

Testimony of
Mr. Alton Frye

April 17, 2002

Mr. Chairman and members of the Committee:

Thank you for inviting my views on the perennial constitutional dilemmas related to the use of force by the American government. Those dilemmas become particularly acute when the nation is faced with so grave and ill-defined a threat as the protracted war on terrorism that lies ahead. Because no one can map the precise contours of the unfolding campaign against terrorism, it is all the more important to design a sound process for engaging both Congress and the Executive Branch in a dependable, continuing partnership to guide our path.

The preface to this discussion must be an appreciation for the prompt and yet deliberate way in which the two branches came together in the aftermath of September 11. The nation's righteous anger under-girded an extraordinary political consensus. President Bush has shown exemplary leadership in pursuing the terrorist Al Qaeda network and its supporters. Yet the most difficult tasks lie ahead, and sustaining the national consensus will depend on effective collaboration between Congress and the President.

An indefinite stream of decisions regarding the use of American forces will arise in the coming months and years, and it behooves a responsible Congress to make sure that it is prepared to participate in them. That objective is important not only as a matter of institutional interest in preserving the Congress's constitutional powers, but as a prerequisite to shaping, refining, guiding and sustaining the difficult actions that President Bush and his successors will surely have to undertake.

Operating in the terra incognita of war against non-state actors and sometimes their state sponsors, in a zone where law enforcement and military power must be blended, in fields where constitutional concerns about civil liberties mingle with complex considerations of national security, where the pursuit of American national interest requires the enlistment of other governments with interests of their own -- the President will need and should welcome the active collaboration of Congress.

May I offer two preliminary points:

First, if not carefully and regularly reconsidered in the context of future phases of the war on terrorism, the broad authority conveyed to the President by Senate Joint Resolution 23, even after refinement in the Senate, could lead to considerable friction between the branches over interpretation.

Second, unless there is continuing consultation in good faith between Congress and the Executive, the unity that marks the beginning of the campaign against terrorism could degenerate into the profound disunity that scarred American politics thirty years ago. One doubts that meaningful consultation can be mandated; it must flow from mutual sensitivity between leaders

in both branches. Nevertheless, the incentives for such consultation would certainly be enhanced by a firm assertion of congressional prerogatives, not as a challenge to the President but as a commitment by the House and Senate to perform their own constitutional duties.

These considerations lend urgency to the subcommittee's inquiry into the relevance of the War Powers Resolution to the manifold operations likely to arise in the war against terrorism. If the inquiry is to be fruitful, however, I believe it must simultaneously understand the long-running legislative-executive arguments over war powers and strive to move beyond them to invent some fresh approaches. The modern debate over war powers is an exceedingly cluttered one, far different from the clarity that marked early constitutional history. Amid the clutter, in the public debates and the scholarly literature, one will find insight and wisdom, but no ready foundation for a viable policy. If the Congress and the Executive are to restore a healthy balance to managing the war powers they share under the Constitution, they must rise above the clutter that litters the political landscape of the last thirty years. Both branches are going to have to avoid rigid postures and rhetorical poses.

1. GET THE PREMISE RIGHT

To begin with, let us return to first purposes. From the beginning, I would argue, the War Powers Resolution has been widely misunderstood. Far from being an assault on presidential power, the Resolution was at its inception a mea culpa by legislators, a recognition that Congress had failed to meet its constitutional obligations by losing effective control of the Vietnam War. As Professor Alexander Bickel lamented in 1973, a war powers bill became necessary because "Congress must declare its own responsibilities to itself and assume them in principle before the country, if it is ever to exercise them in practice in particular situations."

Among the many contributors to that legislation in the Senate and the House -- and it is worth remembering that it won the support of more than two-thirds of the members in both chambers -- no one was more central than Senator Jacob Javits. Senator Javits was deeply committed to a vigorous and effective Executive as America's agent in foreign affairs. He was equally committed to a vigorous and effective Congress. For Javits both were indispensable to a potent American role in the world. The balance that he and his colleagues sought to fashion was intended to invigorate American foreign policy by insuring that Congress met its obligations to share in fateful decisions on the use of force. Javits thought it was essential, politically and constitutionally, to create a procedure that made it difficult, if not impossible, for Congress to evade hard choices on the high policy issues of war and peace.

Thus, the War Powers Resolution was designed primarily to constrain Congress, compelling members to face within a predictable period and under specified procedures the fundamental question regarding military action by the United States: Does the Congress endorse or oppose the commitment of American blood and treasure to a particular mission? To portray the War Powers Resolution as inimical to the President's constitutional authority is to misperceive its premise. That premise is to assert and to accept the burden of responsible policy making that the Constitution assigns to the Congress.

2. Separate Policy Judgment From Consequences

Three decades' experience under the War Powers Act has been mixed, but on balance disappointing. Senator Javits had hoped that the measure would provide the basis for orderly cooperation between the branches on decisions regarding the use of force. The resistance of every President to the law, beginning with President Nixon's unsuccessful veto, and the Supreme Court's refusal to provide a definitive ruling on the law's constitutionality have left a worrisome cloud over legislative-executive relations in this crucial field. Rather than leaving this unwholesome situation to fester and to hamper future interbranch cooperation in the war on terrorism or other military crises, there is evidently a need to try a new approach. In the spirit of brainstorming I would offer a preliminary suggestion.

Focusing on the initial premise that animated Senator Javits, Senator Stennis and others, is there a way to make certain that Congress reaches the high policy questions in a timely and appropriate way? Perhaps the course of wisdom lies in doing less than the War Powers Resolution attempted. By and large the executive has complied with the reporting requirements set forth in the 1973 Act, although it has played word games by filing such reports as "consistent with" rather than "in compliance with" the resolution. Those reports could be the basis for a different response by the Congress.

Instead of linking the congressional determination on the wisdom of a particular use of force with mandated deadlines for withdrawal or other stipulations of executive actions, Congress could address the basic policy question in pristine form: Does the Congress authorize the use of American military power in this situation and for purposes recommended by the President? Using expedited procedures similar to those in the War Powers Resolution and possibly framing the issue in concurrent resolution form, Congress could deal with that question as a distinct one, reserving for separate consideration whether and how to apply its power of the purse or other authority to enforce its verdict. Even when not connected directly to legal mandates, constraints or budgets, freestanding policy resolutions can establish the political context and the practical premise for implementing and enforcing the policy decision. As courts often separate verdict from sentencing, Congress may find it wise to separate policy verdict from pragmatic consequences.

As a technical matter, a concurrent resolution approved by simple majorities could establish parallel procedures in the House and Senate to expedite presentation of and voting on such a policy declaration. This need not mean repeal or amendment of the War Powers Resolution, for there may be occasions when its binding provisions would be most appropriate. For the subtle and shifting possibilities in the war on terrorism, however, it could be useful to add the option of timely legislative declarations focused exclusively on the high policy regarding use of American forces, whether one thought to be imminent or one already initiated by the President. Depending on the need to receive and assess sensitive information or other factors, Congress might wish to debate such a policy resolution in executive session.

Why would isolating the policy issue in this way be worthwhile? Far from being merely hortatory, a clean congressional vote to support or oppose the policy of military action in the instant case would provide a political context for subsequent decisions by both the President and the Congress. The prospect of facing such a vote should induce a degree of self-discipline in the

executive, discouraging it from assuming that it has unfettered discretion to launch an attack and heightening awareness that it must frame its plans with an eye to persuading Congress.

Anticipating that such a vote will occur, even without direct and immediate connection to fixed timetables for withdrawal, defense appropriations or other implications, a prudent executive would know that its capacity to sustain a military engagement would be affected significantly by the congressional pronouncement on the high policy involved. Furthermore, unless the President was confident of winning congressional endorsement of the policy, he would have to contemplate dire international implications of a negative legislative verdict. A division with Congress over such a matter would augur poorly for winning support from other governments. Affirmation of the policy, however, would strengthen the President's hand in pursuing such action, offering the signal of national resolve that is the first desideratum whenever the nation goes to war.

From the congressional standpoint there are several virtues to isolating a vote on the high policy question from the specific requirements of the War Powers Resolution. A positive vote would maximize American power in the coming engagements by demonstrating beyond doubt that the political branches are in accord. Where they are not, setting the policy benchmark in this way would create a wholly different political context for congressional action to govern further military operations. Having made the policy judgment, Congress would retain flexibility for fine-tuning the requirements to be levied on the executive to meet the legislative policy preference. To be sure, a determined president would be expected to fight further on proposed legislative provisions to enforce the policy choice. But the momentum toward restraint or disengagement would be established and the majority that had expressed reservations or opposition toward the use of force would be in position to set a timetable, phase down or terminate expenditures, or otherwise move the government out of the conflict. History makes it apparent that Congress will not undercut forces in the field by precipitate withdrawal of support, but the direction of policy would obviously place the burden on the President to arrange an orderly conclusion to the deployments. To put real teeth in the congressional policy verdict, one could even imagine subjecting later proposals for expenditures in support of a disapproved policy to a point of order in the House or Senate.

In short there is considerable promise in establishing a procedure for Congress to deal with high policy on the use of force as a discrete decision, reserving implementation or enforcement for other legislative processes.

3. KEEP CONGRESS CONNECTED TO EVOLVING CONFLICTS

Steadiness and perseverance are indispensable in warfare, and committing the United States to use force carries an inevitable implication that the effort will be sustained until the mission is successful. Some would argue that too frequent involvement of the Congress will risk weakening or qualifying the resolve necessary to carry out the military tasks. Popular anxieties percolating through the Congress may encourage adversaries to persist in hopes that American will and stamina may falter.

Against those concerns one must weigh other truths. Wars often go wrong. Costs in lives or resources prove excessive. New dangers arise that may justify a change of course and reallocation of military capabilities. Presidents, as well as Congress, can make mistakes - and

find great difficulty in extracting themselves from commitments gone awry. Unless the people and their representatives in Congress give sustained support to military action, such action cannot continue indefinitely. Just as the executive branch will have to adapt its military strategy to changing circumstances in the field, Congress needs to retain the ability to adapt and refresh its policy stance in light of those changing circumstances.

For those reasons it is neither constitutionally sound nor politically reasonable for Congress to limit itself to a single decision point in these matters. Relying on the power of the purse or other devices to adjust policy in an ongoing conflict has proven generally unworkable, partly because members of Congress are often trapped in a catch 22 dilemma: Cutting off the dollars appears to be abandoning troops in the field, but approving the funds may mean keeping them there long after Congress has concluded that a change of course is needed. To escape from this policy box, it makes sense for Congress to provide itself with recurrent opportunities to express its verdict directly on the central policy issue of whether to continue the military effort or to conclude it. Leaving the congressional position to be inferred from votes on other budget authorizations or appropriations is a recipe for repeated contention with the executive.

This problem is bound to be especially acute in the war on terrorism. As President Bush said in redeploying U.S. forces last fall, "it is not now possible to predict the scope and duration of these deployments, and the actions necessary to counter the terrorist threat to the United States." There will be many branch points in such an endeavor. More than a few may involve decisions to take military action in additional countries or in different intensity against one or another enemy. A blanket authorization - to paraphrase Senator Richard Russell on another subject -- for the executive "to go anywhere and do any thing" is hardly in keeping with constitutional values.

President Bush and his administration have served our country magnificently in mounting the action against those responsible for last September's massacres in New York and Washington. The Senate also served the nation well by anchoring the President's authority to act against those responsible for the September 11 attacks in the context of congressional war powers. Senate Joint Resolution 23 wisely limits the authorization to the perpetrators and sponsors of the September 11 attacks. That formulation correctly foresees that other decisions lie ahead and that Congress must be party to them explicitly, not passively or inferentially.

To play its constitutional role constructively in these circumstances, it makes sense for Congress to adopt a two-track approach to its ongoing policy assessments of the war on terrorism. In keeping with the theory set forth earlier, I would look to devices that permit Congress to articulate its policy verdict without linking that verdict to immediate legal constraints on the president's action.

First, noting that President Bush has now filed two reports "consistent with the War Powers Resolution," such reports can be a suitable trigger for an expression of congressional judgment regarding the policy. I would recommend that in the future each such report should be the occasion for priority debate in both Houses and for an appropriate policy resolution by each chamber. A standard formula for such a resolution, perhaps in language simply accepting the executive's report, could build on the presumption that the President's policy enjoys legislative support. Approval of such a resolution would reaffirm the alignment of Congress with the President. Rejecting or tabling such a resolution would signal an altered political context in the

relationship with implications for subsequent action in Congress, a fact that should influence presidential management of the particular military engagement.

Second, since not every key decision point in the war on terrorism will be advertised by a presidential report, Congress needs options to lay down policy markers of its own regarding particular contingencies. Again the challenge is to prepare a procedure which permits and obliges the Congress to express a collective policy view on an expedited basis. Without depending on a presidential report to trigger such a procedure, one might consider empowering any of the relevant committees - Armed Services, Foreign Relations, and perhaps Intelligence - to present a privileged resolution for prompt debate and action in the full chamber. I do not offer a set formula for such a resolution, but conceive of it as conveying approval or disapproval of using appropriate force against a specified group or state. It might be best to consider any such proposal in executive session, both at the committee and at the full Senate or House level. Deliberations in executive session could make clear to the executive branch where Congress stands on the contingency, while not alerting a potential adversary.

Synchronizing action between the House and Senate might well be accomplished through the concurrent resolution described earlier, committing each house to act on any such privileged policy resolution approved by the other. As a more general mechanism not reliant on specific initiatives to trigger debate, perhaps Congress should schedule periodic votes at regular intervals of three or six months to provide an opportunity to refresh or refine its policy perspective on the campaign against terrorism.

Let me stress that the concept here goes beyond congressional hearings and reports. Useful as committee hearings may be, I believe the Congress as a whole needs to construct a stream of regular, collective verdicts to test and convey its current stance on the evolving campaign against terrorism or other uses of force.

Measures along these lines are problematic in a number of ways. They could become mere exercises in rubber stamping executive preferences. On the other hand Congress might well amplify popular sentiments surging through the land in ways that distort national policy. Congressional intrusiveness during the Civil War left generations of American politicians leery of too active a legislative role in military affairs. There is surely a danger of untimely or ill-advised congressional interventions in plans or operations that depend on secrecy to be successful.

The faith of representative democracy, however, is that members would approach such choices with the gravity they deserve. There would be no cheap or easy votes on policy expressions of this nature. Undoubtedly, there will be occasions when the executive branch would prefer Congress to remain silent on delicate questions of statecraft and national security; if persuaded, a majority would have the option to hold its tongue by tabling a resolution of this kind.

4. CONSENSUS IS ESSENTIAL TO NATIONAL COHESION

The case for active, continuing congressional engagement on the many issues of high policy presented by an open-ended campaign against terrorism does not rest on an instinct for institutional self-aggrandizement. It is grounded in the critical need to forge and maintain

America's social cohesion as a nation caught up in war. War, especially prolonged war, always poses the risk of depleting that cohesion, so vital to domestic harmony and international effectiveness.

Members of Congress should also realize how essential their involvement is to the morale and cohesion of the military men and women sent to do violence on our behalf. One of our most distinguished and thoughtful military leaders, former Army Chief of Staff, General Edward Meyer, emphasized that point some months ago. In a letter to Congressman Thomas Campbell, who was then seeking a definitive judicial ruling on the constitutional balance of war powers, General Meyer wrote, "I believe it is essential that when American servicemen are sent into combat that they have the support of their fellow Americans. The War Powers Act causes the people's representatives (the Congress) to take a position, and not leave the troops dangling on threads of definition and interpretation." The parallel, policy-centered procedures outlined here would serve that same need.

Congress's stand on how our nation uses the mighty arsenal at its disposal also bears crucially on America's standing in the world. Even among our closest allies, American power elicits mixed emotions: awe and fear, respect and anxiety. That should surprise no one. Military and economic capabilities of the magnitude America possesses cannot fail to cause alarm in other countries, however benign our intentions. That alarm is heightened to the degree that American force appears to be too easily deployed. In the eyes of others, no less than of our own citizens, American military action may be seen as most legitimate when it is demonstrably subject to democratic governance. This insight is akin to Justice Jackson's memorable formulation that the President's power is at its maximum only when he acts "pursuant to an explicit or implied authorization of Congress."

Marshaling international coalitions to wage the war on terrorism will depend importantly on giving our allies confidence that American power is guided and restrained by a disciplined relationship between Congress and President. Absent attentive, persistent congressional involvement, public diplomacy in the war on terrorism could lose much of the credibility that arises from the perception of America as a model of representative government.

There is thus an enduring necessity to balance executive potency in military endeavors with the legislative review that provides democratic legitimacy. The challenge is not to enchain the presidency but to harness both branches to common purpose. On that insight the War Powers Resolution was founded, and in that insight may be found the germ of other innovations to guarantee that Congress will play its proper constitutional role in the war on terrorism.