

Testimony of

The Honorable Russ Feingold

April 17, 2002

I want to start by thanking all of the witnesses here for joining us. I will introduce each witness in just a few minutes, but in general, I must say that I am very pleased to have this opportunity to discuss constitutional war powers with such a distinguished group of legal commentators.

Today the Constitution Subcommittee will focus on one of the most complicated but ultimately one of the most important constitutional questions confronting this country as we respond to the atrocities of September 11. We will consider the balance of war powers authority under the Constitution as it relates to our fight against terrorism. We will consider, in short, who decides, under our Constitution, when the United States will go to war. This is no easy issue, but it is one that Congress is duty-bound to address.

This discussion begins with a remarkable example of cooperation and respect between the two branches of government in exercising shared war powers authority. Before President Bush ordered U.S. military troops into armed conflict to respond to the attacks of September 11, he took an important and constitutionally-mandated step: He asked for and received the consent of Congress. I supported that resolution.

Senate Joint Resolution 23, which was passed by both Houses of Congress and signed into law by the President, provides the President with statutory authorization to prevent future acts of terrorism by responding with all necessary and appropriate force against those responsible for the September 11 attacks on the United States. In signing the use-of-force resolution, the President stated that Congress "acted wisely, decisively, and in the finest traditions of our country." I could not agree more. The resolution demonstrated that Congress still has the capacity and the dedication to fulfill its constitutionally mandated responsibility, and in so doing to unify the nation in a time of national crisis.

I was very proud to have had the opportunity to support that resolution, and on September 14, I commended the President on the floor of the Senate for recognizing the constitutional role of Congress in authorizing a military response to September 11. I also noted that it was particularly important that the resolution explicitly abided by and invoked the 1973 War Powers Resolution. Through this hearing, we now have an opportunity to explore in more concrete legal terms how the War Powers Resolution applies to the use-of-force authorization. Specifically, we will consider how the War Powers Resolution must shape our national decision-making process as Congress and the President make tough choices about our future military priorities in responding to terrorist threats.

The War Powers Resolution recognizes the shared constitutional responsibilities of both the President and the Congress to make critical decisions concerning the introduction of U.S. Armed Forces into hostilities. The War Powers Resolution calls for more than just a one-time

authorization from Congress to send our forces into battle. By recognizing Congress as custodian of the authority to declare war, or otherwise to provide statutory authority to send our troops into harm's way, the War Powers Resolution also demands regular - and meaningful - consultations between the two branches of government both to begin and to sustain our military engagements.

As our founders and many subsequent commentators have recognized, the separation of powers in this area wisely forces us to develop a broad national consensus before placing our fellow citizens in harm's way. And as we have seen time and again, the United States is indeed the most formidable military force on this planet, provided our soldiers are entrusted with a clear military goal, and through required Congressional authorization, with a popular mandate to back them up. The effectiveness to date of our military campaign to respond to the attacks of September 11 demonstrates that our nation and our military operate at the zenith of moral, political, and military might when acting under Constitutional authority and with a defined democratic mandate.

The President has suggested that the military campaign may one day expand to other theaters of operation. Indeed, the news is rife with speculation about future U.S. military targets. Given the complex nature of the threat that confronts us, more expansive responses may well be necessary. But this hearing will not respond to speculation about any future operations. Instead, this hearing is meant to consider how those decisions will be made. Let me be clear here, we need not consider today the relative merits or risks of any current or future military operation. Such policy discussions are important. But this hearing will consider, as a first principle, the constitutional framework by which all major war powers decisions must ultimately be made if we are to respect the Constitution and maintain our unity of purpose in our ongoing response to terrorism.

I would ask our witnesses, therefore, to focus their attention on two overarching questions as we proceed with this discussion. First, I would ask our witnesses to reflect on the requirements of the standing Congressional use-of-force authorization for the events of September 11, and when, within the limits of the Constitution and the War Powers Resolution, new authorizations or consultations would be required as we expand our military operations. Second, I would also ask the witnesses here to consider how Congress and the Administration might implement a system of more meaningful consultations as we move forward in what could become a long and complicated conflict waged on a variety of fronts in a number of countries.

The War Powers Resolution has been set in motion in our present response to terrorism, and Congress has taken an important step to reassert its constitutional responsibility in this area. Now Congress and the President have a chance to balance the power to wage war in the way that the War Powers Resolution dictates, and in the way that the framers of the Constitution intended. Such cooperation preserves our constitutional structure. It also increases the moral authority of the United States to act forcefully. Given the unprecedented nature of the threat confronting us, a powerful and constitutionally unified response remains essential. I look forward to the guidance that our witnesses today will give us.