

**Questions from Senator Sheldon Whitehouse for all witnesses at the Judiciary Hearing:
“Exercising Congress’s Constitutional Power to End a War”**

Congressional power “to declare war” is found in Article I, Section 8 of our Constitution. The father of our Constitution, James Madison, once said, “The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in the war, and most prone to it. It has accordingly with studied care, vested the question of war in the Legislature.”

- (1) 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?

Yes. The President is the agent of Congress in carrying out the declaration (or authorization) and is subject to the restrictions and conditions placed in that grant of power. For example, the Quasi-War with France in 1798 authorized a naval, not a land, war. When President John Adams issued a proclamation that exceeded the authority granted by Congress over seizure of ships, the Supreme Court in *Little v. Barreme* (1804) held that the proclamation was invalid because in violation of the statute. The Iraq Resolution of October 2002 authorized military action against Iraq, not the general region.

- (2) In law, it is 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 an agent are irrevocable by the grantor?

Not in the war power area. Congress can revisit an authorization or declaration at any time to modify and reshape national security policy. Outside the war power area, there are examples of the Senate confirming a nominee and later, through its rules, insisting that it could “reconsider” its vote. The Supreme Court in *United States v. Smith* (1932) ruled that after the Senate confirms a nomination and the appointee takes the oath and enters into the duties of office, the Senate may not then reconsider and possibly reject the nomination.

- (3) 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 bounds, to a limited expenditure of funds, and to a limited deployment of military forces?

Yes, that is correct. Congress may consider and adopt those measures as well as others.

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Questions of Senator Edward M. Kennedy
Exercising Congress's Constitutional Power to End a War
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1. Which historical precedents are most on point in considering legislation to prevent the President's proposed troop escalation in Iraq?

During the Vietnam War, Congress passed a number of measures to place restrictions on the deployment of U.S. troops and eventually blocked funding for the war. Also, as with Somalia in 1993, Congress can allow troops to remain in the region for a time certain, after which they must be removed unless the President comes to Congress and obtains specific authority in advance for continued troop presence. Those examples, along with others, are included in my statement and testimony to the committee, and also in the CRS report, "Congressional Restrictions on U.S. Military Operations in Vietnam, Cambodia, Laos, Somalia, and Kosovo: Funding and Non-Funding Approaches," January 16, 2007, which the committee has.

2. The Administration's activities in combating terrorism and in conducting war have been cloaked in secrecy. Whether the issue is warrantless wiretapping, the authority to open mail, seizing alleged enemy combatants and holding them without access to lawyers or courts, or using secret harsh interrogation programs, the Administration has used the veil of its commander-in-chief authority to hide its activities. That approach must stop. It is time for Congress to become a partner in making decisions about the conduct of the war. The Administration should be held accountable for its activities, and the planning as we go forward should be conducted in the light of day. What is the proper role of Congress in exercising its oversight role during wartime?

Congress, having authorized military operations in Iraq, may at any time pass supplemental authorization and appropriations measures to reshape U.S. policy. The framers knew that the separation of powers spelled out in the Constitution could be upset by any branch intent on concentrating power, and that the remedy would be for each branch to have an incentive to protect its powers and fight off encroachments. Over the past half-century, Congress has largely lost that instinct and respect for its institutional place in government, particularly in vigorously exercising checks and balances as a means of preserving liberty and limiting executive (or judicial) abuses. For the system to work as the framers hoped, lawmakers must value Congress as a separate body rather than define loyalty as automatic support for presidential initiatives. Individual freedom is best protected by checks and balances, not by deference to the President. There should never be any question of patriotism in opposing military operations that are not in the nation's interest. Lawmakers take an oath of office to support the Constitution, not the President. They need to impress upon their constituents that duty.

3. Many of us feel that the authorization to use military force in Iraq enacted in 2002 is no longer relevant. It was based on Saddam Hussein's possession of weapons of mass destruction, his ties to al Qaeda and his defiance of U.N. Security Council Resolutions. The mission of our armed forces today in Iraq bears no resemblance to the mission authorized by Congress.
 - a. Is the 2002 authorization still valid, even though it's obviously not relevant to our mission in Iraq today? If not, is the President acting outside his authority by continuing the war in Iraq?

The Iraq Resolution contains broad language in Section 3 regarding the use of force. It authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to (1) defend the national security of the United States against the continued threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq." The language in (1) relates to the threat posed by Iraq, not Saddam Hussein, and even though the nature of hostilities in Iraq today was unlikely to be foreseen in 2002 (sectarian fighting and guerrilla warfare), the Administration could still claim that Iraq "poses a threat," particularly to U.S. soldiers. It could argue that conditions in Iraq pose a threat to the region and to the "national security of the United States." The statute clearly gives generous discretion to the President to use force "as he determines to be necessary and appropriate." Although the nature of the war in Iraq has changed dramatically from the expectations of October 2002, it would be difficult to maintain that the President is acting outside his authority by continuing the war. The statutory language of the Iraq Resolution is too broad to sustain that conclusion.

- b. Do the annual appropriations for the war constitute a de facto authorization by Congress to continue the war? Is your answer affected by the fact that it will be necessary for Congress to appropriate funds to ensure the safety of troops in the field, whether or not it agrees entirely with the mission they are carrying out? How can Congress address the needs of the troops without necessarily re-authorizing the war by doing so?

Annual appropriations do not constitute a de facto authorization for the Iraq War. Section 8(a) of the War Powers Resolution specifically states that authority to introduce U.S. troops into hostilities or likely hostilities "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 states that it is intended to constitute specific statutory authorization within the meaning of this joint resolution." It is true that during the Vietnam War some federal judges accepted continued funding as a de facto authorization of the war, but those same judges later reversed themselves on two grounds. One, they learned that Congress follows a two-step legislative policy: authorization bills for policy and appropriation bills to fund the policy. Policy, on the whole, is established in authorization bills, not appropriations bills. Second, they concluded that "[w]e should

not construe votes cast in pity and piety as thought they were votes freely given to express consent.” *Mitchell v. Laird*, 476 F.2d 533, 538 (D.C. Cir. 1973). For further details on this point, see Louis Fisher, *Presidential War Power* 139-41 (2d ed. 2004).

4. Some have taken the position that the President as Commander-in-Chief does not need congressional authorization to wage war in Iraq. Under this view, even if Congress repealed the 2002 authorization to use military force in Iraq, the President could continue military operations there.
- a. Under what conditions, if any, can the President wage war in the absence of congressional authorization?

The delegates at the Philadelphia Convention in 1787 recognized that the President, particularly when Congress is not in session, has authority to “repel sudden attacks.” At the same time, they understood that taking the country *from a state of peace to a state of war* represented a decision left solely to Congress. All three branches understood that fundamental constitutional principle until President Truman in 1950 took the country to war against North Korea by circumventing Congress and obtaining “authority” from the U.N. Security Council. In my analysis, his action represented the first unconstitutional war. The Constitution was not rewritten by that violation.

- b. What remedies does Congress have against a defiant President?

Congress has many remedies, including holding public hearings (both in the Nation’s Capital and in home districts and states) to educate constituents, passing non-binding resolutions expressing opposition to the President’s policy, refusing to grant funds for certain military operations (a decision over which a veto cannot be exercised), eliminating programs and funding for presidential priorities even when they are unrelated to the war, refusing to confirm appointments and treaties desired by the President, and, ultimately, beginning investigation and hearings into impeachment in the House and removal in the Senate. Those remedies increase in potency when the votes have a bipartisan quality.

5. Some have attempted to draw a distinction between the authority of Congress before a use of force is initiated and the power of Congress to shape or end ongoing hostilities. Is there any legal basis for such a distinction? Does congressional authority change once hostilities begin?

Congressional *power* changes once hostilities begin, because the President can now draw attention to his role as Commander-in-Chief, urge the necessity for “victory” and national unity, question the patriotism or judgment of those who are unsupportive, and invoke other political and emotional arguments. But congressional *authority* remains unchanged. Congress retains full authority at all times to revisit and revise military commitments.

6. In an article in the New York Times Magazine Section on February 4, attached, Noah Feldman concluded that Congress can use its appropriation power to end a war, but not to limit the number of troops the President can deploy once the war has been authorized. According to Feldman, legislation blocking the President's troop escalation violates the constitutional structure of divided government because it involves micromanaging the Commander-in-Chief's power. Do you agree or disagree with Feldman that Congress's war power is all or nothing, "an on-off toggle, not a dimmer switch"?

I disagree fundamentally with his entire article, which consists of a series of *assertions* and *ipse dixits* with no supporting facts or history. He does not substantiate a single claim. Dozens and dozens of statutes demonstrate that Congress is not limited to an all-or-nothing choice, and the Constitution itself places Congress as a primary body to both authorize a military commitment and decide later on its continued viability and purpose. I am unaware of any scholarly work by Noah Feldman that would buttress the claims made in his article in the New York Times Magazine.

Consider the following difficulties with his article. (1) He states that once Congress "has authorized a war, as it did the war in Iraq, the president's power as commander in chief surely allows him to conduct the war without being micromanaged from Capitol Hill." The addition of 21,500 troops to Iraq is a significant step and cannot be called "micromanagement." Moreover, use of the word micromanagement is ill-defined and serves no analytical purpose. (2) "No one believes Congress could legitimately pass a law ordering the Army to take one hill instead of another." No one, to my mind, is even arguing that. Such comments appear to be a red herring, an attempt to distract the reader from real issues to non-issues. (3) "During the Civil War, Congress created the Joint Committee on the Conduct of the War, which exercised oversight with a vengeance, debriefing generals after battles and questioning tactical choices. But Lincoln struggled fiercely to preserve his decision-making independence . . ." First, "with a vengeance" is quite vague and journalistic. Second, Lincoln in fact benefited frequently from the Joint Committee's work and Feldman shows no awareness of scholarship in this area. (4) "When it comes to deciding how many troops should be sent where, there is reason to think [President Bush] is right." Feldman offers no reasons. (5) "Congress has used the appropriations power to limit combat before – but only to end wars." That is false, as indicated by many careful studies, including the CRS report cited above. (6) "Given this historical precedent, there is strong reason to think that the president is within his powers as commander in chief – and beyond the reach of Congress – when he allocates troops. Congress would be on much firmer ground if it exerted its power to pull financing for all troops in Iraq than it would be if it tried to dictate precise troop numbers." Feldman draws this conclusion from his position in (5), where he displays an unawareness of what Congress had done in the past. (7) "The constitutional structure of divided powers is designed to discourage Congressional intervention in particular tactical decisions." Unless Feldman explains the difference between tactical and strategic and puts the 21,500 troops in one category or another, this statement is empty.

Two points remain. (8) For laying out the “order of battle,” Feldman claims “a single supreme commander in necessary.” He doesn’t explain why. Another assertion. What *evidence* supports the statement that “a single supreme commander” has been effective in planning and executing a war? By that question I refer not merely to Iraq II but to Vietnam. What is the evidence? (9) In the final paragraph, Feldman states: “there are still some of us who believe that the greatest problem for the United States in Iraq has always been incompetent management.” That is a remarkable statement because it seems entirely at cross-purposes with (8). For his model, Feldman seems left with a single supreme incompetent commander.

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