

Testimony of  
**Mr. John Yoo**

April 17, 2002

MR. CHAIRMAN AND MEMBERS OF THIS SUBCOMMITTEE:

IT IS MY HONOR AND PLEASURE TO COME BEFORE YOU TODAY, TO TESTIFY ON THE WAR POWERS RESOLUTION OF 1973 AND PRESIDENTIAL WAR POWERS UNDER THE CONSTITUTION. AS A FORMER GENERAL COUNSEL OF THE SENATE JUDICIARY COMMITTEE, I HAVE LONG HELD A DEEP AND ABIDING RESPECT FOR THIS COMMITTEE AND ALL OF ITS MEMBERS. I LOOK FORWARD TO ANOTHER THOUGHTFUL EXCHANGE OF IDEAS WITH THE MEMBERS OF THE COMMITTEE TODAY ON THIS MOST IMPORTANT MATTER.

I CURRENTLY SERVE AS DEPUTY ASSISTANT ATTORNEY GENERAL IN THE OFFICE OF LEGAL COUNSEL AT THE DEPARTMENT OF JUSTICE. AS YOU KNOW, THAT OFFICE HELPS THE ATTORNEY GENERAL FULFILL HIS ROLE AS LEGAL ADVISOR TO THE PRESIDENT, PARTICULARLY IN AREAS OF CONSTITUTIONAL LAW AND PRESIDENTIAL POWER.

AS THIS COMMITTEE IS AWARE, LEGAL SCHOLARS HAVE LONG DEBATED THE CONSTITUTIONAL ALLOCATION OF WAR POWERS BETWEEN THE PRESIDENT AND THE CONGRESS, AND THE EFFECT OF THE WAR POWERS RESOLUTION ON THAT ALLOCATION. THIS ADMINISTRATION FOLLOWS THE COURSE OF ADMINISTRATIONS BEFORE US, BOTH DEMOCRATIC AND REPUBLICAN, IN THE VIEW THAT THE PRESIDENT'S POWER TO ENGAGE U.S. ARMED FORCES IN MILITARY HOSTILITIES IS NOT LIMITED BY THE WAR POWERS RESOLUTION. THE SOURCES OF PRESIDENTIAL POWER CAN BE FOUND IN THE CONSTITUTION ITSELF. I SHALL DISCUSS BOTH THE WAR POWERS RESOLUTION AND THE CONSTITUTION TODAY. IN DOING SO, I WILL EXPLAIN IN PARTICULAR HOW THE PRESIDENT'S CONDUCT OF THE WAR AGAINST TERRORISM IS AUTHORIZED UNDER THE CONSTITUTION AND CONSISTENT WITH THE WAR POWERS RESOLUTION.

FIRST, THE WAR POWERS RESOLUTION OF 1973. SECTION 2 OF THAT RESOLUTION RECOGNIZES THAT THE PRESIDENT MAY "INTRODUCE UNITED STATES ARMED FORCES INTO HOSTILITIES" PURSUANT TO (1) A DECLARATION OF WAR, (2) SPECIFIC STATUTORY AUTHORIZATION, OR (3) "A NATIONAL EMERGENCY CREATED BY ATTACK UPON THE UNITED STATES, ITS TERRITORIES OR POSSESSIONS, OR ITS ARMED FORCES."

SECTION 2 OF THE RESOLUTION RECOGNIZES THE PRESIDENT'S BROAD POWER IN THE CURRENT CIRCUMSTANCES. THE PRESIDENT'S DECISION TO USE ARMED FORCES TO COMBAT TERRORISM AND RESPOND TO THE ATTACKS OF SEPTEMBER 11 FALL WITHIN TWO OF THE RESOLUTION'S ENUMERATED PROVISIONS FOR USING MILITARY FORCE. FIRST, THE UNITED STATES WAS ATTACKED ON SEPTEMBER 11 BY MEMBERS OF AN INTERNATIONAL NETWORK OF TERRORISTS. THAT ATTACK UNEQUIVOCALLY PLACED THE UNITED STATES IN A STATE OF

ARMED CONFLICT, JUSTIFYING A MILITARY RESPONSE, AS RECOGNIZED BY CONGRESS, WHILE NATO AND THE UNITED NATIONS RECOGNIZED THE U.S.' EXERCISE OF ITS RIGHT TO SELF DEFENSE. IN RESPONSE TO THE SEPTEMBER 11 ATTACK, THE PRESIDENT IMMEDIATELY ISSUED PROCLAMATION 7463, DECLARING THE EXISTENCE OF A STATE OF NATIONAL EMERGENCY. THUS, THE CONDITIONS RECOGNIZED BY SECTION 2 OF THE RESOLUTION AS JUSTIFYING THE USE OF FORCE WITHOUT ANY ACTION WHATSOEVER FROM CONGRESS - AN ATTACK ON THE UNITED STATES, AND A RESULTING NATIONAL EMERGENCY - HAVE EACH BEEN SATISFIED.

IN ADDITION, THE PRESIDENT HAS SPECIFIC STATUTORY AUTHORIZATION, IN THE FORM OF SJ RES 23 (PUB. L. 107-40). THAT RESOLUTION, WHICH THIS BODY APPROVED UNANIMOUSLY LAST SEPTEMBER, STATES THAT THE PRESIDENT MAY "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 RESOLUTION THUS RECOGNIZES THAT THE PRESIDENT DETERMINES WHAT MILITARY ACTIONS ARE NECESSARY TO COMBAT THOSE WHO ARE ASSOCIATED WITH THE ORGANIZATIONS AND INDIVIDUALS RESPONSIBLE FOR SEPTEMBER 11. THUS, THE PRESIDENT'S AUTHORITY TO CONDUCT THE WAR AGAINST TERRORISM IS RECOGNIZED BY SECTION 2 OF THE WAR POWERS RESOLUTION. CONGRESS HAS SPECIFICALLY EXPRESSED ITS SUPPORT FOR THE USE OF THE ARMED FORCES, AND THE UNITED STATES HAS SUFFERED AN ATTACK. MOREOVER, THE WAR POWERS RESOLUTION SPECIFICALLY PROVIDES, AS IT MUST, THAT "NOTHING IN THIS JOINT RESOLUTION IS INTENDED TO ALTER THE CONSTITUTIONAL AUTHORITY OF THE CONGRESS OR OF THE PRESIDENT." THIS IMPORTANT LANGUAGE RECOGNIZES THE PRESIDENT'S CONSTITUTIONAL AUTHORITY, SEPARATE AND APART FROM THE WAR POWERS RESOLUTION, TO ENGAGE U.S. ARMED FORCES IN HOSTILITIES. THAT BRINGS US TO THE QUESTION: WHAT IS THE SCOPE OF THE PRESIDENT'S CONSTITUTIONAL POWER, EXPRESSLY RECOGNIZED BY THE RESOLUTION?

CONGRESS PROVIDED AN ANSWER WHEN IT OVERWHELMINGLY APPROVED SJ RES 23. THAT RESOLUTION EXPRESSLY STATES THAT "THE PRESIDENT HAS AUTHORITY UNDER THE CONSTITUTION TO TAKE ACTION TO DETER AND PREVENT ACTS OF INTERNATIONAL TERRORISM AGAINST THE UNITED STATES." AS CHAIRMAN FEINGOLD ACCURATELY EXPLAINED ON THE SENATE FLOOR, THIS LANGUAGE PLAINLY RECOGNIZES "THAT THE PRESIDENT HAS EXISTING CONSTITUTIONAL POWERS."

THIS IS QUITE PLAINLY A CORRECT INTERPRETATION OF THE PRESIDENT'S WAR POWER UNDER THE CONSTITUTION. THE RELEVANT SCHOLARLY WORKS COULD FILL THIS ENTIRE ROOM, BUT I WILL TRY TO SUMMARIZE THE ARGUMENT BRIEFLY HERE. UNDER ARTICLE II, SECTION 1 OF THE CONSTITUTION, THE PRESIDENT IS THE LOCUS OF THE ENTIRE "EXECUTIVE POWER" OF THE UNITED STATES AND, THUS, IN THE SUPREME COURT'S WORDS, "THE SOLE ORGAN OF THE

FEDERAL GOVERNMENT IN THE FIELD OF INTERNATIONAL RELATIONS." UNDER ARTICLE II, SECTION 2, HE IS THE "COMMANDER IN CHIEF" OF THE ARMED FORCES OF THE UNITED STATES. THESE TWO PROVISIONS MAKE CLEAR THAT THE PRESIDENT HAS THE CONSTITUTIONAL AUTHORITY TO INTRODUCE U.S. ARMED FORCES INTO HOSTILITIES WHEN APPROPRIATE, WITH OR WITHOUT SPECIFIC CONGRESSIONAL AUTHORIZATION.

NOTABLY, NOTHING IN THE TEXT OF THE CONSTITUTION REQUIRES THE ADVICE AND CONSENT OF THE SENATE, OR THE AUTHORIZATION OF CONGRESS, BEFORE THE PRESIDENT MAY EXERCISE THE EXECUTIVE POWER AND HIS AUTHORITY AS COMMANDER IN CHIEF. BY CONTRAST, ARTICLE II REQUIRES THE PRESIDENT TO SEEK THE ADVICE AND CONSENT OF SENATE BEFORE ENTERING INTO TREATIES OR APPOINTING AMBASSADORS. ARTICLE I, SECTION 10 DENIES STATES THE POWER TO "ENGAGE" IN WAR, EXCEPT WITH CONGRESSIONAL AUTHORIZATION OR IN CASE OF ACTUAL INVASION OR IMMINENT DANGER. ARTICLE III DESCRIBES THE OFFENSE OF TREASON AS THE ACT OF LEVYING WAR AGAINST THE UNITED STATES. MOREOVER, FOUNDING DOCUMENTS PRIOR TO THE U.S. CONSTITUTION, SUCH AS THE SOUTH CAROLINA CONSTITUTION OF 1778, EXPRESSLY PROHIBITED THE EXECUTIVE FROM COMMENCING WAR OR CONCLUDING PEACE WITHOUT LEGISLATIVE APPROVAL. THE FOUNDERS OF THE CONSTITUTION THUS KNEW HOW TO CONSTRAIN THE PRESIDENT'S POWER TO EXERCISE HIS AUTHORITY AS COMMANDER IN CHIEF TO ENGAGE U.S. ARMED FORCES IN HOSTILITIES, AND DECIDED NOT TO DO SO.

OF COURSE, AS THE PRESIDENT HAS THE CONSTITUTIONAL AUTHORITY TO ENGAGE U.S. ARMED FORCES IN HOSTILITIES, CONGRESS HAS A BROAD RANGE OF WAR POWERS AS WELL. CONGRESS HAS THE POWER TO TAX AND TO SPEND. CONGRESS HAS THE POWER TO RAISE AND SUPPORT ARMIES AND TO PROVIDE AND MAINTAIN A NAVY. AND CONGRESS HAS THE POWER TO CALL FORTH THE MILITIA, AND TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE ARMED FORCES. IN OTHER WORDS, ALTHOUGH THE PRESIDENT HAS THE POWER OF THE SWORD, CONGRESS HAS THE POWER OF THE PURSE. AS JAMES MADISON EXPLAINED DURING THE CRITICAL CONSTITUTIONAL RATIFYING CONVENTION OF VIRGINIA, "THE SWORD IS IN THE HANDS OF THE BRITISH KING; THE PURSE IN THE HANDS OF THE PARLIAMENT. IT IS SO IN AMERICA, AS FAR AS ANY ANALOGY CAN EXIST." THE PRESIDENT IS COMMANDER IN CHIEF, BUT HE COMMANDS ONLY THOSE MILITARY FORCES WHICH CONGRESS HAS PROVIDED. CONGRESS ALSO HAS THE POWER TO DECLARE WAR. THIS POWER TO DECLARE A LEGAL STATE OF WAR AND TO NOTIFY OTHER NATIONS OF THAT STATUS ONCE HAD AN IMPORTANT EFFECT UNDER THE LAW OF NATIONS, AND CONTINUES TO TRIGGER SIGNIFICANT DOMESTIC STATUTORY POWERS AS WELL, SUCH AS UNDER THE ALIEN ENEMY ACT OF 1798 (50 U.S.C. § 21) AND FEDERAL SURVEILLANCE LAWS (50 U.S.C. §§ 1811, 1829, 1844). BUT THIS POWER HAS SELDOM BEEN USED. ALTHOUGH U.S. ARMED FORCES HAVE, BY CONSERVATIVE ESTIMATES, BEEN DEPLOYED WELL OVER A HUNDRED TIMES IN OUR NATION'S HISTORY, CONGRESS HAS DECLARED WAR JUST FIVE TIMES. THIS LONG PRACTICE OF U.S. ENGAGEMENT IN MILITARY HOSTILITIES WITHOUT A DECLARATION OF WAR DEMONSTRATES THAT PREVIOUS PRESIDENTS AND

CONGRESSES HAVE INTERPRETED THE CONSTITUTION AS WE DO TODAY. AS THE UNITED STATES ROSE TO GLOBAL PROMINENCE IN THE POST-WORLD WAR II ERA, CONGRESS HAS PROVIDED THE PRESIDENT WITH A LARGE AND POWERFUL PEACETIME MILITARY FORCE. PRESIDENTS OF BOTH PARTIES HAVE LONG USED THAT MILITARY FORCE TO PROTECT the national interest, EVEN THOUGH CONGRESS HAS NOT DECLARED WAR SINCE WORLD WAR II. PRESIDENT TRUMAN INTRODUCED U.S. ARMED FORCES INTO KOREA IN 1950 WITHOUT PRIOR CONGRESSIONAL APPROVAL. PRESIDENT KENNEDY CLAIMED CONSTITUTIONAL AUTHORITY TO ACT ALONE IN RESPONSE TO THE CUBAN MISSILE CRISIS BY DEPLOYING A NAVAL QUARANTINE AROUND CUBA. PRESIDENTS KENNEDY AND JOHNSON DRAMATICALLY EXPANDED THE U.S. MILITARY COMMITMENT IN VIETNAM ABSENT A DECLARATION OF WAR.

IN RESPONSE TO PRESIDENT NIXON'S EXPANSION OF THE VIETNAM WAR INTO LAOS AND CAMBODIA, CONGRESS APPROVED THE WAR POWERS RESOLUTION, BUT THAT RESOLUTION EXPRESSLY DISCLAIMED ANY INTRUSION INTO THE PRESIDENT'S CONSTITUTIONAL WAR POWER. ACCORDINGLY, PRESIDENTS FORD, CARTER, REAGAN, AND THE FIRST PRESIDENT BUSH HAVE COMMITTED U.S. U.S. ARMED FORCES ON A NUMBER OF OCCASIONS. IN THESE CASES, THE ADMINISTRATION HAS GENERALLY CONSULTED WITH, NOTIFIED, AND REPORTED TO CONGRESS, CONSISTENT WITH THE WAR POWERS RESOLUTION.

PRESIDENT CLINTON DEPLOYED U.S. ARMED FORCES IN SOMALIA, HAITI, AND BOSNIA - ALL WITHOUT PRIOR CONGRESSIONAL AUTHORIZATION. IN 1999, THE CLINTON ADMINISTRATION RELIED ON THE PRESIDENT'S CONSTITUTIONAL AUTHORITY TO USE FORCE IN KOSOVO. ASSISTANT SECRETARY OF STATE BARBARA LARKIN TESTIFIED BEFORE CONGRESS THAT APRIL THAT "there is no need for a declaration of war. Every use of U.S. Armed Forces, since World War II, has been undertaken pursuant to the President's constitutional authority. . . . This administration, like previous administrations, takes the view that the President has broad authority as Commander-in-Chief And under his authority to conduct foreign relations, to authorize the use of force in the national interest."

IN SHORT, PRESIDENTS THROUGHOUT U.S. HISTORY HAVE EXERCISED BROAD UNILATERAL POWER TO ENGAGE U.S. ARMED FORCES IN HOSTILITIES. CONGRESS HAS REPEATEDLY RECOGNIZED THE EXISTENCE OF PRESIDENTIAL CONSTITUTIONAL WAR POWER, IN THE WAR POWERS RESOLUTION OF 1973, AND MORE RECENTLY IN SJ RES 23. AND THE COURTS HAVE SUPPORTED THIS VIEW AS WELL. AS THE SUPREME COURT NOTED IN HAMILTON V. DILLIN (1874), IT IS "THE PRESIDENT ALONE, WHO IS CONSTITUTIONALLY INVESTED WITH THE ENTIRE CHARGE OF HOSTILE OPERATIONS." SIGNIFICANTLY, THE COURTS HAVE NEVER STOPPED THE PRESIDENT FROM DEPLOYING U.S. ARMED FORCES OR ENGAGING THEM IN HOSTILITIES - MOST RECENTLY, IN THE CASE OF CAMPBELL v. CLINTON. THAT SAID, ALTHOUGH THE LAST ADMINISTRATION, LIKE ITS PREDECESSORS, QUESTIONED THE WISDOM AND THE CONSTITUTIONALITY OF THE WAR POWERS RESOLUTION, IT IS OUR BELIEF THAT GOVERNMENT WORKS BEST WHEN THE TWO BRANCHES COOPERATE IN MATTERS CONCERNING THE USE OF U.S. ARMED FORCES. ACCORDINGLY, We are committed to close consultations with Congress WHENEVER POSSIBLE regarding the need to use force to combat terrorism and to PROTECT

our national INTEREST, WHENEVER POSSIBLE. We value the views of Congress regarding the appropriate use of military force, as evidenced by our close and meaningful consultations with Congress after the attacks of September 11, and before the introduction of U.S. Armed Forces into combat action in Afghanistan on October 7, 2001. In addition to The President himself addressing a joint session of Congress on September 20, senior members of the Administration briefed members of Congress and their staffs on over 10 occasions in that short time period. One result of these consultations was the enactment of SJ Res 23, which THE President welcomed.

AT THE SAME TIME, HOWEVER, WE MUST RECOGNIZE THAT WE ARE IN A WAR AGAINST, TO USE CHAIRMAN FEINGOLD'S WORDS AGAIN, "A LOOSE NETWORK OF TERRORISTS," AND NOT "A STATE WITH CLEARLY DEFINED BORDERS." WHEN FIGHTING "A HIGHLY MOBILE, DIFFUSE ENEMY THAT OPERATES LARGELY BEYOND THE REACH OF OUR CONVENTIONAL WAR-FIGHTING TECHNIQUES," EXTENSIVE CONGRESSIONAL DISCUSSION WILL OFTEN BE A LUXURY WE CANNOT AFFORD. OUR ENEMY HIDES IN THE CIVILIAN POPULATIONS OF THE NATIONS OF THE WORLD. AS CHAIRMAN FEINGOLD POINTED OUT, "THERE CAN BE NO PEACE TREATY WITH SUCH AN ENEMY." LIKEWISE, THERE CAN BE NO FORMAL, PUBLIC DECLARATION OF WAR AGAINST SUCH AN ENEMY.

THE ATTACKS OF SEPTEMBER 11 INTRODUCED THE UNITED STATES INTO AN UNPRECEDENTED MILITARY SITUATION. THIS ADMINISTRATION IS CONFIDENT THAT THE ALLOCATION OF WAR POWERS CONTEMPLATED BY THE FOUNDERS OF OUR CONSTITUTION IS FULLY ADEQUATE TO ADDRESS THE DANGERS OF THE TWENTY-FIRST CENTURY, AND THAT, ARMED WITH THE WAR POWERS CONFERRED UPON HIM BY THE CONSTITUTION AND RECOGNIZED BY THE WAR POWERS RESOLUTION, THE PRESIDENT WILL BE ABLE TO WORK EFFECTIVELY WITH THIS COMMITTEE AND WITH CONGRESS TO ENSURE THE PROTECTION OF THE UNITED STATES FROM ADDITIONAL TERRORIST ATTACK.

THANK YOU, MR. CHAIRMAN AND MEMBERS, FOR THIS OPPORTUNITY TO DISCUSS THESE IMPORTANT ISSUES WITH THE COMMITTEE. I AM HAPPY TO RESPOND TO ANY QUESTIONS WHICH YOU MAY HAVE.