

Testimony of  
**Ms. Ruth Wedgwood**

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I appreciate the opportunity to appear before this Subcommittee to discuss the mutual powers of the President and the Congress in the support of our nation abroad and in its defense against our adversaries. September 11 has posed an extraordinary challenge for America, in assessing how to safeguard our territory and our citizens against weapons of mass destruction and radical terrorist networks such as al Qaeda.

In the Cold War, we were committed to the containment of the Soviet Union, and created an effective architecture of political and defense alliances in order to carry out that purpose. The Congress was centrally involved in the creation of that architecture, through the appropriation of funds and oversight of their expenditure, in the advice and consent of the Senate to treaties of alliance, and in the important consultations of the Executive Branch with Congressional leadership. The strategy of deterrence depended on both nuclear and conventional forces and gave some stability to the Cold War world, even while the Soviet Union and its allies often posed significant challenges.

The end of the Cold War world has not permitted any easy repose. Indeed, we now face a situation that is, in many ways, less stable. The danger of a radicalized and militant Islamist movement that seeks to use terror tactics against the West has shown us the difficulties of reconstructing a secure environment. The terrible events of September 11 -- with the hijacking of four civilian airplanes, the fiery destruction of the World Trade Center towers, and the attack on the Pentagon -- have taught us that national boundaries will not be respected. The attacks by al Qaeda deliberately targeted civilians at the start of their working day, causing the death of over 3,000 innocent people. The planners evidently sought to kill many thousands more, since at its peak the Trade Center housed over 25,000 workers. In a real sense, al Qaeda has already exceeded the limits of more familiar terrorist action, and established a new norm of death and destruction. Al Qaeda's interest in acquiring weapons of mass destruction, including chemical, biological, radiological, and nuclear devices, is thus a cause for grave alarm. One fears to contemplate the potential use of a nuclear device in an American city.

The terrorist networks of radical Islam have made a cult of martyrdom, and in that setting, our accustomed strategy of deterrence will not work against them. Al Qaeda often does not claim public authorship of its attacks, and thus we may not know immediately against whom to retaliate. The terrorist networks operate surreptitiously within a host of territorial bases; often we must act against them quickly and in confidence, before their operatives pack their bags and flee to a new base. Al Qaeda has also shown entrepreneurial talent, in soliciting alliances with other groups. Thus, we will encounter instances where the corporate structure of the terrorist network is not crystal clear.

Nonetheless, acting effectively and in real time is of central importance -- for we must seek to interrupt the ongoing plans of al Qaeda and its host of recruits before they act against innocent civilians. This is not, in the main, a territorial war, but rather a war against a network. The flexibility of network architecture may demand a flexibility in our own response. Intelligence will be key, including the ability to keep it close. The airstrikes of August 1998 tried to target some of bin Laden's lieutenants but missed their meeting at an Afghan training camp by several hours. So, too, our ability to carry out operations to seize terrorist suspects abroad, with or without the cooperation of a host government, may depend on delicate matters of timing and coordination. Sometimes cooperative governments may not wish to be seen helping us, for fear of retaliation or political consequence, and an element of a successful strategy will require a low profile.

In all of this, the lives of innocent civilians will hang in the balance. Over the last decade, al Qaeda has carried out its campaign against American military and diplomatic assets, but it has continued on a second track with a war of terror against civilians as well. Under the fatwa of Osama bin Laden, there are no innocents in the West. The plan to bomb ten civilian airliners over the Pacific in the mid-1990's was thwarted only because of a chance fire in the Manila apartment of Ramsey Youssef. So, too, only the chance availability of an informant allowed us to intercept al Qaeda's plans to bomb the Lincoln and Holland Tunnels and the United Nations. We will continue to act against al Qaeda through a variety of means, including arrest and criminal prosecution. But we newly recognize that the concerted nature of al Qaeda's campaign against the West amounts to war as well as crime.

In addition, we will have to address the problem of rogue states that may hand off weapons of mass destruction to these terrorist networks. The traffic between state parties and non-state actors can be complicated. Iraq, for example, may find the intifada in the West Bank to be a convenient diversion against any regime change in Iraq, and may choose to support that violence. Despite its past differences with the Taliban, Iran may find al Qaeda of interest as an antidote to the West's new presence on its eastern border. As of 1998, Iraq was evidently interested in subcontracting the production of chemical weapons to Sudan, or elsewhere, in order to evade U.N. inspectors, and apparently discussed cooperative ventures in this regard with representatives of al Qaeda. We thus may confront a shifting array of malign partnerships, where evil deeds have numerous authors.

What does this mean for partnership between the Congress and the Executive Branch? Of course the power to declare war still belongs to the Congress, and the confidence of Congress is a valuable asset for any President in a difficult security environment. In the last half century, the initiation of conflict has rarely been accompanied by formal declarations of war, to be sure - perhaps because the U.N. Charter speaks of "self-defense" rather than war, perhaps because war connotes an all-out conflict of a sort states are eager to avoid. The founders of the Republic did not clarify the allocation of authority for the use of force short of war. Rather, this has been left to constitutional good sense and good relations between the branches.

We are all familiar with the famous change in the final text of Article I of the Constitution, in the midst of the Philadelphia Convention. A proposal to endow Congress with the power to "make" war was instead changed to give Congress the power to "declare" war. A President remains

dependent on the Congress for the fiscal support of his foreign policy, and the raising and support of the armed forces. He will wisely consult with Congress on matters of importance. Nonetheless it is important to recognize that the limited use of force is interwoven with the very conduct of American diplomacy and statecraft. There have been several hundred instances in which limited armed force has been deployed to protect American lives and property, or to signal American commitment to a course of action. At times, indeed, it may be hard to distinguish between a President's power to conduct diplomacy and his power to deploy ground troops and maritime assets. The poster of a Norfolk shipbuilding company once made the point directly - depicting a gray hulking American aircraft carrier against a black background. The caption beneath the carrier read: "70,000 tons of diplomacy." We often use the movement of our military assets and personnel around the world as a way of signaling to foreign adversaries that we are serious, and this movement has been thought to fall within the President's constitutional power as Commander-in-Chief.

We also use the deployment of assets as a method of subtle deterrence. For example, in 1996, we were faced with a Chinese adventure against Taiwan. China bracketed Taiwan with missile shots to the north and the south of the island. In response, the President acted on the recommendation of Secretary of Defense William Perry to send two carrier battle groups through the Taiwan Straits - an area through which we enjoy navigation rights but which otherwise might fall within the exclusive economic zone of China. The movement of one battle group through the straits would have been ordinary. The movement of two carrier battle groups signaled to the Chinese that we did not appreciate their attempt at intimidation.

In the attempt to assure an appropriate role in consulting with the President on major foreign policy decisions, the Congress has wisely understood the need to allow this flexibility in the deployment of military assets. So, too, the Congress has understood that a President needs to be able to signal commitment and deter adversaries by intimating that the use of force may be forthcoming.

One sees this concern for balance in the ultimate limits of the War Powers Resolution. Observers have often criticized the War Powers Resolution for setting in motion a 60-day clock limiting our foreign engagements, tempting a martial adversary to lie in wait until the clock has run out. Perhaps serendipitously, the time limits of the War Powers Resolution most often have matched up with our military doctrine of using overwhelming force, so that a conflict can be quickly concluded. But the practical adaptation of the War Powers Resolution may be aided by the Congress' wise acknowledgement, in Section 8(d)(1), that the joint resolution was designed to facilitate consultation, but was never intended to trammel on the President's inherent powers as Commander in Chief. We have a long tradition of reading statutes practically, in order to avoid close constitutional questions. That same principle applies here. It would be imprudent to suppose a clock starts running every time a President sends a carrier battle group on "innocent passage" through an adversary's territorial waters, or flows forces quietly into a region in order to signal resolve to an adversary. The Congress's practical reading of Section 4 of the War Powers Resolution has acknowledged this. So, too, Presidents have tried to respect Congress's need for information by sending reports that are "consistent with" (if not pursuant to) the War Powers Resolution.

In the current situation, Congress has acted wisely to give the President broad authorization for action. In the joint resolution of September 18, 2001, the Congress declared that the horrendous acts of violence against the United States were an "unusual and extraordinary threat" to our national security. Congress authorized 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." The aim, as Congress noted, is "to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The central importance of this preventative aim gave Congress good warrant for permitting the President a broad range of action.

The initial strategy has been to oust al Qaeda from its comfortable sanctuary with the Taliban in Afghanistan, and to overthrow the Taliban regime. Denying al Qaeda any safe haven in Afghanistan has disrupted its operations, at least for the moment, and has rescued the civilian population of Afghanistan from the Taliban's brutal oppression. But Congress's foresighted resolution also appropriately permits the President to pursue al Qaeda in any other venue where it may set up shop or seek alliances.

So, too, the Congress reiterated, in its preamble in the September 18 resolution, that the President "has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

Finally, the resolution notes that it constitutes specific authorization for the use of force under the War Powers Act, per section 8(a)(1).

The Executive will undoubtedly wish to consult with the leadership of Congress at regular intervals, consistent with its duty to protect sensitive operational intelligence. But it is worth reiterating that the September 18 resolution does not limit the fight against al Qaeda and its allies to any particular country or territory. On September 28, the Security Council similarly acted to forbid countries from assisting international terrorist groups in any way, under a newly rigorous standard against aiding and abetting. The Congress's wisdom is thus coordinate with the strategy of the larger international community, reflected by the Council.

The question has been mooted, lately, whether there is any basis for the use of force against the regime of Saddam Hussein in Iraq. In this regard, the September 18 Congressional resolution may be applicable if the President concludes that available intelligence indicates past or ongoing cooperation between Saddam and al Qaeda.

In addition, one may note the pertinence of United Nations resolutions concerning Iraq, dating from 1990 and 1991, and Congressional authorization of the use of armed force against Iraq in the effort to "achieve implementation of [those] resolutions." The United States has used air power against Iraq on a continuing basis since 1991, even after the expulsion of Iraq from Kuwait in Desert Storm. Our air patrols have enforced the no-fly zones in the north and south of Iraqi territory, in an attempt to protect the Kurds and the Marsh Shia. Almost without surcease, Iraq has acted to threaten our patrols, using radar to "paint" allied aircraft, and we have responded with munitions to remove the threatening radar and anti-aircraft installations. So, too, we have used air power on a continuing basis to force Iraq to meet its obligation to give up the

development of weapons of mass destruction, including nuclear, chemical, and biological weapons. On at least two occasions, in 1993 and 1998, we have used pinprick bombing attacks against Iraq in order to gain its compliance with the U.N. weapons inspection regime.

The campaign against Iraq was authorized by Security Council resolution 678, and after the conclusion of Desert Storm operations, a ceasefire was approved by the Security Council under Resolution 687. A central condition of that ceasefire is that Iraq must give up its weapons of mass destruction and conform to the inspection requirements of the U.N. Special Commission on Iraq (UNSCOM), now succeeded by the U.N. Monitoring, Verification and Inspection Commission (UNMOVIC). Since that time, the United States has represented to the Security Council on repeated occasions that Iraq's flagrant violations of the inspection requirements - ranging from denials of the right to use necessary airfields, to harassment of inspectors, to sequestration of important records, to the expulsion of American inspectors - amounted to a breach of the ceasefire conditions. In a real sense, then, the conflict with Iraq has been ongoing, and we have continued to operate under the original authorization of Resolution 678 to "restore peace and security in the area" and gain compliance with the inspection regime. Any alliance between Saddam Hussein and al Qaeda concerning the production or purchase of weapons of mass destruction would thus fall within the terms of the 1991 prohibitions, as well as the September 18, 2001 Congressional resolution.

Under the Constitution, the President continues to enjoy the power to take necessary action against an imminent threat, even in other locales. One may note that in a different age, the Philadelphia Convention felt it necessary to consign even to state governors the power to "engage in War" where "actually invaded" or where there was "such imminent Danger as will not admit of delay." See U.S. Constitution, Article I, Section 10. Effective self-defense may sometimes require stealth and surprise, in order to counter the calculations of an underground network bent on our destruction. So, too, any attempt by a rogue state to hand-off weapons of mass destruction to a terrorist group, or to use them in a method directly threatening to the United States and its allies, may require immediate action that may not "admit of delay." Certainly, one may not wish to announce to a rogue state in advance the exact scope and scale of plans, lest it take action that thwarts our efforts at prevention and preemption. The wisdom of Congress is a resource that provides good value to any President, but the process of consultation is one that also must be adapted to the circumstances of a new kind of battlefield.