Testimony of

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Mr. Chairman and members of the Committee

Thank you for this invitation to appear before you to address the respective authority of the President and Congress in the present War on Terrorism.

The President is constitutionally authorized as Commander in Chief to introduce troops into hostilities without prior congressional enactment. No President has ever conceded otherwise; no Congress has ever disputed this point, as even the highly controverted (and largely admonitory) War Powers Resolution necessarily concedes the President's constitutional assignment. Today, there are unprecedented terrorist dangers aimed directly at the civilian populations of our Nation and its allies. Congress shares this concern, rightly so. However, a shared concern must not become an occasion to undermine the well settled constitutional responsibility of the President. Rather, with great respect for the important deliberations of this body, Congress should direct its legislative efforts at determining how best the President can be supported with the people's resources; not how cleverly the President's military judgment can be second-guessed or hampered.

The power to declare war is not a condition predicate to the duties of military self-defense imposed by the Constitution upon the President. No President from Washington onward has ever construed it to be so, and it is largely modern academic commentary that has obscured or misstated this crucial aspect of constitutional understanding. Rather, the purpose of a declaration of war is to define the international effect of military actions undertaken by direction of the President.

In the present War, the Congress by joint resolution has confirmed the President's constitutional authority. That resolution, when construed together with the President's Article II power, is ample and plenary, allowing the President, together with his military, national security and homeland defense advisors, to determine the timing, scope, and appropriateness for military intervention.

Congress's role is one of material support, not tactical judgment. As the representative of the people, Congress is obliged to provide this support if it determines that our lives, safety and security justify the actions being taken by the President. Of course, this appropriations-related authority is a well-considered check upon presidential action. Prudentially and practically, both the President and Congress must necessarily collaborate if wartime efforts are to succeed. No Congress should give a blank check to a President, nor is it constitutionally obligated to do so, and no President should expect one. That said, Congress oversteps its constitutionally determined role if it uses monetary conditions to usurp or impede the tactical decisions that only the President can make.

The President has determined that terrorism is world wide. It exists in networks or cells of individuals driven by religious or political fanaticism and supported by an international network of drug dealers and other shadowy criminal enterprises, not infrequently disguised as NGOs and charities. Unfortunately, no credible intelligence suggests that the War is confined to one nefarious leader or a single country. The successful military campaign in Afghanistan is a start, not a finish of this War. Congress, of course, has the formal power - as the holder of the Nation's purse - to refuse to adequately support the further military efforts to confront what the President has properly called an "axis of evil." It can discount the noncompliance of Iraq with UN sanction and its willingness to use biological weapons on its own people; it can turn a blind eye to the terrorist renegades in Somalia and the Philippines. At the farthest extreme, the legislature is constitutionally empowered even to defund our military and intelligence communities. I doubt that few Americans would think the exercise of congressional powers in this peremptory way to be responsible. In doing so, Congress will have indulged a calculus or risk assessment far different from the President, and perhaps, saved money. In the President's judgment, the Congress very likely will not have saved lives.

Ultimately in our democratic republic, it is the people who either affirm or dispute the policy choices made by their President and the Congress. It will then be up to the people to decide which was the better course - that of the sword aimed at those who hate the responsible exercise of freedom or that of the purse aimed at restraining the sword in this mission. Neither the President nor the Congress can avoid making its respective judgments. Certainly, neither can (or should) use the Constitution as a cover plane for its failure to decide.

The actions being taken by President Bush are well within the parameters of the authority given to him by the Constitution. I am confident that the U.S. Supreme Court would not say otherwise. Congress may decide not to support these actions with the people's money. That is its prerogative, and it is one for which it will be held accountable.

The president's role

The President's power to use military force to respond to terrorist and other attack is clear. Article II, Section 2 provides that the "President shall be Commander in Chief of the Army and Navy of the Unites Stats, and of the Militia of the several States, when called into actual Service of the United States." Beyond this, the President is fully vested with all executive power and the authority to "take care" that the laws are faithfully executed.

Constitutional practice dating to our first president removes any doubt that wars were, and can be, fought without congressional authorization. During the first five years of his administration, Washington engaged in a prolonged Indian war in the Ohio Valley. This was not a small skirmish, as President Washington himself proclaimed "we are involved in an actual war!" - one, by the way, that went badly initially for the standing army in 1791. Similarly, John Adams fought a naval war with France, known as the Quasi-War that erupted in 1798 out of France's interference with our commercial relations with Britain. Congress provided the funding, and set the rules for naval engagement, but did not declare war, even as the historical record demonstrates that one was being fought.

Many cases affirm the scope of the President's war power, but it is particularly well affirmed in The Prize Cases, where the Supreme Court opined that it was for Abraham Lincoln, as Commander in Chief to determine what necessary means could be used to respond to belligerents, for such questions under the Constitution, are "to be decided by [the President]." In this century, Attorney General (later Justice) Robert Jackson put the matter equally forcefully:

"[The President] shall be Commander in Chief . . . . By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in times of peace as well as in time of war . . . .[T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country."

In writing in these terms, Attorney General Jackson was reflecting an unbroken line of undisturbed federal interpretation that properly places both the burden and authority upon the President to preserve "our territorial integrity and the protection of our foreign interests" as a matter of constitutional provision, [and not] 'the enforcement of specific acts of Congress."

The framers justified this grant of authority to the President by the need for military and executive action to be taken with "secrecy and dispatch." Without the quality of what Hamilton referred to as "energy in the executive," the community would be unable to protect itself "against foreign attacks." These were not merely the sentiments of those who favored a strong national government. Thomas Jefferson, serving as George Washington's Secretary of State, observed that "[t]he transactions of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. [And what's more] [e]xceptions are to be construed strictly."

This exercise of presidential power has been bi-partisan. For example, on August 20, 1998, President Clinton launched an air strike against terrorist activity (the African embassy bombings) traced to Osama bin Laden. The President acted without congressional authorization, and he did so for reasons that are directly applicable and similar to the present War on Terrorism: intelligence information that traced the bombings to terrorist groups that have acted against U.S. interests in the past, and suggested planning for additional attacks in the future. These groups were employing or seeking weapons of mass destruction, including chemical and dangerous weapons.

As scholars have pointed out, President Clinton's actions have much in common with President Reagan's April 14, 1986 air strike against Libya in response to that nation's involvement with the killing of Americans and others in Berlin. Like the Clinton actions, the Reagan strike was necessary not only in retaliation, but also as a defensive and preventative response to a terrorist attack on U.S. military personnel and her citizens.

The congress' power to declare war

The Congress' power to declare war is not the power to make war, as should be obvious to every American who has lived through both Pearl Harbor and September 11. War can be made upon us. As was noted expressly in the Constitutional convention, the executive must have the power to

repel sudden attacks without prior Congressional authorization. The drafters of our Constitution knew how to use precise language, and indeed, as careful scholarship has since pointed out, "[if] the Framers had wanted to require congressional consent before the initiation of military hostilities, they would have used such language."

The power to declare war, rather than the power to initiate one, was a power to confirm - for international and domestic law purposes - the existence of hostilities between two sovereigns. This was how Blackstone understood the phraseology, and in historical context, how it was understood by the framers as well. In the decades leading up to constitutional drafting and ratification, declaring war meant not authorizing a proper executive response to attack, but to defining the relationship between the citizens of warring nations as to, for example, the seizure or expropriation, of assets. Even the use of the word "declare" in the context of the framing suggests not authorization, but recognition of that which pre-exists. This, for example, is the usage in the Declaration of Independence, recognizing rights that are not created by the government, but pre-exist by virtue of human creation. Professor John Yoo (now of the Office of Legal Counsel) has ably canvassed this area writing that the declare war clause was meant largely to bolster the exclusion of the individual states from the question. He summarizes the historical evidence this way: "a declaration of war was understood as what its name suggests: a declaration. Like a declaratory judgment, a declaration of war represented the judgment of Congress, acting in a [quasi-]judicial capacity (as it does in impeachments), that a state of war existed between the United States and another nation. Such a declaration could take place either before or after hostilities had commenced."

If military activity could only occur upon congressional declaration, this proposition would leave most of American history unexplained, such as American intervention in Korea, Vietnam, Iran, Grenada, Libya, and Panama. Congress has declared war only five times: the War of 1812; the Mexican American War of 1848, the Spanish-American War of 1898, and World War I (1914) and World War II (1941).

Some have disputed this account of the declare war clause, arguing in support of a congressional pre-condition by reference to Article I, Section 8, Clause 11 which gives Congress the power to "grant Letters of Marque and Reprisal, . . ." This somewhat arcane aspect of constitutional text, however, cannot bear the weight of the claim. Letters of Marque and Reprisal are grants of authority from Congress to private citizens, not the President. Their purpose is to expressly authorize seizure and forfeiture of goods by such citizens in the context of undeclared hostilities. Without such authorization, the citizen could be treated under international law as a pirate. Occasions where one's citizens undertake hostile activity can often entangle the larger sovereignty, and therefore, it was sensible for Congress to desire to have a regulatory check upon it. Authorizing Congress to moderate or oversee private action, however, says absolutely nothing about the President's responsibilities under the Constitution.

The drafters of the American Constitution knew how to express themselves. They were familiar with state constitutional provisions, such as that in South Carolina, which directly stated that the "governor and commander-in-chief shall have no power to commence war, or conclude peace' without legislative approval. Article I, Section 10 expressly prohibits states, without the consent of Congress, from keeping troops or ships of war in time of peace, or engaging in war, unless

actually invaded, or in such imminent danger that delay would not be warranted. There is no parallel provision reciting that the President as commander in chief shall not, without the Consent of Congress, exercise his military responsibility.

That the power to declare war is not a power of prior authorization does not leave Congress without check upon executive abuse. That check, however, is anchored in Congress' control of the purse, and, of course, impeachment. When challenged by the anti-federalists, most notably Patrick Henry, to explain how tyranny would not result unless the sword and purse were held by different governments, Madison responded that no efficient government could exist without both, but security is to be found in "that the sword and pursue are not to be given to the same member." No reference was made to the declare war clause or marque and reprisal letters.

How great a role can Congress play in the funding process? Here, the historical record would suggest that Congress is as free as the people they represent. It may explore and evaluate the military mission as the President has outlined it. Congress can refuse to fund the continuation of tactical decisions that it believes unsound; Congress, however, cannot dictate a particular course of engagement or so fetter the President's judgment as to preclude its exercise.

The war powers act

It is facetious to suggest that the War Powers Act or Resolution [WPR] limits constitutional authority, something which it expressly proclaims not to do. (Section 8(d) of the WPR states that "nothing in the Resolution is intended to alter the constitutional authority of either the Congress or the President.") In any event, insofar as the WPR presumes to limit the extent of operations already undertaken by a president, it "makes sense only if the President may introduce troops into hostilities or potential hostilities without prior authorization by the Congress." After surveying comprehensively the large number of occasions where the President has deployed troops without legislative involvement, the Office of Legal Counsel concluded:

"Our history is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.... Thus, constitutional practice over two centuries, supported by the nature of the functions exercised and by the few legal benchmarks that exist, evidences the existence of broad constitutional power."

Even if the WPR could be construed to statutorily amend constitutional text (which it cannot), by its express terms the WPR acknowledges presidential power to introduce Armed Forces into hostilities as a result of an "attack upon the United States, its territories or possessions, or its armed forces." Certainly, that was September 11th. In any event, no president has ever accepted the limiting provisions of the WPR.

No president has ever formally complied with the WPR, even as Presidents have used the vehicle to accomplish consultation with Congress. For example, both the first President Bush and President Clinton sent reports to Congress that were described carefully as "consistent with the Resolution," but not pursuant to, or required by, the WPR. Congress has not sought to use the enforcement mechanism under the WPR, though it has occasionally been referenced or advocated by individual members.

Of course, proponents of the WPR take a different view; a view that posits the need for specific authorization. As mentioned, this view is contrary to constitutional text, history and practice, but in the present circumstance, even this objection is superceded by Congress' own legislative action.

The effect of the joint resolution

If presidential power apart from congressional authorization was somehow questionable as a general matter, it is not open to doubt in the present War on Terrorism which Congress has specifically authorized. (S.J. Res. 25) [hereinafter "force resolution"]. The force resolution recites that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism." While this recital might be argued to concede that the force resolution, itself, was unnecessary, the better construction is one that the force resolution acknowledges the contending views over the legality of the WPR and removes all doubt in the present instance. The President thus has full legal authority with respect to either responding with "all necessary and appropriate force against those nations, organizations, or persons [the President] determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons," and with respect to the steps necessary "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

In my judgment, the force resolution must be read consistently with the President's authority. Some have commented that it relates only to "individuals, groups or states that [are] determined to have links to the September 11 attacks." Yet, Congress clearly intended to authorize the President to address terrorist threats of the future, and therefore, it is highly reasonable to construe the linkage to "nations, organizations, or persons" broadly, especially as we are practically discovering that the terrorist network has manifold capacity to direct and aid cells in multiple guises and distant parts of the world.

Whether a war is properly waged is not for the Courts

The Supreme Court has consistently avoided passing upon the legality of particular military engagements, such as Vietnam and Korea. Lower federal courts have also regularly dismissed these matters as political questions and non-justiciable. The Persian Gulf War yielded two variants on this theme in Dellums v. Bush and Ange v. Bush. Unusually, in Dellums, the trial court decided that Congress possessed sole authority to declare war, and that troop movements authorized without congressional approval by the first President Bush might be challenged if a majority of Congress or the Congress in its entirety joined the litigation. That was not to be, and the suit was dismissed as unripe. By contrast, and far more in keeping with past decision, Judge Lamberth decided in Ange, the parallel case brought by a deployed member of the military, that determining whether the President had exceeded either his constitutional authority or violated the WPR was a nonjusticiable political question.

The judicial branch has consistently found any disagreement between the President and Congress to be a political question, not susceptible to judicial resolution. Common sense and the absence of public measures or standards of judgment readily explains why courts would abstain. Neither the President nor Congress have that luxury. Both must make their constitutionally separate

choices. A President who endangers the lives of his military unnecessarily (or for a purpose that is contrary to the first principles in the Declaration of Independence and implemented by the Constitution) or a Congress that obdurately refuses to support those engaged in necessary combat will be accountable to the people.

Conclusion - Does the war on terrorism change the constitutional order?

The short answer is, no. Yet, as General Joulwan, the former NATO Supreme Allied Commander, reflected before the Senate Foreign Relations Committee (February 7, 2002): "we are at war. But it is a different war than those we fought in the past. There are no front lines. The enemy is dispersed and operates in small cells. The underpinnings of this threat are in its religious radicalism and its hatred of the United States and the civilization that embraces freedom, tolerance and human dignity. It is an enemy willing to commit suicide of its young to achieve it s aims and with little regard for human life. While the enemy may be small in number it would be wrong to underestimate the threat - or the depth of their convictions."

Samuel Berger, former National Security Advisor, echoed the same sentiment at the same hearing: "we must continue to take down al Qaeda cells, and hunt down al Qaeda operatives elsewhere - in Asia, Europe, Africa, here and elsewhere in this Hemisphere. Disruption will be an ongoing enterprise - a priority that will require international intelligence, law enforcement and military cooperation for the foreseeable future. These cells of fanatics will reconstitute themselves. We must treat this as a chronic illness that must be aggressively managed, while never assuming it has been completely cured."

A dispersed enemy needing to be constantly addressed and combated is ill-met by a historically mistaken, if mistakenly commonplace, understanding of the declare war clause. Our national interests are equally ill-served by a wooden interpretation of a likely unconstitutional war powers resolution that even when enacted largely accommodated conventional warfare or deployments on the scale of World War II, rather than the needed (and often covert) responses to the smaller, yet more insidious and diffused nature of modern terrorism.

From 1975 through October 2001, Presidents - without conceding the constitutional validity of the WPR - submitted some 92 reports under the Resolution. In the same period, there were no declarations of war. One can argue that the resolution has fostered dialogue between the legislative and executive departments. So long as that dialog did not compromise classified information or strategy and facilitated Congress' appropriations role in war making, constitutional purposes were well served. Yet, the primary infirmity of the resolution lies in its faulty assumption: namely, that the Constitution envisions a "collective judgment" on the introduction of armed forces. Section 2. It does not. It envisions a President capable of responding with energy and dispatch to immediate threat, and a Congress that can deliberate on the actions already taken, and through judicious resource choices, influence others. Congress, itself, recognized this in Section 3, when it modified the statutory consultation to "in every possible instance" and in Section 4 when it admits the possibility of presidential deployment without advance reporting and only reporting "within 48 hours, in the absence of a declaration of war or congressional authorization."

Wisely, Congress by its September 2001 force resolution has authorized the President to respond to the terrorist threat, as it exists - dispersed, chronic and global. In my judgment, the force resolution fully satisfies Section 5(b)(1) of the WPR and therefore exempts the President's deployment from termination by Congress under the controversial time clock set-out in the WPR. Section 5(c)'s provision for termination by concurrent resolution is also unconstitutional under Supreme Court precedent. INS v. Chadha. While Congress has attempted to address the gap created by the decision in Chadha which held legislative veto devices to be unconstitutional, other far more serious constitutional questions would be raised if the subsequent 1983 amendment to section 601(b) of the International Security and Arms Control Act of 1976 (P.L. 94-329) fixing the WPR legislative veto failing is construed to empower Congress to countermand the President's military judgment and "direct" the withdrawal of troops. As suggested above, Congress properly speaks in its allocation of funds; the Constitution does not envision that Congress would determine the deployment of troops or related law enforcement and intelligence personnel - that is for the President.