

Testimony of

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Introduction

Mr. Chairman, I am grateful for this opportunity to appear before the Subcommittee to discuss the important constitutional question of war powers in the context of the war on terrorism.

The September 11th attacks pose unprecedented challenges for our Nation. We were attacked by a global network that was able to inflict massive casualties upon innocent civilians and would do so again, possibly with greater effect, if given the opportunity. Under such circumstances, we have begun to mobilize a broad range of military, diplomatic, intelligence, law enforcement, economic, and financial tools in order to wage this global war on terrorism. This campaign is likely to be long-term and open-ended, with conflict potentially on multiple fronts; and, in contrast to more conventional operations, it will be much harder to determine when or if the war is over or what constitutes victory.

Despite these complexities, indeed, in fact because of them, I will argue here that the basic principles of our Constitution regarding war powers remain as vital and relevant as ever - indeed even more so - in the fight against global terrorism. I will also argue that Congress's post-September 11th authorization of force correctly recognized that both Congress and the President have a vital constitutional role to play in prosecuting the global war on terrorism; that meaningful high-level consultations are essential as the campaign against terrorists with global reach and their state sponsors unfolds; and that additional congressional authorization may be constitutionally required in some situations in the future.

The Constitution's Allocation of War Powers

Our Constitution deliberately divided war powers between the Congress and the President. In making this choice, the framers sought to create an effective national government capable of protecting and defending the country while also remaining accountable to the American people. The Constitution's provisions concerning war powers -- like those concerning other aspects of governance - reflect a structural system of checks and balances designed to protect liberty by guarding against the concentration of power. In a deliberate break with British precedent, the Constitution gave Congress the power to declare war because the founders believed such a significant decision should be made not by one person, but by the legislature as a whole, to ensure careful deliberation by the people's elected representatives and broad national support before the country embarked on a course so full of risks. Reflecting on this allocation of power, James Madison wrote: "In no part of the constitution is more wisdom to be found, than in the clause which confides the question of war or peace to the legislature, and not to the executive department."

At the same time, the framers wanted a strong Executive who could "repel sudden attacks" and act with efficiency and dispatch in protecting the interests of the United States in a dangerous world. By making the President Commander in Chief, moreover, they sought to ensure effective, unified command over U.S. forces and civilian accountability. The Constitution's division of war powers between the President and the Congress has led inevitably to tension between the branches - and to an enduring tug of war over war powers -- even as the participation of both branches clearly is essential in protecting our country and advancing American interests.

Mr. Chairman, there is a huge scholarly literature about the Framers' intentions with respect to constitutional war powers and about whether historical practices in the two centuries since the Constitution was ratified should alter how we should understand these authorities today. It is impractical for me to offer a detailed and comprehensive discussion here, but let me instead highlight four propositions from the historical record that, in my estimation, are central for understanding the constitutional roles of Congress and the President today.

First, the power to "declare war" vested in Congress was intended by the Framers to be a power to decide, to make a choice, about whether the United States should go to war; it was not a formalistic power to simply validate that a legal state of war existed. On the contrary, Congress was given the power to determine whether the United States should initiate war in order to ensure that the decision to expose the country to such risks and sacrifices reflected the deliberation and judgment of the legislature - the branch most directly representative of the American people, whose lives and resources will be placed on the line -- and to ensure broad national support for such a course of action. This interpretation is further validated by the Constitution's grant of authority to Congress to authorize reprisals, or acts of limited war, that could lead to a wider war, which clearly indicated a broader understanding of Congress's war-commencing role than simply a formal declaration that a state of war existed.

Second, the Chief Executive's authority to repel sudden attacks by force is incontestable. The founders expected the President, as Chief Executive and Commander in Chief, to protect the United States by repelling actual or imminent attacks against the United States, its vessels, and its armed forces. Moreover, if another nation effectively placed the United States in a state of war -- by declaring or openly making war upon the United States - the President as Commander in Chief was expected to exercise the nation's fundamental right of self-defense. However, if an enemy engaged in limited attacks that did not rise to the level of war, the founders expected the President to repel those attacks but not to go beyond this authority and change the state of the nation from peace to war without congressional authorization.

Third, Congress's power of purse, though critically important, is not a substitute for congressional authorization of war before it is commenced. The founders understood that the British monarch's power to go to war was qualified to a substantial degree by the Parliament's power of the purse and its control over military supplies. In giving Congress the power of the purse, including the power of appropriating money to "raise and support Armies" and to "provide and maintain a navy," the Constitution continued this important legislative check. But the Constitution did not stop here. The Constitution also gave Congress the power to declare war and authorize reprisals, so that congressional deliberation would occur before war was commenced. Reliance on the power of the purse alone as a check on executive war powers, moreover, can be

an overly blunt and sometimes ineffective tool for expressing the will of Congress. Limiting or cutting off funds after forces have already been committed is problematic because it undercuts both troops in the field and America's credibility with her allies. Restricting funds in advance is often undesirable as well because it can harm the President's ability to carry out effective diplomacy. In short, as important as Congress's power of the purse is, it is not a substitute for Congress's power to authorize war.

Fourth, historical practice has not fundamentally altered how we should understand the Constitution's allocation of war powers today. Practice, of course, cannot supplant or override the clear requirements of the Constitution, which gives the power to declare war to Congress. Furthermore, of the dozen major wars in American history, five were formally declared by Congress and six were authorized by other legislative measures. There is, to be sure, a pattern of practice involving more limited presidential uses of force falling short of major national conflicts, a substantial number of which involved the protection or rescue of U.S. nationals caught up in harm's way. For example, of the 200 or so cases sometimes cited as examples of unilateral commitments of force by the President, nearly 70 involved the protection or rescue of U.S. nationals, actions far short of deliberate war against foreign countries and reasonably covered by the President's authority to respond to sudden threats. A number of other operations were interventions or peace enforcement actions that aimed at limited goals. Others involved more far-reaching objectives, however, even if the risks were relatively low. In some of these cases, like Haiti, for instance, Congress protested unilateral actions taken by the President and made clear its view that its authorization should have been sought in advance. My basic point is this: one must be very cautious in drawing broad conclusions about presidential power from a numerical list of cases. These instances each have to be examined carefully, and the authority claimed by the President and Congress's reaction fully assessed. Ultimately, however, whatever conclusions one comes to concerning the constitutional implications of small-scale presidential actions undertaken without congressional authorization, the fact remains that major wars have been authorized by Congress.

Where exactly does a global war on terrorism fall on the spectrum between major war and smaller scale military actions? If it were purely a police action against hostile non-state actors, akin to operations against pirates or to other small-scale operations with limited objectives, a case can be made that historical practice indicates a record of presidential deployments without advance congressional authorization. The President, after all, clearly possesses authority to repel and to forestall terrorist attacks against the United States, its forces, and citizens.

Yet, this global campaign is much more ambitious than apprehending terrorists. It aims to destroy a multi-state terrorist infrastructure and potentially defeat or overthrow sponsoring regimes. While military force is not the only, or even indeed the main, instrument for waging this war, the range of military activities that we have mounted to date is very diverse -- combat operations, continuous air patrols, maritime interception of shipping, the training and equipping of foreign militaries for combat operations, operational assistance to post-conflict stability operations, just to name a few. Given that the current campaign is focused against a global terrorist network that is based in over sixty countries, that has the capacity to inflict massive casualties, and that requires or depends upon the sponsorship or acquiescence of various

countries for its training and safe-harbors, the scope and complexities of this military campaign would appear to defy any commonsense notion of a limited police action.

Congress's Post-September 11 Authorization of Force: Scope and Limits

Congress's authorization for the use of force against those responsible for the attacks of September 11 is an express recognition that Congress and the President both have a critical constitutional role to play in the war on terrorism. Mindful of the centrality of congressional war powers in a campaign against terrorism that will be long-term and far-reaching, Congress sought to craft an authorization that both allowed for appropriate executive flexibility but at the same time is not a blank check.

Though not restricted geographically, Congress's post-September 11 authorization does contain some clear limits. The Joint Resolution authorizes the President:

"to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

The joint resolution, in essence, authorizes (a) necessary and appropriate force, against those states, organizations, or persons who (b) planned, authorized, committed, or aided the September 11th attacks, or (c) harbored such organizations or persons, (d) in order to prevent future acts of international terrorism against the United States by such nations, organizations or persons. Thus, the force must be directed against those responsible in some way for the September 11th attacks, or those who harbored such organizations or persons; and the purpose of using force is focused and future-oriented: to prevent additional terrorist acts against the United States by the states, organizations, or persons responsible for the September 11th attacks or who harbored those responsible. The President determines whether the necessary link to the September 11th attacks is established, and presumably Congress expected he would make his determination and the basis for it known to Congress in some fashion, perhaps through a war powers report or through briefings, e.g., to the intelligence committees. Moreover, in signing the Joint Resolution, President Bush made clear that he would consult closely with Congress as the United States responds to terrorism.

Congress' post-September 11th resolution was an unambiguous decision to authorize force. Like the Gulf War authorization in 1991, the authorization explicitly affirms that it "is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." This removes any actions that fall within the scope of the authorization from the War Powers Resolution's 60-day time-clock provision. At the same time, Congress made clear that the requirements of the War Powers Resolution otherwise remain applicable.

The War Powers Resolution and the War Against Terrorism

For all the controversy it has spurred, key elements of the War Powers Resolution are constitutionally compelling and warrant broad support. First, its overriding purpose is to "insure

that the collective judgment of both the Congress and the President" applies to the introduction of U.S. forces into hostilities and to the continued use of those forces. Second, it seeks to enable Congress to better fulfill its constitutional responsibilities by requiring the President "in every possible instance" to "consult with Congress before introducing" U.S. armed forces into hostilities or imminent hostilities and to continue to "consult regularly" with the Congress while U.S. forces are in those situations. Moreover, the legislative history of the War Powers Resolution makes clear that Congress expected consultations to be meaningful:

"Rejected was the notion that consultation should be synonymous with merely being informed. Rather, consultation in this provision means that a decision is pending on a problem and that Members of Congress are being asked by the President for their advice and opinions, and in appropriate circumstances, their approval of action contemplated. Furthermore, for consultation to be meaningful, the President himself must participate and all information relevant to the situation must be made available." (H.Rep. 93-287 (1993), p. 2351).

Third, under the War Powers Resolution, the President is required to report to Congress within 48 hours in designated situations, and to make periodic reports to Congress at least once every six months if U.S. forces remain in hostilities or imminent hostilities.

Whatever conclusions one reaches about the more controversial provisions of the War Powers Resolution, such as the 60-day time clock, the consultation provisions are sound and reasonable efforts to ensure that both the President and the Congress fulfill their constitutional responsibilities concerning the commitment of U.S. forces abroad. Moreover, even when Congress has authorized the use of force, as it did after September 11, regular, meaningful consultations between Congress and the President remain vital in the ongoing war on terrorism. Such consultations are imperative to ensure that there is a frank exchange of views and a shared understanding between Congress and the President on future directions in the war on terrorism and broad support for the steps ahead. To give a counter-example: The experience in Somalia is a cautionary reminder that congressional authorization and support in the early phases of an operation does not replace the need for continued dialogue about the goals and risks of a changing mission. We cannot afford to make the same mistakes in the current context.

Consultations

How should a system of regular, meaningful consultations between Congress and the Administration be structured as the country faces up to what will likely be a long, complex campaign against terrorism? Clearly, a commitment by the President to hold regular consultations with the bipartisan congressional leadership would be invaluable. Second, as the War Powers Resolution expressly provides in section 4(b), Congress should request that a broader range of information be included in the periodic war powers reports provided by the Administration. Those reports, which have generally been perfunctory since the War Powers Resolution was first enacted, should, in the context of the war on terrorism, include a fuller discussion of the objectives and effectiveness of U.S. action, including our efforts to work closely with allies on multiple fronts. Congress may also wish to request that the reports be made more frequently, say every three months, and, in any event, invite Cabinet officials to testify on the state of the war on terrorism when those reports are submitted. The combination of fuller reports and high-level testimony could, in conjunction with meaningful consultations, make for a

more significant and effective dialogue between Congress and the Administration regarding future goals and strategies in the war on terrorism.

Future Authorization

As important as consultations are, however, they are not a substitute for congressional authorization if military action is contemplated that clearly implicates Congress's war powers. While the post-September 11 authorization is broad, it does contain limits, most notably the requirement of a clear link to the attacks of September 11. Other threats to U.S. security unrelated to those attacks may exist or arise in the future, and various military options may be considered, including options that go beyond measures to prevent future acts of terrorism by those responsible for the September 11th attacks. Whether and when additional congressional authorization is constitutionally required will depend on the facts of the situation and on the nature and objectives of the military action contemplated.

Constitutionally, the President clearly possesses the power to repel attacks and to forestall imminent attacks against the United States and its armed forces, and to protect Americans in imminent danger abroad. But the decision to go beyond this and commence a war belongs to Congress. Major military action with far-reaching objectives such as regime change is precisely the kind of action that constitutionally should be debated and authorized by Congress in advance. The Constitution's "wisdom" on this point is compelling: Authorization, if provided by Congress, ensures that the risks and implications of any such action have been fully considered and that a national consensus to proceed exists. Congressional authorization also ensures American combat forces that the country is behind them, and conveys America's resolve and unity to allies as well as adversaries.

The war against terrorism will, unfortunately, be with us for a long time. However, as our nation moves ahead on various fronts, using a variety of tools and means, our response will be more effective and more sustainable if the Congress and the President continue to work together in the best tradition of our great Constitution.

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