Testimony of

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Chairman Feingold and Members of the Committee, I appreciate the opportunity to testify before you today. Unlike many of the other members of the panel this morning, I am not primarily a separation of powers scholar or a theorist of presidential power. Instead, although I have had occasion to contemplate these questions in connection with my service in President Bush's White House Counsel's Office from 2001 to 2003, my perspective on these issues derives as much from a practical appreciation of the imperatives of presidential military decision making in a time of crisis as from a deep study of the case law. The period of my service embraced the attacks of September 11 and their aftermath, and that experience left me with an acute sense of the importance of presidential power and flexibility in responding to serious threats to our nation's security.

I would like to address the question before us this morning in two basic parts, corresponding roughly to law and policy. In the first and more extensive part, I will discuss the extent to which I believe Congress has the constitutional authority to control the existence, scope, geographic limits, and duration of an ongoing military conflict, and the proper way in which such authority may be exercised. In the second part, I will briefly address some of the policy considerations that I believe should inform the exercise of that authority. My overall conclusion is that Congress does indeed possess the power to limit the broad outlines of hostilities through legislation but that there are limits on this power imposed by the President's exclusive authority as Commander in Chief of the United States military. Furthermore, given the relative institutional competencies of the Congress and the Executive, Congress should take great care before seeking to limit Executive action in military affairs, even within the constitutionally permissible limits, lest damage be done to our nation's ability to achieve its military objectives.

The exclusive war powers of the Congress and the President

The respective powers of the Congress and the President in relation to warmaking is a difficult and complex area of constitutional law. It is also one of the areas that is least well defined by existing pronouncements of the federal courts. In seeking to understand the constitutional war powers scheme, it is essential both to consider closely the text of the Constitution and the

practical realities associated with the effective conduct of military operations, both in the Framers' time and in our own.

A study of the constitutional text reveals that the Framers allocated certain specific powers associated with making war to either the Congress or the President but that it also left vast areas of power undefined. I believe that the overall constitutional scheme creates three analytically distinct categories: there is a category of exclusive congressional power, a category of exclusive presidential power, and a broad category in which power is shared between the branches. In broad outline, the exclusive powers of each branch correspond to those specifically enumerated in the Constitution, while the unenumerated war powers were meant to be shared between Congress and the Executive. In this area of shared power, Congress may legislate and bind the executive if a law is passed and enacted; however, because the boundary lines of the President's Commander in Chief powers are blurry, there are many situations in which such legislation could be subject to reasonable, good faith constitutional doubt if in specific application it would invade the province of military command allocated exclusively to the President by the Constitution.

In my view, the questions whether Congress can require a complete cessation of hostilities, impose a troop ceiling, or limit the geographic scope of warfare in the Middle East falls into the realm of shared powers not specifically addressed by the text of the Constitution. Thus, as an abstract matter, Congress has, through the Spending Power and the Necessary and Proper Clause, sufficient authority to enact facially and presumptively constitutional legislation restricting the Executive's freedom of action by defining the broad contours of permissible military engagement. In doing so, however, Congress should be mindful that in particular application, such statutes or appropriations restrictions could well unconstitutionally interfere, for example, with the President's ability to protect troops in the field or repel a sudden attack. If such a law were passed, Congress should be under no illusions that the application and analysis will be so straightforward that any future deviation by the President could be automatically criticized as unlawful or unjustified.

Congress's powers. The Constitution famously allocates to Congress the power "to declare war," U.S. Const. art. I, sec. 8, cl. 11, which is to say the power to bring about a set of legal relations associated with formal hostility between nations. It also allocates to Congress other specific powers associated with military affairs. In a clause discussing Congress's general authority to raise revenue, the Constitution gives Congress the power to "provide for the common defence." Id. cl. 1. In so doing, Congress is then authorized to raise and support armies and to provide and maintain a navy, id. cl. 12 & 13, as well as to "make rules for the government and regulation" of those forces, id. cl. 14. Congress's specifically enumerated war powers also include the power to make rules governing captures of enemy combatants, id. cl. 11, and to define and punish violations of the law of nations that may be committed by such individuals, id. cl. 10. Finally, they include a number of powers associated with the organization and use of domestic militias, which are not directly relevant to the issues at hand. See id. cl. 15 & 16.

The specifically enumerated congressional powers fall broadly into two general categories. The first set of powers relates to providing the country the means to wage war. Thus, the power to raise money and provide for the defense of the nation is specifically defined to include the power to create and maintain the armed forces of the United States and to provide rules for their internal

governance and conduct. The second category relates to laying down traditional legislative rules defining the boundaries between appropriate and inappropriate behavior by our forces and those whom we confront on the battlefield. This category includes the power to make rules relating to captures and to define violations of the laws of war, which are traditional exercises of legislative power to make rules of general, prospective application.

In these areas, I believe the power of Congress is exclusive. Thus, the President cannot raise and support an army or navy unless Congress has authorized him to do so and provided the means. This broad democratic control of the armed forces is responsive to Framers' acute concern about the threat to liberty that they believed could arise from having a standing army - surely a dated concern in 21st century America but one that nonetheless loomed large in the late 1700s. The President cannot declare war. And the President cannot generally engage in prospective rulemaking of a legislative type, although post-New Deal accommodations to the administrative state, as well as inherent powers that may exist in the interstices of the congressionally-provided rules may now give the President some more authority in these particular areas than once would have been the case.

The President's powers. On the other side, the President has but one enumerated power directly related to the conduct of warfare: he is made the Commander in Chief of the United States armed forces. U.S. Const., art. II, sec. 2, cl. 1. Although it stands alone, this power is vital and robust. It has always been understood to make the President preeminent in the conduct of warfare. In debating the "declare war" power given to Congress, the drafters of the Constitution explicitly considered and rejected a proposal to vest in the Congress the power to "make war." That power was reserved to the President via the Commander in Chief clause. Thus, as Commander in Chief, the President has the authority to make those decisions and undertake those actions necessary to engage and defeat our enemies in arms. As the Supreme Court indicated in United States v. Sweeney, 157 U.S. 281 (1895), the purpose of the Commander in Chief clause was to "vest in the President the supreme command over all the military forces - such supreme and undivided command as would be necessary to the prosecution of a successful war." Id. at 284. The Commander in Chief powers thus include responding to sudden attacks or military emergencies; committing America's armed forces to hostilities to respond to military threats; protecting our civilians at home and our troops in the field from armed violence; controlling the military chain of command; directing the disposition of our forces in the field; defining the rules of engagement; and controlling when, where, and how our forces attack the enemy or defend themselves in a theater of battle in an ongoing military conflict. See, e.g., Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . .").

I believe these powers to be exclusive, just as Congress's enumerated powers in the field of warfare are exclusive. For reasons both legal and practical, the committee of 535 individuals that is our Congress cannot command our forces any more than the President can raise those forces. Thus, Chief Justice Chase recognized broad power in the Congress to declare war and make laws necessary to carry it on, "except such as interferes with the command of the forces and conduct of campaigns. That power and duty belong to the President as Commander-in-Chief." Ex parte Milligan, 71 U.S. 2, 139 (1866). And Justice Robert Jackson, whose opinion in Youngstown

Sheet & Tube v. Sawyer, 343 U.S. 579 (1952), is often cited well beyond its purely domestic context for the overly broad proposition that the Congress can impose very nearly any restrictions it likes on the President's exercise of his war powers, stated in that same opinion, "I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." Id. at 645. Unlike some others, I believe Congress's unenumerated powers in military affairs are not plenary and are limited by the President's Commander in Chief power. It is thus theoretically possible in my view for Congress to legislate restrictions relating to the use of force that would violate Article II of the Constitution and the separation of powers.

In this regard, it is important to recall non-Commander in Chief cases such as Myers v. United States, 272 U.S. 52 (1926), in which the Supreme Court invalidated the Tenure of Office Act, which purported to require consent of the Senate before the President could remove certain cabinet officers. President Andrew Johnson had been impeached in part for refusing to comply with the Act on the ground that it was unconstitutional. Yet the Supreme Court ultimately vindicated President Johnson, making clear in the process that despite the breadth of Congress's legislative powers, they are not unlimited and may unconstitutionally invade powers reserved to the President under the Constitution. Although nowhere mentioned in the Constitution, the President's removal power was held to be a necessary incident to his power of appointment, which was essential to its effective exercise and to the proper functioning of the executive branch. Congress acted unlawfully when it attempted to restrict or interfere with that exclusive presidential power.

The same is true of the President's power as Commander in Chief. The Congress cannot legislate in a manner that "impermissibly undermine[s] the powers of the Executive Branch," including the Commander in Chief power, "or disrupts the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions." Morrison v. Olson, 487 U.S. 654, 695 (1986) (internal quotations and citations omitted). The nation has only one Commander in Chief. To the extent Congress were ever to attempt to undermine or interfere with that power by taking for itself authority properly belonging to that Commander, it would act unconstitutionally.

The shared war powers of the Congress and the President

Although the President and the Congress each have important exclusive powers in the field of warfare - Congress primarily as provisioner and rulemaker for the armed forces and the President primarily as wielder of the forces thus created and governed - there are important areas of war power where the Constitution is silent as to which branch is to exercise power. In my view, these include most of the areas in which the Congress is now considering legislation. For example, the Constitution does not specify how an armed conflict is to be terminated. It does not specify who is to decide whether war aims are worth pursuing, or whether the cost of pursuing them at a given moment in time is too high. It does not say whether the President or the Congress is to determine what levels of national military and economic resources may be expended in the pursuit of those aims.

In these areas, I believe the power is shared - that is, both the Congress and the President have legitimate authority to express and give effect to their preferences, and national policy is

ultimately set through the interplay between the two branches. See generally United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). But the power is shared in a particular way - the interplay results in a particular balance between Congress and the President - which makes both constitutional and functional sense.

The first principle defining this interplay is that the President is the first mover. This means that, in the absence of contrary legislation, the President is entitled to set policy on these subjects, which fall into spheres where the institutional advantages of the Executive over a deliberative and legislative body such as the Congress make the President presumptively the best choice to guide the nation. See, e.g., The Federalist No. 70 (Hamilton) ("Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks."); id. No. 74 (Hamilton) ("Of all the cares or concerns of government, the direction of war most peculiarly demand those qualities which distinguish the exercise of power by a single hand."); see also The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force . . . without waiting for any special legislative authority."). Unlike Congress, whose powers are limited to those enumerated, the President, through the Vesting Clause, is endowed with the whole of the "Executive power." U.S. Const., art. II, sec. 1, cl. 1. The Vesting Clause provides the President a vast reserve of implied authority to do whatever may be necessary in executing the laws and governing the nation. See, e.g, Myers, 272 U.S. at 118 ("The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate . . ."). This plainly encompasses making the ongoing, critical decisions and judgments necessary to safeguard the national security and guide our relations, friendly or hostile, with foreign nations and foreign powers. Unlike the Congress, which must follow a constitutionally prescribed and somewhat cumbersome procedure for effecting its will, the President may simply decide and act in these spheres of his international and national security authority. As the Supreme Court has recognized on numerous occasions, the President's inherent authority is especially broad, and his primacy especially clear, in the realm of foreign affairs, military affairs, and intelligence activities. See, e.g., Department of the Navy v. Egan, 484 U.S. 518, 529 (1988); Harlow v. Fitzgerald, 457 U.S. 800, 812 n. 19 (1982); Ludecke v. Watkins, 335 U.S. 160, 173 (1948); Curtiss-Wright Export Co., 299 U.S. at 320.

But unlike the President's core Commander in Chief powers, the broader policy decisions relating to military affairs and the nation's overall defense posture are subject to review and, if legislation can be enacted, control by the Congress. Congress derives its authority in these areas from two principal sources: the Necessary and Proper Clause, and the Spending Clause. Through the Necessary and Proper Clause, Congress has general, residual authority to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers" and all other powers vested in the United States government. U.S. Const., art. I, sec. 8, cl. 18. More than two centuries of constitutional history make clear that this power is not narrowly limited to the specific powers enumerated in Article I but rather extends to any power of the government as a whole, see, e.g., In re Garnett, 141 U.S. 1, 12 (1891) (inferring congressional power to legislate in respect of the federal courts' admiralty and maritime jurisdiction), and, more broadly, to furthering by rational means legitimate constitutional ends of government not forbidden to the Congress, see McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819). Congress's power of the purse also gives it an abundant reserve of authority in the realm of military and defense

matters. Pursuant to the Spending Clause, U.S. Const., art. I, sec. 8, cl. 1, Congress may generally control the levels of spending on various governmental functions, including military spending, as well as the purposes for which federal tax dollars may be expended. Indeed, Congress's power of the purse is so broad that virtually all military activities directed by the President are inevitably, if implicitly, authorized by the Congress through its decisions to fund and not interfere with those activities.

The need to enact legislation to override the President's initial policy choices in these areas of shared power informs the second major principle of the interbranch interplay in this arena: when the Congress and the President disagree on important matters of defense or military policy, Congress can only bind the President if it assembles a veto-proof majority in favor of its view. Nothing short of legislation that complies with the presentment requirements of Article I, section 7, clause 2 of the Constitution could require the President to desist from his preferred course and obey that chosen by the Congress. See generally INS v. Chadha, 462 U.S. 919 (1983). Thus, where the President disagrees strongly enough with the contrary views of the Congress, he may veto the legislation setting forth those views, obliging the Congress to override his veto by a two-thirds majority of each House.

This produces a functionally sensible process and result. It means that in areas of shared war power where there is substantial interbranch disagreement, the President has strong incentives to engage in a public dialogue and debate with the Congress. He will have every reason to share what he knows with the legislature and explain his thinking and that of his military commanders, and to answer the objections and doubts raised by the Members. If disagreement nonetheless persists, a tie or anything close it goes to the Executive, whose overall constitutional primacy in military matters will therefore be respected. But if the President is unable to convince even a third of a single House of Congress that his position is correct - i.e., if there is a substantial consensus among legislators in both Houses of Congress that the President has chosen the wrong course - then the system will override the normal presumption in favor of the President's views and assume that, despite his institutional advantages, he is incorrect. In that case, Congress will set policy for the nation, and the President will be obliged to comply with that policy in all its constitutional applications.

This does not mean, of course that the President must obey whatever Congress enacts. As we have seen, it is possible that Congress could overstep its bounds and enact a restriction on military activity that would amount to a usurpation of the President's role as Commander in Chief of the nation's military. Neither the Necessary and Proper Clause nor the Spending Clause gives the Congress any power to contravene otherwise applicable constitutional requirements or to invade spheres of authority reserved to other branches of government. See, e.g, United States v. Lovett, 328 U.S. 303 (1946) (invalidating condition on appropriation that constituted a bill of attainder); United States v. Will, 449 U.S. 200 (1980) (invalidating appropriation measure that reduced judicial salaries). To take a hypothetical example, if Congress were to enact a law providing that no American soldier could be sent into combat without body armor, there would be a strong argument that such an enactment impermissibly interferes with the Commander in Chief's discretion to order lightly armed or lightly equipped troops to proceed by stealth into battle in appropriate circumstances. Or if Congress purported to forbid the President from sending particular units to Iraq, that, too, would likely be an unconstitutional infringement of the

President's power as Commander in Chief. But in my judgment, if the Congress could muster sufficient strength to enact a mandatory termination of the Iraq War over the President's veto, for example through a de-funding of the war effort, such an enactment would be facially constitutional.

Should the Congress attempt to enact restrictions on the President's ability to conduct the Iraq War - whether in the form of a blanket prohibition on continued hostilities or, more likely, through somewhat more limited or nuanced restrictions - careful analysis would be required to evaluate their constitutionality. Because the outer boundaries of the President's Commander in Chief powers are so poorly defined, it is exceedingly difficult to assess these questions in the abstract. And there may still be considerable uncertainty and room for reasonable, good faith disagreement as to specific proposals.

Moreover, even as to a restriction that all reasonable people could agree was constitutional on its face, it is important to recognize and remember that such a law might be unconstitutional in some of its applications. Precisely because it is impossible to envision all possible developments or events in a field of endeavor as chaotic and fast-moving as warfare, it is essential to retain a degree of humility and flexibility in assessing how the President implements such a law. It would ill serve the national interest for every instance of presidential non-compliance with laws in this area to be decried as presidential "lawbreaking," invoking the familiar tropes about the President not being above the law. I can assure you that the President does not regard himself as being above the law, but he does regard himself, properly, as having an overriding constitutional responsibility to protect our citizens, whether civilian or military. Notwithstanding anything the Congress may enact, the President as Commander in Chief at all times retains authority to direct actions that may be necessary to protect troops in field or to repel sudden attacks or deal with military exigencies.

Thus, even accepting that Congress might constitutionally direct that all combat activities in Iraq cease by December 31, 2007, if our troops were attacked while redeploying out of Iraq on December 30 and the battle raged several days into 2008, or if the President had to rush additional troops back into Iraq to reinforce those attacked, there would be no serious argument in my view that the legislation would be constitutional as applied to that situation or that the President acted unlawfully in doing what was necessary to meet that unexpected challenge and protect the lives of our troops. Or take the example of a troop ceiling: I believe it would probably be within Congress's constitutional authority to fund only a certain troop level in Iraq, but I do not believe the President could fairly be accused of breaking the law or violating his oath to take care that the laws be faithfully executed if he temporarily airlifted more troops into Iraq from a neighboring country to counter an unexpected assault on a previously peaceful part of Iraq located closer to our troops in that neighboring country than to other available troops already in Iraq. Or to take a final example, if Congress were to forbid the taking of any hostile action against a neighboring country such as Iran, that would not mean that the next day, Iranian forces could with impunity invade Iraq and attack our troops. In that event, the President would be well within his constitutional authority to respond until the situation could be stabilized.

Prudential considerations

These hypothetical examples help to illustrate one final, important principle: just because a particular course of action is within Congress's constitutional authority does not mean that authority should be exercised. Even if the Congress could be convinced that it had the power to limit the scope or duration of our effort in Iraq, that does not mean it would be wise or in the national interest to exercise that power. The policy considerations militating against legislative interference in an ongoing war effort can be (and have been) far better articulated by others, but no discussion of this topic would be complete without at least reminding the Committee that there may be weighty reasons to avoid the rigidity and formality of legislation in attempting to curtail an ongoing military conflict. The one law that would undoubtedly reign supreme in such a formal division between the legislature and the executive is the Law of Unintended Consequences. Whether because such a situation would embolden our enemies, demoralize our troops, limit the President's flexibility, cause other adversaries or potential adversaries to underestimate our national resolve and will to fight, retard our chances of pursuing a military strategy that might achieve victory, or touch off a refugee or other humanitarian crisis, extreme care should be taken before foreswearing efforts to use softer forms of power or persuasion to resolve disagreements with the President over war policy in favor of the blunt instrument of legislation.

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In closing, I wish to thank the Committee for the opportunity to address this important issue. Although I am broadly in agreement with other witnesses that Congress possesses constitutional authority through the Spending Clause and the Necessary and Proper Clause to enact legislation limiting in broad outline the scope, intensity, or duration of military conflict, I hope I have conveyed the considerable constitutional uncertainty that may attend the application of any such legislation and the need to proceed with caution. In all events, on matters of this seriousness, our system of government would be best served if all sides would commit themselves to ensuring that the discourse is civil, respectful, and high-minded and that partisan political considerations are put to one side. I would be glad to answer any questions the Committee may have.