

United States Senate, Committee on the Judiciary

A Hearing on

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

Response to Questions from Senator Whitehouse

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February 20, 2007

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

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

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

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

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