Testimony of

David J. Barron

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A Hearing on
"Exercising Congress's Constitutional Power to End a War."
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Professor of Law, Harvard Law School*
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I would like to thank the Committee for inviting me to address the important constitutional issues that are the subject of this hearing and that in recent weeks have occasioned so much debate among lawyers, legal scholars, and the public at large. I have previously explained in a letter to congressional leaders, signed by myself and other constitutional law scholars, that Congress possesses substantial constitutional authority to regulate ongoing military operations, and even to bring them to an end. 1 I would like to elaborate on those conclusions here and to address more directly the claim that some commentators have been making of late - namely, that once military operations have begun the Constitution essentially prohibits Congress from using its war powers to do anything short of cutting off funding altogether.

In my view, there is simply no support in either the founding materials, the decisions of the Supreme Court, or the actual practices of the executive or legislative branches for a rule that would so dramatically circumscribe Congress's powers in a time of war. Though congressional war powers are not plenary, neither do they limit the legislature solely to reliance upon a complete termination of funding in regulating the scope, duration or size of a military operation. To the contrary, our constitutional tradition shows that measures such as those now being considered concerning military operations in Iraq - whether they place caps on troop levels, restrictions on the introduction of new troops, or establish a date certain by which troops must be redeployed - are clearly constitutional exercises of well-established congressional war powers.

The clearest sources of congressional authority to regulate ongoing military operations are to be found in the spending powers the Constitution gives to the legislative branch. A military operation necessarily requires the expenditure of considerable funds. The Congress is alone vested with the constitutional power to appropriate money from the Treasury, and it is given specific spending powers with respect to the Army and Navy.2 Thus, Congress, acting pursuant to those powers, may clearly end a military conflict by denying the funds necessary to continue it (allowing, of course, as any sensible legislation should, for force to be used during the period of time necessary to effectuate an orderly and safe withdrawal.). There is a consensus among scholars on precisely this point, and I do not believe that it may be seriously questioned. In fact, I do not even believe the current Administration disagrees with it.3 And because increases in the size, scope or duration of a conflict themselves necessarily require new expenditures, these same powers also enable Congress to take the more modest step of barring the use of appropriations to

maintain or increase the forces that may be committed to a war, even if it is not finally terminated.4

It bears emphasis, however, that legislative war powers are not solely a function of Congress' s power of the purse. The Constitution names the President as the Commander in Chief, but it also expressly confers upon Congress an impressive array of war powers that are not tied to its general appropriations power (for example, the power "to make rules for the government and regulation of the land and naval forces.").5 Thus, Congress's authority over the conduct of war is more than a byproduct of its de facto power over the money that governmental operations always require. It is the intended consequence of the Founders' desire (made express in the constitutional text) to give the national legislature a range of war powers, and with them, the de jure right to exercise the checking function in wartime (whether by enacting funding limits or imposing direct prohibitions) that is the hallmark of our system of separated powers more generally.6

Indeed, the Constitution's sundry grants of congressional war powers led Chief Justice Marshall early in our history to conclude that "[t]he whole powers of war [are], by the Constitution of the United States, vested in Congress .... ,,7 Whatever nuances that statement fails to include, it does reflect the basic understanding, repeatedly reaffirmed by the Supreme Court, that constitutional war powers are shared by both branches. Both Youngstown Sheet & Tube Co. v. Sawyer (the Steel Seizure case), and the Supreme Court's more recent decision in Hamdan v. Rumsfeld make that much perfectly clear, as each invalidated assertions of presidential war time power that conflicted with statutory limitations.

Notwithstanding this precedent, some have argued that Congress's power over appropriations, like its power under the numerous other constitutional clauses identified above, is severely constrained when military hostilities are actually underway. They have suggested that the outbreak of hostilities cuts short, in effect, the broad authority that the Congress otherwise enjoys over the use of military force.

This argument is usually framed in terms of a constitutional concern about congressional micromanagement of military operations in the field, which is intended to recall problems relating to the Continental Congress's detailed oversight of George Washington's own authority as the Commander in Chief during the Revolutionary War. In response, the Continental Congress did give General Washington much greater discretion than his initial commission conferred, but, significantly, it did so by congressional act and without ever disavowing a legal power to exercise ongoing control over that conflict. The micromanagement concern is also said to find support in dicta in two concurrences from Supreme Court cases-Chief Justice Chase's opinion in Ex Parte Milligan,10 and Justice Jackson's concurrence in Youngstown11 -that arguably raise concerns about statutory limits on ongoing military operations, though no Supreme Court decision has ever invalidated a statute on those grounds.

Against this suggestion, however, is the fact that the Supreme Court has often described the scope of Congress's powers over the conduct of war in quite broad terms. The Court, during World War II, made clear that the two branches' shared power in this regard "extends to every matter and activity so related to war as substantially to affect its conduct and progress." That power "is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the

members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress ofwar."12 The Court also explained during that same conflict that the President's authority as
Commander in Chief is "to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war."13

The concern about micromanagement is rarely specified in any detail, and thus those who raise it are not always clear in identifying its bounds. Perhaps it is meant to address the hypothetical prospect of a Congress actually attempting to assume day-to-day control over tactical judgments through the enactment of repeated statutes intended to override the chief commander's judgments. If so, the fact that the President possesses the veto power indicates that such a strange turn of events could only be effectuated if both the House and the Senate managed to muster consistent and repeated super-majorities, making it a necessarily remote possibility. But even if circumstances short of such a persistent legislative attempt to wrest day-to-day control might he hypothesized in which the micromanagement concern would not be without substance, its scope must of necessity still be a confined one.

The constitutional text reflects, after all, a vital competing concern that must be kept in mind - namely, a concern about the absence of adequate legislative checks on executive action in wartime. And while there is no direct support for the view that the Congress is powerless to limit the conduct of war by statute, there is abundant evidence revealing the Framers' concerns about such unchecked presidential authority. The founding generation obviously did not intend to recreate a chief executive who would in effect be beyond control, especially in military affairs. This concern is reflected even today in the worries that are from time to time expressed about the legislature abdicating its constitutionally assigned oversight role, worries which make sense only if the constitutional plan is understood to give the legislature authority over military operations already underway. Thus, the notion of what might constitute impermissible micromanagement cannot be so expansive as to leave the national legislature with no choice but to confer upon the Commander in Chief a "blank check," immune from even modest revision, whenever it first decides to authorize the use of military force.

In consequence, between the extreme poles of outright abdication and what might be thought to be undue micromanagement, there necessarily lies a substantial zone within which the Congress retains authority over the conduct of war. In my judgment, proposals to set flat caps on troop levels, limit the introduction of additional forces into the theater of operations, or to bring the deployment itself to an end through curtailment of funds fall well within that permissible zone of authority.

Such measures would not undermine the one specific wartime power that the Constitution does clearly assign to the President - that he and no other executive officer be the chief superintendent of the armed forces. The measures now being considered do not in any respect interfere with the constitutionally established internal chain of military command. They do not attempt to countermand the President's judgment as to who within the military may command the forces in the field. Nor do they regulate the President's power of superintendence over the armed forces

that have been made available to him by interfering with the way information may flow up or down the line. They simply define the amount of resources that the President will have under his unified and unchallenged command. For that reason, they cannot be said to be inconsistent with the Constitution's designation of the President as being the chief officer within the military hierarchy.

In addition, such measures clearly do not amount to legislative attempts to usurp anything like the day-to-day operational control over the minutiae of ongoing military that some have pointed to in attempting to give substance to the concern about micromanagement. In fact, the measures now under consideration concerning Iraq are the first to revisit the scope and duration of the conflict since the initial authorization was passed years before. In doing so, these measures do not tell the chief commander, or any military officer, to take a certain hill or to mount a particular offensive. They do not even establish how the troops in the field should be deployed within the existing theater of combat. Indeed, they do not instruct the president to use a single soldier in the field in any particular way. They instead deny the President the funds that would be required in order for him to introduce new troops into the field, set the maximum number of troops that may be in the field as of a date certain, or require those troops now in the field to leave it altogether as a means of bringing the once authorized military engagement to a close. Such rule-like definitions of the nature, size and duration of the force available to the President - which touch not at all upon his power to command those forces already in the field -- cannot seriously be equated, therefore, with statutes that would purport to set the date for D-Day or instruct a particular platoon to take a certain hill on a certain date or any of the other remote hypotheticals that some offer as examples of what they believe would constitute impermissible micromanagement.

In sum, the measures now under consideration all afford the President broad latitude over tactical questions concerning those forces that are authorized to be in the field, for so long as that authorization lasts. But that, of course, is the full extent of the power that one Congress may ever confer on the President when it authorizes him to use military force, unless one accepts the dangerous doctrine that a President who has been given the power to go to war by one legislature becomes at that moment essentially free of subsequent legislative constraint altogether. As a result, whether or not Congress could enact even more restrictive measures, as it is has on occasion done, measures of the type now being considered clearly fall within Congress's war powers just as did the statute initially authorizing the use of military force in Iraq (and not any place the President should choose), even though it, too, identified certain bounds within which the
President's authority was to be exercised.

Of equal importance, the proposed restrictions on military operations in Iraq are legally indistinguishable from many other statutory limitations on the scope and duration of war that have been enacted throughout our history, sometimes even in the midst of hostilities. For its part, the Supreme Court has never held a measure imposing such bounds to have crossed whatever constitutional line the concern about micromanagement may set. To the contrary, Little v. Barreme, which arose out of the undeclared, so-called "Quasi-War" with France at the end of the Eighteenth Century, affirmed the congressional power to impose quite specific constraints on the scope and terms of the prosecution of that conflict. In that instance, the Court held unlawful an

order from the Commander in Chief to a subordinate military officer concerning what ships could be seized at sea, on the ground that a statutory restriction on such interdiction was controlling. 14

Even during the Civil War, President Lincoln, who can hardly be said to have had a modest view of his powers as Commander in Chief, did not assert a right to act in contravention of the statutory limitations on his conduct of the war that he confronted - and he repeatedly acknowledged Congress's constitutional authority to check his action through duly enacted statutes. Among the statutes with which he complied were some that intruded far more deeply into tactical judgments than those now being contemplated. These were the so-called Confiscation Acts, which instructed him to have his troops seize enemy property in the midst of battle, notwithstanding his own strategic preference to avoid having them do SO.15

More recently, similar limitations, and some essentially identical to those now being considered, have been enacted in the midst of a number of military conflicts, taking the form of both direct prohibitions and restrictions on the use of appropriated funds. 16 Perhaps the most well known of these are the ones Congress enacted during the Vietnam War to prohibit the expenditure of funds on hostile actions in Laos and Cambodia.17

Significantly, then-Assistant Attorney General William Rehnquist, who was later to become the Chief Justice of the United States, issued a legal opinion during the Nixon Administration that endorsed Congress's power to continue to define and establish parameters for military operations under way. He noted that "Congress undoubtedly has the power in certain situations to restrict the President's power as Commander in Chief to a narrower scope than it would have had in the absence of legislation,"18 citing as a precedent accepted by the executive a restriction that had been enacted in the midst of the Vietnam War.19 Rehnquist did note that separation-of-powers problems "would be met in exacerbated form should Congress attempt by detailed instructions as to the use of American forces already in the field to supersede the President as Commander in Chief of the armed forces,"20 but that statement was itself carefully limited (and is of course inapplicable here). Rehnquist raised no constitutional objections about measures that would not in any way instruct the chief commander as to how he could use those troops that were actually already in the theater of operations. And, as I have explained, the measures now being considered contain no such instructions.

A conclusion that the Commander in Chief enjoys an illimitable power to escalate or augment a military campaign that was authorized years earlier, and presumably thus to retain the power in connection with it to use, as he sees fit, any of the million persons that may be enlisted in the armed forces at a given time, is simply not consistent with the principles that animated the delineation of war powers set forth in the Constitution's text. The Framers were too concerned about unchecked executive power, especially in times of war, to countenance such a notion. Not surprisingly, therefore, such a conclusion is not supported by either the rulings of the Supreme Court or the more than two centuries of actual practice of the political branches themselves. In consequence, there is no basis for adjudging a restriction on troop increases, a cap on troop levels, or the establishment of a date certain for troop redeployment as being anything other than legitimate and constitutional.

* Affiliation for identification purposes only.

1. See Letter from Constitutional Law Scholars to Congressional Leaders Concerning Constitutionality of
Statutory Limitations on Troop Increase in Iraq, January 17,2007.

2. U.S. Const. art. I, s. 9, cl. 7 (fiNoMoney shall be drawn from the Treasury, but in Consequence of
Appropriations made by Law ...."); See U.S. Const. art. I, sec. 8, cl. 12.

3. Vice President Cheney has been quoted as saying, in this regard, that: "Congress has control over the
purse strings. They have the right, obviously, if they want, to cut off funding," See Associated Press,
Cheney Defends Bush on Iraq, (January 25,2007), available at htto:llwww.msnbc.msn.com/ idI1679 1858/
(last visited January 27,2007).

4. This conclusion comports with James Madison's statement in the Federalist papers that the power of the
purse is the "most complete and effectual weapon ... for addressing every grievance, and for carrying into
effect every just and salutary measure." See The Federalist No. 58, at 359 (James Madison). It also
accords with the specific constitutional provision requiring that any appropriation for the raising of armies
shall expire after two years, thereby ensuring - indeed, mandating -- an ongoing congressional role as to the
deployment of the armed forces. See U.S. Const. art. I, sec. 8, cl. 12.

5. These include the authority to raise revenues and pay debts so as to "provide for the common defence,"U.S. Const. art. I, sec. 8, cl. I; to define and punish piracies and felonies committed on the high
seas and offenses against the law of nations, id. cl. 10; to declare war, grant letters of marque and reprisal,
and make rules concerning captures on land and water, id. cl. II; to raise and support armies, but no
appropriation of money to that use shall be for a longer term than two years, id cl. 12; to provide and
maintain a navy, id cl. 13; to make rules for the government and regulation of the land and naval forces, id
cl. 14; to provide for calling forth the militia to execute the laws ofthe union, suppress insurrections and
repel invasions, id cl. 15; to provide for organizing, arming, and disciplining the militia and for governing
such part of them as may be employed in the service of the United States, reserving to the states
respectively, the appointment of the officers and the authority of training the militia according to

the
discipline prescribed by Congress, id. cl. 16; and to make all laws which shall be necessary and proper for
carrying into execution the foregoing powers, and all other powers vested by this Constitution in the
Government ofthe United States or any Department thereof, id. cl. 18.

6. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will
integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but
interdependence, autonomy but reciprocity."343 U.S. at 645 (Jackson, J., concurring).

7. Talbot v. Seeman, 5 U.S. (1 Cranch) 1,28 (1801).

8. 343 U.S. 579 (1952).

9. 126 S. Ct. 2749 (2006).

10. 4 U.S. 2 (Wall.) at 139-140 (Chase, C.J. concurring in the judgment). This dictum is repeated in Hamdan,
126 S.Ct. at 2773-2774 (2006).

11. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645-46 (Jackson J., concurring).

12. Hirabayashi v. United States, 320 U.S. 81, 93 (1943).

13. Ex Parte Quirin, 317 U.S. 1,26 (1942) (emphasis added).

14. 6 U.S. (2 Cranch) 170 (1804).

15. See 12 Stat. 319 (1861); Act of July 17, 1863, § 5, 12 Stat. 590.

16. See, e.g.. U.S. Public Law No. 93-559, sec. 38 (F) (1)-(2). The Foreign Assistance Act of 1974 (imposing
a personnel ceiling of 4000 Americans in Vietnam within six months of enactment and 3000 Americans
within one year); U.S. Public Law No. 98-43, sec. 4(a), The Lebanon Emergency Assistance Act of 1983
(mandating that the President return to seek statutory authorization as a condition for expanding the size of
the U.s. contingent of the Multinational Force in Lebanon); U.S. Public Law No. 91-652, The Supplemental Foreign Assistance Act of 1971, sec. 8 (prohibiting the use of any funds for the introduction
of U.S. troops to Cambodia or provision of military advisors to Cambodian forces without prior notification
of the congressionalleadership.).U.S. Public Law No. 93-50, sec. 307, The Second Supplemental

Appropriations Act of 1973 ("None of the funds herein appropriated under this act may be expended to
support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam, and South
Vietnam by United States forces, and after August 15, 1973, no other funds heretofore appropriated under
any other act may be expended for such purposes.); U.S. Public Law No. 98-215, sec. 108, The Intelligence
Authorization Act for Fiscal Year 1984 (Boland Amendment, prohibiting certain covert military assistance
in Nicaragua); U.S. Public Law No. 103-139, sec. 8151(b)20(B), The Department of Defense
Appropriations Act, 1994 (limiting the use of funding in Somalia for operations of U.S. military personnel
only until March 31, 1994, and permitting expenditure of funds for the mission thereafter only if the
President sought and Congress provided specific authorization); U.S. Public Law no. 105-85, sec. 1203,
The National Defense Authorization Act for Fiscal Year 1998 (prohibiting funding for Bosnia "after June
30, 1998, unless the President, not later than May 15, 1998, and after consultation with the bipartisan
leadership ofthe two Houses of Congress, transmits to Congress a certification- (1) that the continued
presence of United States ground combat forces, after June 30, 1998, in the Republic of Bosnia and
Herzegovina is required in order to meet the national security interests of the United States; and (2) that
after June 30, 1998, it will remain United States policy that United States ground forces will not serve as, or
be used as, civil police in the Republic of Bosnia and Herzegovina.").

17. Pub. L. No. 91-652, § 7(a), 84 Stat. 1943 (1971).

18. The President and the War Power: South Vietnam and the Cambodian Sanctuaries (May 22,1970), at
http://www.stanford.edul group/lawreview /content/issue6/bybee appendix.pdf..

19. Id.at 21.

20. Id. at 21.