Testimony of

Mr. Michael Glennon

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Thank you for inviting me to testify today.

You have asked us to address two questions that that may arise in connection with use of force in the ongoing war against terrorism. First, at what point will further authorization or consultation be required? Second, how can consultation and reporting be made more meaningful?

Contrary to what seems to be growing sentiment in Congress, authorization and consultation are not interchangeable. Where authorization is required, consultation cannot substitute for it. And even when authorization is in effect, consultation may nonetheless be lawfully required. Let me turn first, therefore, to the question of authorization. At what point, as the war on terrorism proceeds, will the President require additional authorization from Congress?

A. Sources of authorization

To identify the point at which further authorization to use force will be needed, it is first necessary to determine what authorization exists and how far it extends. Authorization to use force in prosecuting the war could derive, in principle, from three possible sources: a treaty, a statute, or the Constitution.

1. Authorization by treaty

The first possible source, a treaty, is most easily dismissed. No treaty currently in force gives the President authority to use force. Indeed, the United States has never been a party to any treaty that purported to give the President authority to use force. The constitutionality of any such treaty would be doubtful in that it would necessarily divest the House of Representatives of its share of the congressional war-declaring power. (For this reason, all of the United States' mutual security treaties have made clear that they do not affect the domestic allocation of power.)

Moreover, war-making authority conferred by any such treaty would be cut off unless it met the requirements of section 8(a)(2) of the War Powers Resolution. Section 8(a)(2) requires, in effect, that any treaty authorizing the use of force meet two conditions. The first condition is that any such treaty must "be implemented by legislation specifically authorizing" the introduction of the armed forces into hostilities or likely hostilities. This condition is not met because no treaty is so implemented. The second condition is that any such implementing legislation must state that it is "intended to constitute specific statutory authorization" within the meaning of the War Powers Resolution. Again, since no implementing legislation is in effect, the second condition is also not met. Thus it must be concluded that, if further authority to use force is required, the President cannot seek that authority from any treaty.

The principle that no treaty can provide authority to use force in the war against terrorism is important because, prior to use of force by the United States in the Gulf War, it was contended that the United Nations Charter, as implemented by the UN Security Council, provided such authority. The argument was that the Security Council resolution authorizing force against Iraq

(Resolution 678 of November 29, 1990) somehow substituted, in United States domestic law, for approval by the United States Congress (which was given later, in P.L. 102-1, on January 14, 1991). The argument was without merit and has been overwhelmingly rejected by legal scholars. Among other things, it is doubtful that the Charter gives the Security Council the power to order member states to use force, and doubtful, too, whether this power, assigned by the Constitution to the Congress and the President, can be delegated to an international organization. In any event, the first Bush Administration never claimed such authority from the Security Council's action. Indeed, Secretary of State James Baker made clear at the time that the Security Council had merely authorized use of force against Iraq, not required it. But it is conceivable that the argument could re-emerge as the war on terrorism unfolds; if it does, Congress should give it short shrift.

2. Authorization by statute

The second source to which the President might turn for authority to use force is statutory law. I reviewed a moment ago the provision of the War Powers Resolution that limits authority to use force that can be inferred from a treaty. A companion provision limits such authority that can be inferred from a statute. That provision is section 8(a)(1). Section 8(a)(1) sets out two similar conditions that must be met before authority to use armed force can be inferred from a given statute. The first condition is that such a statute must "specifically authorize" the introduction of the armed forces into hostilities or likely hostilities. The second condition is that such a statute must state "that it is intended to constitute specific statutory authorization within the meaning of" the War Powers Resolution. Unless each condition is met, a given statute may not be relied upon as a source of authority to use armed force. Arguments challenging the validity of this provision are essentially frivolous (Archibald Cox announced himself "aghast" at the contention); I thus relegate a brief response to an appendix at the end of this testimony (appendix A).

Two statutes now in effect meet these two conditions. The first is the statute enacted by Congress authorizing use of force during the Gulf War, which I alluded to a moment ago (P.L. 102-1, Jan. 14, 1991). Whether this statute continues to provide authority to use force against Iraq is a complicated question, which I understand the Subcommittee does not wish to explore today.

The second statute that meets these conditions is the law enacted by Congress and signed by the President on September 18, 2001, P.L. 107-40. The statute--also known as Senate Joint Resolution 23--is well known to this Subcommittee; for convenience, I append a copy to my statement (see appendix B) and will refer to it as S.J.Res. 23.

How much authority does this statute confer upon the President to use force in prosecuting the war against terrorism? Note at the outset that the statute contains five whereas clauses. Under traditional principles of statutory construction, these provisions have no binding legal effect. Only material that comes after the so-called "resolving clause"--"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled"--can have any operative effect. Material set out in a whereas clause is purely precatory. It may be relevant for the purpose of clarifying ambiguities in a statute's legally operative terms, but in and of itself such a provision can confer no legal right or obligation.

To determine the breadth of authority conferred upon the President by this statute, therefore, it is necessary to examine the legally operative provisions, which are set forth in section 2(a) thereof. That section provides as follows:

IN GENERAL--That the President is authorized 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 central conclusion that emerges from these words--which represent the only substantive provision of this statute--is that all authority that the statute confers is tightly linked to the events of September 11. The statute confers no authority unrelated to those events. The statute authorizes the President to act only against entities that planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001. No authority is provided to act against entities that were not involved in those attacks. The closing reference limits rather than expands the authority granted, by specifying the purpose for which that authority must be exercised--"to prevent any future acts of international terrorism against the United States...." No authority is conferred to act for any other purpose, or to act against "nations, organizations or persons" generally. Action is permitted only against "such" nations, organizations or persons, to wit, those involved in the September 11 attacks.

The statute thus cannot serve as a source of authority to use force in prosecuting the war on terrorism against entities other than those involved in the September 11 attacks. To justify use of force under this statute, some nexus must be established between the entity against which action is taken and the September 11 attacks. A recent article co-authored by Deputy Assistant Attorney General John C. Yoo accurately emphasized the narrowness of the authority conferred by S.J.Res. 23. Professor Yoo wrote as follows:

The Joint Resolution's authorization to use force is limited only to those individuals, groups, or states that planned, authorized, committed, or aided the attacks, and those nations that harbored them. It does not, therefore, reach other terrorist individuals, groups, or states that cannot be determined to have links to the September 11 attacks.

The requirement of a nexus between the September 11 attacks and the target of any force is reinforced by the statute's legislative history. Unfortunately, because of the truncated procedure by which the statute was enacted, no official legislative history can be compiled that might detail what changes were made in the statute, and why. It has been reported unofficially, however, that the Administration initially sought the enactment of legislation which would have set out broad authority to act against targets not linked to the September 11 attacks. The statute proposed by the Administration reportedly would have provided independent authority for the President to "deter and pre-empt any future acts of terrorism or aggression against the United States." Members of Congress from both parties, however, reportedly objected to this provision. The provision was therefore dropped from the operative part of the statute and added as a final whereas clause, where it remained upon enactment.

Accordingly, unless future use of force is directed at an entity that participated in the events of September 11, authority for such use must derive from a source other than S.J.Res. 23. Again, setting aside the only other remaining potential statutory source of authority--the Gulf War authorization (P.L. 102-1, Jan. 14, 1991)--only one possible source remains: the United States Constitution. If use of force by the President is authorized by the Constitution, no authority is needed from any treaty or statute.

3. Constitutional authorization

A starting point in considering the ever-controversial question of the scope of the President's independent constitutional powers is to note a proposition on which commentators from all points on the spectrum have agreed: that the President was possessed of independent constitutional power to use force in response to the September 11 attacks upon the United States. As was widely observed at the time, the War Powers Resolution itself supports this conclusion. Its statement of congressional opinion concerning the breadth of independent presidential power under the Constitution (section 2(c)(3)) recognizes the President's power to use force without statutory authorization in the event of "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." Thus, U.S. military operations in Afghanistan could have been carried out under the President's constitutional authority, even if S.J.Res. 23 had never been enacted. This conclusion has important implications for the specific subject of this Subcommittee's interest--at what point a need further authorization might arise. If future use of force is necessary in or against other countries that, like Afghanistan, are linked to the September 11 attacks, S.J.Res. 23 will continue to suffice, along with the President's constitutional authority, to provide all necessary authorization.

A more difficult question arises in connection with a need to use force in the future against states or groups not connected with the September 11 attacks. This question presents squarely one of the most vexing problems in U.S. constitutional jurisprudence--the scope of the President's power to use armed force without prior congressional approval.

In the last 30 years, Congress has on two occasions expressed its opinion on the issue. One statement of opinion, as I mentioned, is set forth in section 2(c)(3) of the War Powers Resolution. I've also alluded to the other statement: the final whereas clause in S.J.Res. 23. That whereas clause expresses the opinion of Congress that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Obviously, these two statements are inconsistent. The scope of presidential power to wage war that was recognized by Congress in the War Powers Resolution is much narrower than that recognized in S.J.Res. 23. If the President only has power to act alone in "a national emergency created by attack upon the United States, its territories or possessions, or its armed forces," then he obviously is without power to "to take action to deter and prevent acts of international terrorism against the United States" where no attack upon the United States has occurred. Which statement is correct?

In my view, neither. The statement in the War Powers Resolution is overly narrow, and the statement in S.J.Res. 23 is overly broad. The original, Senate-passed version of the War Powers Resolution contained wording--dropped in conference--that came close to capturing accurately the scope of the President's independent constitutional power. It provided--in legally binding, not precatory, terms--that the President may use force "to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack." This formula--unlike the hastily-crafted words of the S.J.Res. 23 whereas clause--was drafted over a period of years, with numerous hearings and advice from the top constitutional scholars in the country. It was supported by Senators Fulbright, Symington, Mansfield, Church, Cooper, Eagleton, Muskie, Stennis, Aiken, Javits, Case, Percy, Hatfield, Mathias, and Scott--not an inconsequential group. The Senate language was dropped in conference only because the House conferees insisted upon their version of the Resolution; they would have scuttled the whole effort

had their version not been accepted. As a participant (counsel to the Senate conferees) in that 1973 conference committee, I can only say that I thought then--as I have on numerous occasions since--that the country would have been far better off if the Senate version of the Resolution had been adopted.

To be sure, not everyone regards the formula from the Senate version of the Resolution as a complete description of bedrock constitutional principle. Yet that formula is the statement that most fully reflects the capacity of the United States Senate for studied, serious, and sustained inquiry into the question that brings this Subcommittee here today. And I believe that that statement (together with the rest of the section in which it was included, which recognizes additional authority to use force in repelling attacks on the armed forces and also in protecting threatened nationals located abroad) approximates most closely the dispassionate conclusion that would still be drawn today by members of both parties if they had the chance to study the issue as it was studied so painstakingly by their predecessors that I mentioned. Further efforts have been undertaken at refining that formula, most notably by Senator Joseph Biden's Subcommittee on War Powers, which held important hearings in 1988. His proposed "Use of Force Act" (S. 2387, 105th Cong., 1st Sess.) flowed from those hearings. But the fundamental premise is unchanged.

That premise can be simply stated: that the war power is shared between Congress and the President.

This is the premise that animates all efforts by members of Congress who seek to have the Executive meet authorization and consultation requirements. This is the premise that is, for all practical intents and purposes, rejected by proponents of sole executive power.

The premise flows from each source of constitutional power:

The constitutional text. Textual grants of war power to the President are paltry in relation to grants of that power to the Congress. The President is denominated "commander-in-chief." In contrast, Congress is given power to "declare war," to lay and collect taxes "to provide for a common defense," to "raise and support armies," to "provide and maintain a navy," to "make rules for the regulation for the land and naval forces," to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions," to "provide for organizing, arming, and disciplining, the militia," and to "make all laws necessary and proper for carrying into execution...all...powers vested by this Constitution in the Government of the United States." Congress is also given exclusive power over the purse: "No money," the Constitution provides, "shall be drawn from the Treasury but in consequence of appropriations made by law."

The case law. Support for the Executive derives primarily from unrelated dicta pulled acontextually from inapposite cases. The actual record is striking: Congress has never lost a war powers dispute with the President before the Supreme Court. While the cases are few, in every instance where the issue of decision-making primacy has arisen--from Little v. Barreme (1804) to the Steel Seizure Case (1952)--the Court has sided with Congress.

Custom. It is commonly asserted that Presidents have used armed force abroad over 200 times throughout U.S. history. It is true that practice can affect the Constitution's meaning and allocation of power. The President's power to recognize foreign governments, for example, like the Senate's power to condition its consent to treaties, derives largely from unquestioned practice tracing to the earliest days of the republic. But not all practice is of constitutional moment. A practice of constitutional dimension must be regarded by both political branches as a juridical norm; the incidents comprising the practice must be accepted, or at least acquiesced in, by the other branch. In many of the precedents cited, Congress objected. Furthermore, the precedents

must be on point. Here, many are not: nearly all involved fights with pirates, clashes with cattle rustlers, trivial naval engagements and other minor uses of force not directed at significant adversaries, or risking substantial casualties or large-scale hostilities over a prolonged duration. In a number of the "precedents," in fact, Congress actually approved of the executive's action (as was true, for example, in the case of the war against the Barbary pirates, which I will discuss in a moment).

Structure and function. If any useful principle derives from structural and functional considerations (and this is doubtful), it is that the Constitution gives the Executive primacy in emergency war powers crises, where Congress has no time to act, and that in non-emergency situations--circumstances where deliberative legislative functions have time to play out--congressional approval is required.

Intent of the Framers. Individual quotations can be, and regularly are, drawn out of context and assumed to represent a factitious collective intent. It is difficult to read the primary sources, however, without drawing the same conclusion drawn by Abraham Lincoln. He said:

The provision of the Constitution giving the war-making power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This our convention understood to be the most oppressive of all kingly oppressions; and they resolved to so frame the Constitution that no one man should hold the power of bringing this oppression upon us.

Chief Justice William Rehnquist (quoting Justice Robert Jackson) shared Lincoln's belief that the Framers' rejected the English model. He said: "The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

Notwithstanding the plain import of these sources of constitutional power, some argue that the only role for Congress occurs after the fact--in cutting off funds if the president commences a war that Congress does not support. Two problems inhere in this theory. First, it reads the declaration-of-war clause out of the Constitution as a separate and independent check on presidential power. The Framers intended to give Congress control over waging war before the decision to go to war is made. Giving Congress a role only after the fact, however, would make its power to declare war nothing but a mere congressional trumpet to herald a decision made elsewhere. Whatever else the Framers may have done to enhance the President's power, surely they did not play the neat trick of giving Congress a war power that is really no power at all. Second, the theory flies in the face of the Framers' manifest intention to make it more difficult to get into war than out of it. This approach would do the opposite. If the only congressional option is to wait for the president to begin a war that Congress does not wish the nation to fight, and then cut off funds, war can be instituted routinely with no congressional approval--and seldom if ever ended quickly. The practical method of cutting off funds is to attach a rider to the Department of Defense authorization or appropriation legislation. This means, necessarily, passing the legislation by a two-thirds vote so as to overcome the inevitable presidential veto. The alternative is for Congress to withhold funding altogether--and be blamed by the president for closing down not merely the Pentagon but perhaps the entire federal government. The short of it is, therefore, that to view the congressional appropriations power as the only constitutional

check on presidential war power is, for all practical purposes, to eliminate the declaration-of-war clause as a constitutional restraint on the president. Proponents of this perspective may believe that Presidents Wilson and Roosevelt could have fought World War I and World War II without prior congressional approval, but this curious interpretation would have been received with astonishment in Philadelphia in 1787.
For reasons such as these, the Office of Legal Counsel of the Justice Department concluded in 1980 that the core provision of the War Powers Resolution--the 60-day time limit--is constitutional. It said:

We believe that Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces as required by the provisions of [section 5(b)] of the Resolution. The Resolution gives the President the flexibility to extend that deadline for up to 30 days in cases of "unavoidable military necessity." This flexibility is, we believe, sufficient under any scenarios we can hypothesize to preserve his function as Commander-in-Chief. The practical effect of the 60-day limit is to shift the burden to the President to convince the Congress of the continuing need for the use of our armed forces abroad. We cannot say that placing that burden on the President unconstitutionally intrudes upon his executive powers.
Finally, Congress can regulate the President's exercise of his inherent powers by imposing limits by statute.

The occasional suggestion is made that, in the war on terrorism, the United States is confronting a new phenomenon--the "privatization of war"--and that traditional constitutional principles must therefore give way if this war is to be prosecuted effectively. It surely is true that al Qaeda represents an entity with fewer governmental links than most of the adversaries encountered by the United States in recent years. But it is not correct that non-state actors are a new phenomenon in the annals of warfare. Many of the belligerents involved in the earliest conflicts fought by the United States were non-state actors. The Barbary pirates are a classic example. These (quite literally) Barbarians were the al Qaeda of the Federalist era--sea-going terrorists who ravaged Mediterranean shipping and exacted millions of dollars in bribes from faint-hearted states. It is worth recalling Jefferson's response. As Secretary of State, he advised that "it rests with Congress to decide between war, tribute, and ransom...." Later, as President, Jefferson told Congress that as President he was "unauthorized by the Constitution, without sanction of Congress, to go beyond the line of defense." "Measures of offense," he said, must be authorized by Congress. Hamilton disagreed that congressional approval was required inasmuch as "Tripoli had declared war in form" against the United States; this, in his view, would have permitted Jefferson to act alone. But if the United States had not been attacked, Hamilton believed, Jefferson would have needed legislative authorization. "[I]t is the peculiar and exclusive province of Congress," Hamilton wrote, "when the nation is at peace to change that state into a state of war....[I]t belongs to Congress only to go to war...." Congress proceeded to enact ten statutes authorizing Presidents Jefferson and Madison to prosecute the Barbary Wars.
The question before the Subcommittee today is whether, in the war against terrorism, Congress will allow the Presidency to be re-created in the image of George III. The incentive to do so is not a consequence of iniquity or treachery within the executive branch. The incentive is atmospheric--it is in the air, a natural impulse that springs from sudden terror and uncertain safety, from the urge simply to protect and to be protected. If Congress's answer is no--if Congress refuses to permit the arrogation of legislative war power by the Executive--then the

only alternative will be to demand adherence to a rigorous authorization requirement.
Where should the line be drawn? I commend to the Subcommittee, once again, the thoughtful formula devised by the Senate itself three decades ago: the President may act alone in using force "to repel an armed attack upon the United States, its territories or possessions; to take necessary and appropriate retaliatory actions in the event of such an attack; and to forestall the direct and imminent threat of such an attack." In all other situations, the President should proceed only if Congress has given its prior approval.

B. Consultation and reporting

I reiterate my opening comment: where authorization is required, consultation will not suffice. Consultation necessarily entails only listening. Constitutionally, listening is not enough. When constitutional lines are crossed, compliance is required.
The War Powers Resolution requires that the President consult with Congress "in every possible instance" before using force. It also requires that, even after Congress has authorized use of force, he "report to the Congress periodically on the status of such hostilities," and "in no event...less often than once every six months." Many members of Congress apparently have concluded, however, that these requirements have not been met. Inevitably, these dissatisfactions lead to pressures to establish a "super" joint consultative committee of congressional leaders which, surely, will do--must do--a better job at getting information than existing committees and individual members.
There is no question that congressional access to information must be complete and continuous. To approach a crisis with full perspective, a decision-maker, in Congress or the executive branch, must be knee-deep in relevant information and analysis prior to the outbreak of the crisis. Agencies that deal with national-security crises normally engage in much "contingency planning," where options are drawn up in advance for the various scenarios likely to arise. These plans, as well as real-time data on events as they unfold, should be fully available to relevant congressional committees. It is to the advantage of the Executive as well as Congress that full information be provided: the smaller the gap in knowledge between the two branches, the smaller the policy differences are likely to be. Reasonable policy-makers often reach differing views only because their informational universes are different.
Nevertheless, I hope that Congress will resist pressures to establish some joint "super" committee. Such a committee, in my view, would be too easily co-opted by the Executive. It would likely be dominated with get-along, go-along Members who are too inclined to ask easy questions and accept evasive answers, not with naysayers and young Turks who are willing to make waves that rock boats in the Pentagon, CIA and State Department. Its members would soon develop a cozy relationship with new-found friends in the executive branch, who surely would target them for favors and special treatment. Their special status would create special problems. Would they represent their absent colleagues' views when their own are in conflict? If the public were misled, would they be willing to share confidential information with their colleagues, let alone with the public? If the Executive took action at odds with their advice, would their privileged position be jeopardized by speaking out? If they remained silent, would their assent be assumed to policies they might otherwise have questioned? Would photo ops at the White House substitute for hard-headed scrutiny of Administration policy proposals? Decentralized power is a source of congressional strength, not weakness.
Lord Bryce reminded us that "the student of institutions as well as the lawyer is apt to overrate

the effect of mechanical contrivances in politics." The War Powers Resolution is one "mechanical contrivance" that was surely overrated thirty years ago. Congress ought not make the same mistake again by adopting some new contrivance that promises to resolve perceived consultation or reporting inadequacies. I believe that the solution to inadequate information is not more detailed or more numerous consultation or reporting requirements, but greater congressional self-reliance. Consulting with executive officials and reading their reports are two of only many ways of getting information. Ninety-five percent of the information to be had from classified briefings is available in the Washington Post. If Congress really wants the rest, it normally can get it.

How? One way to develop needed information is through forceful and insistent staff work. During the evacuation of South Vietnam following the collapse of the Thieu government, the on-site investigations of two members of the professional staff of the Senate Foreign Relations Committee, Richard Moose and Charles Meissner, proved invaluable in assessing executive testimony concerning the number of refugees expected and American capabilities for their removal. Committee staff must be able, with the committee's support, to travel instantly to trouble spots, sometimes under unsafe conditions. They must be skeptics, doubters, unbelievers--persons of independent judgment who are willing to say no, able to acknowledge uncertainty, and able to resist pressures for consensus. They must be individuals of strong institutional pride, whose goal is not to pave the way for a job in the executive branch but to serve the Senate or House of Representatives with dedication and integrity. As the war against terrorism expands, the need for such staff will grow.

Amazingly, some of the most important information Congress can get is not transmitted by the Executive for the simple reason that Congress has never asked. I refer in particular to the legal justification for various actions or policies. Nothing is more important in assessing a given policy than the legal rationale supporting it. Often these justifications are prepared in great detail--but remain unreviewed by Congress merely because Congress has never seriously requested them. I refer, for example, to the Clinton Administration's use of force in Kosovo. Legal scholars in the United States and abroad eagerly awaited an explanation of the legal basis--in constitutional as well as international law--for military operations against Yugoslavia. Even during litigation on the issue (in Campbell v. Clinton (1999)), the Administration never produced a supporting legal rationale. Much the same can be said of military operations undertaken against Iraq in 1998. Similarly, the question whether detainees at Guantanamo are entitled to POW status has generated enormous attention in scholarly communities and beyond--but no legal analysis of the issue has been released. I was advised informally by one administration official that the reason was simply that no congressional request had been made for the document--which had been prepared with painstaking care, and which could have answered persuasively many of the critics. If Congress is serious about authorizing what the Constitution requires to be authorized, it must begin by regularly and diligently insisting that the Executive transmit a legal justification for its actions--not simply a conclusory assertion that the action is justified by the "President's powers as commander in chief" or the President's general "foreign policy" powers, as is commonly done in reports under the War Powers Resolution, but a specific and detailed legal analysis of why and how the action is authorized.

C. Conclusion and recommendations

More important than more information is what Congress does in response to the information it already has; often that information is more than sufficient for carrying out its constitutional

responsibilities. In this regard, it is useful to turn briefly to the recent past, and then to the future. The Nation's involvement in the tragedy of Vietnam traced in part to the cursory consideration given by Congress to the legislation that authorized that involvement, the infamous Gulf of Tonkin Resolution. The Resolution was adopted hastily, with no committee hearings, no mark-up, no conference committee, and little floor debate. In a post-mortem conducted four years later, the Senate Foreign Relations Committee--whose Chairman, J. William Fulbright, had served as the Senate floor manager--issued a report that made recommendations to future Congresses as to how the recurrence of such a mistake might be avoided. The report, entitled "National Commitments," No. 91-129, 91st Cong., 1st Sess. (April 16, 1969), is a tribute to congressional prescience. In it the Committee recommended that, in considering future legislation involving the use or possible use of force, Congress--

(1) debate the proposed resolution at sufficient length to establish a legislative record showing the intent of Congress;
(2) use the words authorize or empower or such other language as will leave no doubt that Congress alone has the right to authorize the initiation of war and that, in granting the President authority to use the Armed Forces, Congress is granting him power that he would not otherwise have;
(3) state in the resolution as explicitly as possible under the circumstances the kind of military action that is being authorized and the place and purpose of its use; and
(4) put a time limit on the resolution, thereby assuring Congress the opportunity to review its decision and extend or terminate the President's authority to use military force.

Recommendation (2) was inapplicable to the consideration of S.J.Res. 23 since, as discussed above, the President had power to respond to the sudden attack on the United States without any authorization from Congress. I also pointed out earlier that S.J.Res 23 is closely linked to the events of September 11. Note, however, that not one of the three remaining recommendations was followed by Congress in enacting S.J.Res. 23. Debate on the measure was perfunctory at best; some Members seemed to consider debate a dispensable inconvenience. No committee hearings were held, no mark-ups were conducted, and floor debate was hurried. No legislative record of any substance was established that will clarify Congress's intent in the event it may be called into question--concerning, for example, use of force against "persons" who happen to be located within the United States; would the law authorize the use of military tribunals to try such persons? (The President's order establishing the tribunals cites S.J.Res. 23 as supporting authority.) S.J.Res. 23 is anything but explicit about "the kind of military action that is being authorized and the place and purpose of its use." Nor are any time limits imposed. If Congress at some point in the future becomes dissatisfied with the purpose or manner in which force is used under the statute, it will have to muster a two-thirds vote to repeal the law over the President's veto--which is one of the reasons that it took years for Congress finally to end American involvement in the Vietnam War. Many commentators have lamented the gradual loss in Congress of an institutional memory; if the legislative branch is to exercise its share of the war power responsibly in the future, it must avail itself of the lessons of the past far more ably than it did following the crisis of September 11th.
The executive branch might also benefit from approaches used successfully in the past. The Subcommittee can perhaps do little to control how the Executive attends to its perceived constitutional responsibilities. One thing Congress can do, however, is to meet the executive

branch half way if the President does what many hope he will do: to get beyond the tired debate over constitutional theology and approach use-of-force issues pragmatically--focusing not upon dogmatic insistence upon constitutional prerogatives, but upon the practical consequences of his action.

Let me spell out what pragmatism would counsel in a concrete situation-- the decision to use force against Iraq. No doubt the White House is already awash in reams of memoranda importuning the President to claim every variety of legal justification for avoiding Congress in the decision to attack Iraq. Some such claims might not be implausible; as I noted earlier, the legal questions are complex. But no useful purpose would be served by getting into a heated constitutional debate with Congress on the eve of a major international conflict. Policy-makers in the executive and legislative branches should be immersed in the intricate military, diplomatic, and political aspects of the issue--not in the diverting legal and constitutional issues that we have been discussing here today.

There is a simple way for the President to lead Congress toward this more productive relationship--that is, by announcing that he seeks congressional approval for policy, rather than for legal, reasons. Such an approach would entail an initial presidential request for authorization with no necessary acknowledgment that it is constitutionally required; indeed, the President would be free to maintain that he can act alone (as the first President Bush did during the Gulf War) just as Congress, in giving that approval, would be free to maintain that he cannot act alone (as Congress did during the Gulf War). All the President need say is that he would welcome congressional support. If polls are to be believed, he will get it overwhelmingly. Congress, in turn, ought thus resist any temptation to establish that its approval was constitutionally required. If neither branch seeks a favorable constitutional precedent, one winner will emerge: the Nation. The resulting policy would benefit enormously from the legitimacy conferred by inter-branch cooperation. Domestic support would be solidified. Overseas, adversaries as well as allies would see the United States as united. This could be crucial if the action led to a more extensive conflict than anticipated. Kosovo was a "little war"--but would have been a much bigger war if the British had honored Gen. Wesley Clark's order to confront the Russian contingent approaching Pristina. Little wars can pose big risks. When possible, big risks should be shared.

President Dwight Eisenhower knew this. Eisenhower repeatedly saw the wisdom in seeking congressional approval before using force. Eisenhower was often urged to use his sole constitutional power to come to the aid of the French in Vietnam. He refused. "There is going to be no involvement of America in war," he said, "unless it is a result of the constitutional process that is placed upon Congress to declare it." When China took aggressive action against offshore islands in 1955, Eisenhower was again pressured to react, relying upon his independent commander-in-chief powers. Again he refused and instead sought congressional approval, observing that "[i]t would make clear the unified and serious intentions of our Government, our Congress, and our people." In 1957, when violence threatened the Middle East and American military involvement seemed advisable, Eisenhower again sought advance congressional approval to use force. "I deem it necessary to seek the cooperation of the Congress," he said. "Only with that cooperation can we give the reassurance needed to deter aggression." Eisenhower promised "hour-by-hour" contact with Congress if military action became necessary.

Weak presidents need incessantly to underscore their "delicate, plenary, and exclusive" constitutional prerogatives. Strong presidents do not. I hope that, as the war on terrorism expands, this President will act from perceived strength, not weakness. If he does, I hope that Congress will respond in the spirit of President Kennedy, whose words apply equally to inter-

branch harmony as to international understanding: "Civility," he said, "is not a sign of weakness, and sincerity is always subject to proof."
I would be happy to answer any questions.
APPENDIX A

Constitutionality of Section 8(a)(1) of the War Powers Resolution

Section 8(a) of the War Powers Resolution provides as follows:

Sec. 8. (a) Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--
(1) from any provision of law (whether or not in effect before the date of the enactment of this joint resolution), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution; or
(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it is intended to constitute specific statutory authorization within the meaning of this joint resolution.

Section 8(a)(1) was adopted virtually verbatim from paragraph (4) of section 3 of the Senate-passed version of the Resolution, S. 440, 93rd Cong., 1st Sess. (1973). (The House bill contained no comparable provision.) Its meaning and purpose were explained in the report of the Senate Foreign Relations Committee on the bill. The Committee said as follows:

The purpose of this clause is to counteract the opinion in the Orlando v. Laird decision of the Second Circuit Court holding that passage of defense appropriation bills, and extension of the Selective Service Act, could be construed as implied Congressional authorization for the Vietnam war.

S. Rep. 93-220 at 25 (1973). In Orlando, the court had rejected the argument that authorization to use force in Vietnam could not properly be inferred from "military appropriations or other war-implementing legislation that does not contain an express and explicit authorization for the making of war by the President." 443 F.2d at 1043.
The case for the constitutionality of section 8(a)(1) is simply put. A law enacted by Congress is presumed to be constitutional. The burden of persuasion falls upon one who challenges a statute's constitutionality. The argument challenging the constitutionality of section 8(a)(1) (which may also extend to section 8(a)(2), concerning treaties) seems to be a two-pronged contention,roughly as follows:

1. One Congress cannot bind a later Congress; legislative acts must be alterable when the legislature chooses to alter them. One legislature is competent to repeal any law which a former legislature was competent to pass. New legislators cannot be bound by policies of earlier days. New legislators have a right to repeal by inference preexisting laws; the latest expression of the legislative will must prevail. Therefore, Congress remains free to authorize use of force

implicitly, the words of section 8(a)(1) notwithstanding.
2. Use of force may be authorized constitutionally by appropriations statutes and other laws implicitly or indirectly facilitating that use. Therefore, section 8(a)(1) would take from Congress a constitutionally permissible method of authorizing war.

Each argument is easily answered. Although their premises are of course correct, their conclusions simply do not follow.

The first argument mistakes the premises that it posits with a very different implicit premise--that section 8(a)(1) is somehow "unrepealable." Obviously it is not. Any time Congress wishes to repeal section 8(a)(1) it can do so. It can do so, moreover, using precisely the same procedure applicable to the repeal of any other statute. The Congress that enacted section 8(a)(1) thus did not in this sense "bind" later Congresses, for later Congresses retain full discretion to alter that section if and when they choose to alter it. Any Congress wishing to authorize use of force implicitly can easily do so: it can either repeal section 8(a)(1) at the same time it enacts such implicit authorization, or it can simply provide by law that section 8(a)(1) does not apply to the legislation in question.

What this first challenge to section 8(a)(1) neglects to note is that the so-called "last-in-time doctrine" is not mandated or created by the Constitution. The doctrine is simply a canon of construction--a judicially-invented guideline for "finding" the will of Congress where that will is in doubt, i.e., in the event two statutes conflict. The courts simply assume, quite reasonably, that Congress probably intended the latter. But that assumption is always rebuttable. If the evidence is clear that Congress intended the former, the first in time will prevail, the object being, again, simply to give effect to the will of Congress. Like other canons of construction, the last-in-time doctrine therefore can be countermanded by Congress, which may intend that its intent be gleaned using a different canon of construction. (Legislatures regularly adopt their own canons of construction. State criminal codes, for example, typically subject all provisions to a canon that requires that their provisions be construed narrowly.) Section 8(a)(1) simply sets forth a canon of construction. That canon provides that, in specified circumstances, the intent of Congress should be gleaned not through application of the last-in-time doctrine, but through application of a first-in-time principle. There is no constitutional reason why the last in time must control if Congress indicates otherwise in a legislatively-prescribed non-supersession canon, nor is there any reason why Congress must leave its intent to be guessed at by the Executive or the courts.

The second argument proceeds from a similar presupposition of unalterability with respect to section 8(a)(1). But that presupposition is unfounded. Congress has not disabled itself from exercising its right to authorize hostilities through the enactment of appropriations legislation if it wishes to do so. Indeed, section 8(a)(1) places appropriations laws on a footing no different from general legislation. Either method may be used if Congress chooses to do so. Each, however, is subject to the canon of construction set out in section 8(a)(1). If Congress wishes to use appropriations legislation to authorize use of force, no impediment precludes it from doing that. The effect of section 8(a)(1) is simply to make clear the congressional intent that such authorization not be inferred unless Congress clearly intended to grant it. There is nothing novel in such a canon, which has, indeed, been used by Congress in other contexts in the realm of foreign relations. See, e.g., § 15 of the Act of Aug. 1, 1956, as amended, Pub. L. No. 84-885, 70 Stat. 890 (codified at 22 U.S.C. § 2680(a)(1)(b)), which prohibits appropriations not authorized by law to be made to the Department of State and precludes nonspecific supersession of that prohibition.

If these two objections were correct, Congress, in enacting the War Powers Resolution, wrote empty words: whatever the constitutional validity of the 60-day time limit, that requirement will virtually never apply because Congress will almost always be deemed to have enacted some implicit authorization contemplated by the Resolution. The objections proceed on the assumption that a disclaimer of authority cannot simply be stated once, but must be reiterated in every single piece of legislation from which authority might conceivably be inferred. Yet Congress, in enacting legislation, is deemed to be on notice as to what laws already exist; its intent is considered to embrace all acts in pari materia. Section 8(a)(1) is in effect a statement by Congress that it wants the non-supersession canon to apply to every piece of authorizing and appropriating legislation insofar as that legislation might be read as approving the introduction of the armed forces into hostilities.

Practice shows that section 8(a)(1) has placed no burden on either Congress or the Executive. Congress has authorized use of force three times since enactment of section 8(a)(1) in 1973--in the Lebanon War Powers Resolution, the Gulf War Resolution, and S.J.Res. 23. Each of those laws complied with section 8(a)(1) by meeting the two conditions it sets out. In none of those instances did the President challenge the constitutionality of section 8(a)(1). No reasonable argument can be made that Congress was put to an unreasonable effort by including in those authorizations the wording contemplated by section 8(a)(1).

To the contrary, section 8(a)(1) has had precisely the effect Congress intended in precluding executive officials from claiming congressional approval in instances where there was none. President Clinton would surely have preferred to be able to make a plausible claim of congressional support for military operations undertaken in Haiti and Kosovo, but the reality is that opinion within Congress was divided and Congress never approved those actions. Similarly, military operations in Grenada, Panama, Somalia, and elsewhere were not given prior approval by Congress--and that conclusion was indisputable because of section 8(a)(1).

Section 8(a)(1) serves a critically important purpose. It ensures that the decision whether to authorize armed force--the most significant decision Congress can make--will not be misinterpreted. Action that momentous calls for decisional clarity. That is all that section 8(a)(1) requires. Its enactment represented a triumph of congressional responsibility, and its validity ought not be doubted.

APPENDIX B

S. J. RES. 23

Public Law 107-40

107th CONGRESS

1st Session

JOINT RESOLUTION

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it
Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,
SECTION 1. SHORT TITLE.
This joint resolution may be cited as the 'Authorization for Use of Military Force'.
SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.
(a) IN GENERAL- That the President is authorized 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.
(b) War Powers Resolution Requirements-
(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.
(2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Michael J. Glennon

Biographical Note

Michael J. Glennon is a Fellow at the Woodrow Wilson International Center for Scholars in Washington, D.C., and Professor of Law at the University of California, Davis, Law School.

Prior to going into teaching, he was Legal Counsel to the Senate Foreign Relations Committee (1977-1980) and Assistant Counsel in the Office of the Legislative Counsel of the United States Senate (1973-1977). In 1998 he taught international and constitutional law in Lithuania on a Fulbright fellowship. He is the recipient of the Deak Prize and Certificate of Merit from the American Society of International Law. From 1986 to 1999 he was on the Board of Editors of the American Journal of International Law. He has been a member of the American Law Institute since 1988.

Professor Glennon is the author of numerous articles on constitutional and international law as well a number of books. These include Limits of Law, Prerogatives of Power: Interventionism after Kosovo (Palgrave: 2001); United States Foreign Relations and National Security Law, 2nd ed. (with Thomas M. Franck; West Publishing Company: 1993); When No Majority Rules, (Congressional Quarterly Press: 1992)); Constitutional Diplomacy (Princeton University Press: 1990); and Foreign Affairs and the U.S. Constitution (co-edited with Louis Henkin and William D. Rogers; Transnational Publishers: 1990).

He served as a consultant to the Senate Foreign Relations Committee and the Senate Judiciary Committee in 1988 in connection with the ABM Treaty interpretation dispute. He has also served as a consultant to the U.S. State Department and the International Atomic Energy Agency, advised several foreign governments, and testified before the World Court and various congressional committees. A frequent commentator on public affairs, he has spoken widely within the United States and overseas, and appeared on Nightline, The Today Show, NPR's All Things Considered and other national news shows.