will be advertised by a Presidential report, Congress needs options to lay down policy markers of its own regarding particular contingencies. Again the challenge is to prepare a procedure which permits and obliges the Congress to express a collective policy view on an expedited basis. Without depending on a Presidential report to trigger such a procedure, one might consider empowering any of the relevant committees—Armed Services, Foreign Relations, and perhaps Intelligence—to present a privileged resolution for prompt debate and action in the full chamber. I do not offer a set formula for such a resolution, but conceive of it as conveying approval or disapproval of using appropriate force against a specified group or state. It might be best to consider any such proposal in executive session, both at the committee and at the full Senate or House level. Deliberations in executive session could make clear to the executive branch where Congress stands on the contingency, while not alerting a potential adversary.

Synchronizing action between the House and Senate might well be accomplished through the concurrent resolution described earlier, committing each house to act on any such privileged policy resolution approved by the other. As a more general mechanism not reliant on specific initiatives to trigger debate, perhaps Congress should schedule periodic votes at regular intervals of 3 or 6 months to provide an opportunity to refresh or refine its policy perspective on the campaign against terrorism.

Let me stress that the concept here goes beyond congressional hearings and reports. Useful as committee hearings may be, I believe the Congress as a whole needs to construct a stream of regular, collective verdicts to test and convey its current stance on the evolving campaign against terrorism or other uses of force.

Measures along these lines are problematic in a number of ways. They could become mere exercises in rubber stamping executive preferences. On the other hand Congress might well amplify popular sentiments surging through the land in ways that distort national policy. Congressional intrusiveness during the Civil War left generations of American politicians leery of too active a legislative role in military affairs. There is surely a danger of untimely or ill-advised congressional interventions in plans or operations that depend on secrecy to be successful.

The faith of representative democracy, however, is that members would approach such choices with the gravity they deserve. There would be no cheap or easy votes on policy expressions of this nature. Undoubtedly, there will be occasions when the executive branch would prefer Congress to remain silent on delicate questions of statecraft and national security; if persuaded, a majority would have the option to hold its tongue by tabling a resolution of this kind.

#### 4. CONSENSUS IS ESSENTIAL TO NATIONAL COHESION

The case for active, continuing congressional engagement on the many issues of high policy presented by an open-ended campaign against terrorism does not rest on an instinct for institutional self-aggrandizement. It is grounded in the critical need to forge and maintain America's social cohesion as a Nation caught up in war. War, especially prolonged war, always poses the risk of depleting that cohesion, so vital to domestic harmony and international effectiveness.

Members of Congress should also realize how essential their involvement is to the morale and cohesion of the military men and women sent to do violence on our behalf. One of our most distinguished and thoughtful military leaders, former Army Chief of Staff, General Edward Meyer, emphasized that point some months ago. In a letter to Congressman Thomas Campbell, who was then seeking a definitive judicial ruling on the constitutional balance of war powers, General Meyer wrote, "I believe it is essential that when American servicemen are sent into combat that they have the support of their fellow Americans. The War Powers Act causes the people's representatives (the Congress) to take a position, and not leave the troops dangling on threads of definition and interpretation." The parallel, policy-centered procedures outlined here would serve that same need.

Congress's stand on how our Nation uses the mighty arsenal at its disposal also bears crucially on America's standing in the world. Even among our closest allies, American power elicits mixed emotions: awe and fear, respect and anxiety. That should surprise no one. Military and economic capabilities of the magnitude America possesses cannot fail to cause alarm in other countries, however benign our intentions. That alarm is heightened to the degree that American force appears to be too easily deployed. In the eyes of others, no less than of our own citizens, American military action may be seen as most legitimate when it is demonstrably subject to democratic governance. This insight is akin to Justice Jackson's memorable formula-

tion that the President's power is at its maximum only when he acts "pursuant to an explicit or implied authorization of Congress."

Marshaling international coalitions to wage the war on terrorism will depend importantly on giving our allies confidence that American power is guided and restrained by a disciplined relationship between Congress and President. Absent attentive, persistent congressional involvement, public diplomacy in the war on terrorism could lose much of the credibility that arises from the perception of America as a model of representative government.

There is thus an enduring necessity to balance executive potency in military endeavors with the legislative review that provides democratic legitimacy. The challenge is not to enchain the presidency but to harness both branches to common purpose. On that insight the War Powers Resolution was founded, and in that insight may be found the germ of other innovations to guarantee that Congress will play its proper constitutional role in the war on terrorism.

Chairman FEINGOLD. Thank you.

I have not interjected to this point, but I just want to underscore something you just said. I think some people assume that this topic means that I or anyone else is complaining that the executive is running roughshod here and that it is Congress complaining. I mean, that can be part of it. Certainly, there are issues about consultation.

But I think you hit the nail on the head when you indicated this also has to do with Congress not necessarily eagerly asserting the powers that it has. It is a pretty good deal for Congress, if tough decisions about war are made by the executive; if things do not go well, they are not responsible. If they go well, they can say, "We were with him all the way."

And what it destroys, in my view, is a delicate balance that was intended where this is a joint process between the executive and the Congress.

So I just think it is important that it has to do significantly with congressional acquiescence and failure to assert its authority. It is not simply a question of somehow the executive not showing leadership, which I certainly think the executive has shown strong leadership.

The second point I just want to make here that your comments stimulated has to do with what I have observed back in my State as I go to every one of my counties every year and hold town meetings. I held a number of the town meetings right after September 11th, and people were enormously accepting and pleased that there seemed to be a consultation and contact between Congress and the executive. And they felt comforted by that, just as they were by the sight of Members of Congress singing "God Bless America" on the steps of the Capitol on September 11th.

What I am observing now, though, as I hold these meetings, is some anxiety, a feeling that the elected representatives are not as involved in this—whether that is true or not, there is a perception out there—and that the people themselves are not very comfortable with knowing where we are going. Although they accept the fact that they cannot know everything, just as Members of Congress have to accept that.

So these are two ways in which I want to clarify some of the reasons why it seems so important to me that we grapple with this issue.

And I appreciate your testimony.

Next is Ruth Wedgwood, who is the Edward B. Burling professor of international law and diplomacy and director of international law and organization at Yale Law School and at the School of Advanced International Studies. She is also currently a senior fellow for international law and organizations at the Council on Foreign Relations. She serves on the U.S. Secretary of State's Advisory Committee on International Law and the National Security Study Group of the Hart-Rudman Commission. She was also chief of staff to the head of the Criminal Division in the U.S. Department of Justice and chaired the Attorney General's Working Group on FBI Informant and Undercover Guidelines.

She is a former federal prosecutor in the Southern District of New York.

Professor Wedgwood has written extensively on international law questions.

And we welcome you. You may proceed.

**STATEMENT OF RUTH WEDGWOOD, PROFESSOR OF LAW, YALE LAW SCHOOL, AND EDWARD B. BURLING PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY, PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHN HOPKINS UNIVERSITY, BALTIMORE, MD**

Ms. WEDGWOOD. Thank you very much, Senator Feingold.

I have to admit initially I am an undeclared participant in the longstanding debate on the War Powers Act. I have not written extensively in the area, though I have my views.

And I think the reason why I have often been reluctant to commit to writing, although I will do it so this afternoon, is that on many occasions I think it is best that disputed constitutional issues not be resolved. You can have colorable arguments on both sides. And often I think the interbranch relationships work best when there is a healthy respect by each side for the plausible arguments that each side can make upon the Constitution.

Any sensible President will want to consult with Congress frequently, which I think President Bush fully appreciates.

That said, I have to admit that deep down I am an unrepentant Hamiltonian, with a rather strong notion of executive power, because of all the reasons that Alexander Hamilton cited in the Federalist Papers, which is that oftentimes in foreign policy one is going to need stealth, secrecy, and speed.

And if one believes in a practical Constitution, which I do, the present circumstance where we have to fight an adversary of a sort we have never had before is all the more occasion, I think, for having perhaps to concede that a President has to be given some latitude.

Al Qaeda is different. The martyrdom cult means they are undeterrable. They have no territorial base so you do not know where to find them. They are patient. I mean, for many of us have been with great chagrin waiting for the other shoe to drop. And the fact that things have been okay so far is no great comfort, because the one thing that al Qaeda has shown over the last 10 years is they will wait until we are not watching.

So this kind of indefatigability and patience on the part of the adversary I think may make 60-day, 90-day time limitations par-

ticularly impractical, even if those limits worked adequately well back in the days of land warfare where the Powell–Weinberger doctrine of overwhelming force often seemed to be coincident in the practical time that we needed to commit to finish off those other kinds of war.

The stakes are different too. You spoke eloquently about the problem of imminent hostilities and the lives of our armed forces and putting folks in harm's way. But this war is different, as we all well know, because the folks in harm's way include civilians. And this is the first time we have had an adversary who deliberately sought to target civilians.

I teach law of war. And this is just the anomalous case. This violates every ordinary norm even of terrorism amongst terrorists, targeting civilians in this number. And I think there are serious people who still worry about radiological bombs and nuclear devices in this town.

So when it comes to the President's power, I am happy and grateful that the Congress has given broad authorization heretofore through its joint resolutions, which moots out, I think, many of the constitutional questions, because when you do look at the resolution of September 18th, I think the Congress did generously go out of its way to give the President a great deal of latitude to try to roll up the network of every organization that was involved in cooperation with al Qaeda in the September 11th attacks. And that I think was foresighted on the part of Congress.

And in addition, I think it was generous and appropriate of Congress to acknowledge openly and plainly in the text of that resolution that the President has some independent authority under Article 2 of the Constitution.

On the question of Iraq, which I know we are not going into that specifically, but I would just note for the record, since I do teach UN issues at Yale and Hopkins, and this is often before me. There has, in a sense, been a continuing conflict with Iraq since 1991. Often we are asked, "Why don't you have to go back to the Security Council for a new resolution for your pinprick bombings in 1993 or 1998?" the attempts we made to try to give teeth to the UN weapons inspection commission.

And the answer has always been that the war was concluded only by a cease-fire that had conditions; Iraq has never met those conditions. The conditions of Resolution 687 have been openly flaunted by—the violation has been openly flaunted by Saddam Hussein.

And therefore, in a real sense, we argued before the UN, the initial 1991 conflict has not really been concluded. It has been in quiescence.

But the no-fly zones north and south, the constant vigilance we maintain to take out Iraqi radar and anti-aircraft, and the several occasions when we have used direct bombing campaigns to remind Saddam Hussein we are serious about weapons inspection, have all been under the umbrella, so far as the UN is concerned, of that initial resolution, and, I think, therefore, in parallel, the umbrella of the Congress' approval of the use of armed force to enforce those resolutions.

Let me just say—I do not want to take more than a moment more—what I think may make it particularly difficult to make public, certainly, and even to broadcast largely some of the intelligence upon which the administration may have to act. I do hold that in general it is real hard to separate diplomacy from deployments of force. Every time a carrier battle group is sent somewhere to send a signal, in a sense, the President is deploying significant armed force, equipped for combat always. Or when we flow troops in just to give a signal, there is a subtle ebb and flow of diplomacy and deployments.

And I think in the post-Vietnam trauma, I am not sure that every academic or every Congressperson at that moment was in a mood to appreciate the necessary intermarriage of diplomacy and deployment.

But the powers of Commander in Chief and the powers of the President to conduct diplomacy I think inevitably involve an ability to certainly signal commitments in an attempt to undertake soft forms of deterrence by deploying troops and equipment abroad.

But in this particular case, where WMD is so different, we are all used to the wording of the Caroline case, the Daniel Webster decision in 1842 which talked about anticipatory self-defense, that you do not have to wait to receive the first blow. And in the Caroline case, Webster put it almost in spot market kind of rhetoric. He said you can reply before attack where there is a threat that is instant, overwhelming, leaving no choice of means and no moment for deliberation. But that is the moment before.

With WMD, we may need a far more vigorous and earlier response. Elihu Root had a very different way of putting it, Secretary of State, Secretary of War. He spoke of the right of the state to protect itself by preventing a condition of affairs in which it will be too late to protect itself.

And here, where we face the danger of off-camera handoffs by Saddam Hussein to al Qaeda, our worst nightmare is the unobserved subcontracting by a rogue state to a terrorist network in an attempt to obscure the authorship of an attack. We may well have to engage in preemptive self-defense.

And because of that necessity, I think it also makes it more difficult to consult in the particular with Congress. I think it is very important to have these kinds of policy discussions with Congress and always take on board Congress' views. But if you did have that possibility of preemptive self-defense, you do not want to let the other guy know you are coming, because if the other guy did have a WMD by that time and he knows you are coming, he will let loose.

So the whole point of preemptive self-defense is to be stealthy and secret and quick. And in this town, as we all know, if you tell anything to more than three people, in any branch of government, you have problems.

So in practical, human terms, normal human foibles, I think these are discussions that one has to have in principle rather than in the real-time of the particular occasion for response.

I do think it is an unprecedented kind of situation, but it is there.

And finally, my favorite part of the Constitution, which I always think is underappreciated just because it has to do with states rather than the Federal Government, but Article 1, Section 10, which says—with language that goes well beyond the War Powers Resolution, may I say—that even Governors, simple, humble Governors, Governor Pataki of New York, say, can engage in war where they are actually invaded or face imminent danger as will not admit of delay.

So I do think the drafters of the War Powers Resolution perhaps had an incomplete contemplation of that moment. They speak only of actual invasion or actual attack. In real-life, strategic relationships you have to be able to think about participatory self-defense and preemptive self-defense.

Thank you.

[The prepared statement of Ms. Wedgwood follows:]

STATEMENT OF RUTH WEDGWOOD, PROFESSOR OF LAW, YALE LAW SCHOOL AND EDWARD B. BURLING PROFESSOR OF INTERNATIONAL LAW AND DIPLOMACY, PAUL H. NITZE SCHOOL OF ADVANCED INTERNATIONAL STUDIES, JOHNS HOPKINS UNIVERSITY, BALTIMORE, MD

I appreciate the opportunity to appear before this Subcommittee to discuss the mutual powers of the President and the Congress in the support of our Nation abroad and in its defense against our adversaries. September 11 has posed an extraordinary challenge for America, in assessing how to safeguard our territory and our citizens against weapons of mass destruction and radical terrorist networks such as al Qaeda.

In the cold war, we were committed to the containment of the Soviet Union, and created an effective architecture of political and defense alliances in order to carry out that purpose. The Congress was centrally involved in the creation of that architecture, through the appropriation of funds and oversight of their expenditure, in the advice and consent of the Senate to treaties of alliance, and in the important consultations of the executive branch with Congressional leadership. The strategy of deterrence depended on both nuclear and conventional forces and gave some stability to the cold war world, even while the Soviet Union and its allies often posed significant challenges.

The end of the cold war world has not permitted any easy repose. Indeed, we now face a situation that is, in many ways, less stable. The danger of a radicalized and militant Islamist movement that seeks to use terror tactics against the West has shown us the difficulties of reconstructing a secure environment. The terrible events of September 11—with the hijacking of four civilian airplanes, the fiery destruction of the World Trade Center towers, and the attack on the Pentagon—have taught us that national boundaries will not be respected. The attacks by al Qaeda deliberately targeted civilians at the start of their working day, causing the death of over 3,000 innocent people. The planners evidently sought to kill many thousands more, since at its peak the Trade Center housed over 25,000 workers. In a real sense, al Qaeda has already exceeded the limits of more familiar terrorist action, and established a new norm of death and destruction. Al Qaeda's interest in acquiring weapons of mass destruction, including chemical, biological, radiological, and nuclear devices, is thus a cause for grave alarm. One fears to contemplate the potential use of a nuclear device in an American city.

The terrorist networks of radical Islam have made a cult of martyrdom, and in that setting, our accustomed strategy of deterrence will not work against them. Al Qaeda often does not claim public authorship of its attacks, and thus we may not know immediately against whom to retaliate. The terrorist networks operate surreptitiously within a host of territorial bases; often we must act against them quickly and in confidence, before their operatives pack their bags and flee to a new base. Al Qaeda has also shown entrepreneurial talent, in soliciting alliances with other groups. Thus, we will encounter instances where the corporate structure of the terrorist network is not crystal clear.

Nonetheless, acting effectively and in real time is of central importance—for we must seek to interrupt the ongoing plans of al Qaeda and its host of recruits before they act against innocent civilians. This is not, in the main, a territorial war, but rather a war against a network. The flexibility of network architecture may demand

a flexibility in our own response. Intelligence will be key, including the ability to keep it close. The airstrikes of August 1998 tried to target some of bin Laden's lieutenants but missed their meeting at an Afghan training camp by several hours.<sup>1</sup> So, too, our ability to carry out operations to seize terrorist suspects abroad, with or without the cooperation of a host government, may depend on delicate matters of timing and coordination. Sometimes cooperative governments may not wish to be seen helping us, for fear of retaliation or political consequence, and an element of a successful strategy will require a low profile.

In all of this, the lives of innocent civilians will hang in the balance. Over the last decade, al Qaeda has carried out its campaign against American military and diplomatic assets, but it has continued on a second track with a war of terror against civilians as well. Under the fatwa of Osama bin Laden, there are no innocents in the West. The plan to bomb ten civilian airliners over the Pacific in the mid-1990's was thwarted only because of a chance fire in the Manila apartment of Ramsey Youssef. So, too, only the chance availability of an informant allowed us to intercept al Qaeda's plans to bomb the Lincoln and Holland Tunnels and the United Nations. We will continue to act against al Qaeda through a variety of means, including arrest and criminal prosecution. But we newly recognize that the concerted nature of al Qaeda's campaign against the West amounts to war as well as crime.

In addition, we will have to address the problem of rogue states that may hand off weapons of mass destruction to these terrorist networks. The traffic between State parties and non-state actors can be complicated. Iraq, for example, may find the intifada in the West Bank to be a convenient diversion against any regime change in Iraq, and may choose to support that violence. Despite its past differences with the Taliban, Iran may find al Qaeda of interest as an antidote to the West's new presence on its eastern border. As of 1998, Iraq was evidently interested in subcontracting the production of chemical weapons to Sudan, or elsewhere, in order to evade U.N. inspectors, and apparently discussed cooperative ventures in this regard with representatives of al Qaeda.<sup>2</sup> We thus may confront a shifting array of malign partnerships, where evil deeds have numerous authors.

What does this mean for partnership between the Congress and the executive branch? Of course the power to declare war still belongs to the Congress, and the confidence of Congress is a valuable asset for any President in a difficult security environment. In the last half century, the initiation of conflict has rarely been accompanied by formal declarations of war, to be sure—perhaps because the U.N. Charter speaks of “self-defense” rather than war,<sup>3</sup> perhaps because war connotes an all-out conflict of a sort states are eager to avoid. The founders of the Republic did not clarify the allocation of authority for the use of force short of war. Rather, this has been left to constitutional good sense and good relations between the branches.

We are all familiar with the famous change in the final text of Article I of the Constitution, in the midst of the Philadelphia Convention. A proposal to endow Congress with the power to “make” war was instead changed to give Congress the power to “declare” war. A President remains dependent on the Congress for the fiscal support of his foreign policy, and the raising and support of the armed forces.<sup>4</sup> He will wisely consult with Congress on matters of importance. Nonetheless it is important to recognize that the limited use of force is interwoven with the very conduct of American diplomacy and statecraft. There have been several hundred instances in which limited armed force has been deployed to protect American lives and property, or to signal American commitment to a course of action. At times, indeed, it may be hard to distinguish between a President's power to conduct diplomacy and his power to deploy ground troops and maritime assets. The poster of a Norfolk shipbuilding company once made the point directly—depicting a gray hulking American aircraft carrier against a black background. The caption beneath the carrier read: “70,000 tons of diplomacy.” We often use the movement of our military assets and personnel around the world as a way of signaling to foreign adversaries that we are serious, and this movement has been thought to fall within the President's constitutional power as Commander-in-Chief.

<sup>1</sup>See Ruth Wedgwood, *The Law at War; How Osama Slipped Away*, *The National Interest*, Winter 2001/02.

<sup>2</sup>See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 *Yale Journal of International Law* 559, 571–72 nn. 50 and 52 (1999).

<sup>3</sup>See United Nations Charter, Article 51.

<sup>4</sup>See United States Constitution, Article I, Section 8 (power of Congress to raise and support armies). Congress' additional power to grant “letters of marque and reprisal” to commission naval privateers dates from the time when the United States still lacked an adequate public navy. Instead, America relied on private vessels operating under public commission to disrupt enemy shipping in wartime. Privateering was abandoned in the mid-to-late nineteenth century.

We also use the deployment of assets as a method of subtle deterrence. For example, in 1996, we were faced with a Chinese adventure against Taiwan. China bracketed Taiwan with missile shots to the north and the south of the island. In response, the President acted on the recommendation of Secretary of Defense William Perry to send two carrier battle groups through the Taiwan Straits—an area through which we enjoy navigation rights but which otherwise might fall within the exclusive economic zone of China. The movement of one battle group through the straits would have been ordinary. The movement of two carrier battle groups signaled to the Chinese that we did not appreciate their attempt at intimidation.

In the attempt to assure an appropriate role in consulting with the President on major foreign policy decisions, the Congress has wisely understood the need to allow this flexibility in the deployment of military assets. So, too, the Congress has understood that a President needs to be able to signal commitment and deter adversaries by intimating that the use of force may be forthcoming.

One sees this concern for balance in the ultimate limits of the War Powers Resolution. Observers have often criticized the War Powers Resolution for setting in motion a 60-day clock limiting our foreign engagements, tempting a martial adversary to lie in wait until the clock has run out. Perhaps serendipitously, the time limits of the War Powers Resolution most often have matched up with our military doctrine of using overwhelming force, so that a conflict can be quickly concluded. But the practical adaptation of the War Powers Resolution may be aided by the Congress' wise acknowledgement, in Section 8(d)(1), that the joint resolution was designed to facilitate consultation, but was never intended to trammel on the President's inherent powers as Commander in Chief. We have a long tradition of reading statutes practically, in order to avoid close constitutional questions. That same principle applies here. It would be imprudent to suppose a clock starts running every time a President sends a carrier battle group on "innocent passage" through an adversary's territorial waters, or flows forces quietly into a region in order to signal resolve to an adversary. The Congress's practical reading of Section 4 of the War Powers Resolution has acknowledged this. So, too, Presidents have tried to respect Congress's need for information by sending reports that are "consistent with" (if not pursuant to) the War Powers Resolution.

In the current situation, Congress has acted wisely to give the President broad authorization for action. In the joint resolution of September 18, 2001,<sup>5</sup> the Congress declared that the horrendous acts of violence against the United States were an "unusual and extraordinary threat" to our national security. Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." The aim, as Congress noted, is "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The central importance of this preventative aim gave Congress good warrant for permitting the President a broad range of action.

The initial strategy has been to oust al Qaeda from its comfortable sanctuary with the Taliban in Afghanistan, and to overthrow the Taliban regime. Denying al Qaeda any safe haven in Afghanistan has disrupted its operations, at least for the moment, and has rescued the civilian population of Afghanistan from the Taliban's brutal oppression. But Congress's foresighted resolution also appropriately permits the President to pursue al Qaeda in any other venue where it may set up shop or seek alliances.

So, too, the Congress reiterated, in its preamble in the September 18 resolution, that the President "has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

Finally, the resolution notes that it constitutes specific authorization for the use of force under the War Powers Act, per section 8(a)(1).

The Executive will undoubtedly wish to consult with the leadership of Congress at regular intervals, consistent with its duty to protect sensitive operational intelligence. But it is worth reiterating that the September 18 resolution does not limit the fight against al Qaeda and its allies to any particular country or territory. On September 28, the Security Council similarly acted to forbid countries from assisting international terrorist groups in any way, under a newly rigorous standard against aiding and abetting.<sup>6</sup> The Congress's wisdom is thus coordinate with the strategy of the larger international community, reflected by the Council.

The question has been mooted, lately, whether there is any basis for the use of force against the regime of Saddam Hussein in Iraq. In this regard, the September

<sup>5</sup> Senate Joint Resolution 23, Pub. L. 107-40, 115 Stat. 224 (Sept. 18, 2001).

<sup>6</sup> Security Council Resolution 1373, September 28, 2001.

18 Congressional resolution may be applicable if the President concludes that available intelligence indicates past or ongoing cooperation between Saddam and al Qaeda.

In addition, one may note the pertinence of United Nations resolutions concerning Iraq, dating from 1990 and 1991,<sup>7</sup> and Congressional authorization of the use of armed force against Iraq in the effort to “achieve implementation of [those] resolutions.”<sup>8</sup> The United States has used air power against Iraq on a continuing basis since 1991, even after the expulsion of Iraq from Kuwait in Desert Storm. Our air patrols have enforced the no-fly zones in the north and south of Iraqi territory, in an attempt to protect the Kurds and the Marsh Shia. Almost without surcease, Iraq has acted to threaten our patrols, using radar to “paint” allied aircraft, and we have responded with munitions to remove the threatening radar and anti-aircraft installations. So, too, we have used air power on a continuing basis to force Iraq to meet its obligation to give up the development of weapons of mass destruction, including nuclear, chemical, and biological weapons. On at least two occasions, in 1993 and 1998, we have used pinpoint bombing attacks against Iraq in order to gain its compliance with the U.N. weapons inspection regime.<sup>9</sup>

The campaign against Iraq was authorized by Security Council resolution 678, and after the conclusion of Desert Storm operations, a cease-fire was approved by the Security Council under Resolution 687. A central condition of that cease-fire is that Iraq must give up its weapons of mass destruction and conform to the inspection requirements of the U.N. Special Commission on Iraq (UNSCOM), now succeeded by the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC). Since that time, the United States has represented to the Security Council on repeated occasions that Iraq’s flagrant violations of the inspection requirements—ranging from denials of the right to use necessary airfields, to harassment of inspectors, to sequestration of important records, to the expulsion of American inspectors—amounted to a breach of the cease-fire conditions. In a real sense, then, the conflict with Iraq has been ongoing, and we have continued to operate under the original authorization of Resolution 678 to “restore peace and security in the area” and gain compliance with the inspection regime. Any alliance between Saddam Hussein and al Qaeda concerning the production or purchase of weapons of mass destruction would thus fall within the terms of the 1991 prohibitions, as well as the September 18, 2001 Congressional resolution.

Under the Constitution, the President continues to enjoy the power to take necessary action against an imminent threat, even in other locales. One may note that in a different age, the Philadelphia Convention felt it necessary to consign even to State Governors the power to “engage in War” where “actually invaded” or where there was “such imminent Danger as will not admit of delay.” See U.S. Constitution, Article I, Section 10. Effective self-defense may sometimes require stealth and surprise, in order to counter the calculations of an underground network bent on our destruction. So, too, any attempt by a rogue State to hand-off weapons of mass destruction to a terrorist group, or to use them in a method directly threatening to the United States and its allies, may require immediate action that may not “admit of delay.” Certainly, one may not wish to announce to a rogue State in advance the exact scope and scale of plans, lest it take action that thwarts our efforts at prevention and preemption. The wisdom of Congress is a resource that provides good value to any President, but the process of consultation is one that also must be adapted to the circumstances of a new kind of battlefield.

Chairman FEINGOLD. Thank you. I appreciate your remarks as well.

We certainly are not going to delve deeply into any particular situation, but I just want to note two things about your Iraq example.

I noticed that you referred to the authority with regard to any action that might be taken with regard to Iraq back to the 1991 authorization. You did not refer to Senate Joint Resolution 23.

<sup>7</sup> Security Council Resolution 660, August 2, 1990; Security Council Resolution 678, Nov. 29, 1990; Security Council Resolution 678, April 3, 1991.

<sup>8</sup> “Authorization for Use of Military Force Against Iraq,” 102 House Joint Resolution 77, 102 Pub. L. 1, 105 Stat. 3. (“The President is authorized . . . to use United States Armed Forces pursuant to United Nations Security Council Resolution 678 (1990) in order to achieve implementation of Security Council Resolutions 660 [seq.]”).

<sup>9</sup> See Ruth Wedgwood, *The Enforcement of Security Council 687: The Threat of Force Against Iraq’s Weapons of Mass Destruction*, 92 American Journal of International Law 724 (1998).

Secondly, with regard to Iraq, I understand your point about the fact that certainly the goals with regard to Iraq and all the particulars have not necessarily been completed during the past 10 years. But it does seem to me that simply because the Congress authorized an action, that does not necessarily mean it is authorized forever or that there is not a question of the scope of what has been authorized.

And again, I simply want to report for the record that what I am hearing from my constituents is a feeling that this could happen and that they have not been consulted and their elected representatives have not been consulted.

Now, that does not mean, as you fairly pointed this out, that Congress should not say, "Look, we are authorizing today, and you need to do it tomorrow." It could be, as Professor Frye I think was suggesting, that it would be a debate, which was greatly appreciated by the American people with regard to the Gulf War, where the general confines of what might be considered, what might have to be done is discussed publicly, so people can participate through their elected representatives.

That is just a point I want to make, because I think there is an assumption that somehow we are going to hamstring the executive in terms of the very delicate things they have to do vis-a-vis handling a situation with Iraq. It does not have to be something that does that and still could perform a very useful function for the American people.

Ms. WEDGWOOD. If I could just note, Senator—

Chairman FEINGOLD. Sure.

Ms. WEDGWOOD [continuing]. Lest I be misread also. I take Senate Resolution 23 from last September and the 1991 House joint resolution as being belt and suspenders. Either would suffice, but together they are very powerful indeed.

Chairman FEINGOLD. Fair enough.

All right. We will now go to Jane Stromseth, who is a professor of law at Georgetown University Law Center. She joined Georgetown University Law Center faculty in 1991, where she focused on constitutional law, international law, and international institutions.

Professor Stromseth received her doctorate in international relations at Oxford, where she was a Rhodes Scholar. At Yale Law School, she served as an articles editor of the Yale Law Journal.

After receiving her J.D. in 1987, she served as law clerk on the U.S. District Court for the District Columbia and to U.S. Supreme Court Justice Sandra Day O'Connor.

From February 1999 to February 2000, Professor Stromseth served as director for multilateral and humanitarian affairs at the National Security Council. During 1989 to 1990, she was an attorney adviser in the Office of Legal Advisor at the U.S. Department of State.

She has written widely on the constitutional war powers of Congress and the President and on various topics in international law.

We welcome you. And you may proceed.

**STATEMENT OF JANE STROMSETH, PROFESSOR OF LAW,  
GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, D.C.**

Ms. STROMSETH. Thank you very much, Mr. Chairman. I am grateful to be here today.

And if I may, I would like to ask your permission to put my longer statement in the record.

Chairman FEINGOLD. Without objection.

Ms. STROMSETH. Thank you.

Since the horrific attacks of September 11th, we have begun to mobilize a broad range of tools in a global war against terrorism. The military components of this campaign are diverse. They include combat operations, continuous air patrols, maritime interception of shipping, the training and equipping of foreign militaries for combat operations, and assistance to post-conflict peacekeeping, just to name a few.

This campaign is likely to be long-term, far-reaching, and in contrast to more conventional military operations, it will be much harder to determine when or if the war is over or what constitutes victory.

Despite these complexities, and indeed in fact because of them, I will argue here that the basic principles of our Constitution concerning war powers remain as vital and relevant as ever, indeed more so, in this war against terrorism.

I will also argue that Congress' post-September 11 authorization of force correctly recognized that both Congress and the President have a vital role to play in this war; that meaningful, high-level consultations are essential as the campaign unfolds; and that additional congressional authorization may be constitutionally required in some situations in the future.

Our Constitution's division of war powers between Congress and the President is part of a structural system of checks and balances designed to protect liberty by guarding against the concentration of power. The division of war powers was also designed to draw upon the distinctive attributes of both Congress and the President, the legislature's deliberative qualities and the President's ability to act with efficiency and dispatch in creating an effective national government capable of protecting and defending the United States.

Mr. Chairman, there is a huge scholarly literature about the Framers' intent and about the meaning of subsequent historical practice, and time does not permit me to engage in a comprehensive discussion here. But let me highlight four points from the record that in my view are essential to understanding the constitutional division of war powers and how they apply to the war on terrorism.

First, the power to declare war vested in Congress was intended by the Framers to be a power to decide, to make a choice about whether the United States should go to war. It was not a formalistic power to simply validate that a previous state of war existed. On the contrary, the Constitution gave Congress the power to decide whether the United States should initiate war because the founders believed such a significant decision for the country should not be made by one person alone but rather by the legislature as a whole to ensure careful deliberation by the people's elect-

ed representatives and broad national support before the country engaged in such an action.

Second, the founders clearly expected the President as Chief Executive and Commander in Chief to protect the United States by repelling attacks, or imminent attacks, against the United States, its vessels, its forces, and to protect American citizens. Moreover, they wanted effective, unified military command in a single set of hands.

However, if an enemy engaged in limited acts, limited attacks that did not themselves bring us into a full state of war, the Constitution envisioned that that decision would be made by the Congress.

Third, Congress' power of the purse, though critically important, is not a substitute for congressional authorization of war before it is commenced. Reliance on the power of the purse alone as a check on executive war powers, moreover, can be overly blunt and sometimes ineffective and counterproductive as a tool for expressing Congress' will.

Fourth, historical practice has not fundamentally altered how we should understand the Constitution's allocation of war powers today. Of the dozen major wars in American history, five were formally declared by Congress and six were authorized by other legislative means.

Now, there is, to be sure, a practice of limited presidential uses of force that falls short of major national conflicts. A substantial number of these, 70 out of the sometimes 200 cases cited by scholars, involve the protection or rescue of U.S. nationals, actions far short of deliberate war against a foreign state and reasonably falling within the President's authority to respond to sudden attacks.

Other cases went beyond this. But as a general matter, one has to be very cautious about drawing broad conclusions about presidential war powers from a very disparate set of cases, some of which were protested by Congress. And so one has to look at the instances very carefully.

And the fact remains that major wars have been authorized by Congress.

Well, which side of the line, in any event, does the current global campaign against terrorism fall? The global war on terrorism in which we are now engaged aims to destroy a multistate terrorist network and potentially to defeat or overthrow sponsoring regimes. The scope and complexity of this global campaign against a terrorist network based in over 60 countries goes beyond any common-sense notion of a limited police action.

Congress, in authorizing the use of force after the September 11th attacks, recognized that the situation we faced implicated the war powers both of the Congress and of the President. And the authorization, though it has no geographical limits and allows for appropriate executive flexibility, is not a blank check.

The joint resolution authorizes the use of necessary and appropriate force against those responsible for the September 11th attacks or those who harbored those responsible. And the purpose of using force is focused in the future, oriented to prevent additional terrorist attacks against the United States by those responsible for the September 11th attacks.

Mr. Chairman, let me make two final points, one about consultation and one about the possibility for future authorizations.

In a campaign against terrorism that is likely to be long and far-reaching, regular and meaningful consultations between Congress and the President as envisioned in the War Powers Resolution are essential to ensure that there is a shared understanding between Congress and the President on future directions in that war and broad support for the steps ahead. A commitment by the President and Cabinet officials to hold regular consultations with the bipartisan leadership, and ideally with the broader group of members as well, I think would be invaluable.

Moreover, given the complexity of the campaign against terrorism, its open-ended nature, its geographic scope, the enormous stakes involved, Congress, I think, should request that a broader range of information be provided in the regular war powers reports that are submitted pursuant to the War Powers Resolution. I think the combination of fuller reports, and perhaps seeking high level testimony when those reports are filed, that combination would, I think, spur a more significant and effective dialogue between Congress and the administration regarding future goals as this campaign unfolds.

But, as Alton Frye and others have I think properly suggested, as important as consultations are, they are not a substitute for congressional authorization in those situations where the Constitution envisions and expects Congress to authorize the choice for war.

As our country moves ahead in the campaign against terrorism, threats to our security that are not linked to September 11th may well present themselves. Whether and when additional congressional authorization is constitutionally required will depend on the facts of the situation and on the nature and magnitude of the military action contemplated.

While the President clearly possesses the power to repel and forestall attacks, the decision to commence a war belongs to Congress. Major military action with far-reaching objectives, such as toppling a government, for instance, is the kind of action that constitutionally the founders expected would be debated and authorized by Congress in advance.

And in this connection, I realize Iraq is not the focus here, but since it was brought up by a previous panelist, let me just say that absent a connection to the September 11th attacks, which may be established—we do not know that at this point—but absent that connection, I do not think that statutory authority currently exists to go to war against Iraq. The 1991 Gulf War authorization does not provide a current authorization to commence such a war. And I think for exactly the reason, Senator, you mentioned: The American people have a sense that these issues have to be debated contemporaneously in light of current circumstances, not relying simply on a resolution adopted over a decade ago in a different set of circumstances.

The war against terrorism, unfortunately, will be with us for a long time. However, as our Nation moves ahead on various fronts, using a variety of tools and means, our response will be both more effective and more sustainable if the Congress and the President

continue, as they have done so far, to work together in the best tradition of our great Constitution.

Thank you.

[The prepared statement of Ms. Stromseth follows:]

STATEMENT OF JANE STROMSETH, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY  
LAW CENTER, WASHINGTON, D.C.

#### INTRODUCTION

Mr. Chairman, I am grateful for this opportunity to appear before the Subcommittee to discuss the important constitutional question of war powers in the context of the war on terrorism.

The September 11th attacks pose unprecedented challenges for our Nation.

We were attacked by a global network that was able to inflict massive casualties upon innocent civilians and would do so again, possibly with greater effect, if given the opportunity. Under such circumstances, we have begun to mobilize a broad range of military, diplomatic, intelligence, law enforcement, economic, and financial tools in order to wage this global war on terrorism. This campaign is likely to be long-term and open-ended, with conflict potentially on multiple fronts; and, in contrast to more conventional operations, it will be much harder to determine when or if the war is over or what constitutes victory.

Despite these complexities, indeed, in fact because of them, I will argue here that the basic principles of our Constitution regarding war powers remain as vital and relevant as ever—indeed even more so—in the fight against global terrorism. I will also argue that Congress’s post-September 11th authorization of force correctly recognized that both Congress and the President have a vital constitutional role to play in prosecuting the global war on terrorism; that meaningful high-level consultations are essential as the campaign against terrorists with global reach and their State sponsors unfolds; and that additional congressional authorization may be constitutionally required in some situations in the future.

#### THE CONSTITUTION’S ALLOCATION OF WAR POWERS

Our Constitution deliberately divided war powers between the Congress and the President. In making this choice, the framers sought to create an effective national government capable of protecting and defending the country while also remaining accountable to the American people. The Constitution’s provisions concerning war powers—like those concerning other aspects of governance—reflect a structural system of checks and balances designed to protect liberty by guarding against the concentration of power. In a deliberate break with British precedent, the Constitution gave Congress the power to declare war because the founders believed such a significant decision should be made not by one person, but by the legislature as a whole, to ensure careful deliberation by the people’s elected representatives and broad national support before the country embarked on a course so full of risks. Reflecting on this allocation of power, James Madison wrote: “In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department.”<sup>1</sup>

At the same time, the framers wanted a strong Executive who could “repel sudden attacks” and act with efficiency and dispatch in protecting the interests of the United States in a dangerous world. By making the President Commander in Chief, moreover, they sought to ensure effective, unified command over U.S. forces and civilian accountability. The Constitution’s division of war powers between the President and the Congress has led inevitably to tension between the branches—and to an enduring tug of war over war powers—even as the participation of both branches clearly is essential in protecting our country and advancing American interests.

Mr. Chairman, there is a huge scholarly literature about the Framers’ intentions with respect to constitutional war powers and about whether historical practices in the two centuries since the Constitution was ratified should alter how we should understand these authorities today. It is impractical for me to offer a detailed and comprehensive discussion here,<sup>2</sup> but let me instead highlight four propositions from

<sup>1</sup> Alexander Hamilton & James Madison, *Letters of Pacifcus and Helvidius on the Proclamation of Neutrality of 1793*, at 89 (James Madison) (Washington, D.C., J. Gideon & G.S. Gideon 1845).

<sup>2</sup> In a longer piece, I discuss original intent, historical practice, and current arguments about war powers more fully and systematically, and I draw on my conclusions in that piece here. See

the historical record that, in my estimation, are central for understanding the constitutional roles of Congress and the President today.

*First, the power to “declare war” vested in Congress was intended by the Framers to be a power to decide, to make a choice, about whether the United States should go to war; it was not a formalistic power to simply validate that a legal State of war existed.* On the contrary, Congress was given the power to determine whether the United States should initiate war in order to ensure that the decision to expose the country to such risks and sacrifices reflected the deliberation and judgment of the legislature—the branch most directly representative of the American people, whose lives and resources will be placed on the line—and to ensure broad national support for such a course of action. This interpretation is further validated by the Constitution’s grant of authority to Congress to authorize reprisals, or acts of limited war, that could lead to a wider war, which clearly indicated a broader understanding of Congress’s war-commencing role than simply a formal declaration that a State of war existed.

*Second, the Chief Executive’s authority to repel sudden attacks by force is incontestable.* The founders expected the President, as Chief Executive and Commander in Chief, to protect the United States by repelling actual or imminent attacks against the United States, its vessels, and its armed forces. Moreover, if another Nation effectively placed the United States in a State of war—by declaring or openly making war upon the United States—the President as Commander in Chief was expected to exercise the nation’s fundamental right of self-defense. However, if an enemy engaged in limited attacks that did not rise to the level of war, the founders expected the President to repel those attacks but not to go beyond this authority and change the State of the Nation from peace to war without congressional authorization.

*Third, Congress’s power of purse, though critically important, is not a substitute for congressional authorization of war before it is commenced.* The founders understood that the British monarch’s power to go to war was qualified to a substantial degree by the Parliament’s power of the purse and its control over military supplies. In giving Congress the power of the purse, including the power of appropriating money to “raise and support Armies” and to “provide and maintain a navy,” the Constitution continued this important legislative check. But the Constitution did not stop here. The Constitution also gave Congress the power to declare war and authorize reprisals, so that congressional deliberation would occur before war was commenced. Reliance on the power of the purse alone as a check on executive war powers, moreover, can be an overly blunt and sometimes ineffective tool for expressing the will of Congress. Limiting or cutting off funds after forces have already been committed is problematic because it undercuts both troops in the field and America’s credibility with her allies. Restricting funds in advance is often undesirable as well because it can harm the President’s ability to carry out effective diplomacy. In short, as important as Congress’s power of the purse is, it is not a substitute for Congress’s power to authorize war.

*Fourth, historical practice has not fundamentally altered how we should understand the Constitution’s allocation of war powers today.* Practice, of course, cannot supplant or override the clear requirements of the Constitution, which gives the power to declare war to Congress. Furthermore, of the dozen major wars in American history, five were formally declared by Congress and six were authorized by other legislative measures.<sup>3</sup> There is, to be sure, a pattern of practice involving more limited Presidential uses of force falling short of major national conflicts, a substantial number of which involved the protection or rescue of U.S. nationals caught up in harm’s way. For example, of the 200 or so cases sometimes cited as examples of unilateral commitments of force by the President, nearly 70 involved the protection or rescue of U.S. nationals, actions far short of deliberate war against foreign countries and reasonably covered by the President’s authority to respond to sudden threats. A number of other operations were interventions or peace enforcement actions that aimed at limited goals. Others involved more far-reaching objectives, however, even if the risks were relatively low. In some of these cases, like Haiti, for instance, Congress protested unilateral actions taken by the President and made

Jane E. Stromseth, “Understanding Constitutional War Powers Today: Why Methodology Matters,” 106 Yale L.J. 845 (1996).

<sup>3</sup>The five declare wars are the War of 1812; the Mexican-American War of 1848; the Spanish-American War of 1898; World War I; and World War II. The wars authorized by other legislative measures include the Naval War with France (1798–1800); the First Barbary war (1801–1805); the Second Barbary War (1815); the Civil War; the Vietnam War; and the Persian Gulf War. The Korean War stands alone as the only major war not expressly authorized by Congress in advance.

clear its view that its authorization should have been sought in advance.<sup>4</sup> My basic point is this: one must be very cautious in drawing broad conclusions about Presidential power from a numerical list of cases. These instances each have to be examined carefully, and the authority claimed by the President and Congress's reaction fully assessed.<sup>5</sup> Ultimately, however, whatever conclusions one comes to concerning the constitutional implications of small-scale Presidential actions undertaken without congressional authorization, the fact remains that major wars have been authorized by Congress.

Where exactly does a global war on terrorism fall on the spectrum between major war and smaller scale military actions? If it were purely a police action against hostile non-state actors, akin to operations against pirates or to other small-scale operations with limited objectives, a case can be made that historical practice indicates a record of Presidential deployments without advance congressional authorization. The President, after all, clearly possesses authority to repel and to forestall terrorist attacks against the United States, its forces, and citizens.

Yet, this global campaign is much more ambitious than apprehending terrorists. It aims to destroy a multi-state terrorist infrastructure and potentially defeat or overthrow sponsoring regimes. While military force is not the only, or even indeed the main, instrument for waging this war, the range of military activities that we have mounted to date is very diverse—combat operations, continuous air patrols, maritime interception of shipping, the training and equipping of foreign militaries for combat operations, operational assistance to post-conflict stability operations, just to name a few. Given that the current campaign is focused against a global terrorist network that is based in over sixty countries, that has the capacity to inflict massive casualties, and that requires or depends upon the sponsorship or acquiescence of various countries for its training and safe-harbors, the scope and complexities of this military campaign would appear to defy any commonsense notion of a limited police action.

#### CONGRESS'S POST-SEPTEMBER 11 AUTHORIZATION OF FORCE: SCOPE AND LIMITS

Congress's authorization for the use of force against those responsible for the attacks of September 11 is an express recognition that Congress and the President both have a critical constitutional role to play in the war on terrorism. Mindful of the centrality of congressional war powers in a campaign against terrorism that will be long-term and far-reaching, Congress sought to craft an authorization that both allowed for appropriate executive flexibility but at the same time is not a blank check.

Though not restricted geographically, Congress's post-September 11 authorization does contain some clear limits. The Joint Resolution authorizes the President:

“to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

The joint resolution, in essence, authorizes (a) necessary and appropriate force, against those states, organizations, or persons who (b) planned, authorized, committed, or aided the September 11th attacks, or (c) harbored such organizations or persons, (d) in order to prevent future acts of international terrorism against the United States by such nations, organizations or persons. Thus, the force must be directed against those responsible in some way for the September 11th attacks, or those who harbored such organizations or persons; and the purpose of using force is focused and future-oriented: to prevent additional terrorist acts against the United States by the states, organizations, or persons responsible for the September 11th attacks or who harbored those responsible. The President determines whether the necessary link to the September 11th attacks is established, and presumably Congress expected he would make his determination and the basis for it known to Congress in some fashion, perhaps through a war powers report or through briefings, e.g., to the intelligence committees. Moreover, in signing the Joint Resolution,

<sup>4</sup>Both Houses of Congress adopted identical resolutions declaring that the President “should have sought” congressional approval before sending U.S. troops to Haiti and urging “prompt and orderly withdrawal.” S.J. Res. 229, 103d Cong., 1st Sess. (1994). The vote was 91 to 8 in the Senate, and 258 to 167 in the House.

<sup>5</sup>For discussion of historical practice, see Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War* (2d ed. 1989); Louis Fisher, *Presidential War Power* (1995); and Jules Lobel, “Little Wars” and the Constitution, 50 U. Miami L. Rev. 61 (1995).

President Bush made clear that he would consult closely with Congress as the United States responds to terrorism.

Congress' post-September 11th resolution was an unambiguous decision to authorize force. Like the Gulf War authorization in 1991, the authorization explicitly affirms that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." This removes any actions that fall within the scope of the authorization from the War Powers Resolution's 60-day time-clock provision. At the same time, Congress made clear that the requirements of the War Powers Resolution otherwise remain applicable.

#### THE WAR POWERS RESOLUTION AND THE WAR AGAINST TERRORISM

For all the controversy it has spurred, key elements of the War Powers Resolution are constitutionally compelling and warrant broad support. First, its overriding purpose is to "insure that the collective judgment of both the Congress and the President" applies to the introduction of U.S. forces into hostilities and to the continued use of those forces. Second, it seeks to enable Congress to better fulfill its constitutional responsibilities by requiring the President "in every possible instance" to "consult with Congress before introducing" U.S. armed forces into hostilities or imminent hostilities and to continue to "consult regularly" with the Congress while U.S. forces are in those situations. Moreover, the legislative history of the War Powers Resolution makes clear that Congress expected consultations to be meaningful:

"Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions, and in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." (H.Rep. 93-287 (1993), p. 2351).

Third, under the War Powers Resolution, the President is required to report to Congress within 48 hours in designated situations,<sup>6</sup> and to make periodic reports to Congress at least once every 6 months if U.S. forces remain in hostilities or imminent hostilities.

Whatever conclusions one reaches about the more controversial provisions of the War Powers Resolution, such as the 60-day time clock,<sup>7</sup> the consultation provisions are sound and reasonable efforts to ensure that both the President and the Congress fulfill their constitutional responsibilities concerning the commitment of U.S. forces abroad. Moreover, even when Congress has authorized the use of force, as it did after September 11, regular, meaningful consultations between Congress and the President remain vital in the ongoing war on terrorism. Such consultations are imperative to ensure that there is a frank exchange of views and a shared understanding between Congress and the President on future directions in the war on terrorism and broad support for the steps ahead. To give a counter-example: The experience in Somalia is a cautionary reminder that congressional authorization and support in the early phases of an operation does not replace the need for continued dialog about the goals and risks of a changing mission. We cannot afford to make the same mistakes in the current context.

#### CONSULTATIONS

How should a system of regular, meaningful consultations between Congress and the Administration be structured as the country faces up to what will likely be a long, complex campaign against terrorism? Clearly, a commitment by the President to hold regular consultations with the bipartisan congressional leadership would be invaluable. Second, as the War Powers Resolution expressly provides in section 4(b), Congress should request that a broader range of information be included in the periodic war powers reports provided by the Administration. Those reports, which have

<sup>6</sup>These include when U.S. forces are introduced into hostilities or imminent hostilities, "into the territory, airspace or waters of a foreign nation, while equipped for combat," or "in numbers which substantially enlarge" existing deployments of combat-equipped forces in foreign nations.

<sup>7</sup>The controversial portions of the War Powers Resolution include section 2c, which I think does too narrowly state the President's constitutional war powers, but does not affect the operation of the rest of the resolution, and the 60-day time clock provisions, including the concurrent resolution provision (section 5(b)). At the same time, however, the War Powers Resolution explicitly states that it is not intended "to alter the constitutional authority of the Congress or of the President," 8(d)(1), and it also contains a severability clause, which provides that if any provision or application of the resolution is held invalid, the remainder of the resolution shall not be affected. (Section 9).

generally been perfunctory since the War Powers Resolution was first enacted, should, in the context of the war on terrorism, include a fuller discussion of the objectives and effectiveness of U.S. action, including our efforts to work closely with allies on multiple fronts. Congress may also wish to request that the reports be made more frequently, say every 3 months, and, in any event, invite Cabinet officials to testify on the State of the war on terrorism when those reports are submitted. The combination of fuller reports and high-level testimony could, in conjunction with meaningful consultations, make for a more significant and effective dialog between Congress and the Administration regarding future goals and strategies in the war on terrorism.

#### FUTURE AUTHORIZATION

As important as consultations are, however, they are not a substitute for congressional authorization if military action is contemplated that clearly implicates Congress's war powers. While the post-September 11 authorization is broad, it does contain limits, most notably the requirement of a clear link to the attacks of September 11. Other threats to U.S. security unrelated to those attacks may exist or arise in the future, and various military options may be considered, including options that go beyond measures to prevent future acts of terrorism by those responsible for the September 11th attacks. Whether and when additional congressional authorization is constitutionally required will depend on the facts of the situation and on the nature and objectives of the military action contemplated.

Constitutionally, the President clearly possesses the power to repel attacks and to forestall imminent attacks against the United States and its armed forces, and to protect Americans in imminent danger abroad. But the decision to go beyond this and commence a war belongs to Congress. Major military action with far-reaching objectives such as regime change is precisely the kind of action that constitutionally should be debated and authorized by Congress in advance. The Constitution's "wisdom" on this point is compelling: Authorization, if provided by Congress, ensures that the risks and implications of any such action have been fully considered and that a national consensus to proceed exists. Congressional authorization also ensures American combat forces that the country is behind them, and conveys America's resolve and unity to allies as well as adversaries.

The war against terrorism will, unfortunately, be with us for a long time. However, as our Nation moves ahead on various fronts, using a variety of tools and means, our response will be more effective and more sustainable if the Congress and the President continue to work together in the best tradition of our great Constitution.

Chairman FEINGOLD. Thank you very much, Professor.

I just want to mention two items here, in light of your testimony.

One is, I was pleased to have you sort of join the point that Dean Kmiec had raised, which I had not heard before, the idea that declaring war is merely to in effect have Congress ratify something that is already happened. I would submit—and I certainly know that he has a dean of law, so I am careful to do this—but that if the Framers had intended that to be the case, they could have used words like "ratify" or "endorse" or "acknowledge." To me, "declare" has always been a strong word suggesting a proactive role for Congress.

But that is an interesting point that I had not thought about before. And as we get into the questions, you can respond to that.

Secondly, some of the testimony seems to merge or maybe even confuse consultations over broad scope of policy directions versus consultation over tactical decisions, which is a dangerous thing. Because none of us, at least nobody that I work with here in the Senate, really believes that we should be consulted about every tactical decision. That is a scary thought, in terms of our armed forces.

And the trouble is, though, as the discussion proceeds, if the goal for consultation is portrayed as trying to get into all that, it makes people turn off on the whole idea of legitimate consultation. And that is something we have to avoid.

The War Powers Resolution talks about scope of operations and not about delving into the President's tactical decision-making. And I want it very clear on the record that that is, at least from my interest in this, what we are talking about here, not an attempt to undercut the very difficult responsibilities that our Executive has in conducting this war and this battle.

Thank you, Professor.

The final witness is Professor Michael Glennon, who is currently scholar in residence at the Woodrow Wilson Center. He is also a professor of law at the University of California–Davis Law School. He is an expert in international constitutional law.

He has held staff positions with the Senate Legislative Council's office and with the Senate Foreign Relations Committee.

And he has also written very widely on these war power issues.

Thank you for joining us.

**STATEMENT OF MICHAEL GLENNON, PROFESSOR OF LAW AND SCHOLAR IN RESIDENCE, WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, WASHINGTON, D.C.**

Mr. GLENNON. Thank you, Mr. Chairman.

Let me begin by congratulating you on putting this hearing together on this critically important subject.

You have asked us to address two questions: First, when will additional authorization be necessary in prosecuting the war against terrorism? Second, how can consultation and reporting practices be made more meaningful?

As I outlined in my prepared statement, the starting point in answering your first question is to determine what authorization is already in place. In principle, authorization of use of force could come from any one of three possible sources: a treaty, a statute, or the Constitution.

There is no treaty that is currently in effect that confers authority on the President to use force. Indeed, the United States has never been a party to such a treaty. And any treaty that purported to do that probably would be unconstitutional.

As to statutes, the War Powers Resolution requires that any authorization to use force be explicit. There are only two statutes currently in force that meet the War Powers Resolution's explicitness requirements.

One of those statutes is the Gulf War Resolution of 1991. In theory, this could confer authority on the President to attack Iraq. I understand that the subcommittee does not wish to explore that complicated question today, so I will not get into that.

The second statute that meets the War Powers Resolution's explicitness requirement is of course S.J. Res. 23. That is the statute passed by Congress, again, on September 14. S.J. Res. 23 would provide continuing authority to use force against entities that were involved in the September 11th attacks on the Pentagon and the World Trade Center.

But S.J. Res. 23 would provide no authority for use of force against an entity not involved in the September 11th attacks.

And I would refer the subcommittee in this connection to the straightforward and clear statement of my friend John Yoo, which appears, Mr. Chairman, on page 516 of the article that you entered

in the record at the outset of this hearing from the Harvard Journal of International Law and Policy, in which John says the following, "The joint resolution's authorization to use force is limited only to those individuals, groups or states that planned, authorized, committed or aided the attacks and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups or states that cannot be determined to have links to the September 11th attacks."

Now, I must say I am somewhat perplexed at my friend Ruth Wedgwood's suggestion that either would suffice, either of these two resolutions would suffice, to provide authority for attacking Iraq. S.J. Res. 23 would not provide authority for attacking Iraq unless it were established that Iraq was involved in the September 11th attacks.

Let me turn, Mr. Chairman, to the Constitution. When the Constitution permits the President to use force without congressional approval is one of the most contentious and vexing issues in American constitutional jurisprudence. In my view, the best short answer to that question was given in the Senate version of the War Powers Resolution, language that was dropped in conference.

It said that the President may act alone in using armed force in the following circumstances: "to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack."

The Senate version of the War Powers Resolution also recognized the President's power to act alone in repelling attacks on the United States armed forces and in protecting threatened U.S. nationals who are located abroad.

In all other situations, the Senate believed in 1973 that prior congressional approval is constitutionally required.

Now, contrast the Senate's 1973 formula with the formula set out in the hastily drafted whereas clause, the fifth whereas clause, of S.J. Res. 23.

And I want to underscore something. A whereas clause is not part of the legally operative language of the statute. It can have no binding effect. It is import is purely prefatory.

The 1973 formula that the Senate adopted flows directly from the sources of constitutional power that Jane Stromseth just identified, the Constitution's text, the Framers' intent, the case law, subsequent custom and practice, and functional and structural considerations. Those sources suggest the rejection of the British model in which war-making power resided exclusively in the king. They explain the adoption of a new American model in which the war power was shared between the executive and legislative branches.

Now, how could consultation and reporting be made more meaningful? Let me begin, Mr. Chairman, by suggesting how I think Congress should not attempt to make consultation and reporting more meaningful.

Congress needs to resist the urge to substitute consultation for authorization. Authorization and consultation are not interchangeable. Consultation can entail only listening. When constitutional lines are crossed, more than listening is required. The Constitution requires compliance. And compliance requires authorization.

Second, I know that many in Congress believe that the information provided by the executive in the war against terrorism has been inadequate. But I hope that Congress will also resist the recurring temptation to set up some superconsultative committee to try to remedy these deficiencies. The risk is too great that such a committee would be co-opted by the executive branch.

The truth is, when the Congress really needs certain information, it can almost always get it. One of the most important documents to get are those describing the legal justification for given actions, "What is the specific legal rationale?" which Congress in many cases does not even request.

Finally, in the next stage of the war on terrorism, I hope that the President will sidestep this tired debate about constitutional theology and ask for congressional approval simply as a matter of sound public policy.

No one can be certain, Mr. Chairman, what is next in this war. But the last thing this Nation needs is a heated constitutional debate on the eve of an international conflict.

Weak Presidents need incessantly to underscore their constitutional prerogatives; strong Presidents do not. If the President acts pragmatically, as Alton Frye has suggested, I hope that Congress will meet him halfway. This means resisting the effort to establish a precedent that its approval was constitutionally required.

The words of President Kennedy carry as much wisdom for inter-branch relations as they do for international harmony. "Civility," he said, "is not a sign of weakness. And sincerity is always subject to proof."

Thank you.

[The prepared statement of Mr. Glennon follows:]

STATEMENT OF MICHAEL GLENNON, PROFESSOR OF LAW AND SCHOLAR IN RESIDENCE, WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS, WASHINGTON, D.C.

Thank you for inviting me to testify today.

You have asked us to address two questions that may arise in connection with use of force in the ongoing war against terrorism. First, at what point will further authorization or consultation be required? Second, how can consultation and reporting be made more meaningful?

Contrary to what seems to be growing sentiment in Congress, authorization and consultation are not interchangeable. Where authorization is required, consultation cannot substitute for it. And even when authorization is in effect, consultation may nonetheless be lawfully required. Let me turn first, therefore, to the question of authorization. At what point, as the war on terrorism proceeds, will the President require additional authorization from Congress?

#### A. SOURCES OF AUTHORIZATION

To identify the point at which further authorization to use force will be needed, it is first necessary to determine what authorization exists and how far it extends. Authorization to use force in prosecuting the war could derive, in principle, from three possible sources: a treaty, a statute, or the Constitution.

##### 1. AUTHORIZATION BY TREATY

The first possible source, a treaty, is most easily dismissed. No treaty currently in force gives the President authority to use force. Indeed, the United States has never been a party to any treaty that purported to give the President authority to use force. The constitutionality of any such treaty would be doubtful in that it would necessarily divest the House of Representatives of its share of the congressional war-declaring power. (For this reason, all of the United States' mutual security treaties have made clear that they do not affect the domestic allocation of power.) Moreover, war-making authority conferred by any such treaty would be cutoff unless it

met the requirements of section 8(a)(2) of the War Powers Resolution. Section 8(a)(2) requires, in effect, that any treaty authorizing the use of force meet two conditions. The first condition is that any such treaty must “be implemented by legislation specifically authorizing” the introduction of the armed forces into hostilities or likely hostilities. This condition is not met because no treaty is so implemented. The second condition is that any such implementing legislation must state that it is “intended to constitute specific statutory authorization” within the meaning of the War Powers Resolution. Again, since no implementing legislation is in effect, the second condition is also not met. Thus it must be concluded that, if further authority to use force is required, the President cannot seek that authority from any treaty.

The principle that no treaty can provide authority to use force in the war against terrorism is important because, prior to use of force by the United States in the Gulf War, it was contended that the United Nations Charter, as implemented by the U.N. Security Council, provided such authority. The argument was that the Security Council resolution authorizing force against Iraq (Resolution 678 of November 29, 1990) somehow substituted, in United States domestic law, for approval by the U.S. Congress (which was given later, in P.L. 102-1, on January 14, 1991). The argument was without merit and has been overwhelmingly rejected by legal scholars. Among other things, it is doubtful that the Charter gives the Security Council the power to order member states to use force, and doubtful, too, whether this power, assigned by the Constitution to the Congress and the President, can be delegated to an international organization. In any event, the first Bush Administration never claimed such authority from the Security Council’s action. Indeed, Secretary of State James Baker made clear at the time that the Security Council had merely *authorized* use of force against Iraq, not required it. But it is conceivable that the argument could re-emerge as the war on terrorism unfolds; if it does, Congress should give it short shrift.

## 2. AUTHORIZATION BY STATUTE

The second source to which the President might turn for authority to use force is statutory law. I reviewed a moment ago the provision of the War Powers Resolution that limits authority to use force that can be inferred from a treaty. A companion provision limits such authority that can be inferred from a statute. That provision is section 8(a)(1). Section 8(a)(1) sets out two similar conditions that must be met before authority to use armed force can be inferred from a given statute. The first condition is that such a statute must “specifically authorize” the introduction of the armed forces into hostilities or likely hostilities. The second condition is that such a statute must state “that it is intended to constitute specific statutory authorization within the meaning of” the War Powers Resolution. Unless each condition is met, a given statute may not be relied upon as a source of authority to use armed force. Arguments challenging the validity of this provision are essentially frivolous (Archibald Cox announced himself “aghast” at the contention); I thus relegate a brief response to an appendix at the end of this testimony (appendix A).

Two statutes now in effect meet these two conditions. The first is the statute enacted by Congress authorizing use of force during the Gulf War, which I alluded to a moment ago (P.L. 102-1, Jan. 14, 1991). Whether this statute continues to provide authority to use force against Iraq is a complicated question, which I understand the Subcommittee does not wish to explore today.

The second statute that meets these conditions is the law enacted by Congress and signed by the President on September 18, 2001, P.L. 107-40. The statute—also known as Senate Joint Resolution 23—is well known to this Subcommittee; for convenience, I append a copy to my statement (see appendix B) and will refer to it as S.J. Res. 23.

How much authority does this statute confer upon the President to use force in prosecuting the war against terrorism? Note at the outset that the statute contains five *whereas* clauses. Under traditional principles of statutory construction, these provisions have no binding legal effect. Only material that comes after the so-called “resolving clause”—“*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*”—can have any operative effect. Material set out in a *whereas* clause is purely precatory. It may be relevant for the purpose of clarifying ambiguities in a statute’s legally operative terms, but in and of itself such a provision can confer no legal right or obligation.

To determine the breadth of authority conferred upon the President by this statute, therefore, it is necessary to examine the legally operative provisions, which are set forth in section 2(a) thereof. That section provides as follows:

IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines

planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

The central conclusion that emerges from these words—which represent the only substantive provision of this statute—is that all authority that the statute confers is tightly linked to the events of September 11. The statute confers no authority unrelated to those events. The statute authorizes the President to act only against entities that planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. No authority is provided to act against entities that were not involved in those attacks. The closing reference limits rather than expands the authority granted, by specifying the purpose for which that authority must be exercised—“to prevent any future acts of international terrorism against the United States. . . .” No authority is conferred to act for any other purpose, or to act against “nations, organizations or persons” generally. Action is permitted only against “such” nations, organizations or persons, to wit, those involved in the September 11 attacks.

The statute thus cannot serve as a source of authority to use force in prosecuting the war on terrorism against entities other than those involved in the September 11 attacks. To justify use of force under this statute, some nexus must be established between the entity against which action is taken and the September 11 attacks. A recent article co-authored by Deputy Assistant Attorney General John C. Yoo accurately emphasized the narrowness of the authority conferred by S.J. Res. 23. Professor Yoo wrote as follows:

The Joint Resolution’s authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed, or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups, or states that cannot be determined to have links to the September 11 attacks.<sup>1</sup>

The requirement of a nexus between the September 11 attacks and the target of any force is reinforced by the statute’s legislative history. Unfortunately, because of the truncated procedure by which the statute was enacted, no official legislative history can be compiled that might detail what changes were made in the statute, and why. It has been reported unofficially, however, that the Administration initially sought the enactment of legislation which would have set out broad authority to act against targets not linked to the September 11 attacks. The statute proposed by the Administration reportedly would have provided independent authority for the President to “deter and pre-empt any future acts of terrorism or aggression against the United States.”<sup>2</sup> Members of Congress from both parties, however, reportedly objected to this provision.<sup>3</sup> The provision was therefore dropped from the operative part of the statute and added as a final whereas clause, where it remained upon enactment.

Accordingly, unless future use of force is directed at an entity that participated in the events of September 11, authority for such use must derive from a source other than S.J. Res. 23. Again, setting aside the only other remaining potential statutory source of authority—the Gulf War authorization (P.L. 102–1, Jan. 14, 1991)—only one possible source remains: the United States Constitution. If use of force by the President is authorized by the Constitution, no authority is needed from any treaty or statute.

### 3. CONSTITUTIONAL AUTHORIZATION

A starting point in considering the ever-controversial question of the scope of the President’s independent constitutional powers is to note a proposition on which commentators from all points on the spectrum have agreed: that the President was possessed of independent constitutional power to use force in response to the September 11 attacks upon the United States. As was widely observed at the time, the War Powers Resolution itself supports this conclusion. Its statement of congressional opinion concerning the breadth of independent Presidential power under the Con-

<sup>1</sup> Robert C. Delahunty & John C. Yoo, *The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Nations and the Nations That Harbor or Support Them*, HARV. J. LAW & PUB. POL. 488, 516 (Spring, 2002).

<sup>2</sup> Helen Dewar & Juliet Eilperin, *Emergency Funding Deal Reached; Hill Leaders Agree to Work Out Language on Use of Force*, WASH. POST, Sept. 14, 2001 at A30.

<sup>3</sup> Helen Dewar & John Lancaster, *Congress Clears Use of Force, Aid Package; \$40 Billion—Double Bush’s Request—Earmarked for Rebuilding Terror Response*, WASH. POST, Sept. 16, 2001 at A11.

stitution (section 2(c)(3)) recognizes the President's power to use force without statutory authorization in the event of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Thus, U.S. military operations in Afghanistan could have been carried out under the President's constitutional authority, even if S.J. Res. 23 had never been enacted. This conclusion has important implications for the specific subject of this Subcommittee's interest—at what point a need for further authorization might arise. If future use of force is necessary in or against other countries that, like Afghanistan, are linked to the September 11 attacks, S.J. Res. 23 will continue to suffice, along with the President's constitutional authority, to provide all necessary authorization.

A more difficult question arises in connection with a need to use force in the future against states or groups not connected with the September 11 attacks. This question presents squarely one of the most vexing problems in U.S. constitutional jurisprudence—the scope of the President's power to use armed force without prior congressional approval.

In the last 30 years, Congress has on two occasions expressed its opinion on the issue. One statement of opinion, as I mentioned, is set forth in section 2(c)(3) of the War Powers Resolution. I've also alluded to the other statement: the final *whereas* clause in S.J. Res. 23. That *whereas* clause expresses the opinion of Congress that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Obviously, these two statements are inconsistent. The scope of Presidential power to wage war that was recognized by Congress in the War Powers Resolution is much narrower than that recognized in S.J. Res. 23. If the President only has power to act alone in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," then he obviously is without power to "take action to deter and prevent acts of international terrorism against the United States" where no attack upon the United States has occurred. Which statement is correct?

In my view, neither. The statement in the War Powers Resolution is overly narrow, and the statement in S.J. Res. 23 is overly broad. The original, Senate-passed version of the War Powers Resolution contained wording—dropped in conference—that came close to capturing accurately the scope of the President's independent constitutional power. It provided—in legally binding, not precatory, terms—that the President may use force "to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack." This formula—unlike the hastily crafted words of the S.J. Res. 23 *whereas* clause—was drafted over a period of years, with numerous hearings and advice from the top constitutional scholars in the country. It was supported by Senators Fulbright, Symington, Mansfield, Church, Cooper, Eagleton, Muskie, Stennis, Aiken, Javits, Case, Percy, Hatfield, Mathias, and Scott—not an inconsequential group. The Senate language was dropped in conference only because the House conferees insisted upon their version of the Resolution; they would have scuttled the whole effort had their version not been accepted. As a participant (counsel to the Senate conferees) in that 1973 conference committee, I can only say that I thought then—as I have on numerous occasions since—that the country would have been far better off if the Senate version of the Resolution had been adopted.

To be sure, not everyone regards the formula from the Senate version of the Resolution as a complete description of bedrock constitutional principle. Yet that formula is *the* statement that most fully reflects the capacity of the U.S. Senate for studied, serious, and sustained inquiry into the question that brings this Subcommittee here today. And I believe that that statement (together with the rest of the section in which it was included, which recognizes additional authority to use force in repelling attacks on the armed forces and also in protecting threatened nationals located abroad) approximates most closely the dispassionate conclusion that would still be drawn today by members of both parties if they had the chance to study the issue as it was studied so painstakingly by their predecessors that I mentioned. Further efforts have been undertaken at refining that formula, most notably by Senator Joseph Biden's Subcommittee on War Powers, which held important hearings in 1988. His proposed "Use of Force Act" (S. 2387, 105th Cong., 1st Sess.) flowed from those hearings. But the fundamental premise is unchanged.

That premise can be simply stated: *that the war power is shared between Congress and the President.*

This is the premise that animates all efforts by Members of Congress who seek to have the Executive meet authorization and consultation requirements. This is the premise that is, for all practical intents and purposes, rejected by proponents of sole executive power.

The premise flows from each source of constitutional power:

- *The constitutional text.* Textual grants of war power to the President are paltry in relation to grants of that power to the Congress. The President is denominated “commander-in-chief.” In contrast, Congress is given power to “declare war,” to lay and collect taxes “to provide for a common defense,” to “raise and support armies,” to “provide and maintain a navy,” to “make rules for the regulation for the land and naval forces,” to “provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions,” to “provide for organizing, arming, and disciplining, the militia,” and to “make all laws necessary and proper for carrying into execution . . . all . . . powers vested by this Constitution in the Government of the United States.” Congress is also given exclusive power over the purse: “No money,” the Constitution provides, “shall be drawn from the Treasury but in consequence of appropriations made by law.”

- *The case law.* Support for the Executive derives primarily from unrelated dicta pulled acontextually from inapposite cases. The actual record is striking: Congress has never lost a war powers dispute with the President before the Supreme Court. While the cases are few, in every instance where the issue of decisionmaking primacy has arisen—from *Little v. Barreme* (1804) to the *Steel Seizure Case* (1952)—the Court has sided with Congress.

- *Custom.* It is commonly asserted that Presidents have used armed force abroad over 200 times throughout U.S. history. It is true that practice can affect the Constitution’s meaning and allocation of power. The President’s power to recognize foreign governments, for example, like the Senate’s power to condition its consent to treaties, derives largely from unquestioned practice tracing to the earliest days of the republic. But not all practice is of constitutional moment. A practice of constitutional dimension must be regarded by both political branches as a juridical norm; the incidents comprising the practice must be accepted, or at least acquiesced in, by the other branch. In many of the precedents cited, Congress objected. Furthermore, the precedents must be on point. Here, many are not: nearly all involved fights with pirates, clashes with cattle rustlers, trivial naval engagements and other minor uses of force not directed at significant adversaries, or risking substantial casualties or large-scale hostilities over a prolonged duration. In a number of the “precedents,” in fact, Congress actually approved of the executive’s action (as was true, for example, in the case of the war against the Barbary pirates, which I will discuss in a moment).

- *Structure and function.* If any useful principle derives from structural and functional considerations (and this is doubtful), it is that the Constitution gives the Executive primacy in emergency war powers crises, where Congress has no time to act, and that in non-emergency situations—circumstances where deliberative legislative functions have time to play out—congressional approval is required.

- *Intent of the Framers.* Individual quotations can be, and regularly are, drawn out of context and assumed to represent a factitious collective intent. It is difficult to read the primary sources, however, without drawing the same conclusion drawn by Abraham Lincoln. He said:

“The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.”

Chief Justice William Rehnquist (quoting Justice Robert Jackson) shared Lincoln’s belief that the Framers’ rejected the English model. He said:

“The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image.”

Notwithstanding the plain import of these sources of constitutional power, some argue that the only role for Congress occurs after the fact—in cutting off funds if the president commences a war that Congress does not support. Two problems inhere in this theory. First, it reads the declaration-of-war clause out of the Constitution as a separate and independent check on Presidential power. The Framers intended to give Congress control over waging war before the decision to go to war is made. Giving Congress a role only after the fact, however, would make its power to declare war nothing but a mere congressional trumpet to herald a decision made elsewhere. Whatever else the Framers may have done to enhance the President’s power, surely they did not play the neat trick of giving Congress a war power that is really no power at all.

Second, the theory flies in the face of the Framers' manifest intention to make it more difficult to get into war than out of it. This approach would do the opposite. If the only congressional option is to wait for the president to begin a war that Congress does not wish the Nation to fight, and then cutoff funds, war can be instituted routinely with no congressional approval—and seldom if ever ended quickly. The practical method of cutting off funds is to attach a rider to the Department of Defense authorization or appropriation legislation. This means, necessarily, passing the legislation by a two-thirds vote so as to overcome the inevitable Presidential veto. The alternative is for Congress to withhold funding altogether—and be blamed by the president for closing down not merely the Pentagon but perhaps the entire Federal Government. The short of it is, therefore, that to view the congressional appropriations power as the only constitutional check on Presidential war power is, for all practical purposes, to eliminate the declaration-of-war clause as a constitutional restraint on the president. Proponents of this perspective may believe that Presidents Wilson and Roosevelt could have fought World War I and World War II without prior congressional approval, but this curious interpretation would have been received with astonishment in Philadelphia in 1787.

For reasons such as these, the Office of Legal Counsel of the Justice Department concluded in 1980 that the core provision of the War Powers Resolution—the 60-day time limit—is constitutional. It said:

“We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of “unavoidable military necessity.” This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.

Finally, Congress can regulate the President's exercise of his inherent powers by imposing limits by *statute*.”<sup>4</sup>

The occasional suggestion is made that, in the war on terrorism, the United States is confronting a new phenomenon—the “privatization of war”—and that traditional constitutional principles must therefore give way if this war is to be prosecuted effectively. It surely is true that al Qaeda represents an entity with fewer governmental links than most of the adversaries encountered by the United States in recent years. But it is not correct that non-state actors are a new phenomenon in the annals of warfare. Many of the belligerents involved in the earliest conflicts fought by the United States were non-state actors. The Barbary pirates are a classic example. These (quite literally) Barbarians were the al Qaeda of the Federalist era—sea-going terrorists who ravaged Mediterranean shipping and exacted millions of dollars in bribes from faint-hearted states. It is worth recalling Jefferson's response. As Secretary of State, he advised that “it rests with Congress to decide between war, tribute, and ransom. . . .” Later, as President, Jefferson told Congress that as President he was “unauthorized by the Constitution, without sanction of Congress, to go beyond the line of defense.” “Measures of offense,” he said, must be authorized by Congress. Hamilton disagreed that congressional approval was required inasmuch as “Tripoli had declared war in form” against the United States; this, in his view, would have permitted Jefferson to act alone. But if the United States had not been attacked, Hamilton believed, Jefferson would have needed legislative authorization. “[I]t is the peculiar and exclusive province of Congress,” Hamilton wrote, “when the Nation is at peace to change that State into a State of war . . . .” “[I]t belongs to Congress only to go to war . . . .” Congress proceeded to enact ten statutes authorizing Presidents Jefferson and Madison to prosecute the Barbary Wars.

The question before the Subcommittee today is whether, in the war against terrorism, Congress will allow the Presidency to be re-created in the image of George III. The incentive to do so is not a consequence of iniquity or treachery within the executive branch. The incentive is atmospheric—it is in the air, a natural impulse that springs from sudden terror and uncertain safety, from the urge simply to protect and to be protected. If Congress's answer is no—if Congress refuses to permit the arrogation of legislative war power by the Executive—then the only alternative will be to demand adherence to a rigorous authorization requirement.

<sup>4</sup>*Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization*, 4A OP. OFFICE OF THE LEGAL COUNSEL, DEP'T OF JUSTICE 185, 196 (1980).

Where should the line be drawn? I commend to the Subcommittee, once again, the thoughtful formula devised by the Senate itself three decades ago: the President may act alone in using force “to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack.” In all other situations, the President should proceed only if Congress has given its prior approval.

#### B. CONSULTATION AND REPORTING

I reiterate my opening comment: where authorization is required, consultation will not suffice. Consultation necessarily entails only listening. Constitutionally, listening is not enough. When constitutional lines are crossed, *compliance* is required.

The War Powers Resolution requires that the President consult with Congress “in every possible instance” before using force. It also requires that, even after Congress has authorized use of force, he “report to the Congress periodically on the status of such hostilities,” and “in no event . . . less often than once every 6 months.” Many Members of Congress apparently have concluded, however, that these requirements have not been met. Inevitably, these dissatisfactions lead to pressures to establish a “super” joint consultative committee of congressional leaders which, surely, will do—must do—a better job at getting information than existing committees and individual members.

There is no question that congressional access to information must be complete and continuous. To approach a crisis with full perspective, a decisionmaker, in Congress or the executive branch, must be knee-deep in relevant information and analysis prior to the outbreak of the crisis. Agencies that deal with national-security crises normally engage in much “contingency planning,” where options are drawn up in advance for the various scenarios likely to arise. These plans, as well as real-time data on events as they unfold, should be fully available to relevant congressional committees. It is to the advantage of the Executive as well as Congress that full information be provided: the smaller the gap in knowledge between the two branches, the smaller the policy differences are likely to be. Reasonable policymakers often reach differing views only because their informational universes are different.

Nevertheless, I hope that Congress will resist pressures to establish some joint “super” committee. Such a committee, in my view, would be too easily co-opted by the Executive. It would likely be dominated with get-along, go-along Members who are too inclined to ask easy questions and accept evasive answers, not with naysayers and young Turks who are willing to make waves that rock boats in the Pentagon, CIA and State Department. Its members would soon develop a cozy relationship with new-found friends in the executive branch, who surely would target them for favors and special treatment. Their special status would create special problems. Would they represent their absent colleagues’ views when their own are in conflict? If the public were misled, would they be willing to share confidential information with their colleagues, let alone with the public? If the Executive took action at odds with their advice, would their privileged position be jeopardized by speaking out? If they remained silent, would their assent be assumed to policies they might otherwise have questioned? Would photo ops at the White House substitute for hard-headed scrutiny of Administration policy proposals? Decentralized power is a source of congressional strength, not weakness.

Lord Bryce reminded us that “the student of institutions as well as the lawyer is apt to overrate the effect of mechanical contrivances in politics.” The War Powers Resolution is one “mechanical contrivance” that was surely overrated thirty years ago. Congress ought not make the same mistake again by adopting some new contrivance that promises to resolve perceived consultation or reporting inadequacies. I believe that the solution to inadequate information is not more detailed or more numerous consultation or reporting requirements, but greater congressional self-reliance. Consulting with executive officials and reading their reports are two of only many ways of getting information. Ninety-five percent of the information to be had from classified briefings is available in the *Washington Post*. If Congress really wants the rest, it normally can get it.

How? One way to develop needed information is through forceful and insistent staff work. During the evacuation of South Vietnam following the collapse of the Thieu government, the onsite investigations of two members of the professional staff of the Senate Foreign Relations Committee, Richard Moose and Charles Meissner, proved invaluable in assessing executive testimony concerning the number of refugees expected and American capabilities for their removal. Committee staff must be able, with the committee’s support, to travel instantly to trouble spots, sometimes

under unsafe conditions. They must be skeptics, doubters, unbelievers—persons of independent judgment who are willing to say no, able to acknowledge uncertainty, and able to resist pressures for consensus. They must be individuals of strong institutional pride, whose goal is not to pave the way for a job in the executive branch but to serve the Senate or House of Representatives with dedication and integrity. As the war against terrorism expands, the need for such staff will grow.

Amazingly, some of the most important information Congress can get is not transmitted by the Executive for the simple reason that Congress has never asked. I refer in particular to the legal justification for various actions or policies. Nothing is more important in assessing a given policy than the legal rationale supporting it. Often these justifications are prepared in great detail—but remain unreviewed by Congress merely because Congress has never seriously requested them. I refer, for example, to the Clinton Administration's use of force in Kosovo. Legal scholars in the United States and abroad eagerly awaited an explanation of the legal basis—in constitutional as well as international law—for military operations against Yugoslavia. Even during litigation on the issue (in *Campbell v. Clinton* (1999)), the Administration never produced a supporting legal rationale. Much the same can be said of military operations undertaken against Iraq in 1998. Similarly, the question whether detainees at Guantanamo are entitled to POW status has generated enormous attention in scholarly communities and beyond—but no legal analysis of the issue has been released. I was advised informally by one administration official that the reason was simply that no congressional request had been made for the document—which had been prepared with painstaking care, and which could have answered persuasively many of the critics. If Congress is serious about authorizing what the Constitution requires to be authorized, it must begin by regularly and diligently insisting that the Executive transmit a legal justification for its actions—not simply a conclusory assertion that the action is justified by the “President's powers as commander in chief” or the President's general “foreign policy” powers, as is commonly done in reports under the War Powers Resolution, but a specific and detailed legal analysis of why and how the action is authorized.

### C. CONCLUSION AND RECOMMENDATIONS

More important than more information is what Congress *does* in response to the information it already has; often that information is more than sufficient for carrying out its constitutional responsibilities. In this regard, it is useful to turn briefly to the recent past, and then to the future.

The Nation's involvement in the tragedy of Vietnam traced in part to the cursory consideration given by Congress to the legislation that authorized that involvement, the infamous Gulf of Tonkin Resolution. The Resolution was adopted hastily, with no committee hearings, no mark-up, no conference committee, and little floor debate. In a post-mortem conducted 4 years later, the Senate Foreign Relations Committee—whose Chairman, J. William Fulbright, had served as the Senate floor manager—issued a report that made recommendations to future Congresses as to how the recurrence of such a mistake might be avoided. The report, entitled “National Commitments,” No. 91-129, 91st Cong., 1st Sess. (April 16, 1969), is a tribute to congressional prescience. In it the Committee recommended that, in considering future legislation involving the use or possible use of force, Congress—

- (1) debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;
- (2) use the words *authorize* or *empower* or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the Armed Forces, Congress is granting him power that he would not otherwise have;
- (3) State in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and
- (4) put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force.

Recommendation (2) was inapplicable to the consideration of S.J. Res. 23 since, as discussed above, the President had power to respond to the sudden attack on the United States without any authorization from Congress. I also pointed out earlier that S.J. Res. 23 is closely linked to the events of September 11. Note, however, that not one of the three remaining recommendations was followed by Congress in enacting S.J. Res. 23. Debate on the measure was perfunctory at best; some Members seemed to consider debate a dispensable inconvenience. No committee hearings were held, no mark-ups were conducted, and floor debate was hurried. No legislative

record of any substance was established that will clarify Congress's intent in the event it may be called into question—concerning, for example, use of force against “persons” who happen to be located within the United States; would the law authorize the use of military tribunals to try such persons? (The President's order establishing the tribunals cites S.J. Res. 23 as supporting authority.) S.J. Res. 23 is anything but explicit about “the kind of military action that is being authorized and the place and purpose of its use.” Nor are any time limits imposed. If Congress at some point in the future becomes dissatisfied with the purpose or manner in which force is used under the statute, it will have to muster a two-thirds vote to repeal the law over the President's veto—which is one of the reasons that it took years for Congress finally to end American involvement in the Vietnam War. Many commentators have lamented the gradual loss in Congress of an institutional memory; if the legislative branch is to exercise its share of the war power responsibly in the future, it must avail itself of the lessons of the past far more ably than it did following the crisis of September 11th.

The executive branch might also benefit from approaches used successfully in the past. The Subcommittee can perhaps do little to control how the Executive attends to its perceived constitutional responsibilities. One thing Congress can do, however, is to meet the executive branch half way if the President does what many hope he will do: to get beyond the tired debate over constitutional theology and approach use-of-force issues pragmatically—focusing not upon dogmatic insistence upon constitutional prerogatives, but upon the practical consequences of his action.

Let me spell out what pragmatism would counsel in a concrete situation—the decision to use force against Iraq. No doubt the White House is already awash in reams of memoranda importuning the President to claim every variety of legal justification for avoiding Congress in the decision to attack Iraq. Some such claims might not be implausible; as I noted earlier, the legal questions are complex. But no useful purpose would be served by getting into a heated constitutional debate with Congress on the eve of a major international conflict. Policy-makers in the executive and legislative branches should be immersed in the intricate military, diplomatic, and political aspects of the issue—not in the diverting legal and constitutional issues that we have been discussing here today.

There is a simple way for the President to lead Congress toward this more productive relationship—that is, by announcing that he seeks congressional approval for policy, rather than for legal, reasons. Such an approach would entail an initial Presidential request for authorization with no necessary acknowledgment that it is constitutionally required; indeed, the President would be free to maintain that he can act alone (as the first President Bush did during the Gulf War) just as Congress, in giving that approval, would be free to maintain that he cannot act alone (as Congress did during the Gulf War). All the President need say is that he would welcome congressional support. If polls are to be believed, he will get it overwhelmingly. Congress, in turn, ought thus resist any temptation to establish that its approval was constitutionally required.

If neither branch seeks a favorable constitutional precedent, one winner will emerge: the Nation. The resulting policy would benefit enormously from the legitimacy conferred by inter-branch cooperation. Domestic support would be solidified. Overseas, adversaries as well as allies would see the United States as united. This could be crucial if the action led to a more extensive conflict than anticipated. Kosovo was a “little war”—but would have been a much bigger war if the British had honored Gen. Wesley Clark's order to confront the Russian contingent approaching Pristina. Little wars can pose big risks. When possible, big risks should be shared.

President Dwight Eisenhower knew this. Eisenhower repeatedly saw the wisdom in seeking congressional approval before using force. Eisenhower was often urged to use his sole constitutional power to come to the aid of the French in Vietnam. He refused. “There is going to be no involvement of America in war,” he said, “unless it is a result of the constitutional process that is placed upon Congress to declare it.” When China took aggressive action against offshore islands in 1955, Eisenhower was again pressured to react, relying upon his independent commander-in-chief powers. Again he refused and instead sought congressional approval, observing that “[i]t would make clear the unified and serious intentions of our Government, our Congress, and our people.” In 1957, when violence threatened the Middle East and American military involvement seemed advisable, Eisenhower again sought advance congressional approval to use force. “I deem it necessary to seek the cooperation of the Congress,” he said. “Only with that cooperation can we give the reassurance needed to deter aggression.” Eisenhower promised “hour-by-hour” contact with Congress if military action became necessary.

Weak presidents need incessantly to underscore their “delicate, plenary, and exclusive” constitutional prerogatives. Strong presidents do not. I hope that, as the war on terrorism expands, this President will act from perceived strength, not weakness. If he does, I hope that Congress will respond in the spirit of President Kennedy, whose words apply equally to inter-branch harmony as to international understanding: “Civility,” he said, “is not a sign of weakness, and sincerity is always subject to proof.”

I would be happy to answer any questions.

## APPENDIX A

### CONSTITUTIONALITY OF SECTION 8(A)(1) OF THE WAR POWERS RESOLUTION

Section 8(a) of the War Powers Resolution provides as follows:

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances 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 stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

Section 8(a)(1) was adopted virtually verbatim from paragraph (4) of section 3 of the Senate-passed version of the Resolution, S. 440, 93rd Cong., 1st Sess. (1973). (The House bill contained no comparable provision.) Its meaning and purpose were explained in the report of the Senate Foreign Relations Committee on the bill. The Committee said as follows:

The purpose of this clause is to counteract the opinion in the *Orlando v. Laird* decision of the Second Circuit Court holding that passage of defense appropriation bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war.

S. Rep. 93-220 at 25 (1973). In *Orlando*, the court had rejected the argument that authorization to use force in Vietnam could not properly be inferred from “military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President.” 443 F.2d at 1043.

The case for the constitutionality of section 8(a)(1) is simply put. A law enacted by Congress is presumed to be constitutional. The burden of persuasion falls upon one who challenges a statute’s constitutionality. The argument challenging the constitutionality of section 8(a)(1) (which may also extend to section 8(a)(2), concerning treaties) seems to be a two-pronged contention, roughly as follows:

1. One Congress cannot bind a later Congress; legislative acts must be alterable when the legislature chooses to alter them. One legislature is competent to repeal any law which a former legislature was competent to pass. New legislators cannot be bound by policies of earlier days. New legislators have a right to repeal by inference preexisting laws; the latest expression of the legislative will must prevail. Therefore, Congress remains free to authorize use of force implicitly, the words of section 8(a)(1) notwithstanding.

2. Use of force may be authorized constitutionally by appropriations statutes and other laws implicitly or indirectly facilitating that use. Therefore, section 8(a)(1) would take from Congress a constitutionally permissible method of authorizing war.

Each argument is easily answered. Although their premises are of course correct, their conclusions simply do not follow.

The first argument mistakes the premises that it posits with a very different implicit premise—that section 8(a)(1) is somehow “unrepealable.” Obviously it is not. Any time Congress wishes to repeal section 8(a)(1) it can do so. It can do so, moreover, using precisely the same procedure applicable to the repeal of any other statute. The Congress that enacted section 8(a)(1) thus did not in this sense “bind” later Congresses, for later Congresses retain full discretion to alter that section if and when they choose to alter it. Any Congress wishing to authorize use of force implicitly can easily do so: it can either repeal section 8(a)(1) at the same time it enacts

such implicit authorization, or it can simply provide by law that section 8(a)(1) does not apply to the legislation in question.

What this first challenge to section 8(a)(1) neglects to note is that the so-called “last-in-time doctrine” is not mandated or created by the Constitution. The doctrine is simply a canon of construction—judicially invented guideline for “finding” the will of Congress where that will is in doubt, *i.e.*, in the event two statutes conflict. The courts simply assume, quite reasonably, that Congress probably intended the latter. But that assumption is always rebuttable. If the evidence is clear that Congress intended the former, the first in time will prevail, the object being, again, simply to give effect to the will of Congress. Like other canons of construction, the last-in-time doctrine therefore can be countermanded by Congress, which may intend that its intent be gleaned using a different canon of construction. (Legislatures regularly adopt their own canons of construction. State criminal codes, for example, typically subject all provisions to a canon that requires that their provisions be construed narrowly.) Section 8(a)(1) simply sets forth a canon of construction. That canon provides that, in specified circumstances, the intent of Congress should be gleaned not through application of the last-in-time doctrine, but through application of a *first-in-time* principle. There is no constitutional reason why the last-in-time must control if Congress indicates otherwise in a legislatively prescribed non-supersession canon, nor is there any reason why Congress must leave its intent to be guessed at by the Executive or the courts.

The second argument proceeds from a similar presupposition of unalterability with respect to section 8(a)(1). But that presupposition is unfounded. Congress has not disabled itself from exercising its right to authorize hostilities through the enactment of appropriations legislation if it wishes to do so. Indeed, section 8(a)(1) places appropriations laws on a footing no different from general legislation. Either method may be used if Congress chooses to do so. Each, however, is subject to the canon of construction set out in section 8(a)(1). If Congress wishes to use appropriations legislation to authorize use of force, no impediment precludes it from doing that. The effect of section 8(a)(1) is simply to make clear the congressional intent that such authorization not be inferred unless Congress clearly intended to grant it. There is nothing novel in such a canon, which has, indeed, been used by Congress in other contexts in the realm of foreign relations. *See, e.g.*, § 15 of the Act of Aug. 1, 1956, as amended, Pub. L. No. 84–885, 70 Stat. 890 (codified at 22 U.S.C. § 2680(a)(1)(b)), which prohibits appropriations not authorized by law to be made to the Department of State and precludes nonspecific supersession of that prohibition.

If these two objections were correct, Congress, in enacting the War Powers Resolution, wrote empty words: whatever the constitutional validity of the 60-day time limit, that requirement will virtually never apply because Congress will almost always be deemed to have enacted some implicit authorization contemplated by the Resolution. The objections proceed on the assumption that a disclaimer of authority cannot simply be stated once, but must be reiterated in every single piece of legislation from which authority might conceivably be inferred. Yet Congress, in enacting legislation, is deemed to be on notice as to what laws already exist; its intent is considered to embrace all acts *in pari materia*. Section 8(a)(1) is in effect a statement by Congress that it wants the non-supersession canon to apply to every piece of authorizing and appropriating legislation insofar as that legislation might be read as approving the introduction of the armed forces into hostilities.

Practice shows that section 8(a)(1) has placed no burden on either Congress or the Executive. Congress has authorized use of force three times since enactment of section 8(a)(1) in 1973—in the Lebanon War Powers Resolution, the Gulf War Resolution, and S.J. Res. 23. Each of those laws complied with section 8(a)(1) by meeting the two conditions it sets out. In none of those instances did the President challenge the constitutionality of section 8(a)(1). No reasonable argument can be made that Congress was put to an unreasonable effort by including in those authorizations the wording contemplated by section 8(a)(1).

To the contrary, section 8(a)(1) has had precisely the effect Congress intended in precluding executive officials from claiming congressional approval in instances where there was none. President Clinton would surely have preferred to be able to make a plausible claim of congressional support for military operations undertaken in Haiti and Kosovo, but the reality is that opinion within Congress was divided and Congress never approved those actions. Similarly, military operations in Grenada, Panama, Somalia, and elsewhere were not given prior approval by Congress—and that conclusion was indisputable because of section 8(a)(1).

Section 8(a)(1) serves a critically important purpose. It ensures that the decision whether to authorize armed force—the most significant decision Congress can make—will not be misinterpreted. Action that momentous calls for decisional clar-

ity. That is all that section 8(a)(1) requires. Its enactment represented a triumph of congressional responsibility, and its validity ought not be doubted.

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APPENDIX B—J. RES. 23

PUBLIC LAW 107–40, 107TH CONGRESS, 1ST SESSION

JOINT RESOLUTION

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the “Authorization for Use of Military Force”.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements—

(1) SPECIFIC STATUTORY AUTHORIZATION—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Chairman FEINGOLD. Thank you. I appreciate your testimony as well.

In fact, I do want to note that the original proposal of the administration for the resolution was much broader, and I think dangerously broader, and that although I am sure it was not an easy conversation, that in fact there was an accommodation reached between the Congress and the President to come up with language that was more, I think, appropriately tailored to the situation. And I do think your comments about meeting halfway are well-taken.

Let me make a couple of comments and as a way to introduce questions for all of you to answer, but beginning with Mr. Yoo.

In January 1991, the former President Bush was threatening to launch a military operation against Iraq without seeking congressional authorization. At that time, Senator Biden chaired a hearing before the Judiciary Committee—if anybody is wondering if this is an appropriate place to do this, this is the way it was done in the past—in which several prominent legal scholars questioned the authority of the President to authorize the use of force in Iraq without congressional approval.

And based in part on those hearings, former President Bush, as we have indicated, sought and ultimately received congressional authorization for Operation Desert Storm.

And as has been indicated by a number of the excellent witnesses we have had today, many of us see that as an important victory for the Constitution and for our constitutional structure.

Today, as I noted in my opening statement, the current President has demonstrated similar respect for the Constitution by requesting and obtaining constitutional authority to respond to the attacks of September 11th.

But I do take it from your testimony, Mr. Yoo, and others, that the administration believes that the congressional authorization was not necessary. And while I agree that the President enjoyed a constitutional window of opportunity to respond to the attacks, absent any congressional authorization, eventually time limits and the requirement for congressional authorization under the War Powers Resolution I think would have kicked in.

So I guess what I would like to ask you in that context is, why, as a practical matter, would any administration ever seek a congressional authorization for committing military troops abroad, if there is no military necessity to do so?

And then, if it makes practical rather than legal sense, especially given Congress' power of the purse, would not that suggest that our constitutional structure has in effect a built-in preference for preauthorization, except for in clear emergencies when such authorization would not be possible?

Your comments? And then I welcome anybody here to respond.

Mr. YOO. So your first question, Senator, is why does any President seek congressional authorization at all, given the theory of executive war powers we have outlined today? And then the second is, does the Constitution actually have a structural bias in favor of congressional preauthorization?

Chairman FEINGOLD. Or wouldn't it make sense to seek it from a practical point of view? And that is suggesting that there may well be a constitutional preference or intention that there be preauthorization in most cases.

Mr. YOO. I think you are quite right that the administration's position has been that the congressional authorization was not necessary, but it was welcome. And I think it goes to the administration's preference, as a practical matter, as a political matter, as a matter of prudence and good policy, to seek cooperation with the legislature in matters involving the use of armed forces abroad.

That said, the administration does not consider the negotiations that led to the drafting of that authorization and the signature of it to cede any of the executive branch's constitutional authorities.

As to your second question in terms of Congress' power of the purse, I would like to emphasize that Congress does have the power of the purse, and that is Congress' primary and perhaps most important power over the course of military operations going forward.

However, I agree as a matter of practical good sense, we do seek Congress' cooperation to make sure that all appropriations will be forthcoming for military operations. And that does involve consultation, which this administration, I think the record shows, has engaged in with Congress. I think there have been over 10 consultations between the President and the executive branch and Con-

gress. And this administration fully intends to make sure that that continues wherever possible.

Chairman FEINGOLD. Thank you, Mr. Yoo.

Mr. FISHER.

Mr. FISHER. The words here are interesting. When President Bush in January 1991 came to Congress, he actually did not ask for authority; he asked for support. And Congress did the right thing by using the word “authorize.” But even when it came to President Bush and he signed into law, he said, “I did not ask for authority. I asked for support.” Well, of course what counts is what is in the public law. So the word “authorize” is very important.

The second one, when we talk here today that it would be wise or prudent or pragmatic for a President to get statutory authority from Congress, to me the reason it is wise and prudent and pragmatic is the constitutional reason for it. It is not just good policy or it will make the constituents feel a little bit better. There is a constitutional framework that calls for that.

Thank you.

Chairman FEINGOLD. Dean Kmiec.

Mr. KMIEC. Well, thank you, Dean Feingold.

[Laughter.]

Senator I did want to respond briefly to the earlier point and then this one as well.

You mentioned that you thought Congress was careful in its words or that the convention was careful in its words as it drafted the declare war clause.

I think it was very careful. And as we know from the debates in the constitutional convention, they changed the word from “make” to “declare” because they were anticipating from their own experience that others could put us in a state of war, and I believe as well anticipating that the President would need to place us in a state of anticipatory self-defense, if you want to call it that, to use Daniel Webster’s words, as well, and that, therefore, the more appropriate word “declare” was to declare in light of these facts, in light of these conditions.

And they had other choices. They knew very well that state constitutions—for example, they were very familiar with the South Carolina constitution, which explicitly said to the South Carolina Governor that he could not engage in war without prior authorization. And they could have chosen the words, “The President shall be Commander in Chief when we authorize him to be Commander in Chief.” And of course in other places, in explicitly denying state authority to engage in warfare, they knew how to use the words in the negative.

So one thing I would say is that the convention debate at least says to me, and the words that they chose, that they were deliberately not including an explicit requirement of preauthorization.

But I do think Professor Wedgwood is right. One of the last things the world needs and the Congress needs and the President needs at this point is an extended constitutional debate that amounts to a kind of “he says, she says” mounting up of the opposing sides of the academic literature, because we have a much more practical problem in front of us, and that is the one that you recog-

nized initially. And that is the nature of this warfare that we are fighting.

And so the real question is: Does this Congress believe that the President has the authority to engage in anticipatory self-defense, to in fact undertake both the military and related law enforcement measures to counteract the terrorist threats that we face without being locked into a reporting mechanism—which I believe, by the way, is already satisfied by the joint resolution that you passed in terms of S.J. 23—but without being locked into that?

I think that is the question that needs to be asked and answered by the President and the Congress as a whole.

And there is your question about a consultative mechanism. And I think it really is a consultative mechanism, because to insist upon the academic literature, that one side of the debate means one thing and, therefore, authorization must occur within a given time frame, is to open up our people and our Nation to a far graver threat on the basis of an academic argument.

Chairman FEINGOLD. Well, let me just quickly respond, and then we will go to the next response.

First, this is a rare opportunity to return to law school without being graded.

[Laughter.]

And let me suggest that, certainly, when the Framers chose to take the word “make” out of the Constitution for the declaration of war power, I mean, the word “make war” sounds like Congress is going to conduct war. I would suggest that for you to then suggest that the word “declaration” has such a narrow meaning does not give the word “declare” sort of the middle meaning that I think the Framers probably intended. It is that Congress was not simply responding to a fact that was already accomplished but was making a decision about whether to have a war waged presumably principally by the executive.

So I think I agree with your notion that the word “make” was rejected for a reason.

The other point I want to make is that I do not think we can minimize the importance of this constitutional structure for our being successful in this war against terrorism. I heard Professor Wedgwood talking about al Qaeda and how unique it is. I will give you that. I do not know how completely unique it is, though, when it is compared to the fanaticism of the Nazi regime or the kamikazes of Japan. I am not sure that this is completely different and that our Framers did not anticipate extremely difficult challenges, even the kind of very unique challenging that we are facing now.

And again, I return to this, although it is perhaps not a legal argument: I cannot tell you how important it is that the American people feel engaged in this. It is from our neighborhoods that the men and women are being asked to go and fight in these very difficult situations. If the President technically has the ability to act entirely on his own in this area and to not have the American people feel that they are engaged in this through their elected representatives, so be it. But I suggest that apart from it being a sort of a constitutional game or discussion, it is just the opposite. It is an attempt to maintain a national unity through our system.

Do you want to respond to that?

Mr. KMIEC. Just one quick thought.

And I think you have that mechanism, as I said in my opening statement. And the mechanism that I think the Framers anticipated for you is the appropriations process. And this you can go back into history and find, in fact, our most venerable President, President Washington, engaging in exactly that discussion. He fought what he termed an actual war against the Indian tribes and the Indian nations. And he, quite frankly, was brought before appropriations committees or the equivalent to justify the expansion of the number of troops and the level of force that he was seeking to apply at a given time rather than seeking alternative courses. I think that is the constitutionally envisioned structure.

What is more problematic or difficult is how that gets accomplished in terms of the appropriation structure in light of the necessary secrecy and in light of the necessary dispatch or swiftness that we have to counteract threats that are opposed to us.

Chairman FEINGOLD. This is the kind of exchange I hope we have. But I can tell you I have been watching that appropriations process for 10 years. It is not a good place for this kind of discussion.

[Laughter.]

In fact, the debate always comes down to one thing, "Are you going to vote to take away the money and the arms and the support for our men and women over there?" I mean, the fact is that that is not a great place. It is a very important power. But I see that as a second stage role for Congress.

And to simply rely on that, it is in practice very difficult. Although Senator Byrd would argue and I think agree with you that it is the preeminent power in this regard.

Mr. Frye.

Mr. FRYE. Senator, I want to agree with one important point just made.

Clearly, this conversation should not get bogged down unduly in the cluttered landscape of the literature. It is a constitutional issue with a rich literature, and there is some wisdom there that we need to refer to. But it would be shortsighted of us all if that is all we dealt with.

To my good friend and colleague Ruth Wedgwood's invocation of Alexander Hamilton, a lot of us would be invoking Jefferson and Adams and Abraham Lincoln with very powerful contrary views on key points.

So those are important reference points, but not to me the primary hinge on which this conversation should be based.

I would submit that you do have to look to the large, broad purpose of the Constitution. The precedents are important. But you can begin with the largest and broadest purposes of the Constitution, which by contrast with Professor Corwin's famous assertion that it was an invitation to struggle for the control of American foreign policy, I argue it was an inducement to collaboration, a structure designed to compel both branches to take account of their political stake in finding common ground.

In the current situation, while appropriations leverage is important, it is a factor, it does not seem to me nearly sufficient. And our experience shows that it has not been effective, because of the

self-detering aspects of the prospect of cutting off funds for forces in the field and other considerations. It has just not worked.

And so it seems to me that we do need to look for mechanisms that constantly put the pressure on Congress to refresh its policy judgments, just as the President commanding forces in the field will have to take account of changing circumstances.

Wars sometimes go wrong. You have to do things differently. Sometimes you have to engage in a strategic retreat or a reorientation. The President is certainly the authority to make those kinds of decisions.

But similarly, if the executive has to retain the degree of flexibility to update its opinion, its judgment, Congress needs periodic mechanisms to continue expressing its policy verdict without putting the impossible burden on itself of taking the dollars away in every case.

Chairman FEINGOLD. All right. Any other comments on that point?

Professor Wedgwood, yes?

Ms. WEDGWOOD. Very briefly. And I think it is a very valuable discussion to be having, particularly since it can be done in a situation of calm and calm reflection.

But I guess my concerns are that while we all understand, know, love, cherish, engage in, and relish our complicated constitutional system, that one of the reasons why one does not necessarily want to resolve these ultimate constitutional questions, why it is important to still have out there a coherent theory that the executive has certain powers, is because our adversaries could at times mistake our separation of powers and our checks and balances for indecision.

And we all remember that al Qaeda tape, or that Al Jazeera tape, when Osama is visiting the sheik, who cannot get up, and says, "Watch, people like a strong horse not a weak horse." And he assumes that the region will go where there is a perception of kind of Caudillo culture and macho power.

And I think any person worries, whether in a family or in a government, that internal debate could be mistaken by an adversary for indecision where ultimately it will not be, I trust. But national unity clearly should be our most important goal.

I do think on principle there is a difference between what the 18th century understanding of war was and self-defense, because that was the age of—one still had Clausewitzian war up through the end of the nineteenth century, where since the U.N. Charter one of the reasons why no one declares war anymore is we only do self-defense, you declare self-defense. It doesn't sound quite right.

And so I think you actually have an interesting convergence. The times we use war are very much the times that fit the imputed authority of the Presidents by analogy to Article 1, Section 10, or in his power of Commander in Chief. Presidents do not engage in wars anymore to gain territory or riches or manifest destiny for new parts of the continent. So in a sense, I think the 18th century version of war is antique.

And secondly, even then, there was a coherent argument that the purpose of the declaration was to put neutrals and third parties on notice—and insurance companies—that there was a state of war.

And then I will finally just note as a historical footnote before putting this to bed that Lincoln began the Civil War without a declaration of force from the Congress. That was the important difference between him and Buchanan.

And finally on the Nazis, the Nazis were every bit as vicious, to be sure, but we knew where to find them and they had an address, they had a territory.

Here again, the difficulty of even framing what a congressional resolution could look like is—it might have to amount to generic categories. “Congress authorizes the use of force wherever a terrorist group which threatens to use weapons of mass destruction against the American people or our allies may be found.” It is going to be almost so generic that it maybe frustrating to the Congress itself.

If you get below that, what do we know about Iraq? What do we know about Somalia? Then you get to the problem of intelligence-sharing.

So I think it is a very real problem that in the case of a ubiquitous, ephemeral enemy, you really cannot declare war or authorize force with a specificity that Congress is accustomed to from the past land battles of the earlier period of the republic.

Chairman FEINGOLD. Well, I think actually that is what we did a fairly good job of doing in Senate Joint Resolution 23. We narrowed it to what we knew at the time with the assumption that since this is going to be a long effort, that we may have to have future authorizations. It seems to me, given the fact that the attack had just occurred a couple of days before, it was fairly good.

Ms. WEDGWOOD. I am not quarreling with its elegance, only just to note that even in that language it notes that the authority extends to the organizations, nations, persons that the President determines did the following things.

Chairman FEINGOLD. Fair enough. But it was possible, instead of just throwing up our hands and saying there is no way to define this and let the executive do whatever they want, it was possible to put some parameters. And I am very pleased we did that.

Let me ask a little more specific question.

Mr. Yoo, how do you interpret the War Powers Resolution, particularly Section 4(c), which states that “the President shall report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months”? Did Senate Joint Resolution 23 authorizing the use of force trigger that reporting requirement in your view?

Mr. YOO. Senator, I think that we are committed to making reporting requirements that are consistent with the War Powers Resolution. And you will note that we have just recently done that. On March 20th, we submitted, I think, a report within the required time limits that would be consistent with the War Powers Resolution. And the President also submitted reports soon after September 11th, when forces were deployed to the Pacific and Central commands, and also when combat first started in Afghanistan. So the administration is submitting reports that will be consistent with the War Powers Resolution.

Chairman FEINGOLD. I certainly agree with that. But I heard you indicate that the administration is committed to it. Do you agree that the reporting requirement does in fact apply to our ongoing anti-terrorism operations?

Mr. YOO. Because of Senate Joint Resolution 23?

Chairman FEINGOLD. Is it a requirement that the executive must follow?

Mr. YOO. As a matter of law? Let me say this. I do not think there is a constitutional problem with Congress asking the President to make reports at certain intervals about activities. If that reporting requirement is some kind of standard that has to be met in order to receive authorization to use force, I think on that point the administration would disagree, because we think that the President's power to use force in this situation against terrorists, particularly those connected with September 11th but also to preempt any future terrorist attacks, comes from the Constitution itself.

But if the reporting requirement is seen as just Congress asking the executive branch for reports, that does not raise a constitutional problem in our mind.

Chairman FEINGOLD. And as you have indicated, the President has apparently filed three reports under Senate Joint Resolution 23. Could you describe how those reports are prepared?

Mr. YOO. I do not think I am permitted to, because that matter would be privileged. That would be a matter of internal executive branch deliberations.

But I can say that they are thoroughly discussed and vetted within the executive branch by all the relevant agencies involved. And they are taken extremely seriously by the President and the White House and the major agencies.

Chairman FEINGOLD. On that regard, you have mentioned these three reports, and you know that they are very short, and they do not give us very much information on the status or scope or duration of our military engagements as required by statute.

For example, a report dated September 24th, 2001, states that "it is not now possible to predict the scope and duration of these deployments and the actions necessary to counter the terrorist threat to the United States. It is likely that the American campaign against terrorism will be a lengthy one." And then in a later report to Congress, one on October 9th, 2001, the President reported in almost identical terms that: "It is not possible to know at this time either the duration of combat operations or the scope and duration of the deployment of U.S. armed forces necessary to counter the terrorist threat to the United States."

Of course I know that this is a difficult military campaign, and it is indeed difficult to predict where it will take us, but these notifications from the President are not terribly helpful.

And you just discussed the most recent one, March 20th, 2002, which provides some additional detail on operations in Afghanistan, the Philippines, Georgia and Yemen, but only the most basic of details. And again it repeats that: "It is not possible to know at this time either the duration of combat operations or the scope and duration of the deployment of U.S. armed forces necessary to counter the terrorist threat to the United States."

Now, my concern is that these reports might as well invite us to read the details in the newspaper.

Mr. YOO. I would say that is usually how I find out what is going on.

[Laughter.]

Chairman FEINGOLD. Or CNN, of course.

Can you say that these reports are truly responsive to the legislative intent of the War Powers Resolution?

Do any other members of the panel, after Mr. Yoo responds, who have been engaged in this issue for such a long time, have any comments on the adequacy of these reports? Do they achieve the objectives of the War Power Resolution?

I will begin with you.

Mr. YOO. Well, I mean, part of that depends on what you think the intention or purpose of the War Powers Resolution notification reporting system is. I mean, I do not think that the reports fall below whatever is required to be consistent with the statutory standard. I think what you are asking for is you want more than what the War Powers Resolution actually calls for.

I think another point to make is I think there is no attempt by the administration here to be opaque or evasive. I think part of it is an attempt to be honest. I mean, as you have pointed out in your floor statements and as several members of the panel have pointed out, it is impossible to predict exactly how our forces are going to be used, because it is impossible to predict the enemy. This enemy is difficult to locate. They do not have a capital or a territory. And it is, as you yourself point out, it is very difficult, therefore, to figure out how our forces are going to be used until we get the information immediately.

So I think what you have seen over these three reports is that they do become more comprehensive with the March one being more comprehensive, because after the events have occurred, we know more and we can report to Congress more often on that. But it is I think in part because of the nature of the enemy we face.

The other thing I would point out is there is, I think, an operational security concern. Al Qaeda in particular is an enemy that has demonstrated an ability to monitor what happens in the United States in our political system. I think as you know from the hearings that where the Attorney General appeared last year, they seem to be very sophisticated in the workings of our legal and political systems.

And so I think have to be even more conscious and careful in this conflict than we might be in other ones, in making sure that we do not tip off or release any kind of information that might be helpful to the enemy.

Chairman FEINGOLD. As I think I said to the Attorney General at the time, as long as we do not sort of change our legal system without actually legislating it or constitutionally altering it because of that threat, it would make me feel better.

Mr. KMIEC. Mr. Chairman.

Chairman FEINGOLD. Yes, Dean.

Mr. KMIEC. I come from an era of Office of Legal Counsel that was probably less cooperative than the current one that you have. But I would fight a little bit with the premise.

Section 4(a)(1), which I think you were referring to, if I understand correctly, requires reporting in the absence of either a declaration of war or a congressional authorization. But as we have been making frequent reference to today, we have had a congressional authorization. Whether it was needed or not we can debate. And therefore in terms of the reporting requirement, one I think might be able to argue that 4(a)(1) has not been triggered. Perhaps you are referring to a different section of Section 4.

Chairman FEINGOLD. 4(c). "Whenever United States armed forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation, as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months."

Mr. YOO. Senator, can I just amend mine just to be complete—because I do not want to mislead you—that the administration has been conducting regular briefings with the Armed Services and Intelligence committees. So we also want to make sure the administration makes efforts to cooperate and consult with the Congress. It does not just do it through these letters and through these notifications.

Chairman FEINGOLD. Fair enough.

Other reactions to the adequacy.

Mr. Frye.

Mr. FRYE. Well, just a technical point. I am free of the knowledge that Mr. Yoo brings to the table about current arrangements. But as early as 1974, there was a dedicated war powers reporting system established in the operations director of the JCS. And from the military, information was conveyed to the legal counsel in the Defense Department and shared simultaneously with the State Department. Those were to be the administrative processes on the basis of which a recommendation would go to the President as to whether a report would be required.

That may have been changed in later practice. I cannot speak to it. But Secretary Kissinger and Secretary Schlesinger established those mechanisms to implement the reporting requirement within a few months of the enactment of the statute.

I think President Bush is proceeding in good faith. I worry that perhaps some of the counsel he receives may suggest to him he has unfettered latitude to expand military operations beyond the intent of either the War Powers Resolution or Joint Resolution 23.

But I think he is being very straightforward in acknowledging that he in fact cannot meet the standards set in 4(c). When he says in his letters each time that it is not possible to know either the duration of combat operations or the scope and duration of the deployment of U.S. forces necessary to counter the terrorist threat, I think he is acknowledging and describing a reality we all accept as a part of this very fluid, very difficult circumstance.

However, I do want to take issue with my colleague Professor Wedgwood. I do not believe that that recognition of the difficulty of anticipating the scope and duration of such an engagement excuses a failure to share information quite broadly with the relevant

elements of the Congress. If we are about to deploy thousands, tens of thousands, scores of thousands of forces to pursue al Qaeda or conduct a military operation, I find it implausible to say that secrecy can be maintained in the executive branch when it could not be maintained by executive branch executive session deliberations with the relevant committees of the Congress.

Chairman FEINGOLD. Mr. Fisher.

Mr. FISHER. I wanted to say something that is related to that. It was suggested earlier by Ruth Wedgwood that if there is internal debate, it might send a signal to the enemy that we have a weakness here. And I think it is quite the opposite.

I think President Eisenhower said it very well, that it is with joint action with the two branches operating in concert, that that sends the best message not just to allies that they know the two branches are in for the long haul, but sends a message to enemies that there is no division inside the U.S. Government.

Chairman FEINGOLD. Thank you, Mr. Fisher. I felt some discomfort with that remark as well. So let's let Professor Wedgwood respond.

Ms. WEDGWOOD. Lest I be seen as an enemy of checks and balances, I am all in favor of checks and balances. I just point out that, in culturally very different circumstances, in countries where Mr. Big is used to being the guy in charge, I am not sure he will always appreciate the way in which, symphonically, all the pieces will come together at the end in a working democracy.

So I think it is important. And I am sure everybody in the process does make clear that the healthy debate that we have on how we use force in no way should be mistaken by an adversary for any lack of unity or any ultimate unwillingness to do what has to be done.

And I think, frankly, when Presidents sometimes say, "I do have the power to do this," it is not so much—they are not trying to disregard the Congress. I think it is meant almost as international signaling saying just, "You folks out there who are not part of democratic processes abroad, our adversaries, do not mistake what we are doing. We are going to do it." And I think it is not meant so much internally.

And let me just note that Alton very kindly handed me the March 20th letter to Speaker Hastert, which is one of the written reports. I think almost by definition the good stuff is never going to be in a written document, not until God does away with Xerox machines.

Chairman FEINGOLD. Just a quick comment, then I will go to Professor Stromseth.

I am fascinated by your argument, as I have indicated before, that this is such a fundamentally different kind of threat, in effect that the world has changed and we are facing a different threat. I am reminded of my friend Tom Friedman's brilliant work. But his comment that he ultimately had to retract is that the world has changed with globalization and we are not going to attack a country that has a McDonald's—and then we bomb Belgrade.

You know, these assumptions that the world is fundamentally changed and these are threats that are not sort of something that we can work within the constitutional structure is something that

I do not want to accept. But I think you have to look at this with an open mind and realize that we have never seen this before.

But I think we also have to let time settle in a little bit and see if maybe the constitutional structure that was set up and the assumptions that were made are actually very appropriate for this.

But it is a difficult question, I give you that.

Professor Stromseth.

Ms. STROMSETH. Yes, I just wanted to follow exactly on that point. I mean, the founders lived in very dangerous and difficult times as well. We were a weak country. We were subject to attack, invasion. And it was a situation where there were many, many threats.

And I think very practically in the Constitution, they made a distinction between the President's ability to repel attacks, to repel war, and Congress' decision to make the affirmative decision to enter into war. That is why they changed the language from "make" to "declare," to underscore that distinction between commencing and repelling war, and also to underscore that the President has the tactical authority as Commander in Chief to make the operational decisions.

There was I think eminent wisdom in the way they thought about the different attributes of the two branches and how they would work together effectively for the Nation.

And on the point of consultation, Senator, I completely agree with you. The point of consultation is not to micromanage operational decisions. It is to discuss broad objectives and to make sure that the country is behind those broad objectives.

And finally, I cannot resist quoting James Madison, my favorite founder, who said, reflecting on the Constitution's allocation of war powers, "In no part of the Constitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature and not to the executive department."

And of course the wisdom I think he was referring to is precisely the wisdom that your constituents out in Wisconsin are talking about, the sense that these decisions are difficult decisions, they require deliberation, they require consensus, and they are not decisions that simply should be made by one person alone.

But once they are made, you do not want to micromanage a lot of the details. You want to make sure that there is a continuing consensus on the overarching aims.

Chairman FEINGOLD. Very good.

So as to not violate another provision of the Constitution, the Eighth Amendment, I am just going to ask one more question, given the fact we have not even had a break. But let me do this.

At various times since 1973 and again recently, Members of Congress have proposed the idea of a select consultation group within Congress that would allow the President to provide more meaningful and more frequent briefings to a small group of Members. And I believe some of you referred to that.

The idea is that this group could then bring the message and the substance of those consultation back to both houses of Congress.

And, Professor Stromseth, I believe you mentioned that proposal. And I wonder if you could say a bit more about it? I think Professor Glennon raised some concerns. And I hope your responses will be

beyond the fact that I am concerned that I would not be in the group.

Ms. STROMSETH. Actually, Senator, I testified before the Senate Judiciary Committee I think it was eight years ago, and this same question came up. And you asked the same question. And I have been thinking about it ever since, because I think it is a very good one.

In fact, the question you asked then was, shouldn't there be a more diverse set of individuals involved in a consultative group? I mean, isn't there a sense that if you have the same folks, that they will not tend to ask harder questions about the underlying—or challenge the underlying premises?

So I guess while I would like to see some sort of consultative mechanism that is more regular, that is accepted and embraced by both branches, I would like to see some way of ensuring that it does somehow include a more diverse group of people, so it does allow for, I think, a greater range of perspectives to be represented.

Chairman FEINGOLD. Professor Glennon.

Mr. GLENNON. Senator, I have reservations about such a group for a number of reasons that are spelled out in my testimony. Two principal ones are as follows.

First, the membership, which you and Professor Stromseth have just been talking about, would not likely include the sorts of individuals, young Turks, naysayers and agnostics and skeptics, who are essential to avoiding the second phenomenon that causes me to have reservations about such a group, namely, processes of group think.

One of the most important books I have ever read, which has influenced my thinking about these sorts of things is a book entitled "Groupthink" by Irving Janis, who analyzes why some groups, such as the EXCOM during the Cuban Missile Crisis did not develop the kinds of paralysis and inability to question conventional wisdom that seem to prevail in other groups. And I am afraid that a group that is as insular as this group probably would be would likely fall victim to this phenomenon of group think.

It needs to—and this is the key thing—have an independent status that causes it to have an independent staff that are regularly in the stream of information about crises before those crises develop, rather than like the NSC staff.

It would not have that. The executive, given the experience that we have had with these reporting requirements—I have been reading these reports for 30 years now. They are useless. I do not think a single report that has been provided under the War Powers Resolution has ever generated so much as a newspaper story about any news that has been revealed in that. That is the kind of information that is shared voluntarily by the executive with the Congress.

And I am afraid that you would not, therefore, have a committee with the continuing status whose staff is knee deep in the kinds of contingency studies and ongoing information that would be essential to making it work correctly.

Chairman FEINGOLD. Mr. Fisher.

Mr. FISHER. Yes, I think one of the great strengths of Congress to me is the decentralization. People often call it fragmentation or splintering. But decentralization with your subcommittees and

your committees, that to me is where the vitality and different approaches and different thinking come from.

I have not been comfortable in recent years with the budget summits that come up with a handful of members doing this. At least there they have to come back and get authorization through the regular public law.

But I think the strength of Congress has to rely on the expertise in committees and subcommittees. And any move upward to centralize I think ends up weakening Congress.

Chairman FEINGOLD. I thank you.

Well, I want to thank this terrific panel. I was very honored to have the chance to listen to all of you and ask you questions. You have given me a lot of things to think about as we go forward.

But I do think this is very important for the continued vitality of our Constitution. I think this discussion and trying to come together on this is very important for our number one priority of our country, which is fighting terrorism.

There is no doubt in my mind that that is our first priority. And I want to make sure we get it right. And I want to make sure we do it in the best American tradition.

So I thank you.

And I ask consent that Senator Hatch, his statement be placed in the record.

[The prepared statement of Senator Hatch follows:]

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

Mr. Chairman, I am one who strongly believes that we all must leave our political party affiliations at the door when it comes to our national security and supporting our troops in the field. When President Clinton drew criticism for sending our troops to Kosovo, I stood on the floor of the Senate and spoke out in support of his use of military force. I say now, as I said then, that I believe the 1973 War Powers Resolution is an unconstitutional encroachment on executive power by the legislative branch. And, my legal assessment remains the same regardless of who happens to sit in the White House.

All of us should continue to support the President during these obviously difficult times. That was precisely the message we conveyed in passing the joint resolution on September 15—days after terrorists murdered thousands of Americans in a series of cowardly attacks. In the midst of this grave crisis, we endorsed the President's unqualified authority to use "all necessary and appropriate force" against any Nation or organization that "he determines" aided in the terrorist attacks. Furthermore, we recognized in the joint resolution that it also, for what it was worth, constituted specific authorization under the War Powers Resolution.

The entire Senate has spoken with one voice with respect to the President's authority to use military force against any Nation that aided or harbored terrorist organizations.

We sit here today 7 months after the most disastrous and destructive terrorist acts in our history. The fires have died in lower Manhattan, and the smoke has cleared from the skies over the Pentagon, but bodies still lie trapped under the rubble, and our Nation and thousands of American families still live daily with a deep, unyielding grief. The overwhelming majority of Americans stand shoulder-to-shoulder with the President in our fight to rid the world of terrorists who would do Americans harm.

I hope that today's hearing will provide more information on how we can aid the President in making sure he has all the tools necessary to keep our citizens safe. I look forward to hearing from today's panel of distinguished scholars. Particularly, I want to welcome one of this Committee's most respected former counsels, Professor John Yoo, who is now a leading authority on the scope of Presidential war powers.

Chairman FEINGOLD. And we will leave the record open for a week, for witnesses to submit additional information and also for Senators to direct written questions to the witnesses.

Again, thank you very much. And the hearing is concluded.  
[Whereupon, at 3:45 p.m., the subcommittee was adjourned.]  
[Questions and answers and submissions for the record follow:]

## QUESTIONS AND ANSWERS

### ALTON FRYE: RESPONSES TO QUESTIONS FROM SENATOR THURMOND

1. Far from rejecting this approach, S. J. Res. 23 provides an essential framework for implementing it. The Resolution does indeed offer broad authority for the President to act against those who were responsible for the September 11 attacks and President Bush has exercised that authority masterfully.

It is important to note, however, that the Resolution specifically bases its authorization for the use of force on section 5(b) of the War Powers Resolution and makes clear that other requirements of the War Powers Resolution remain in force. That is far from an open-ended grant of authority. The President has in fact begun to submit the reports required by the War Powers Resolution. The clear import of the law is that Congress should not merely receive such reports but assess them and, if it deems it wise, to revise its policy guidance in light of them.

2. As a constitutional conservative, I believe that the valid definition of the President's war-making powers begins with the founders' intent and understanding. There can be no question that they accorded primacy to Congress in decisions over war and peace.
  - Thus, in 1793 **George Washington** gave us his understanding when, in deferring offensive action against the Creek Indians, he wrote that "the constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure."
  - Similarly, in 1798 **Alexander Hamilton** advised the Secretary of War that in meeting French naval harassment the Executive could do more than repel force with force, since anything beyond that ... "requires the sanction of that department which is to declare or make war. In so delicate a case, in one which involves so important a consequence as that of War – my opinion is that no doubtful authority ought to be exercised by the President." [Emphasis added]
  - In 1801 **Thomas Jefferson's** first message to Congress stressed his deference to congressional authority in these matters, reporting on an episode involving an attack by a Tripolitan marauder on an American naval ship: "Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offense also, they will place our force on an equal footing with that of its adversaries."
  - The same view animated Congressman **Abraham Lincoln** when he voted to censure President Polk's provocative actions in the prelude to the war with Mexico. In Lincoln's words, the constitutional convention understood war "to be the most oppressive of kingly

oppressions, and they resolved to so frame the Constitution that no one man should hold the power of bringing oppression upon us.”

No constitutional amendment has altered the fundamental standards enunciated by Washington, Hamilton, Jefferson, Lincoln and others. The President’s constitutional powers are ample to repel or respond to attack. Congressional authority is required to undertake or sustain offensive military action -- if that action is to claim constitutional legitimacy.

3. No one would propose that Congress “vote on every change in military strategy.” The challenge is to design a workable mechanism for Congress periodically to record its consensus on the basis question of continuing or concluding a military conflict.
  - Good faith consultation between the branches is devoutly to be desired and earnestly to be encouraged. It is a vital lubricant in the relationship on which healthy public policy depends. Yet consultation is necessarily partial and limited, involving at best the leaders and key committees in Congress with a relatively small number of executive officials. Consultation *per se* is not a satisfactory gauge of the collective opinion of the people’s representatives, and it is that opinion that should guide the initiation, continuation or extension of American policy in war.
  - For that reason, when protracted military operations are under way, I believe it would be wise for Congress to respond to reports filed by the President “consistent with” the War Powers Resolution. Such reports offer an appropriate occasion and trigger for a periodic congressional debate on the high policy question of an ongoing military engagement, and for a congressional verdict about the wisdom of such engagement by a vote on acceptance of the report. As my testimony indicates, I believe Congress can best express itself on the high policy issue by separating it from consequences, deadlines, funding decisions and the like. The purpose is to keep the branches aligned in any endeavor with such profound impact on the lives and fortunes of our citizens. If, however, a President’s military leadership puts the nation in a hole, it is up to Congress to say, “stop digging.”

4. The framers gave the Congress a lot more than the power of the purse and there is no reason for Congress to narrow its policy role to that singular authority. Read Article I side by side with Article II. Not only the sequence and scale of the articles, but their substance underscores the objective that the first branch of government should guide the nation in the most fundamental policy decisions. If the enumerated powers of Congress were insufficient to make that point, the “necessary and proper” clause confirms it. Thus to observe that Congress has found it politically difficult to enforce its power to govern war-making by reliance on the power of the purse is hardly irrelevant to the constitutional

issue. It is an acknowledgement that Congress needs to invent more broadly based mechanisms and procedures to fulfill its constitutional responsibilities.

Thus, the theme I strike is that Congress needs an approach that will constrain it to reach the central policy choices in the use of force and to forge the majority view of which it alone is capable. In an evolving conflict those choices arise not once, but repeatedly. So, too, should Congress express itself on the basic policy not once, but repeatedly-- not indirectly, but directly -- not ambiguously, but explicitly. Ideally, such tests of congressional opinion will find Congress and the President standing together. Should that not be the case, rather than protracted frictions over detailed provisions of authorization bills and appropriations, Congress owes the country, the men and women in our armed forces, and , yes, the President a clear indication of whether it favors continuing or concluding the particular military engagement.

I thank you for your good questions and I appreciate your consideration of my responses.

Alton Frye  
Tuesday, May 07, 2002

Questions by Senator Strom Thurmond for Dr. Louis Fisher, regarding his testimony before the Constitution Subcommittee of the Senate Judiciary Committee on April 17, 2002.

1. Dr. Fisher, in your testimony, you assert that the framers gave Congress the power to “initiate war.” However, Article I, Section 8 gives Congress the power to “declare war.” Do you think that “declare war” and “initiate war” mean the same thing? Couldn’t the framers have used broader language to delineate Congressional war powers?

British precedents allowed the Executive to initiate war and to exercise control over all of external affairs. Both John Locke and William Blackstone endorsed that form of government. However, the framers expressly repudiated the British model by placing many powers of external affairs expressly in Congress (declare war, issue letters of marque and reprisal, foreign commerce, etc.) or placed them as a shared power between the Senate and the President (appointing ambassadors and making treaties). Reserving to Congress the power to take the country from a state of peace to a state of war represented a core constitutional principle to the framers.

My statement, on page 2, includes quotes from George Mason and James Wilson regarding the framers’ belief that only Congress could take the country to war. Many other statements are available. When Pierce Butler wanted to give the President the power to make war, Roger Sherman objected: “The Executive shd. be able to repel and not to commence war.” Elbridge Gerry said he “never expected to hear in a republic a motion to empower the Executive alone to declare war.” James Madison cautioned that “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.*” He said that “In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war and peace to the legislature, and not to the executive department. . . . War is in fact the true nurse of executive aggrandizement. . . . it has grown into an axiom that the executive is the department of power most distinguished by its propensity to war; hence it is the practice of all states, in proportion as they are free, to disarm this propensity of its influence.”

I do not think that “declare war” and “initiate war” mean the same thing. By the time of the Philadelphia Convention, the practice of *declaring* war had declined. In Federalist No. 25, Alexander Hamilton acknowledged that the “ceremony of a formal denunciation of war has of late fallen into disuse.” Under the Constitution, Congress has a choice between declaring war or authorizing war. It chose to authorize war against France in 1798 and against the Barbary pirates during the Administrations of Thomas Jefferson and James Madison. The first time it declared war was in 1812, against England. Whether by declaration or by authorization, the decision to *initiate* war lay with Congress.

2. Dr. Fisher, you argue that the power of the purse is not an effective check against the President because of the difficulty of overcoming a Presidential veto. However, isn’t your concern political in nature and irrelevant to the framework established by the Constitution?

There are two types of funding checks. One is to deny the use of funds already appropriated to stop a war initiated and expanded by the President. Such a provision is likely to be vetoed. To argue that a President may initiate war and continue hostilities until Congress attracts a majority of votes to deny funds, and then a two-thirds majority in each House to override a probable veto, raises core constitutional issues of which branch has the authority to initiate war. The concern is constitutional, not political, in nature, and is highly relevant to the constitutional framework established by the framers. The second type of spending check is to deny funds that the President

is seeking. Here the congressional leverage is much greater. However, even if Congress were to deny the President these funds, the Administration usually has access to funds already appropriated, and can use these unobligated, carryover funds to continue a presidential war. Once again constitutional values are at stake.

3. Dr. Fisher, your testimony states that Congress has been unable to decline funding for military operations in the past. However, didn't Congress refuse to fund Cambodian operations during the conflict in Vietnam? Please see *Congress' Power of the Purse*, Kate Stith, 97 Yale L. J. 1343, 1360 (1988).

As I mentioned in my statement, on page 3, Congress voted in 1973 to deny funds for the war in Southeast Asia, but the House was unable to override President Nixon's veto of the bill. In litigation on the issue, in *Holtzman v. Schlesinger* (1973), Judge Judd said "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 is had not authorized."

A more successful use of the power of the purse was language enacted in 1993, providing that no funds for the operations of U.S. armed forces in Somalia could be used for expenses after March 31, 1994, although that date could be extended "if so requested by the President and authorized by the Congress." The legislation further provided that funds could be used after the March 31 date to protect American diplomatic facilities and American civilians. Moreover, to assure that American forces would not be under UN control, the measure provided that U.S. combat forces in Somalia "shall be under the command and control of United States commanders under the ultimate direction of the President of the United States." 107 Stat. 1475-77, § 8151 (1993). This funding cutoff was effective because the Administration recognized the need to withdraw militarily from Somalia. There was no veto threat, as there might be if an Administration were determined to continue military operations with or without the support of Congress.

4. Dr. Fisher, would you agree that the language of S.J.Res. 23, which passed the Senate by a vote of 98-0, places no time or geographic restrictions on the President's ability to act, provided that he can connect the object of his military actions with the terrorist attacks of September 11? Does S.J.Res. 23 satisfy the War Powers Resolution for any future use of military force?

There are no time or geographic limitations in the statute, but there are implicit restrictions on what a President may do. For example, Congress did not expect a President to use military force against al Qaeda networks in countries in Europe, Africa, South America, etc., unless those nations expressly authorized the United States to intervene. Similarly, even though no time limit exists in the statute, it would be difficult to argue that Presidents may operate under this authority for decades to come without an intervening statute. S.J.Res. 23 satisfies the War Powers Resolution in the sense that it represents "specific statutory authorization," as required by Section 2(c)(2) of the War Powers Resolution. I do not read S.J. Res. 23 as giving blanket authority "for any future use of military force."

5. Dr. Fisher, has the War Powers Resolution been successful in checking the power of the President in waging war? Hasn't the Resolution proved to be unenforceable?

I have argued elsewhere, with David Gray Adler, that the War Powers Resolution expanded executive power by giving a green light to presidential wars that can be completed within 60 to 90 days. See *The War Powers Resolution: Time to Say Goodbye*, 113 Pol. Sci. Q. 1 (1998). There have

been great difficulties in enforcing the War Powers Resolution, particularly when Presidents act militarily without reporting under Section 4(a)(1), which starts the clock. Efforts by Members of Congress to ask federal judges to rule on noncompliance with the War Powers Resolution have been repeatedly unsuccessful.

6. Dr. Fisher, do you feel that the threat of military force is part of diplomacy, the traditional domain of the President? For example, wasn't the threat of force instrumental during the Cuban Missile Crisis and during President Clinton's standoff with the military regime in Haiti?

Presidents may use the threat of military force as a diplomatic weapon, but the Constitution placed in the hands of Congress the decision to take the country to war. In the *Prizes Cases* (1863), the Supreme Court upheld a blockade placed by President Abraham Lincoln. Yet Justice Grier carefully limited the President's power as Commander in Chief to defensive actions, noting that he "has no power to initiate or declare a war either against either a foreign nation or a domestic State." The executive branch took exactly the same position. During oral argument, Richard Henry Dana, Jr., who was representing the President, acknowledged that Lincoln's action had nothing to do with "the right to initiate a war, as a voluntary act of sovereignty. That is vested only in Congress."

In a case decided by the Supreme Court in 1889, England had requested the United States to supply naval forces in a military action against China. The Court made it clear that offensive operations had to be authorized by Congress, not the President: "As this proposition involved a participation in existing hostilities, the request could not be acceded to, and the Secretary of State in his communication to the English government explained that the war-making 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." *The Chinese Exclusion Case*, 130 U.S. 581, 591 (1889). Significantly, the Court spoke not merely of the congressional power to declare war but of broader power: *war-making*.

In 1954, when President Dwight D. Eisenhower was pressured to intervene in Indochina, he told reporters at a news conference: "I will say this: there is going to be no involvement of America in war unless it is the result of the constitutional process that is placed upon Congress to declare it. Now, let us have that clear; and that is the answer."

With regard to President Clinton's threat to invade Haiti, House and Senate debates were strongly critical of his claim that he could act militarily without first seeking legislative authority. Both Houses passed legislation stating that "the President should have sought and welcomed Congressional approval before deploying United States forces to Haiti." Ever legislators who voted against the resolution agreed that President Clinton should have gotten approval from Congress. Louis Fisher, *Presidential War Power* 157 n.105 (1995).

There are substantial risks when Presidents threaten military force, as part of diplomacy, when they lack congressional authority and support. If the threat does not yield the desired conduct on the part of the other country, the President may argue that the United States (actually the President) has suffered a loss of credibility, and it is therefore necessary to actually use military force. That was the situation President Clinton found himself in with Haiti. Fisher, *Presidential War Power*, at 154-57.

## RESPONSE TO QUESTIONS FROM SENATOR THURMOND

Michael J. Glennon

May 7, 2002

1. No doubt the Framers had multiple levels of intent with respect to this and other constitutional questions; it is always difficult to fathom the intent of collective entities, particularly those who gathered so long ago. Some of the Framers may well have intended in part to permit the Congress to determine the consequences of certain acts under the law of nations. Such an intent would not, however, necessarily be inconsistent with an intent to reject the British model in which the war power reposed exclusively in the King. As my testimony indicates, this was the conclusion of President Lincoln and Justice William Rehnquist, a view in which I concur.
2. The Constitution, as your prior question correctly implies, consists of more than simply bare text. Case law, custom, the intent of the Framers, and structural and functional considerations also determine what we regard as "constitutional." As my testimony indicates, the textual sources of the congressional share of the war power are numerous and, with these other sources of constitutional power, combine to provide support for the conclusion reached by the Senate in adopting its version of the War Powers Resolution (which your question quotes).
3. No hard and fast line can be drawn concerning the obligation of the President to share information with Congress, which is why I did not attempt in my testimony to formulate a general rule. Sometimes the Constitution probably does require the President to share some information with some congressional committees (or Members) in some circumstances. In some situations, sharing information with Congress could compromise national security. My own judgment is that, given the security precautions Congress has taken, those situations will be few. I believe that, as a policy matter, the Executive should—for its own benefit, as my testimony indicates—seek to share more information rather than less information with Congress. But no one can say with certainty where the constitutional line must be drawn.
4. My experience with the Senate Foreign Relations Committee convinced me that not only is it practical for staff to visit trouble spots but sometimes essential. Staff are the eyes and ears of Congress. Representatives of the executive branch visit hostile areas for the simple reason that physical risk is not the only consideration: reliable information is essential to making sound policy. Unless Congress is willing to cede foreign policy-making to the Executive, it needs its own independent sources of information. On some occasions, accompaniment by executive officials may be required. But the Committee on Foreign Relations has benefited enormously from on-site staff visits. Physical danger, unfortunately, is simply an unavoidable part of some jobs.
5. I have suggested that the War Powers Resolution should in large part be repealed. I wrote the following in *Too Far Apart: Repeal the War Powers Resolution*, 50 UNIVERSITY OF MIAMI LAW REVIEW 17 (October, 1995):

If the War Powers Resolution is not the flower child of another era, it is at least seen to be; in a legal system increasingly driven by the perceived consequences of violation rather than its own long-term integrity, that is worse. But we must take the system as we find it, and the reality is that the law's long-term integrity is undermined by what has become to the separation-of-powers what the old 55-mile-an-hour speed limit became to driving.

I favor strengthening the Resolution over repealing it. But, if the alternatives are the current version of the Resolution versus no Resolution, a hardheaded cost-benefit analysis is required. Many commentators have sung the merits of a workable Resolution, but few have examined the costs of the unworkable Resolution now in force, a Resolution that does not yield the originally advertised benefits but which does impose costs. Given the choice between no Resolution and one that doesn't work—one, indeed, that confounds the congressional role rather than strengthens it; one that confuses public attention rather than focuses it; one that, with each use of force, deflects attention from underlying policy considerations as well as constitutional questions; one that gives the Congress no information about a crisis that it cannot get from the *New York Times*; and one that has rendered the law irrelevant—the better choice is no Resolution. The costs of this Resolution outweigh its benefits.

6. No. As indicated in my answer to your second question, the text is not the only source of constitutional authority. Based upon other sources of authority, Presidents conclude executive agreements and send diplomatic representatives abroad without Senate advice and consent. Congress and the Senate have no power to interfere with the President's sole power to recognize foreign governments, even though there is no express textual prohibition against such interference and even though there is no express textual grant of the recognition power to the President. There is more to the Constitution than simply its text.
7. It depends what is meant, of course, by "won." Congress itself is not a party in litigation, and thus does not win or lose cases *per se*, but congressional institutional interests occasionally are at stake in claims litigated by third parties. In at least two such cases involving the war power, congressional institutional interests prevailed. Those cases are *Little v. Barreme* 6 U.S. (2 Cranch) 170 (1804) and in *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952).
8. Yes.

Questions by Senator Strom Thurmond for Professor Jane Stromseth, regarding her testimony before the Constitution Subcommittee of the Senate Judiciary Committee on April 17, 2002

1. Professor Stromseth, in your testimony, you indicate that there is historical precedent for the President to act without Congressional authorization when pursuing police actions. Isn't the current war on terrorism a police action as well as a military action because the enemy is dispersed throughout the world? Didn't Congress acknowledge this in S.J. Res. 23, authorizing the President to use force not only against nations, but persons and organizations as well?

Presidents historically have used limited force in "police" actions in pursuit of individuals, including pirates and bandits, both with and sometimes without the authorization of Congress. The President, moreover, has clear constitutional authority to repel attacks against the United States, its forces, and citizens and to forestall imminent attacks. The current war on terrorism is a complex and multi-faceted campaign involving a wide range of both law enforcement and military actions. Some of the military operations are akin to small-scale "police" actions designed to apprehend individual terrorists. Other aspects of the war against terrorism go well beyond this and, as in Afghanistan, involve sustained combat operations against a state that supported and harbored those responsible for the September 11 terrorist attacks. S.J. Res. 23 recognizes that the war against terrorism will include a diverse range of military actions directed against both non-state and state actors. The joint resolution authorizes the President to use necessary and appropriate force against nations, organizations or persons responsible for the September 11 attacks in order to "prevent any future acts of international terrorism against the United States by such nations, organizations or persons." In enacting S.J. Res. 23, Congress recognized the importance of its authorization and support in a campaign that is likely to be long and far-reaching, that is focussed on a global terrorist network based in over sixty countries, and that will involve military actions that vary in scope and complexity, including military operations that go beyond limited "police" actions to apprehend individual terrorists.

2. You state in your testimony that the President has the power to repel actual or imminent attacks against the United States. If the President received intelligence information that an attack on the United States was imminent, would he have the ability to strike preemptively in an offensive manner?

The President's constitutional authority to repel attacks against the United States is incontestable. This includes the power to repel imminent attacks against the United States. Thus, if the President received intelligence information that an attack on the United States was imminent, he certainly would have the authority to exercise the country's right of anticipatory self-defense by using force to

prevent and preempt the imminent attack. I would not characterize such a preemptive act of anticipatory self-defense against an imminent attack as “offensive” in nature; instead, using necessary and appropriate force preemptively to forestall and prevent an imminent attack upon the United States would, in my view, be a defensive action undertaken as an exercise of the right of self-defense.

3. Professor Stromseth, you have argued that the framers intended Congress to have broad powers over the initiation of hostilities that are not conducted pursuant to a declaration of war. This argument is partly based on Article I, Section 8, Clause 11 of the Constitution, which gives Congress the power to “grant Letters of Marque and Reprisal, . . .” Isn’t the Marque and Reprisal Clause fundamentally different because it authorizes *private* parties to engage in hostilities?

The Constitution’s Marque and Reprisal Clause, which gives Congress the power to “grant Letters of Marque and Reprisal,” is important in understanding the scope of the war powers vested in Congress. Letters of marque and reprisal have a long history dating back to the 12<sup>th</sup> or 13<sup>th</sup> century. Originally, as your question indicates, they were governmental authorizations permitting private parties to use force – to settle their own grievances against another state or its citizens. By requiring sovereign permission for private reprisals, European states during the 12<sup>th</sup> to 17<sup>th</sup> centuries aimed to control private warfare and to satisfy their citizens’ grievances. But by the mid-18<sup>th</sup> century, governmental control over warfare had increased substantially, and reprisals were generally authorized by sovereign states to pursue their own claims against other states. During the 18<sup>th</sup> century, letters of marque and reprisal were used by states as a way to authorize private forces, and sometimes public forces, to take military action in support of state goals. (For an historical analysis of marque and reprisal, see Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U.Pa.L. Rev. 1035 (1986)). In other words, at the time of the Constitution’s drafting, letters of marque and reprisal were likely understood as a way for states to authorize or commence limited hostilities against another state short of declared war. Eighteenth century statemen and treatise-writers on the law of nations referred to reprisals, in particular, as acts of limited hostility or “imperfect war” that interrupted the public tranquility only partially and that generally had the narrow objective of rectifying a specific injustice. The Constitution’s founders understood, however, that state reprisals could and often did lead to full-fledged or “perfect” war. Thus, they likely understood Congress’s power to grant letters of marque and reprisal as the power to authorize the initiation of hostilities such as reprisals short of declared war – hostilities that could easily escalate and lead to war. This power is in addition to Congress’s clear constitutional power to declare or authorize war.

4. Professor Stromseth, do you feel that historical precedent is valuable in terms of defining the war-making powers of the President and Congress? What past Presidential actions provide precedential value and what actions do not?

Yes, I do think historical practice is valuable in understanding the respective war powers of the President and the Congress. Historical practice cannot override or amend the clear provisions of the Constitution, but it can help illuminate those aspects of the division of war powers that are uncertain or open-ended. Analyzing the precedential significance of historical practice is an extremely important and complex matter. I've discussed it at some length in Jane Stromseth, "Understanding Constitutional War Powers Today: Why Methodology Matters," 106 *Yale Law Journal* 845, 872-886 (1996). Let me try to summarize some key points here in answering your question.

In evaluating the significance of historical practice in constitutional interpretation, I think the approach taken by Justice Frankfurter in his *Youngstown* concurrence is a promising one if applied thoughtfully to the war powers context. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring). Frankfurter's general approach to historical practice was embraced by the Supreme Court in *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). It has several key components:

- First, practice cannot "supplant" a clear constitutional requirement. *Youngstown*, 343 U.S. at 610. The Constitution clearly gives Congress the power to declare war, and thus the President cannot, by virtue of historical practice, appropriate that power. To argue otherwise would be to claim, in effect, that the President alone or with congressional acquiescence can "amend" the Constitution in contravention of the document's explicit amendment provisions. In contrast, where the constitutional text is genuinely ambiguous or silent, as it is regarding issues such as the President's power as Commander in Chief to deploy forces abroad for foreign policy purposes in peacetime or the precise scope of the President's authority to "repel sudden attacks," historical practice can shed light on how we should understand the President's constitutional power today.
- Second, Frankfurter wrote, the practice must be "systematic," "unbroken" and "long-pursued." *Id.* In the war powers context, the requirement of a "systematic" practice means that one must differentiate between types of actions: Cases in which the President has used limited force to rescue or protect American citizens, for instance, cannot be used to claim executive authority to commit American forces unilaterally to major hostilities.
- Third, the executive practice must be "long pursued to the knowledge of the Congress and never before questioned . . ." *Id.* Congress, in other words, must not only be on notice of an executive practice and accompanying claim of authority to act; Congress also must accept that practice and claim of authority. Assessing whether Congress can fairly be said to have done so, of course, raises many complex and difficult issues of interpreting legislative intent, particularly in the war powers context, which certainly argues for caution in making conclusions about the significance of history.

As I discuss more fully in my Yale Law Journal piece, with respect to war powers, only two categories of historical practice seem to me unambiguously to meet the Frankfurter standard embraced in *Dames & Moore*. The first is the long-standing presidential practice of deploying forces abroad for foreign policy purposes in peacetime -- deployments that do not involve commencing hostilities. The Constitution does not clearly allocate this power, and successive congresses generally have accepted or acquiesced in this executive practice over the years. By accepting substantial presidential latitude in making peacetime troop deployments, congresses over the years have recognized the value of presidential discretion and flexibility in the fluid and often dangerous realm of foreign affairs. Yet Congress has not thereby given up its own authority over such troop deployments and it can exercise concurrent authority. The second category of historical practice that meets the Frankfurter standard, in my judgment, is the long-standing presidential practice of using limited force to rescue American citizens abroad whose lives are in imminent danger. Neither the constitutional text nor the original debates clearly address executive authority in this context. The practice is well established historically. Congress, moreover, generally has accepted or acquiesced in such protective actions involving minimal risk of either sustained hostilities or escalation and has provided statutory authority for certain actions that do not amount to acts of war. In contrast, historical practice has not given the President the legal authority to commence war against another country, whether the war be large or small. The Constitution clearly vests that authority in Congress.

5. Professor Stromseth, you argue that the Congress should provide judgment before combat operations because it is responsible to the people. However, isn't the President, as an elected official, responsive to the people? Aren't the President's actions further constrained by Congress' power of the purse and the power to impeach?

Yes, as an elected official who represents all Americans, the President is clearly responsive and accountable to the people. Moreover, in exercising his considerable foreign affairs powers he can act with efficiency and dispatch in protecting the United States and the American people. In dividing the war powers between Congress and the President, however, the Constitution provides for two lines of accountability before the United States commences or initiates war. The President is Commander in Chief of the armed forces of the United States and has clear authority to repel attacks, to exercise the nation's rights of self-defense, and to conduct war authorized by Congress. But, as I discuss in my statement, the Constitution vests the power to declare or authorize war in the legislature as a whole, to ensure careful deliberation by the people's elected representatives in Congress and broad national support before the United States commences a war. In short, both the President and the Congress are responsible to the people and each has valuable attributes that are important in the constitutional distribution of war powers and in the current campaign against terrorism.

Certainly Congress's power of the purse and the power to impeach are important elements of the structural system of checks and balances set forth in our Constitution. But, as I discuss in my statement, the Constitution in addition gives to Congress the power to decide whether the United States should commence war. Legislative deliberation before the United States initiates war serves a number of important purposes in addition to those served by Congress's power of the purse. Moreover, the power of the purse, though extremely important, can be an overly blunt instrument for expressing congressional will and, in some situations, can risk undercutting U.S. diplomacy and deployments at critical moments. This underscores the importance and value of deliberation by both the Congress and the President before U.S. forces initiate hostilities in order to ensure a strong national consensus for the action undertaken.

6. Professor Stromseth, does the President have the power to use force to respond to a national emergency created by an attack on the United States? Isn't the President currently responding to a national emergency, and shouldn't he have some latitude in his response?

Yes, the President clearly has constitutional authority to use force to respond to an attack upon the United States. The President's constitutional power to repel attacks upon the United States has been clear from the beginning. The War Powers Resolution, in section 2©, likewise recognizes the President's constitutional powers as Commander in Chief to respond to "a national emergency created by attack upon the United States..." The President currently is responding to the September 11 attacks upon the United States and, as Commander in Chief, the President should have some latitude in his response. Congress recognized this in crafting S.J.Res.23, which gives latitude to the President to use "all necessary and appropriate force" against those responsible for the attacks of September 11 and contains no geographical limits, in recognition of the global nature of terrorist networks and the role of organizations and individuals as well as states. In enacting S.J.Res.23, which the President welcomed and signed into law, both branches recognized that the most effective response to the September 11 attacks upon the United States is a unified one in which both Congress and the President act together.

7. Professor Stromseth, would you agree that the language of S.J. Res. 23, which passed the Senate by a vote of 98-0, places no time or geographic restrictions on the President's ability to act, provided that he can connect the object of his military actions with the terrorist attacks of September 11? Does S.J. Res. 23 satisfy the War Powers Resolution for any future use of military force?

S.J. Res. 23 authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized,

committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The resolution contains no geographic restrictions on the President’s ability to use “all necessary and appropriate force” against those nations, organizations, or persons he determines “planned, authorized, committed, or aided” the September 11 terrorist attacks, or harbored such organizations or persons. The resolution contains no time limits, although it does indicate that the purpose of using force is focussed and future-oriented: to prevent additional terrorist acts against the United States by the states, organizations, or persons responsible for the September 11 attacks or who harbored those responsible. In short, S.J. Res. 23, though broad in several respects, also has limits and is focussed on preventing future acts of terrorism against the United States by those responsible for the September 11 attacks.

S.J. Res. 23 explicitly affirms that it “is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.” This language clearly and expressly states Congress’s intent to authorize force, consistent with section 8(a)(1) of the War Powers Resolution. As a result of this language, military action that falls within the scope of S.J. Res. 23 is not subject to the 60-day time clock contained in section 5(b) of the War Powers Resolution. At the same time, S.J. Res. 23 also states that “[n]othing in this resolution supercedes any requirement of the War Powers Resolution.” Thus the reporting and consultation requirements of the War Powers Resolution are still applicable to actions authorized by S.J. Res. 23. Given the likely scope and time-frame of the war on terrorism, regular reports and meaningful, high-level consultations will be important as the campaign against those responsible for the September 11 attacks continues.

## SUBMISSIONS FOR THE RECORD

STATEMENT BY SENATOR STROM THURMOND (R-SC), BEFORE THE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, REGARDING THE APPLICATION OF THE WAR POWERS RESOLUTION TO THE WAR ON TERRORISM, WEDNESDAY, APRIL 17, 2002, SD-226, 2:00 PM.

Mr. Chairman:

Thank you for holding this important hearing regarding the War Powers Resolution and its application to the war on terrorism. In addressing the War Powers Resolution, our discussion today will focus on the constitutional roles of the President and Congress in waging war. I hope that by having thoughtful discussions on these fundamental issues, we will promote an atmosphere in which President Bush and Congress can work together constructively. By proceeding in a spirit of cooperation, our Nation will no doubt succeed in rooting out terrorism and spreading the light of democracy and freedom to all the world.

Today's hearing will explore the powers of the President and the Congress as mandated by the Constitution, the War Powers Resolution, and the resolution authorizing the President to use force in response to the September 11 terrorist attacks. In a February 11 Washington Times piece, Chairman Feingold voiced his concern that President Bush, without consulting Congress and seeking its authorization, may target Iraq and other rogue nations during the next

phase of U.S. military operations. While I agree with his assertion that the President should consult with Congress whenever possible, I believe that the President has broad constitutional powers to combat terrorism as he sees fit. As our Commander in Chief, the President has the power to commence military operations in Iraq or other countries without congressional authorization. Furthermore, Congress has already provided the President with an open-ended mandate to deter future acts of terrorism by passing the use of force resolution. This explicit authorization satisfies the requirements of the War Powers Resolution.

The first place that we should look when examining war powers is the Constitution. The Constitution divides war powers between the President and Congress. Article II, Section 2 directs that 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." Under Article II, the President is also vested with the executive power. Article I, Section 8 gives Congress the power to declare war and to raise and support the armed forces.

Although the Constitution seeks to divide war-making

powers, it provides the President with substantial authority in this area by designating him as the Commander in Chief and Chief Executive. It is readily apparent that war-making is more of an executive function than a legislative one. The President is best equipped to make crucial and time-sensitive decisions about the deployment of troops based on the latest intelligence information. In addition, the President is the Nation's leader in setting foreign policy, a process that is often deeply intertwined with decisions relating to the use of military force.

Senator Feingold has challenged the proposition that the Constitution provides the President with substantial war-making powers. During the Senate floor debate on the use of force resolution, Senator Feingold stated, "Congress owns the war power. But by this resolution, Congress loans it to the President in this emergency." I disagree with the distinguished Senator's characterization of the distribution of war powers. The concept of "loaning" the war power to the President is completely without precedent and has no basis in the Constitution. Rather, the text of the Constitution and historical practice demonstrate that war powers are shared.

It is important to note that the framers specifically rejected giving Congress the power to "make war." In fact, the Constitutional Convention voted to change the phrase from "make war" to "declare war." It was commonly understood at the time of the ratification that a declaration of war signaled a legal status under international law. As Alexander Hamilton noted in The Federalist No. 25, a declaration of war was by no means required to initiate hostilities. Therefore, it is clear that the framers intended the President to have war-making powers. If Congress was meant to be all powerful in this arena, the framers would have made it explicit.

When the Supreme Court has addressed war powers and foreign policy issues, it has often been deferential to the President's judgments. In the Prize Cases, the Supreme Court refused to decide whether President Lincoln was justified in the use of a blockade against the Southern states. Rather, the Court found that this decision was discretionary, falling under the President's duties as Commander in Chief. The Prize Cases, 67 U.S. (2 Black) 635, (1862).

Just years later, the Supreme Court heard a case in

which the state of Mississippi sued to enjoin President Andrew Johnson from implementing Reconstruction statutes by directing the military to divide 10 Southern states into military districts. The Supreme Court noted that as Commander in Chief, the President must have discretion in carrying out his duties, as they are executive and political in nature. State of Mississippi v. Johnson, 71 U.S. 475 (1866).

In U.S. v. Curtiss-Wright Corp., 299 U.S. 304 (1936), the Supreme Court was faced with the question of whether Congress could transfer powers to the President relating to international affairs. Congress had purported to delegate to the President the power to implement an arms embargo in South America when, in his discretion, such an action would contribute to peace between warring nations. Writing for the majority, Justice Sutherland wrote that presidential power is not dependant wholly on acts of Congress because of the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations... ."

As Senator Feingold has rightly noted, discussions of war powers must also include an analysis of the War Powers

Resolution, which became law in 1973 and was passed over President Nixon's veto. It was largely a reaction to the conflict in Vietnam and was meant to add structure to the constitutional tug-of-war between the President and Congress regarding war powers. Section 3 of the War Powers Resolution requires the President to consult with Congress "in every possible instance" before introducing U.S. Armed Forces into hostile situations. This is a vague and general requirement that is fleshed out in other sections of the resolution. Section 2(c) states that the President may only introduce forces into hostilities when there is (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency caused by attack upon the United States or the armed forces. Section 4(a) further requires that the President inform Congress within 48 hours of introducing armed forces into hostilities, and Section 5(b) requires the president to remove troops within 60 days, unless Congress has authorized the action.

I voted against the War Powers Resolution in 1973 because I found it unnecessary to restrict the President's ability to conduct military operations that he determines are in the best interests of the United States. As time

passed, the Resolution proved to be ineffective and largely irrelevant. Moreover, many scholars have taken the position that it is unconstitutional. No President, Republican or Democrat, has acknowledged the constitutionality of the War Powers Resolution, arguing that the Resolution interferes with the President's inherent authorities to conduct warfare as Commander in Chief.

Historical practice supports this position. Since the presidency of George Washington, there have been at least 125 deployments of U.S. forces abroad without prior express authorization from Congress. Perhaps the most striking example of the use of force without congressional authorization was President Truman's commitment of troops to the Korean peninsula from 1950 through 1953. He did not seek the approval of Congress before or after the fact.

In 1962, during the Cuban missile crisis, President Kennedy implemented a quarantine on the shipment of missiles from the Soviet Union. He also warned that if the Soviet Union launched missiles from Cuba against any nation in the Western Hemisphere, the U.S. would retaliate with nuclear weapons. President Kennedy never sought congressional approval for his actions.

In 1986, President Reagan ordered the attack of targets in Tripoli and Benghazi, Libya, after the bombing of a Berlin nightclub frequented by U.S. military officers. President Reagan claimed to act under his own authority as Commander in Chief.

President Clinton commenced a number of military operations, also relying on his Commander in Chief powers. In 1993, President Clinton ordered U.S. naval forces to launch missiles against the headquarters of the Iraqi Intelligence Service in Baghdad in response to an assassination attempt against former President Bush in Kuwait. No congressional approval was sought.

Also in 1993, President Clinton began preparations to deploy troops to Haiti, without congressional approval, in an effort to force General Cedras to step down so that the rightfully elected President Aristide could take power. In addition, the President sent aircraft carriers into the region. Last minute diplomacy worked, and General Cedras stepped down before American troops entered combat operations.

Most recently, President Clinton sent 30,000 soldiers as part of a NATO operation to respond to the Yugoslav

government's violence against ethnic Albanians in Kosovo. The President took this action despite a failed House vote that would have authorized force. In addition, the War Powers Resolution requirement to remove troops within 60 days was ignored.

I would like to emphasize that Congress retains substantial power to check the President's ability to wage war, despite the ineffectiveness of the War Powers Resolution. The real power of Congress does not lie in the implementation of a system of notification and authorization, as the War Powers Resolution attempts to do. Rather, it is the power of the purse that enables Congress to refuse to fund presidential prerogatives. In fact, Congress has done so in the past, refusing to fund Cambodian operations in the Vietnam War. The President cannot conduct military operations without money, and Congress can decline the necessary funding.

Even if we were to assume the constitutionality and continued validity of the War Powers Resolution, Congress has met its requirements by specifically authorizing the President to use force in response to the terrorist attacks of September 11. By an overwhelming vote of 98-0, the

Senate approved S.J.Res.23, which authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons" that he determines took part in the September 11 terrorist attacks. The President is empowered to use force "in order to prevent any future acts of international terrorism against the United States."

The language of this joint resolution is clear and unambiguous. Its finding section states that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." The language of the resolution itself is quite broad and places no time or geographical restraints on the President's ability to respond to the terrorist attacks. Therefore, S.J.Res.23 authorizes, in the broadest possible terms, the use of force against those responsible for the September 11 attacks. Under the resolution, there is no time limit imposed on our operations in Afghanistan. Additionally, the President may commence military operations in other countries that contributed to the atrocities of September 11.

There has been rampant speculation over the Administration's plans regarding Iraq. Numerous media

reports have indicated that Iraq was involved in the terrorist plot of September 11. If true, the President may commence military actions against Iraq, and such actions would be specifically authorized under the use of force resolution. Furthermore, the text of the resolution specifies that the President is the person who makes the determination that a nation is responsible for the terrorist attacks. Congress has instructed the President to use his best judgment, and if he decides that Iraq is culpable, he may take action. In fact, as the findings section states, the President has the constitutional authority to take action.

Neither the War Powers Resolution nor the authorization of force require further Congressional authorization for future military actions aimed at those responsible for the terrorist attacks. Congress has already authorized the President to act in a broad manner, and this authorization satisfies the War Powers Resolution. If it is the will of Congress to repeal the authorization of force, it may do so.

I am not advocating that Congress abdicate its very important role in the war-making process. Congress should watch U.S. military actions with vigilance and should

suspend funding for military operations if it disagrees with the President's objectives. It is also critical that the President consult with Congress whenever possible. Consultations would not only be politically advisable but would also enable the President and the Congress to present a unified front. However, the Constitution does not mandate consultations. Even if it did, this kind of determination would be highly fact-specific and impossible to implement. Rather, the Administration and Congress should seek to develop good faith communications on a regular basis. Common sense and comity should be our guideposts. I hope that our discussions today are productive, and I look forward to hearing from our distinguished witnesses.