

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

February 21, 2007

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

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

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

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

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

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