

**Statement of Senator Patrick Leahy
Chairman, Senate Judiciary Committee
Hearing on “Exercising Congress’s Constitutional Power to End a War”
January 30, 2007**

Today, this Committee holds a hearing on the constitutional powers of the Congress with respect to war.

Of course, the Constitution reserves to the Congress the power to “declare war” in Article I, section 8. In addition to the so-called power of the purse, the Constitution provides a number of specific powers to Congress. In particular, the Constitution provides that Congress shall have the power to “provide for the common Defence,” “to define and punish . . . Offenses against the Law of Nations,” “to make Rules concerning Captures on Land and Water,” “to raise and support Armies,” “to provide and maintain a Navy,” “to make Rules for the Government and Regulation of the land and naval Forces,” “to provide for calling forth the Militia to execute the Laws of the Union . . . and repel Invasions,” “to provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States,” and “to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.”

Contrast these extensive provisions and powers with that of the President, who is designated the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Indeed, Senator Specter made the point over the weekend that the express congressional power to “raise and support Armies” and to appropriate funds for their use is further circumscribed by the Constitution in order to require congressional action periodically by limiting such funding to no longer than two years.

Last week the Senate Majority Leader moved to proceed to a resolution reported by the Senate Foreign Relations Committee regarding the President’s plan to send more Americans into the conflicts in Iraq. When Republican objections to proceeding to consideration of the Senate resolution of disapproval for escalating the war are overcome, the Senate will proceed to that debate. Congressional authority with respect to war is part of this debate. Today, the Senate Judiciary Committee is holding a hearing on these legal and constitutional matters.

Today, Senator Specter and I are writing the Attorney General asking for the Bush-Cheney Administration’s views on these legal and constitutional issues. We ask: What constitutional authority do you recognize resides with the Congress with respect to war? How do you believe Congress can exercise its authorities? What limits to you believe exist on those authorities? We also request legal analyses and the opinions of the Office of Legal Counsel, which represent the official legal position of the Executive, on these matters. We look forward to the Attorney General’s prompt and thorough response. As the Republican Leader has said, there is no more important issue than the Iraq war.

In a recent column in *The New York Times*, Adam Cohen recalled the observation of James Madison that “the Executive is the branch of power most interested in war, and most prone to it” and that it was to counteract this danger that the Constitution “with studied care, vested the question of war in the Legislature.” Mr. Cohen goes on to recall the case of the Flying Fish in 1799, the Steel Seizure case in 1952, and the Hamdan case in 2006, all of which circumscribed presidential action. He recalls the capping of the number of American military personnel in South Vietnam in the Foreign Assistance Act of 1974 and the provisions of the Lebanon Emergency Assistance Act of 1983. He concludes: “The Constitution’s text, Supreme Court cases and history show, however, that Congress can instead pass laws that set the terms of military engagement.”

Almost two years ago, during this Committee’s hearing on the nomination of John Roberts to be Chief Justice of the United States, my first questions to the nominee were about these very matters. I posed the hypothetical whether there was any doubt that Congress could declare the end to war by enacting a law doing so, and overriding a presidential veto if necessary. Ours is a constitutional government in which the Constitution vests lawmaking power in the Congress. The President is not above the law but is commanded by the Constitution to “take Care that the Laws be faithfully executed.”

I thank and commend Senator Feingold, the Chairman of the Constitution Subcommittee, for organizing and chairing this important hearing. I join him in welcoming our distinguished panel of witnesses and thank them for sharing their insights with us and the Senate.

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