

United States Senate, Committee on the Judiciary

A Hearing on

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

Response to Questions from Senator Kennedy

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

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

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

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

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

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

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

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

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

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

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

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

General, Office of Legal Counsel, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* (May 22, 1970), at 20

http://www.stanford.edu/group/lawreview/content/issue6/bybee_appendix.pdf. By contrast, the hypothetical statute that Professor Feldman assumes to be clearly unconstitutional operates precisely by ordering troops who are already in the field to undertake certain detailed operations. Thus, even on his own terms, his argument is not persuasive in seeking to equate a cap on force size with a command to take a particular hill.

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

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

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