EXERCISING CONGRESS'S CONSTITUTIONAL POWER TO END A WAR (Without in the Process Breaking the Law)

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prepared statement of

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About the Witness

Professor Robert F. Turner holds both professional and academic doctorates from the University of Virginia School of Law, where in 1981 he co-founded the Center for National Security Law. He has also served as the Charles H. Stockton Professor of International Law at the Naval War College and a Distinguished Lecturer at the U.S. Military Academy at West Point. In addition to teaching seminars on Advanced National Security Law at the law school, for many years he taught International Law, U.S. Foreign Policy, and seminars on the Vietnam War and Foreign Policy and the Law in what is now the Woodrow Wilson Department of Politics at Virginia.

A veteran of two voluntary tours of duty as an Army officer in Vietnam, Dr. Turner has spent much of his professional life studying legal and policy issues related to war and peace. Senator John Tower wrote the foreword to his 1983 book *The War Powers Resolution: Its Implementation in Theory and Practice*; and former President Gerald Ford wrote the foreword to *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (1991). Dr. Turner wrote the separation-of-powers and war powers chapters of the 1400-page law school casebook, *National Security Law,* which he co-edits with Professor John Norton Moore. Turner's most comprehensive examination of these issues, *National Security and the Constitution,* has been accepted for publication as a trilogy by Carolina Academic Press and is based upon his 1700-page, 3000-footnote doctoral dissertation by the same name.

Professor Turner served for three terms as chairman of the prestigious ABA Standing Committee on Law and National Security in the late 1980s and early 1990s and for many years was editor of the ABA *National Security Law Report*. He has also chaired the Committee on Executive-Congressional Relations of the ABA Section of International Law and Practice and the National Security Law Subcommittee of the Federalist Society.

His academic expertise is supplemented by many years of governmental service, including five years during the mid-1970s as national security adviser to Senator Robert P. Griffin with the Foreign Relations Committee and subsequent Executive Branch service as Special Assistant to the Under Secretary of Defense for Policy, Counsel to the President's Intelligence Oversight Board at the White House, and acting Assistant Secretary of State for Legislative and Intergovernmental Affairs in 1984-85. His last government service was as the first President of the U.S. Institute of Peace, which he left twenty years ago to return to the University of Virginia.

The views expressed herein are personal and should not be attributed to the Center or any other entity with which the witness is or has in the past been affiliated.

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Mr. Chairman and members of the Committee. It is a great pleasure to appear before you once again this morning. The issue before us is one of great importance to the nation and to the principle of the rule of law. As this hearing will demonstrate, it is also an issue about which honest and able scholars can profoundly disagree.

Introduction

Because I think it is so critical to these issues, I will spend a few minutes at the start addressing the original understanding of the constitutional paradigm regarding the separation of powers between Congress and the President related to war and foreign affairs. Secondly, on the basis of that understanding, I will argue that the Constitution gave the President a considerable amount of discretion in these areas that was *not intended to be checked* by either Congress or the Judiciary — including what John Jay described as 'the business of intelligence"[1] and the conduct of war and diplomacy.

This is not to suggest that Congress and the Senate don't have important roles relative to these areas. The commander-in-chief power[2] itself is a conditional authority, and until Congress "raises and supports" an army[3] or "provides and maintains" a navy,[4] the President has no military force to "command." One-third-plus-one of the Senate can exercise a "negative" over presidential ratification of a treaty,[5] and a majority can block the appointment of diplomats and military officers.[6] The President can spend no money from the Treasury without "Appropriations made by law."[7] Each of these powers is, and was intended by the Founding Fathers to be, important. So my third point is that, in virtually any large-scale and sustained military operation, the Constitution effectively vests Congress with the constitutional power to end a war—as the title of today's hearing suggests. By refusing new appropriations and rejecting requests for new troops and supplies, Congress can virtually assure that American military forces and/or allies who rely upon our assurances will be defeated and our enemies will prevail on the battlefield.

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[1] As I discussed during my testimony before this Committee on February 28 and March 31 of last year, in *Federalist* No. 64 John Jay explained that because Congress could not be trusted to keep secrets, the new Constitution had left the President "able to manage the business of intelligence as prudence may suggest."
[2] U.S. CONST., Art. II, Sect. 2.
[3] *Id.* Art. I, § 8, Cl. 12.
[4] *Id*. Cl. 13.
[5] *Id*. Art. II, § 2, Cl. 2.
[6] *Id*.
[7] *Id*., Art. I, § 9, Cl. 7.

My fourth point is that the Founding Fathers viewed the powers of Congress and the Senate related to war and foreign affairs as "exceptions" to the general grant of "executive Power" vested in the President; and, as such, these powers were intended to be strictly construed. Neither Congress nor the President may properly exercise their own powers in a manner that usurps the constitutional authorities of the other, and when Congress attempts to control decisions vested by the people in the discretion of the President it becomes a "lawbreaker." In candor, in recent decades I have witnessed far more lawbreaking by Congress in the national security realm than by the President.

My final point, Mr. Chairman, may be the most important one: *Consider the consequences.* Even if Congress has the constitutional power to cut off food and ammunition to our forces at war and ultimately guarantee a victory in Iraq for those who have been killing our forces and engaging in the wholesale and brutal slaughter of the people of Iraq – be they members of al Qaeda in Iraq, followers of pro-Iranian factions, or other radical groups – I beseech you to *think through the wisdom* of taking such action. There is a reason the Framers vested considerable discretion in the President in this area, and unconstitutional efforts by Congress to usurp that discretion since 1970 have led to the unnecessary slaughter of millions, the consignment to totalitarian tyranny of tens of millions, the needless deaths of large numbers of our own military forces, and quite possibly contributed to the slaughter of 3000 innocent people on September 11, 2001.

I recognize that these are strong and serious charges, but they are not hyperbole. I hope you will bear with me as I add some substance to this outline and endeavor to document the points I have made.

The Original Understanding of the War/Foreign Affairs Constitutional Paradigm

I submit it is important to start this inquiry by examining the original understanding of the Constitution and its interpretation between 1787 and about 1970, when—during the heated national debate over the war in Vietnam—America virtually suffered a hard drive crash here at home. Understandings about constitutional separations of powers that had historically been embraced by all three branches of government were suddenly forgotten by almost everyone, and a new generation of scholars and politicians began looking anew at the constitutional text in search of new theories and paradigms.

Seeking to ascertain the original understanding is hardly the *only* step in constitutional interpretation, but it is nevertheless an important part of the

process. Words are an imperfect instrument for conveying ideas, and sometimes outside of context words can be ambiguous. Even more important, some words used by the Framers of our Constitution have over the years lost all or part of their original meaning. Thus, if we were to learn that a prominent supporter of the Constitution in 1787 later declared that it was an "awful" document, our understanding of his sentiments would be furthered by the knowledge that in the eighteenth century the word "awful" meant something that filled one with awe or was awe inspiring.[8]

Terms like "declare War"[9] and "executive Power"[10] had clear meanings to the authors of our Constitution, who as a group were remarkably well-read men and were familiar with the writings of Grotius, Vattel, Lock, Montesquieu, and Blackstone. And when we seek to understand such language without comprehending those meanings we run a great risk of going astray. To the authors of our Constitution, the term "militia" referred to the able-bodied men of military age in each state who were subject to being called up to perform their civic duty in the event of foreign invasion, rebellion, or a similar contingency. Yet how many "experts" today, in ignorance of that reality, contend that the Second Amendment's guarantee of a "well-regulated militia" was intended merely to permit states to maintain an armory for use by its "national guard"?

So I hope you will bear with me a bit while I rewind the clock to the late eighteenth century and examine some of the writings of men like Thomas Jefferson, George Washington, John Marshall, and the three authors of the *Federalist Papers* to help us understand the constitutional text. In particular, it is imperative that we understand that they interpreted the term "executive Power" in Article II, Section 1, as that term was used by writers like John Locke, Montesquieu, and William Blackstone.

My academic interest in these subjects was first sparked more than four decades ago, when as an undergraduate I heard a lecture by the great Quincy Wright. Professor Wright, as you may know, served as President of the American Society of International Law and both the American and the International Political Science Association. His 1922 treatise on *The*

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[8] I found a number of Web sites that discuss this change in meaning. See, e.g., http://www.bethel.edu/~dhoward/resources/WORDSTUDIESMETHOD.htm.
("Similarly, English *awful* comes from *awe* and *full*, i.e., 'full of awe.' The word's history is meaningful in a phrase such as 'the awful presence of God': here, the idea is that God's presence is of such a nature that it calls forth a response of awe when it is experienced. However, *awful* usually does not have this meaning [today] in English usage. Rather, it means 'terrible, horrible,' as in 'The train wreck was an *awful* catastrophe.' To appeal to the etymology of *awful* in this case would result in little understanding of what happened.")

[9] U. S. CONST., Art. I, Sec. 8, Cl. 11.

[10] *Id*. Art. II, Sec. 1.

Control of American Foreign Policy remains a classic in the field. And in that volume he observed that "when the constitutional convention gave 'executive power' to the President, the foreign relations power was the essential element in the grant, but they carefully protected this power from abuse by provisions for senatorial or congressional veto."[11]

Fifty years later, writing in *Foreign Affairs and the Constitution*, Columbia Law School Professor Louis Henkin added: "The executive power . . . was not defined because it was well understood by the Framers raised on Locke, Montesquieu and Blackstone."[12] But that observation doesn't tell us very much unless we are familiar with the separation-of-powers writings of those great scholars.

Let us look first at John Locke, who a century before our Constitution went into force coined the term "federative power" in his *Second Treatise on Civil Government* to denote the control of decisions involving "war, peace, leagues, and alliances." Locke placed the federative power in the same hands as the "executive" power. The gist of his arguments was that the successful management of war and foreign affairs required the attributes of unity of plan, secrecy, and speed and dispatch. And since large, deliberative legislative assemblies are inherently lacking in those competencies, and further are unable to anticipate all of the developments that might occur on a battlefield or in foreign negotiations, these matters must of necessity be entrusted to the prudence of the executive to be managed for the common good. Consider this excerpt:

> These two Powers, Executive and Federative, though they be really distinct in themselves, yet one comprehending the Execution of the Municipal Laws of the Society within its self, upon all that are parts of it; the other **the management of the security and interest of the publick** [*sic*] **without,** with all those that it may receive benefit or damage from, yet they are always almost united. And though this federative Power in the well or ill management of it be of great moment to the commonwealth, yet it is **much less capable to be directed by antecedent, standing, positive Laws, than** [by] **the Executive; and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick** [*sic*] **good**. . . . [W]hat is to be done in reference to Foreigners, depending much upon their actions, and the variation of designs and interest, must be left in great part to the Prudence of those who have this Power committed to them,

[11] QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 147 (1922).
[12] LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 43 (1972).

> to be managed by the best of their Skill, for the advantage of the Commonwealth.[13]

Other publicists whose writings were highly influential on the Founding Fathers characterized foreign affairs (including war) as a component of the "executive" power. In 1748, Montesquieu — characterized by James Madison in *Federalist* No. 47 as "[t]he oracle who is always consulted and cited" on the subject of separation of powers[14] — reasoned that "[i]n every government there are three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive in regard to matters that depend on the civil law." He explained that by the first of these "executive" powers, the prince or magistrate "makes peace or war, sends or receives embassies, establishes the public security, and provides against invasion."[15]

Similarly, in the late 1760s, Sir William Blackstone published his four-volume *Commentaries on the Laws of England*, and observed that the King of England "is and ought to be absolute" in his "executive" prerogative with respect to "this nation's intercourse with foreign nations," adding that with respect to treaties, pardons, and "this nation's intercourse with foreign nations" there is "no legal authority that can either delay or resist him" save as expressed in the Constitution.

> [T]he executive part of government . . . . is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government: and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation . . . . With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. . . . *What is done by the*

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[13] JOHN LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT §147 (1689) (bold emphasis added).

[14] THE FEDERALIST NO. 47 at 324 (Jacob E. Cooke, ed. 1961) (Madison).

[15] 1 BARON DE MONTESQUIEU (CHARLES DE SECONDAT), SPIRIT OF THE LAWS 151 (Thomas Nugent, ed. 1900).

> *royal authority, with regard to foreign powers, is the act of the whole nation . . . .*[16]

And if you think such a description has nothing to do with the American Executive, consider this 1800 statement by Representative John Marshall (Fed.-Va.) "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . He possesses the whole Executive power. . . . *In this respect the President expresses constitutionally the will of the nation*."[17]

One of the many myths that we often hear about the American Revolution is that our ancestors were rejecting the British constitutional system. But when Thomas Jefferson wrote his powerful *Summary View of the Rights of British America*[18] in 1774, his complaint was not that the British Constitution was inherently bad, but rather that it had been corrupted and abused by both King and Parliament so as to deny the colonial subjects their fundamental rights. Few, if any, American leaders were more hostile to Great Britain than Jefferson. Yet, in a letter to John Adams written shortly after the Federal Convention had adjourned, Jefferson acknowledged that the English Constitution was "better than all which have proceeded it . . . ."[19] Pulitzer Prize-winning historian Professor Gordon S. Wood, of Brown University, observed in *The Creation of the American Republic 1776-1787* that the American colonists "revolted not against the English constitution but on behalf of it."[20]

Why am I so certain the Founding Fathers viewed foreign affairs as a component of the "executive Power" vested in the President in Article II, Section 1, of their new Constitution? Because they discussed it repeatedly. During the First Session of the First Congress, Representative James Madison introduced a bill to establish a Department of Foreign Affairs. It was a very simple bill that could fit on a single page, essentially declaring that the department was hereby established and was to be headed by a Secretary who was to conduct the business of said department as directed by the President. As Johns Hopkins scholar Charles Thach explained in his 1922 classic, *The Creation of the Presidency 1775-1789*:

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[16] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 242-45 (1765) (emphasis added).

[17] 10 ANNALS OF CONG. 613-15 (1800) (emphasis added).

[18] 1 THE PAPERS OF THOMAS JEFFERSON 121 (Julian P. Boyd, ed., 1950). This classic summary of the causes of the American Revolution is also available on line at http://www.yale.edu/lawweb/avalon/jeffsumm.htm .

[19] *Jefferson to Adams,* Sept. 28, 1787, *in* 12 PAPERS OF THOMAS JEFFERSON 189 (Julian Boyd, ed. 1955).

[20] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 at 10 (1969).

> The sole purpose of that organization was to carry out, not legislative orders, as expressed in appropriation acts, but the will of the executive. In all cases the President could direct and control, but in the 'presidential' departments [war and foreign affairs] he could determine what should be done, as well as to how it should be done. …**Congress was extremely careful to see to it that their power of organizing the department did not take the form of ordering the secretary what he should or should not do.**[21]

During the debate on Madison's bill, a question arose about who could remove the Secretary once appointed by the President with the advice and consent of the Senate. Madison carried the day by observing that the Constitution has vested the nation's "executive power" in the President, the appointment or removal of an executive officer was by nature "executive" business, and the Senate had only been joined in the *appointment* and not the removal part of that process. As Madison explained his view (which prevailed in both the House and the Senate) to a colleague from the Philadelphia Convention in reporting on the important debate: "[T]he Executive power being in general terms vested in the President, all powers of an Executive nature, not particularly taken away must belong to that department. . . ."[22]

I would submit that this is an important precedent, and that the same logic that narrowly construed the Senate's role in executive appointments might also have relevance in the debate on the scope of the congressional power "to *declare* War." For, as I will demonstrate, that power was also recognized as an "exception" to the President's general grant of executive power.

John Jay was by far America's most experienced diplomat, and not surprisingly George Washington tapped him to be the new nation's first Secretary of Foreign Affairs. But Jay had also served as Chief Justice of New York, and he persuaded the President to appoint him Chief Justice of the United States – a move that opened the way for Thomas Jefferson, who was just returning from his post as U.S. Minister to France, to be named Secretary of Foreign Affairs. (The department was soon renamed "Department of State" when additional duties, like keeping the national seal and issuing commissions to executive officers and judges, were attached to the job.)

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[21] CHARLES C. THACH, THE CREATION OF THE PRESIDENCY 1775-1789 at 160 (bold emphasis added).

[22] *Madison to Edmund Pendleton*, 21 June 1789, *in* 5 WRITINGS OF JAMES MADISON 405-06 n. (Gaillard Hunt, ed. 1904).

Soon after taking office, Jefferson was asked by President Washington where the Constitution has vested all of the decisions regarding foreign affairs that were not expressly addressed in the text of the document. Jefferson provided this response:

> The Constitution . . . . has declared that "the Executive power shall be vested in the President," submitting only special articles of it to a negative by the Senate . . . .
> **The transaction of business with foreign nations is executive altogether**; it belongs, then to the head of that department, except as to such portions of it as are specially submitted to the Senate. Exceptions are to be construed strictly.[23]

One week later, President Washington made this entry in his diary:

> "Tuesday, 27th [April 1790]. Had some conversation with Mr. Madison on the propriety of consulting the Senate on the places to which it would be necessary to send persons in the Diplomatic line, and Consuls; and with respect to the grade of the first—His opinion coincides with Mr. Jay's and Mr. Jefferson's—to wit—that **they have no Constitutional right to interfere** with either, and that it might be impolitic to draw it into a precedent, their powers extending no farther than to an approbation or disapprobation of the person nominated by the President, all the rest being **Executive** and vested in the President by the Constitution.[24]

So we have Thomas Jefferson, George Washington, America's first Chief Justice, and two of the three authors of the *Federalist Papers* clearly on record as believing that the business of foreign affairs was vested *exclusively* in the President as part of the "executive Power" contained in Article II, Section 1, save for those narrowly construed "exceptions" clearly vested in Congress or the Senate. But, obviously, there were sharp differences of opinion among the Founding Fathers on many issues, so it is useful to consider the views of Jefferson's key rival at the time and the third contributor to the *Federalists*. Alexander Hamilton, too, addressed this issue – most clearly in his first *Pacificus* essay in 1973:

> The general doctrine of our Constitution . . . is that the executive power of the nation is vested in the President; subject only to the

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[23] *Jefferson's Opinion on the powers of the Senate Respecting Diplomatic Appointments,* April 24, 1790, in 3 THE WRITINGS OF THOMAS JEFFERSON 16, 17 (Mem. ed. 1903) (bold italics added).

[24] 4 DIARIES OF GEORGE WASHINGTON 122 (Regents' Ed. 1925) (bold emphasis added).

> exceptions and qualifications which are expressed in the instrument. . . .
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> It deserves to be remarked, that as the participation of the Senate in the making of treaties, and **the power of the Legislature to declare war**, are **exceptions out of the general "executive power" vested in the President**, they are **to be construed strictly**, and ought to be extended no further than is essential to their execution.
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> While, therefore, the Legislature can alone declare war, can alone actually transfer the nation from a state of peace to a state of hostility, it belongs to the "executive power" to do whatever else the law of nations . . . enjoin in the intercourse of the United States with foreign Powers.[25]

This might be an appropriate time to make another observation. On August 17, 1787, James Madison and Elbridge Gerry (who later served as Madison's Vice President) moved during the Constitutional Convention to deny Congress the power to "make" war and substitute instead the power to "declare" war.[26] There are some differences in the surviving notes on this debate (which was conducted under rules of strict secrecy), but the final vote appears to have been 8-to-1 in favor of the Madison-Gerry motion, with only New Hampshire in the end voting in the negative. And a key argument in the debate for denying Congress the power to "make" war was made by Rufus King — that "'make' war might be understood to 'conduct' it which was an *Executive* function."[27] As I will discuss below, it is significant that a motion to take from the President the executive power "of peace" – that is, to give Congress the power to *end* a war – was considered and then *rejected* by a vote of 0 to 10 states. This is not to suggest that Congress lacks the power to end a war merely by refusing to appropriate new funds or to raise military forces. But from this record it is difficult to make a case that the Framers intended to give Congress the power to simply direct that the President end a war.

Accepting that the power to "declare War" was an exception to the President's general grant of "executive" power, and thus was to be construed "strictly," it is worth noting that "declare War" was a term of art from the law of nations that had a well understood and rather narrow meaning at the time the Constitution was written. The Framers understood the concept of "force short of war," and the leading publicists of the era associated formal declarations of war only with what today we would call all-out "aggressive" wars. In the eighteenth century, every sovereign State had the right to resort to self-help measures to protect itself as well as to

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[25] 15 THE PAPERS OF ALEXANDER HAMILTON 39 (Harold C. Syrett ed., 1969) (bold emphasis added).

[26] 2 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 at 318 (1966).

[27] *Id*. at 319 n*.

blatant armed international aggression to further its perceived self-interest. The sovereign State was the supreme entity, there being no international legislature to establish rules, executive to enforce them, or judiciary to resolve disputes among nations. States were therefore only constrained by the treaties and customary practices to which they voluntarily consented to be bound.

There is some confusion inherent in the term "offensive," as in *jus ad bellum* it is distinguished from going to war for "defensive" purposes (i.e., in today's parlance, a State had to declare war before launching an "aggressive" war), while under *jus in bello* it includes offensive counter-attacks like Douglas MacArthur's 1950 Inchon Landing in Korea or Norman Schwarzkopf's brilliant "left hook" in the early days of Operation Desert Storm. Neither of those "offensive" maneuvers changed the UN Security Council-authorized forces led by American generals into the "aggressors" for purposes of establishing the lawfulness of the conflict. The point I am making is that when the term "offensive" is used in a *jus ad bellum* context, it is synonymous with "aggressive" – and such military operations have been *illegal* in theory since the 1922 Kellogg-Briand Treaty and in reality since the adoption of the UN Charter in 1945.

Thus, I would submit that, in terms of international law, the kinds of conflicts historically associated with formal declarations of war are now blatantly unlawful. No country has clearly issued a "declaration of war" since the 1940s, and in that sense the congressional power to "declare War" may today be as much an anachronism as the power conveyed in the same clause of Article I, Section 8, of the Constitution empowering Congress to "grant Letters of Marque and Reprisal . . . ."[28]

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[28] U.S. CONST., Art. I, Sec. 8, Cl. 11. "Letters of Marque and Reprisal" were a means by which sovereign States issued legal authority to private ship owners ("privateers") to seize ships belonging to a foreign State against whom the issuing government had a claim for wrongful conduct under the law of nations. Vessels seized under this authority were then taken to prize courts, where the authorization was examined and facts were established. If the prize court found the seizure to be proper, the ship and its cargo were ordered sold and the proceeds were divided according to an established formula, giving the ship owner a large chunk of the proceeds, the ship captain a somewhat smaller piece, the first mate still less, on down to the cabin boy who would get some small trinket. But Letters of Marque and Reprisal were declared illegal by the 1856 Declaration of Paris, and within a few decades the United States — which had not signed the 1856 Declaration — accepted this as reflecting binding customary international law. This is not to suggest that if an American President elected to launch an aggressive war against another State today the Constitution would not still give Congress its negative over the decision, but merely to note that the kinds of "war" with which formal declarations were associated are now illegal and the instruments have ceased to be used in international relations. If one accepts the view that this power of Congress was to be strictly construed, it may today be as much an anachronism as the power to grant Letters of Marque and Reprisal. That is not to suggest that getting Congress formally "on board" before sending large numbers of American forces into combat is not an excellent idea for prudential reasons, or that other

In discussing the meaning of a "declaration of war" in his 1620 classic, *De Jure Belli ac Pacis*, Hugo Grotius – often described as the "father" of modern international law, explained "no declaration is required when one is repelling an invasion, or seeking to punish the actual author of some crime."[29] This was consistent with the writings of sixteenth century Italian jurist Alberico Gentili, who reasoned: "when war is undertaken for the purpose of necessary defence, the declaration is not at all required."[30] The most influential international law publicist at the time of the Federal Convention was certainly Switzerland's Emmerich de Vattel, whose writings were often cited by Jefferson and by Hamilton and John Marshall as well.[31] In discussing formal declarations of war, Vattel asserted "[h]e who is attacked and only wages defensive war, needs not to make any hostile declaration . . . ."[32]

Advocates of broad congressional war power are fond of quoting a September 1789 letter from Thomas Jefferson to James Madison, of which there are two extant versions. In the copy actually sent to Madison, Jefferson wrote: "We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay."[33] A slightly different version is found in Jefferson's own files – presumably the original[34] – in which the power "of letting him loose" is replaced by "of declaring war."

What the champions of legislative war powers miss here is that Jefferson is *conceding* that, by its nature, the power to "declare war" is "executive" in character. Why else would he speak of "transferring" this power to Congress? Under the Articles of Confederation, there was no national executive and the Continental Congress was invested with the full power "to make war." So the most logical explanation for Jefferson's wording is that, like Locke, Montesquieu, and other writers of the time, he recognized that the entire business of "war" was by nature "executive" in character. Assuming this is true, then his maxim (widely shared by others at the time) that "exceptions" to the President's grant of the nation's "executive"

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constitutional provisions do not give Congress very important powers relative to armed conflict that only a very foolish President would ignore.

[29] HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. III, Ch. 3.

[30] 2 ALBERICO GENTILI, DE JURE BELLI LIBRI TRES 140 (1620 [1933 ed.]).

[31] *See* Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT'L L. 903, 906-10 (1994).

[32] *Quoted in id.,* 909.

[33] *Jefferson to Madison*, Sept. 6, 1789, in 15 PAPERS OF THOMAS JEFFERSON 397.

[34] Prior to acquiring his polygraph machine to make simultaneous duplicate copies of his letters, it was Jefferson's practice to copy important letters to retain a copy for his own files and often again to send to others. In making such a copy he would often think of a more eloquent way to make his point, and save the original for his own records while sending the improved version to his correspondent.

power that were vested in the Senate or Congress were to be construed strictly should be applied.

This leads to yet another important separation of powers issue. Both the Philadelphia debates and the state ratification debates are replete with concerns that the power of the "sword" and the power of the "purse" must be kept separate.[35] Yet if Congress usurps the President's executive and commander-in-chief power to control the movement of troops (the "sword"), it will violate that fundamental principle because it already possesses the power of the "purse."

There is yet another greatly misunderstood statement by Jefferson that is cherished by scholars who seek authority for a broad interpretation of the "declare War" clause. In his first state-of-the-union address in December 1801, President Jefferson reported on an encounter between the American schooner *Enterprise* and a Tripolitan cruiser in the Mediterranean. He told Congress that, because Congress had not authorized war, the American ship was only permitted to defend itself when attacked and then had to let the enemy ship go free. I don't have time to dwell on the details of this incident here, beyond noting that Jefferson grossly misstated the facts of the case and referring interested readers elsewhere for a detailed discussion.[36] We now have both a valuable compilation of historical naval records on the Barbary Wars and Jefferson's hand-written notes from his first cabinet meeting, and it is absolutely clear that Jefferson and his cabinet agreed on March 15, 1801, to send two-thirds of the new American Navy to the Mediterranean with instructions that — if upon arrival at Gibraltar they confirmed the rumors that Barbary Pirates had declared war on America — they were to "distribute your force in such manner, as your judgment shall direct, so as best to protect our commerce & chastise their insolence—by **sinking, burning or destroying their ships & Vessels wherever you shall find them**."[37] I would add that Jefferson does not appear to have even informed Congress of this decision (although the deployment was reported in the newspapers and there was no effort to keep it secret), and when he did finally refer to the deployment more than six months after the ships had departed Norfolk there appear to have been no expressions of concern from Congress.

That early Congresses shared the understanding that the conduct of war and the business of diplomacy and intelligence were the exclusive province of the Executive is clear from the deference they showed in these areas. Thus, the first appropriations bill for foreign intercourse – enacted by Congress on July 1, 1790 – provided that:

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[35] *See, e.g.*, 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 139, 144, 146.

[36] I discuss this incident at some length in Turner, *War and the Forgotten Executive Power Clause of the Constitution*, 34 VA. J. INT'L L. at 910-915 (1994).

[37] *Quoted in id*. at 911.

> [T]he President shall account specifically for all such expenditures of the said money as in his judgment may be made public, and also for the amount of such expenditures as he may think it advisable not to specify, and cause a regular statement and account thereof to be laid before Congress annually.[38]

This broad congressional deference to the President during the early years of our history was captured by President Jefferson in a February 19, 1804, letter to Treasury Secretary Albert Gallatin:

> The Constitution has made the Executive the organ for managing our intercourse with foreign nations. . . .
> From the origin of the present government to this day . . . it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications, but leave the whole to the discretion of the President.[39]

Until about the time of World War II, there were very few statutes that even arguably constrained the President's discretion in foreign affairs or the conduct of war. As America began playing a greater role on the world stage, more powers of Congress involving things like foreign trade and assistance came into play and the number of statutes increased – most of which were largely drafted by the Executive Branch. But the basic understanding that the Constitution entrusted not only the execution of foreign policy to the President, but the *formulation* of that policy as well – subject to the Senate's negative over a completed treaty – continued until the time of the Vietnam War. Thus, in a speech at Cornell Law School in 1959, Senate Foreign Relations Committee Chairman J. William Fulbright explained:

> The pre-eminent *responsibility* of the President for the **formulation** and **conduct of American foreign policy** is clear and **unalterable**. He has, as Alexander Hamilton defined it, all powers in international affairs "which the Constitution does not vest elsewhere in clear terms." He possesses sole authority to communicate and negotiate with foreign powers. He controls the external aspects of the Nation's power, **which can be moved by his will alone—the armed forces**, the diplomatic corps, the Central

[38] U.S. STATUTES AT LARGE, vol. 1, p. 129 (1790).

[39] 11 THE WRITINGS OF THOMAS JEFFERSON 5, 10 (Mem. ed. 1903).

> Intelligence Agency, and all of the vast executive apparatus.[40]

Let me close this first section by observing that the Supreme Court has also recognized the President's special responsibilities in these areas. Consider, for example, Chief Justice William Howard Taft's lengthy discussion of early views of the "executive Power" in *Myers v. United States* in 1926, striking down the Tenure in Office Act that had led to the 1868 impeachment of President Andrew Johnson:

> Washington's first proclamation of neutrality in the war between France and Great Britain . . . was at first criticized as an abuse of executive authority. It has now come to be regarded as one of the greatest and most valuable acts of the first President's Administration, and has been often followed by succeeding Presidents. Hamilton's argument was that the Constitution, by vesting the executive power in the President, gave him the right, as the organ of intercourse between the Nation and foreign nations, to interpret national treaties and to declare neutrality. He deduced this from Article II of the Constitution on the executive power, and followed exactly the reasoning of Madison and his associates as to the executive power upon which the legislative decision of the First Congress as to Presidential removals depends, and he cites it as authority. . . .
>
> Our conclusion on the merits, sustained by the arguments before stated, is that Article II grants to the President the executive power of the Government, . . . [and]; that the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed, and not to be extended by implication . . . .[41]

Certainly the most cited foreign affairs case is *United States v. Curtiss-Wright Export Corp*., in which the Supreme Court declared:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast

[40] J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L. Q. 1, 3, (1961) (bold emphasis added).
[41] *Myers v. United States*, 272 U.S. 52, 137, 163-64 (1926) (Taft, C.J.).

> external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. **Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it.** As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." . . .
>
> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, **plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations** -- a power which does not require as a basis for its exercise an act of Congress but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[42]

Dean Harold Koh's "Shared Powers" Paradigm and the Effect of *Youngstown* on *Curtiss-Wright*

Before leaving this theoretical section, let me briefly address the very popular views of Yale Law School Dean Harold Hongju Koh – an old and able friend with whom I have shared many platforms over the years on these issues – in his prize-winning 1990 volume *The National Security Constitution*. (I have recently written on this issue at greater length elsewhere.[43])

Like Lou Fisher and many others, Harold favors the "shared powers" concept of foreign affairs. I'm not fond of the term, not because I don't agree that many decisions in foreign affairs ultimately require the participation of more than one branch but because the specific role of each branch tends to be unique. The President "nominates" and "appoints," while the Senate may either consent or veto the person nominated. The President has the exclusive power to speak to foreign governments on behalf of the nation, but before a treaty he has negotiated may bind the

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[42] *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319-20 (1936) (bold emphasis added).

[43] Robert F. Turner, *Executive Power in Wartime*, THE CHRONICLE REV., Sept. 15, 2006 at B9.

United States as conventional international law it must be approved by two-thirds of those Senators present and voting. I think it best not to merge these distinct roles with language that might suggest that the actual functions of each branch are interchangeable or "shared" in some way. It is not that Harold and Lou are necessarily *wrong* in this explanation, but rather that I fear the use of the term "shared powers" may promote sloppy thinking by readers less knowledgeable about the actual workings of government.

My real quarrel with Harold's scholarship involves his suggestion that there is some struggle going on between the Supreme Court's landmark 1936 *Curtiss-Wright* opinion and the concurring opinion of Justice Robert Jackson in the 1952 Steel-Seizure case (*Youngstown Sheet & Tube Co. v. Sawyer*). Candidly, I think this argument is silly. The two opinions when properly understood are not at all in conflict. But before turning to that, let me put the issue on context by quoting from Harold's highly-acclaimed volume:

> At the Republic's birth, the Framers deliberately drafted a Constitution of shared powers and balanced institutional participation, fully aware of the risks that arrangement posed to the nation's international well-being. By mandating that separated institutions share powers in foreign as well as domestic affairs, the Framers determined that we must sacrifice some short-term gains for speed, secrecy, and efficiency in favor of the longer-term consensus that derives from reasoned interbranch consultation and participatory decision making. Although in the early years of the Republic, all three branches condoned a de facto transformation of the original National Security Constitution from a scheme of congressional primacy to one of executive primacy, they never rejected the concept of power sharing and institutional participation . . . .[44]

He then goes on the explain how *Curtiss-Wright* radically changed the historic paradigm:

> In 1936, *Curtiss-Wright's* dicta boldly asserted the alternative vision of unfettered presidential management. But even as the Cold War raged, the 1947 National Security Act, *Youngstown*, and finally the post-Vietnam era framework statutes (e.g., War Powers Resolution) definitively rejected that vision as America's constitutional model for dealing with the outside world. Vietnam (and

[44] HAROLD HONGKU KOH, THE NATIONAL SECURITY CONSTITUTION 211 (1990).

> Watergate, as well, to the extent that it arose from Vietnam) then taught that even in a nuclear age, America would not conduct globalism at the price of constitutionalism. It is therefore ironic that the *Curtiss-Wright* model should now resurface . . . .[45]

In reality, throughout the Cold War the Supreme Court routinely relied upon *Curtiss-Wright* as the established foreign affairs paradigm, as it does today. If its status was weakened in any way by *Youngstown*, someone clearly forgot to tell the Court, which continues to cite *Curtiss-Wright* more than any other case dealing with foreign affairs.[46]

I was particularly amused by this passage of the Koh book:

> Critics on the right, in contrast, argue that to preserve our activist foreign policy, we must revise constitutionalism, abandoning the *Youngstown* vision in favor of *Curtiss-Wright*. Yet because many of these same critics also espouse the constitutional jurisprudence of original intent, they are forced to engage in revisionist history to contend that the Framers did not originally draft the Constitution to promote congressional dominance in foreign affairs.[47]

I think what I enjoyed the most was that, of the ten or so "[c]ritics on the right" he footnotes to this passage, he listed me *first* – well ahead of such far more distinguished scholars as former Yale Law School Dean Eugene Rostow and my University of Virginia colleague and mentor John Norton Moore. But, flattery aside, I've never been able to get Harold to come up with statements from men like Washington, Jefferson, Madison, Hamilton, or Jay supporting his theory that foreign and domestic affairs involved the same basic "sharing of powers." I hope I've demonstrated in some detail the broad consensus among these key Founders that Congress and the Senate were to be excluded from many decisions in the foreign affairs realm, and the powers they were given that were exceptions to the broad grant of "executive Power" to the President were intended to be construed strictly. In contrast, without any effort to document his assertion, Harold simply tells his reader "the first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with Congress, not the president, being granted the dominant role."[48] And

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[45] *Id*. at 211-12.

[46] A WestLaw search reveals that *Curtiss-Wright* has been relied upon in Supreme Court cases in five of the last seven years. *See, e.g., Pasquantino v. United States,* 544 U.S. 349, 369 (2005) ("In our system of government, the Executive is "the sole organ of the federal government in the field of international relations," *United States v. Curtiss-Wright* . . . .")

[47] *Id*. at 225.

[48] *Id*. at 75.

sadly, in the post-Vietnam era, this is the prevailing paradigm being taught in our universities and law schools.

Elsewhere in the volume, Professor Koh writes:

> This structural vision of a foreign affairs power shared through balanced institutional participation has inspired the National Security Constitution since the beginning of the Republic, receiving its most cogent expression in justice Robert Jackson's famous 1952 concurring opinion in *Youngstown*. Yet throughout our constitutional history, what I call the *Youngstown* vision has done battle with a radically different constitutional paradigm. This counter image of *unchecked executive discretion* has claimed virtually the entire field of foreign affairs as falling under the president's inherent authority. Although this image has surfaced from time to time since the early Republic, it did not fully and officially crystallize until Justice George Sutherland's controversial, oft-cited 1936 opinion for the Court in *United States v. Curtiss-Wright Export Corp.* As construed by proponents of executive power, the *Curtiss-Wright* vision rejects two of *Youngstown's* central tenets, that the National Security Constitution requires congressional concurrence in most decision on foreign affairs and that the courts must play an important role in examining and constraining executive branch judgments in foreign affairs.[49]

One wonders if Harold has carefully *read* Justice Jackson's *Youngstown* concurrence, or the majority opinion in the case by Justice Black. For both went to considerable lengths to emphasize that they were not endeavoring to constrain the powers of the President in dealing with the external world. At issue in that case was whether the President's "war powers" authorized him to order the Secretary of the Interior to seize domestic steel mills – the *private property* of American citizens – in order to prevent a labor strike that might affect the availability of steel for the Korean War. (And keep in mind that the Fifth Amendment guarantees that "[n]o person shall . . . be deprived of . . . property, without due process of law . . . .")

There is no reason to believe that Justice Jackson was in any way hostile to *Curtiss-Wright* as the appropriate foreign policy paradigm. On the contrary, just two years before *Youngstown*, he wrote for the majority in *Johnson v. Eisentrager*:

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[49] *Id*. at 72.

> Certainly it is not the function of the Judiciary to entertain private litigation - even by a citizen - which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. . . . The issue . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible. *United States v. Curtiss-Wright Corp* . . . .[50]

And consider this excerpt from Justice Black's majority opinion in *Youngstown*:

> The order cannot properly be sustained as an exercise of the President's military power as Commander-in-Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces had the ultimate power as such to take possession of **private property** in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.[51]

Similarly, Justice Jackson in *Youngstown* was very deferential to presidential power with respect to the external world:

> [N]o doctrine that the Court could promulgate would seem to be more sinister and alarming than that **a President whose conduct of foreign affairs is so largely uncontrolled, and often is even unknown**, can vastly enlarge his mastery over the **internal affairs** of the country by his own commitment of the Nation's armed forces to some foreign adventure. . . .
>
> That military powers of the Commander in Chief were not to supersede representative government of **internal affairs** seems obvious from the Constitution and from elementary American history. . . . Such a limitation [the Third Amendment] on the command power, written at a time when the militia rather than a standing army was contemplated as a military weapon of the Republic, underscores the Constitution's policy that Congress, not the

[50] 339 U.S. 763 (1950).
[51] 343 U.S. 579, 587 (1952) (bold emphasis added).

> Executive, should control utilization of the war power as an instrument of **domestic** policy . . . .
>
> We should not use this occasion to circumscribe, much less to contract, the lawful role of the President as Commander in Chief. I should indulge the widest latitude of interpretation to sustain his **exclusive** function to command the instruments of national force, at least **when turned against the outside world for the security of our society**. But, when it is turned **inward**, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence. . . . What the power of command may include I do not try to envision, but I think it is not a military prerogative, without support of law, to seize person or property because they are important or even essential for the military or naval establishment.[52]

Even more fundamentally, in *Youngstown* Justice Jackson actually cited *Curtiss-Wright* as authority, but then explained: "**That case does not solve the present controversy. It recognized internal and external affairs as being in separate categories** . . . ."[53] And as both Justice Black and Jackson repeatedly emphasized, *Youngstown* was an "internal affairs" case.

That is also the consensus of scholars like Professor Louis Henkin, who in *Foreign Affairs and the Constitution* noted:

> *Youngstown* has not been considered a "foreign affairs case". The President claimed to be acting within "the aggregate of his constitutional powers," but the majority of the Supreme Court did not treat the case as involving the reach of his foreign affairs power, and even the dissenting justices invoked only incidentally that power or the fact that the steel strike threatened important American foreign policy interests.[54]

Consider also the reaction of Justice Rehnquist, joined by Chief Justice Burger and two other members of the Court, in the 1979 dispute over President Carter's constitutional power to terminate the mutual security treaty between the United States and Taiwan. Senator Goldwater had urged the Court to decide the case on *Youngstown*, but Rehnquist wrote:

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[52] *Id*. at 642, 644, 645.
[53] *Id*. at 637 n.2 (bold emphasis added).
[54] HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 341 n.11.

> The present case differs in several important respects from *Youngstown* . . . cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable **domestic** impact. . . . Moreover, as in *Curtiss-Wright*, the effect of this action, as far as we can tell, is "entirely **external** to the United States, and [falls] within the category of **foreign affairs**.[55]

This is not to say that the *Youngstown* case offers no insights into the current controversy over the power of Congress to end a war. One of the arguments used by Justice Black in rejecting President Truman's claim that he had authority to seize the steel mills was that Congress had considered and rejected a proposal to delegate that power to the President in 1947:

> Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency. Apparently it was thought that the technique of seizure, like that of compulsory arbitration, would interfere with the process of collective bargaining. Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances.[56]

I have already shown that the power to "declare War" was an "exception" to the general grant of "executive power" to the President, and thus was to be "construed strictly." For that reason, the First Session of the First Congress rejected the argument that in giving the Senate a negative over the *appointment* by the President of the Secretary of Foreign Affairs, the Founding Fathers included within that power a role in decisions to *remove* that officer. Add to that the fact that, on August 17, 1787 – in connection with the decision to narrow the power given to Congress from the authority to "make War" to the power "to declare War" – the Constitutional Convention considered an amendment to "give the Legislature power of peace, as they were to have that of war."[57] In other

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[55] *Goldwater v. Carter* 444 U.S. 996 (1979) (bold emphasis added).
[56] *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 586 (1952).
[57] 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 319.

words, the proposal was to give Congress not only a "negative" over the *commencement* of the kind of major war that was associated with formal declarations of war at the time, but also the power of bringing a war to an end by legislation or vetoing any executive agreement intended to terminate a war. (Part of the concern here was that peace might be obtained by conceding territory or other valuable consideration to an enemy that Congress might find excessive.) After a brief debate, this proposal to give Congress a role in ending a war was *unanimously rejected* by a vote of 0 to 10.[58] (But, again, this does not affect the clear power of Congress to indirectly compel the end of a war by refusing new appropriations to raise and equip military forces.)

Harold Koh (and others) often seek to reinforce their contention that Congress was intended by the Founding Fathers to be the senior branch in foreign affairs and war by citing cases like *Little v. Bareme*,[59] the 1804 admiralty case in which the Supreme Court held that the captain of the U.S. Navy frigate *Boston* had exceeded his authority by seizing *The Flying Fish*, a Danish ship bound *from* a French port during the quasi-war with France in 1799. In enacting the relevant statute, Congress had authorized the President:

> to stop and examine any ship or vessel of the United States on the high seas, which there may be reason to suspect to be engaged in any traffic or commerce contrary to the true tenor of the act, and if upon examination it should appear that such ship or vessel is **bound, or sailing to**, any port or place within the territory of the French republic or her dependencies, it is rendered lawful to seize such vessel, and send her into the United States for adjudication.[60]

Since *The Flying Fish* had been seized while bound *from* (rather than "to") a French port, Chief Justice Marshall declared the seizure to have been improper. He reasoned:

> It is by no means clear that the president of the United States, whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce. But

[58] *Id*.
[59] *Little v. Bareme,* 6 U.S. (2 Cranch) 170 (1804).
[60] *Id*. (Bold italics added.)

> when it is observed that the general clause of the first section of the "act, which declares that such vessels may be seized, and may be prosecuted in any district or circuit court, which shall be holden within or for the district where the seizure shall be made," obviously contemplates a seizure within the United States; and that the fifth section gives a special authority to seize on the high seas, and limits that authority to the seizure of vessels bound or sailing to a French port, **the legislature seem to have prescribed that the manner in which this law shall be carried into execution, was to exclude a seizure of any vessel not bound to a French port**.[61]

So at first glance it certainly does appear that Chief Justice Marshall recognized a superior power in Congress to direct the day-to-day conduct of military operations. However, if you will examine the text of the Constitution, the actual basis for this holding becomes apparent. Article I, Section 8, Clause 11 of the Constitution gives to Congress the power ""To declare War, grant Letters of Marque and Reprisal, and **make Rules concerning Captures on** Land and **Water** . . . ." In reality, *Little v. Bareme* addressed a rather narrow situation in which Congress had passed a law establishing rules concerning captures on water – one of the expressed "exceptions" in the Constitution to the President's general grant of the "executive" and "Commander in Chief" powers. While Congress was apparently not thrilled with the Court's decision (it promptly voted to indemnify Captain Little for his losses in the case), it is as clear that Congress has the power to place limitations on "captures" on the high seas as it is that this narrow power does not authorize Congress to direct the general conduct of military operations during periods of authorized war. I would add that there are two or three other cases advocates of congressional primacy like to cite, but when carefully examined they usually involve either a narrow exception to presidential power that has been clearly vested in Congress by the Constitution or presidential efforts to seize private property within the United States during wartime without the "due process of law" mandated by the Fifth Amendment (as in the *Youngstown* case).

Others may disagree, but my own sense is that *The National Security Constitution* is not a particularly useful contribution to the literature in this highly-specialized field. Indeed, my strong sense is that when the book was written Harold was totally unaware of the materials I have cited above from Washington, Jefferson, and all three authors of the *Federalist* papers.

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[61] *Id*. at 177-78 (bold italics added).

"Unchecked" Presidential Discretion in the Conduct of War and Foreign Affairs

I have already noted John Jay's explanation in *Federalist* No. 64 that the new Constitution had left the President "able to manage the business of intelligence as prudence may suggest," and the Supreme Court's 1936 declaration that "Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it." These are clear references to *exclusive* and *unchecked* presidential power.

One of the great myths in the post-Vietnam separation-of-powers debates is the idea that Congress and the Judiciary are supposed to be able to "oversee" and "check" every presidential power in a democracy. I sometimes wonder if modern legislators paid attention in law school during the discussion of the most famous of all cases, *Marbury v. Madison*. There, Chief Justice Marshall referred to the President's unchecked constitutional discretion, and used his control over the Department of Foreign Affairs as an example:

> By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [A]nd **whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion.** The subjects are political. They respect the nation, not individual rights, and **being entrusted to the executive, the decision of the executive is conclusive.** The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the president. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.[62]

It is certainly true, as many have observed, that if neither Congress nor the Judiciary has a check or "negative" over presidential decisions, the risks of abuse of power and the exercise of poor judgment increase. If we allow the President to authorize the military to detain enemy combatants for the duration of hostilities without charging them with a crime or giving them a

[62] *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 165-66 (1803).

trial (both of which are permitted by the Law of Armed Conflict, recognized by the Geneva Convention Relative to the Treatment of Prisoners of War, and acknowledged as lawful by the Supreme Court in the *Hamdi* case), some innocent people may suffer. But it is even more obvious that by allowing the President to authorize the military to empower an Army private to use lethal force against someone believed to be an enemy combatant on the battlefield, there is a *greater* risk of mistakes that could on occasion lead to the tragic loss of innocent life. Similarly, occasions arise where the military launches missiles or other high-explosive ordinance against buildings or other structures based entirely upon intelligence information that those structures are being used to house enemy forces — and sometimes that information is inaccurate and innocent people lose their lives. Those lives might be spared if we required the private, or the captain who is about to authorize the firing of a cruise missile or the launching of a Hellfire missile from a Predator drone, to come before Congress or prove beyond reasonable doubt in a court of law that the intelligence information is reliable and no innocent people will be harmed. Yet few serious people would prohibit our military from making battlefield decisions with the speed and dispatch long recognized to be essential for operational success.

The Founding Fathers understood that success in war, intelligence gathering, and diplomacy depended on unity of design, secrecy, and speed and dispatch; and they vested authority to make the necessary decisions exclusively in the President save for those limitations clearly expressed in the Constitution itself – including the power of Congress to control expenditures from the Treasury and the creation of military forces, and a variety of other checks expressly vested in Congress or the Senate.

Congressional and Senate "Negatives" and Other Powers in these Areas

Others in this hearing will no doubt provide a complete list of all of the powers related to war and foreign affairs that are expressly vested in the Congress or the Senate in Article I, Section 8, and Article II, Section 2, of the Constitution. As I have already acknowledged, many of these are powers of tremendous importance.

I think it is also true that on occasion the Executive Branch fails to recognize some of the more esoteric "exceptions" to the President's general grant of executive power over foreign affairs. To mention one example, I have no serious doubt that Congress has the constitutional power to pass legislation mandating the humane treatment of detainees during armed conflict. The Constitution expressly gives Congress the power to "define and punish Piracies and Felonies committed on the high

Seas, and Offences against the Law of Nations,"[63] and to "make Rules concerning Captures on Land and Water . . . ."[64] Yes, those are "exceptions" out of the general "executive" and "Commander in Chief" powers vested in the President, and thus, as already discussed, are to be construed strictly. But I can't image the Supreme Court not recognizing this power even with a strict construction.

By refusing to "raise" new military forces and rejecting appropriations requests for supplies and equipment for existing forces, Congress clearly has the power to bring any major armed conflict to an end. The Constitution prohibits the President from spending Treasury funds without appropriations,[65] and wars generally require a great deal of money.

I trust no one in this room would argue that the President may lawfully use the "power" he arguably possesses as Commander in Chief of the Army to order the First Armored Division to seize the gold from the Bullion Depository at Fort Knox and deliver it to the White House for the purpose of converting it to cash on international markets to fund the war in Iraq. One might contend that he has the raw "power" to accomplish that end, in the sense that – unaware of the ultimate purpose – military officers might well carry out apparently lawful orders to make it happen. (Military officers might be told the move was necessary to thwart an impending terrorist plot to seize the gold.)

I mention this example, because it is certainly clear that Congress has the "power" – at least until the courts step in – to abuse its control over the nation's purse strings to deny the President even his salary. To be sure, the Constitution provides that the President "shall receive" a compensation for his services which shall neither be increased nor decreased during his term of office,[66] but before that compensation may be paid there must be an appropriation. And refusing to appropriate money to pay the President's salary would be an abuse of power and a violation of the oath of office each of you took to support the Constitution.[67] Nothing in the Constitution even arguably gives Congress the power to interfere with decisions involving, to quote Chief Justice Chase again, "the conduct of

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[63] U.S. Const., Art. I, Sec. 8, Cl. 10.

[64] *Id*. Cl. 11.

[65] *Id.,* Art. I, Sec. 9, Cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.")

[66] U.S. CONST., Art. II, Sec. 1, Cl. 9 ("The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.")

[67] *Id*., Art. VI, Cl. 3 ("The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution . . . .")

campaigns," and deciding how many troops from among those forces "raised" by Congress are necessary to fight a war authorized by Congress[68] – and where and how those forces should be deployed – is at the heart of the President's constitutional power. This proposition in my view is not arguable.

Reconciling Congressional and Executive Powers Pertaining to War

As the Supreme Court noted in *Curtiss-Wright* and many other cases, all constitutional powers "must be exercised in subordination to the applicable provisions of the Constitution."[69] So one of the issues we need to address this morning is how do we draw the line between the constitutional powers of Congress and those of the President.

Last June in the *Hamdan* decision, the Supreme Court quoted[70] with favor a portion of Chief Justice Salmon P. Chase's concurring opinion in what it described as "the seminal case of *Ex parte Milligan*." Speaking for the majority, Justice Stevens was primarily concerned with presidential power over tribunals, so for our purposes it is useful to include some language that was only partly quoted in *Hamdan*. Chief Justice Chase wrote:

> Congress has the power not only to raise and support and

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[68] Obviously, the Authorization for the Use of Military Force enacted by Congress in October 2002, 116 Stat. 1498, Pub. L. 107-243, pursuant to the (flagrantly unconstitutional) War Powers Resolution, was the constitutional equivalent to a formal declaration of war. *See, e.g., Bas v. Tingy,* 4 U.S. (4 Dall.) 37 (1800); and *Talbot v. Seeman*, 5 U.S. (1 Cranch 1, (1801).

[69] *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 320 (1936).

[70] In Part IV of the majority opinion, Justice Stevens wrote:

> The Constitution makes the President the "Commander in Chief" of the Armed Forces, Art. II, §2, cl. 1, but vests in Congress the powers to "declare War … and make Rules concerning Captures on Land and Water," Art. I, §8, cl. 11, to "raise and support Armies," *id.*, cl. 12, to "define and punish … Offences against the Law of Nations," *id.*, cl. 10, and "To make Rules for the Government and Regulation of the land and naval Forces," *id*., cl. 14. The interplay between these powers was described by Chief Justice Chase in the seminal case of *Ex parte Milligan:*
>
> > "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. . . . Congress cannot direct the conduct of campaigns . . . .")

> govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, **except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.** Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But **neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President.** Both are servants of the people, whose will is expressed in the fundamental law. **Congress cannot direct the conduct of campaigns** . . . .[71]

I believe Chief Justice Chase correctly reconciled the relevant powers in this case, and it is certainly not a "shared powers" paradigm. And from this, it seems obvious that Congress has no power to tell the President he cannot send another 20,000 or 100,000 troops to Iraq. Any effort to do so in a legally binding manner would be futile[72] and a further act of congressional lawbreaking.

Senator William Borah on the Power of Congress to Usurp Constitutional Authority of the President

On the second floor of the Senate corridor to the U.S. Capitol Building there is a statute of Senator William E. Borah, the "Lion of Idaho" who was elected to six terms in the Senate and chaired the Foreign Relations Committee for eight years. A progressive Republican who biographers say was "known for his integrity" and independence, Borah is perhaps best known today for his leading role in blocking Senate consent to the ratification of the Versailles Treaty in 1917 that would have brought America into the League of Nations. The official Senate biography of Senator Borah notes that *Time* magazine once referred to him as the "most

[71] *Ex parte Milligan,* 71 U.S. 2, 139-40 (1866).

[72] I say "futile" because it would be so clearly unconstitutional that the President would quite properly ignore it and the courts would refuse to enforce it. As Chief Justice John Marshall noted in *Marbury*, "an act of the legislature, repugnant to the constitution, is void . . . ." *Marbury v. Madison*, 5 U.S. at 177 (Marshall, C.J.).

famed Senator of the century."[73] And his views are particularly relevant to today's hearing, because he was such a strong isolationist and a champion of the constitutional prerogatives of the Senate. He understood that the Senate had a constitutional negative over a presidential decision to ratify a treaty, and in 1917 no Senator was more instrumental in exercising that power. But he also understood that the President had important national security powers that were not subject to congressional veto, and time and again he stood firm on principle.

Consider this excerpt from the *Congressional Record* of an exchange Senator Borah had on December 27, 1922, with Senator James Reed of Missouri. To place it in context, following the end of World War I President Wilson elected to keep many American troops in Germany to help maintain the peace. President Harding kept them there, and legislators here in Washington were getting angry letters from parents who wanted their sons home now that the war had been won. Both Senator Reed and Senator Borah shared that goal, and this colloquy occurred on the Senate floor:

> MR. REED of Missouri. Does the Senator think and has he not thought for a long time that the American troops in Germany ought to be brought home?
>
> Mr. BORAH. I do.
>
> Mr. REED of Missouri. So do I . . . . Would it not be easier to bring the troops home than it would be to have the proposed [disarmament] conference?
>
> Mr. BORAH. You can not bring them home, nor can I.
>
> Mr. REED of Missouri. We could make the President do it.
>
> Mr. BORAH. We could not make the President do it. He is Commander in Chief of the Army and Navy of the United States, and if in the discharge of his duty he wants to assign them there, I do not know of any power that we can exert to compel him to bring them home. We may refuse to create an Army, but when it is created he is the commander.
>
> Mr. REED of Missouri. I wish to change my statement. We can not make him bring them home . . ., but I think if there were a resolution passed asking the President to bring the

[73] http://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_BorahWilliam.htm.

> troops home, where they belong, the President would recognize that request from Congress.[74]

An even more illuminating exchange occurred six years later, during consideration of a naval appropriations bill, when the Foreign Relations Committee chairman had this exchange with Senator John Blaine, a newly-elected member from Wisconsin:

> Mr. BORAH. Mr. President, the Constitution of the United States has delegated certain powers to the President; it has delegated certain powers to Congress and certain powers to the judiciary. Congress can not exercise judicial powers or take them away from the courts. Congress can not exercise executive power specifically granted or take it away from the President. The President's powers are defined by the Constitution. **Whatever power belongs to the President by virtue of constitutional provisions, Congress can not take away from him. In other words, Congress can not take away from the President the power to command the Army and the Navy of the United States.** . . . Those are powers delegated to the President by the Constitution of the United States, and the Congress is bound by the terms of the Constitution.
>
> Mr. BLAINE. Another question. All that the Senator has said in a general way is sound constitutional law, but before there can be any action on the part of any Government unit requiring the expenditure of funds that are in the Public Treasury, or that may be placed in the Public Treasury, Congress must first act and make an appropriation for every essential purpose. That money so appropriated can be used for no other purpose than that designated by Congress, and there is no power that can coerce Congress into making an appropriation. Therefore, Congress's power over matters respecting the making of war unlawfully, beyond the power of the President outside of the Constitution or within the Constitution, or conducting hostilities in the nature of the war during peace time, can be limited and regulated under the power of Congress to appropriate money.
>
> Mr. BORAH. Of course, I do not disagree with the proposition that if Congress does not create an army, or does not provide for an army, or create a navy, the President can not exercise his control or command over an

[74] 64 CONG. REC. 993 (1922).

> army or navy which does not exist. **But once an army is created, once a navy is in existence, the right to command belongs to the President, and the Congress can not take the power away from him.**

After some additional discussion involving other participants, Senator Blaine returned again to his contention that Congress could control the President's conduct as Commander-in-Chief by using its power over the purse:

> Mr. BLAINE. Mr. President, just one other question of the distinguished Senator from Idaho [Senator Borah]. I know that ordinarily he does not hedge. I want to press him just once more to give us the value of his training as a constitutional lawyer. I repeat, assuming that Congress has created an army and has created a navy, after that is all done, then may Congress not limit the uses to which money may be put by the President as Commander in Chief in the operation and in the command of the Army and Navy?
> The Senator has said that, of course, if we do not create an army and navy, then there is nothing over which the President has command. But we have an Army and a Navy. **Can not Congress limit, by legislation, under its appropriation acts, the purpose of which money may be used by the President as Commander in Chief of the Army and Navy?**
>
> Mr. BORAH. I do not know what the Senator means by "purposes for which it may be used." Undoubtedly the Congress may refuse to appropriate and undoubtedly the Congress may say that an appropriation is for a specific purpose. In that respect the President would undoubtedly be bound by it. But the **Congress could not, through the power of appropriation, in my judgment, infringe upon the right of the President to command whatever army he might find.**

The debate continued, and shortly thereafter, in response to another question, Senator Borah said:

> [I]f the Army is in existence, if the Navy is in existence, if it is subject to command, he may send it where he will in the discharge of his duty to protect the life and property of American citizens. Undoubtedly he could send it, although the money were not in the Treasury. What the result would be in the future as to appropriations would be another thing.

> I do not challenge the proposition that by refusing to appropriate, the President may be affected in the exercise of his power to command. The Congress might also refuse to appropriate for the Supreme Court for marshals, but why speculate about fanciful things?

Finally, this exchange occurred between Senator Borah and Senator Henrik Shipstead, a first-term Senator from Minnesota:

> Mr. SHIPSTEAD. I agree with the Senator in that and I do not want to take away from the President the power to use the troops to protect American life and property.
>
> Mr. BORAH. The Senator could not take it away from the President even if he wanted to do so. It is a power which belongs to him. We can not take it away from him.[75]

In my doctoral dissertation on "National Security and the Constitution" I demonstrate that this was the prevailing paradigm in all three branches throughout most of our history, but things changed in response to "Vietnam." I put the word in quotes, because much of the public and congressional reaction to the war in Indochina had little to do with the realities of that conflict and far more to do with misperceptions, myths, and in some cases lies that were spread to turn the American people and our Congress against the war.

This is an issue of more than casual interest to me, not only because I served twice in Vietnam as an Army officer, but because even prior to that I wrote my undergraduate honors thesis on the war and since leaving the Army more than thirty-five years ago I have written or edited a number of books on the issue. I have taught seminars on the war for undergraduates at Virginia and for military officers at the Naval War College, and I suspect the interdisciplinary graduate seminar on "Legal and Policy Issues of the Indochina War" that I have co-taught with my colleague Professor John Norton Moore at the Law School for the past fifteen years or so is the only offering of its kind at any American law school. But before turning to the issue of post-Vietnam congressional "lawbreaking," let me briefly address the alarming belief that it is lawful for Congress to usurp presidential discretion merely by placing "riders" on appropriations bills declaring in detail how the money may or may not be used.

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[75] 69 CONG. REC. 6759-60 (1928) (bold emphasis added).

The "Power of the Purse"

One of the most alarming techniques for congressional lawbreaking in the post-Vietnam era has been the abuse of the appropriations power. I addressed this issue at length decades ago,[76] and in the interest of time will only briefly summarize the issue here.

The basic issue is a simple one. May Congress use one of its legitimate powers in such a way as to indirectly exercise discretion vested by the Constitution in another branch of the government? The issue is not a new one, and the consistent answer has always been a resounding "NO!"

I want to be careful here in my choice of words. Obviously, if Congress refuses to raise an army, this act will have the effect of denying the President any army to command. There is nothing inconsistent with the Constitution in such a decision (although it may leave the country vulnerable to its enemies). What I'm addressing is an effort by Congress not to simply refuse to approve appropriations requests, but rather to appropriate money and then attach "conditions" designed to usurp discretion vested exclusively in the President by the Constitution.

In the above-mentioned April 1790 memorandum from Secretary of Foreign Affairs Thomas Jefferson to President Washington, Jefferson noted there was a theoretical possibility that the Senate might try to control the President's discretion to select ambassadors by simply refusing to consent to the appointment of anyone until the President submits and nominates their choice. But Jefferson concluded that such behavior would be an abuse of process of which the Senate cannot be assumed capable.

Earlier I raised the hypothetical of Congress trying to coerce the President into surrendering his powers by simply refusing to appropriate money to pay his salary. I trust most of you would recognize that would be unconstitutional and wrong. Nor would it be proper for Congress to condition appropriations for the Department of of Defense upon the President's agreement that he would nominate and appoint the spouse of the Speaker of the House to that position.

If such behavior were permissible, might not the President engage in the same sorts of coercive behavior? As the nation's chief executive officer, he possesses a certain amount of prosecutorial discretion in deciding which criminals to focus resources on. Would anyone argue it would be proper for the President to inform the Senators from New York that if they

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[76] Robert F. Turner, *The Power of the Purse*, in THE CONSTITUTION AND NATIONAL SECURITY 73-96 (Howard E. Shuman & Walter R. Thomas, eds. 1990). This book chapter was based upon a presentation made at a 1987 conference celebrating the Bicentennial of the U.S. Constitution at the National Defense University.

did not cast certain votes as directed, he would instruct the U.S. Attorney in New York City to spend less effort prosecuting drug dealers or members of organized criminal enterprises — and would have the most effective FBI agents reassigned to other states or detailed to Washington, DC, for extended specialized training? He might add that in the spirit of keeping the public fully informed and the "people's right to know," he was going to experiment by having all federal law enforcement agencies in New York to publish all of their plans and activities on the Internet, including the names of future targets for wiretaps and the addresses of locations to be raided by authorities.

Perhaps the voters of New York would cast their ballots differently if they believed that their physical safety and quality of life were at risk (although I have my doubts). My point is that neither political branch may properly abuse its legitimate constitutional discretion for the purpose of usurping the independent constitutional authority of the other – and it doesn't make any difference whether this is done directly or through intimidation by threats to abuse power.

And this is true as well for the powers of the people. During World War II, a powerful member of the House Appropriations Committee inserted a rider in the Urgent Deficiency Appropriation Act of 1943 barring expenditure of any appropriated funds to pay the salaries of three named government employees. The bill provided emergency funds for food and ammunition for U.S. forces on the front lines of Europe and the Pacific, and President Roosevelt wisely decided not to endanger the security of American forces – and perhaps the war effort itself – by vetoing the bill to protect the constitutional rights of three individuals. In a signing statement, Roosevelt denounced the provision as "unconstitutional," declaring it was "thus not binding on the Executive or Judicial branches."

While the Constitution clearly prohibits Congress from enacting bills of attainder,[77] when the victims of this appropriations rider made their way to the Supreme Court the Congress asserted that the "power of the purse" was a non-justiciable political question that the Court could not examine. But in *United States v. Lovett*, the Supreme Court decided otherwise:

> We…cannot conclude, as [Counsel for Congress] urges, that [the section] is a mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress had final say. . . . We hold that [the section] falls precisely within the category of congressional actions

[77] "No Bill of Attainder . . . shall be passed." U.S. CONST., Art. I, Sec. 9, Cl. 3.

> which the Constitution barred by providing that "No Bill of Attainder or ex post facto Law shall be passed."[78]

Yes, the power of the purse is an important power and was intended by the Founding Fathers to be so. It was given to Congress in the best traditions of the British Constitution, and a key concern for denying it to the President was that he was to have command of the "sword," and tyranny threatened when these two great powers were consigned to the same hands.

I will touch on some of the abuses of the power of the purse in a moment, but first let me make an important point. If Congress may properly seize the independent powers vested by the people in the President through the Constitution merely by predicating their acts with "no money herein or hereafter appropriated may be expended unless the President . . .," then the system of separation of powers that Madison and his colleagues felt was essential to preserving the people's freedom is *dead*. The fears of Madison and Jefferson about the "tyranny of the legislature" will have come true. This was one of the great fears in the Federal Convention of 1787. Noting the tendency of state legislatures to abuse their powers so as to usurp the authority of the governors, Madison remarked in Philadelphia:

> Experience has proved a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent. If no effectual check be devised for restraining the instability & encroachments of the latter, a revolution of some kind or other would be inevitable.[79]

The following year, in *Federalist* No. 48, Madison lamented that the authors of most state constitutions had given too little attention to the dangers of legislative abuse. He wrote: "They seem never to have recollected the danger from legislative usurpations; which by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpation."[80] In a "representative republic," Madison warned, it is "against the enterprising ambition" of the Legislative department "that the people ought to indulge all their jealousy and exhaust all their precautions."[81] The Supreme Court observed in 1976 that "the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of

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[78] *United States v. Lovett*, 328 U.S. 303, 313, 315, (1946).
[79] 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION 35.
[80] *Federalist* No. 48 at 333.
[81] *Id*. at 334.

the National Government will aggrandize itself at the expense of the other two branches."[82]

If Congress can use conditions on its power of the purse to usurp the Commander-in-Chief power that is expressly spelled out in Article II, Section 2, of the Constitution, what chance has the *implied* power of judicial review that we trace back to *Marbury v. Madison*? What is to stop the current Congress from conditioning appropriations for the Judiciary on a proviso that "no funds shall be available" if the Supreme Court overturns *Roe v. Wade*? And if *this* Congress can properly enact that appropriations rider, obviously all the foes of abortion need to do is secure a bare majority in both houses of Congress and then attach a rider conditioning funds for the Judiciary upon a *reversal* of *Roe v. Wade* to a veto-proof bill. It certainly would be a convenient arrangement for the congressional majority. The next logical step might be to deny funds to the courts if *any* statute is overturned on constitutional grounds, or if the Supreme Court seeks to enforce any of the Bill of Rights. But it is not a power permitted to Congress by our Constitution, and — whether the target is the power of the President, the Judiciary, or the people —each time it is exercised those Members who vote in the affirmative become part to *lawbreaking*.

There is a long line of Supreme Court cases declaring that Congress may not use conditional appropriations to accomplish an end that it would be prohibited from accomplishing directly. Columbia Law School Professor Louis Henkin, in his *Foreign Affairs and the Constitution*, reasoned:

> Even when Congress is free not to appropriate, it ought not be able to regulate Presidential action by conditions on the appropriation of funds to carry it out, if it could not regulate the action directly. So, should Congress provide that appropriated funds shall not be used to pay the salaries of State Department officials who promote a particular policy or treaty, the President would no doubt feel free to disregard the limitation, as he has "riders" purporting to instruct delegations to international conferences.[83]

Examine the list of powers enumerated in Article I, Section 8, and – keeping in mind that those that relate to war and foreign affairs were intended to be construed strictly – find one that authorizes the Congress to pass a law telling the President on what hill each soldier shall be deployed or limiting the number that can be assigned to a specific location in time of war. I don't think such a power exists. Nor does Congress have the power to compel the Commander in Chief to order reserve forces into

[82] *Buckley v. Valeo*, 424 U.S. 1, 129 (1976).
[83] LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 113 (1972).

battle at a given time, or prohibiting him from using those forces as he deems best to carry out an authorized war. This is not a close issue.

Why British Constitutional Precedents
Involving the Power of the Purse Are Not Relevant

It is true that the history of the British Constitution is replete with instances in which Parliament has used its control over the purse to coerce the King into making concessions. But I submit those precedents are of no relevance to the American political system. England started out as a monarchy in which all powers were vested in the King. Little by little, those powers were challenged and concessions were begrudgingly made. In the end, most would agree Great Britain is a better, and certainly a more free, country.

But the United States has a written Constitution that was authored by remarkably wise men and approved through democratic processes by the representatives of the people in the several states. It is a Constitution that may be altered without resort to force by those same democratic processes, and the manner in which amendments may be approved is set forth clearly in Article V. Extortion, coercion, and intimidation are not mentioned. British lords struggled for centuries to compel the monarchy to change. That is simply *not* part of the American system of government.

Congressional "Lawbreaking" Through the Usurpation of Executive Power And the Abuse of Legitimate Powers of Congress and the Senate

I have already addressed several examples where Congress has "broken the law" of the Constitution. This is not the occasion to try to prepare a laundry list of unconstitutional statutes, but were one inclined to do so it might be useful to start with the congressional reaction to the 1983 *Chadha* case. My good friend Lou Fisher has observed that in the two year period after the Supreme Court declared that "legislative vetoes" were unconstitutional, Congress enacted more than 200 *new* legislative vetoes. I am told by friends who follow legislation closely that it is rare for a major appropriations bill to be enacted without at least one legislative veto.

I've written two books and numerous articles addressing the constitutional infirmities of the 1973 War Powers Resolution, and I sense there is a growing consensus today that in its anger over Vietnam Congress clearly

usurped presidential authority in that statute. In a May 19, 1988, colloquy on the Senate floor involving Senators Robert Byrd, Sam Nunn, John Warner, George Mitchell, and perhaps others, the shortcomings of that statute were hit time and again. To provide but one example, Senator Mitchell remarked:

> Although portrayed as an effort "to fulfill"—not to alter, amend or adjust—"the intent of the framers of the U.S. Constitution," the War Powers Resolution actually expands Congress' authority beyond the power to declare war to the power to limit troop deployment in situations short of war. . . .
> By enabling Congress to require—by its own inaction—the withdrawal of troops from a situation of hostilities, the resolution unduly restricts the authority granted by the Constitution to the President as Commander in Chief. . . .
> [T]he War Powers resolution does not work, because it oversteps the constitutional bounds on Congress' power to control the Armed Forces in situations short of war and because it potentially undermines our ability to effectively defend our national interests.
> The War Powers Resolution therefore threatens not only the delicate balance of power established by the Constitution. It potentially undermines America's ability to effectively defend our national security.[84]

I am pleased that Dr. Louis Fisher is testifying at this hearing, for in my view he is probably the most able scholar in the land on these issues who supports congressional supremacy. For many years, Lou engaged in an exchange of letters with our mutual friend Eugene Rostow, the former Dean of Yale Law School. Gene asked me to substitute for him in the exchanges, and Lou and I exchanged a letter or two before I was called upon to testify before the House International Relations Committee about twenty years ago on the origins of the War Powers Resolution. I tried to carefully prepare a detailed presentation of the congressional role in getting America into the Vietnam War; and, to my surprise, a few days after the hearing I received a letter from Lou telling me he had been in the audience and was finally persuaded that Congress was a full partner in the Vietnam commitment. But there was still the Korean War, so the "imperial president" concern would go on. (That led me to research that issue, and to discover that Harry Truman consulted carefully with Congress and had Secretary of State Acheson put his "best people" to work drafting legislation for Congress to consider should it become necessary to commit U.S. forces, and repeatedly expressed a desire to go before a joint session of Congress. But everywhere he turned,

[84] CONG. REC. 6177-78 (daily ed., May 19, 1988).

congressional leaders assured Truman that he had ample authority under the Constitution and the UN Charter to act. So Truman acquiesced to the will of Congress, and as soon as the war became unpopular conservative Republicans like Karl Mundt and Richard Nixon branded it "Truman's War" and accused him of violating the Constitution.[85]

Vietnam was of more than academic interest to me. I spent a good deal of time there between 1968 and coming out during the final evacuation at the end of April 1975, and I lost some good friends there. So much of the debate about Iraq has centered on the alleged "mistakes" of Vietnam that it might be useful to pause for a moment and review that history.

The initial commitment to defend Indochina was made when the Senate in 1955 consented to the ratification of the SEATO Treaty by a vote of 82-1. That treaty pledged us to defend the protocol states (Laos, Cambodia, and South Vietnam) from communist aggression. And when it became clear that South Vietnam was facing such aggression, Congress pushed Lyndon Johnson to "do something" about the problem. A former Senate Majority Leader who had watched what Korea did to Harry Truman, LBJ was not going to do anything without getting Congress formally on board. So when North Vietnamese boats attacked the *U.S.S. Maddox* in international waters on August 2, 1964 (a fact Hanoi has admitted), Johnson sought statutory authorization from Congress. The Southeast Asia Resolution provided in part:

> Sec. 2. The United States regards as vital to its national interest and to world peace the maintenance of international peace and security in southeast Asia. Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

In case there was any doubt that Congress was formally authorizing the President to go to war, this colloquy took place on the Senate floor during the debate between Senate Foreign Relations Committee Chairman J. William Fulbright and the Ranking Republican, John Sherman Cooper:

> Mr. Cooper. Does the Senator consider that in enacting this resolution we are satisfying that requirement [the

[85] *See*, Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth.* 19 HARV. J. L. & PUB. POL. 533 (1996).

> "constitutional processes" requirement] of Article IV of the Southeast Asia Collective Defense treaty? In other words, are we not giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?
> Mr. Fulbright. I think that is correct.
> Mr. Cooper. Then, looking ahead, if the President decided that it was necessary to use such force as could lead into **war**, we will give that authority by this resolution?
> Mr. Fulbright. That is the way I would interpret it.[86]

Congress went on to approve that statute by a 99.6% majority, more than tripling Johnson's appropriations request in the process. Looking back on this three years later in connection with the National Commitments Resolution, the Senate Foreign Relations Committee declared in its report: "The committee does not believe that formal declarations of war are the only available means by which Congress can authorize the President to initiate limited or general hostilities. Joint resolutions such as those pertaining to . . . the Gulf of Tonkin are a proper method of granting authority."[87]

In the early years, Congress approved large appropriations for the war by 90 percent majorities in both houses. But then the anti-war movement began having an effect, and legislators started picking up the charge that LBJ had "lied" to Congress when he accused Hanoi of "Aggression from the North." I remember as a Senate staff member as late as 1974 sitting on the couch in the back of the Senate chamber and listening as a current member of this Committee asserted that the government was not telling the truth about the National Liberation Front, which he assured his colleagues was *independent* of Hanoi. Having just completed writing a 500-page book on the history of *Vietnamese Communism*,[88] I knew then he was mistaken. And after the war ended, Hanoi repeatedly bragged about the *Lao Dong* Party's success in deceiving Americans and told the story of the May 1959 Politburo decision to open the Ho Chi Minh Trail and liberate South Vietnam by force.[89]

The charge that LBJ had illegally gone to war without a formal "declaration of war" was picked up by legislators as well, although some had the integrity to acknowledge Congress has in fact been a full partner in the decision. Senator Jacob Javits, for example – who was one of my

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[86] 110 CONG. REC. 18049 (1964) (bold emphasis added).
[87] Sen. Rep't No. 90-797 (1967).
[88] ROBERT F. TURNER, VIETNAMESE COMMUNISM: ITS ORIGINS AND DEVELOPMENT (1975).
[89] *See, e.g., Opening the Trail*, VIETNAM COURIER 9 (Hanoi, May 1984).

favorites during my years as a Senate staff member – asserted in March 1966: "It is a fact, whether we like it or not, that by virtue of having acted on the resolution of August 1964, we are a party to present policy."[90] Yet in 1973 Javits explained the need for the War Powers Resolution by arguing that it was "a bill to end the practice of presidential war and thus to prevent future Vietnams. . . . The War Powers Act would assure that any further decision to commit the United States to any warmaking must be shared in by the Congress to be lawful."[91]

In reality, it is absolutely clear that the War Powers Resolution would not have affected the decision to go to war in Indochina. Section 2(c)(2) of that statute expressly recognizes the "constitutional power of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . pursuant to . . . specific statutory authorization," which is exactly what the August 1964 Southeast Asia Resolution was. And that joint resolution authorized the President not only to assist South Vietnam, but all of the SEATO Treaty protocol states, including Cambodia. (So much for the demands that President Nixon be impeached for extending the war into Cambodia in 1970.[92])

As I hear people talk about Iraq being an "unwinnable" war, I am reminded of similar allegations about the war in Vietnam many decades ago (and still today). I don't know how closely any of you have been following the literature, but Yale University's distinguished Professor John Lewis Gaddis was certainly correct two years ago writing in *Foreign Affairs* when he observed that "Historians now acknowledge that American counterinsurgency operations in Vietnam were succeeding during the final years of that conflict . . . ."[93] One of the best early recognitions of this reality was by my late friend Bill Colby in his excellent book *Lost Victory*. Lewis Sorley's highly-regarded *A Better War* makes the same point, as have many other recent volumes. Even more interesting, there have now been several accounts from former North Vietnamese[94] and Viet Cong[95] leaders who concede we had them on the

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[90] *Quoted in* ROBERT F. TURNER, REPEALING THE WAR POWERS RESOLUTION: RESTORING THE RULE OF LAW IN U.S. FOREIGN POLICY 33-34 (1991),

[91] *Id*. 34.

[92] Particularly good on the issue of the legality of the war in Cambodia is the late John Hart Ely's *War and Responsibility*, which notes that FDR did not seek additional congressional authority to invade North Africa to do battle with German military forces there.

[93] John Lewis Gaddis, *Grand Strategy in the Second Term*, FOREIGN AFFAIRS, Jan-Feb. 2005, available on line at: http://www.foreignaffairs.org/20050101faessay84101-p30/john-lewis-gaddis/grand-strategy-in-the-second-term.html.

[94] *See for example* the interview with former North Vietnamese Army Col. Bui Tin, who accepted the surrender of South Vietnam on April 30, 1975, and later served as Editor of the Party daily, *Nhan Dan*, in Hanoi, in *How North Vietnam Won the War*, WALL STREET JOURNAL, August 3, 1995 at 8.

[95] *See* TRUONG NHU TANG, A VIET CONG MEMOIR 58, 142-47.

ropes by the early 1970s and their only chance was that the anti-war movement would pressure Congress to throw in the towel.

Between 1968 and 1975 I visited 42 of South Vietnam's 44 provinces plus Laos and Cambodia, and the improvement in security between 1968 and 1971 was dramatic. Despite press reports to the contrary, the 1968 Tet Offensive was a dramatic defeat for the Communists and combined with the May offensive virtually destroyed the Viet Cong as a fighting force. By the early 1970s the overwhelming number of enemy troops were North Vietnamese regulars. And when they launched their 1972 Spring Offensive (what we sometimes called the "Easter Offensive"), they were driven back with tremendous casualties by South Vietnamese units with only American air support. Many view that as the test that showed South Vietnam could make it on its own without U.S. ground forces.

A few months later, the *Linebacker II* bombing campaign against the Hanoi-Haiphong area left Hanoi totally vulnerable (after its entire supply of SAM-2 missiles had been depleted) and compelled to return to the Paris talks and sign the peace agreement on January 27, 1973. At that point, things looked pretty good to many of us who knew the situation in country and had been following the war closely for many years.

But Congress was angry, and a new class had been elected in 1972 with a pledge to end the war. Protesters said that was the way to "stop the killing" and promote "human rights," and few on the Hill were even interested in listening to people like Bill Colby who really understood what was going on.

So in May 1973, Congress decided to exercise its "power of the purse" to end that war by enacting a rider to a continuing appropriations act that provided:

> Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein or heretofore appropriated may be obligated or expended to finance directly or indirectly combat activities by United States military forces in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia.[96]

The rest, as they say, is history. Both Moscow and Beijing had reduced aid to Hanoi and pressured the Vietnamese Communists to scale back their efforts to conquer their southern neighbor. But as my late friend and colleague Douglas Pike observed, Congress then "snatched defeat from the jaws of victory," Soviet and Chinese aid to Hanoi increased dramatically, and Premier Pham Van Dong told his Politburo comrades

[96] Pub. L. 93-52, 87 Stat. 130.

that the Americans would not come back now, "even if we offered them candy." So in flagrant violation of the UN Charter, North Vietnam sent virtually its entire Army (leaving behind only the 325th Division to protect the Hanoi area) to conquer its neighbors behind columns of Soviet-made tanks that would have been easy prey for American airpower had Congress not by statute prevented us from fulfilling John F. Kennedy's solemn pledge that America would "oppose any foe" for the cause of freedom.

I still remember listening on a couch in the back of the Senate chamber as war critics opposed further aid to our allies, pointing out (correctly) that South Vietnam had billions of dollars worth of aircraft, tanks, and artillery they weren't even using. (They didn't explain that the reason was because the U.S. Congress had cut aid so drastically that the South Vietnamese didn't have fuel for their tanks, spare parts to keep aircraft flyable, or ammunition for their artillery. Amazingly, a more than two-ton 105 mm howitzer is seldom decisive in battle when you are out of ammo.) It was a sad time, and during the final weeks I returned to Vietnam in an effort to help rescue orphans.

Most Americans seem to have turned off their TVs after April 30, 1975, when any reference to "Vietnam" was made; and I wonder how many members of this Committee are aware of what soon happened. In the first three years after the Communists seized control of tiny Cambodia, more people were slaughtered than were killed in combat throughout Indochina during the previous 14 years of war. The Yale University Cambodia Genocide Project[97] estimates that 1.7 million people were slaughtered by Pol Pot and his comrades, or slightly more than 20 percent of the entire population of Cambodia. Hundreds of thousands of others were killed in Vietnam, and hundreds of thousands more died indirectly as they tried to flee the country in small boats and fell victim to pirates, rough waters, or starvation.

When I watch the anti-Iraq demonstrations on television, I can't help but recall the indignant protesters who were certain that if we just brought our troops home and cut off aid to the victims of totalitarian aggression there would be "peace" and "human rights" throughout Indochina. And I wonder how many of the old veterans from the Vietnam protest days may have read the story of the "killing fields" in *National Geographic Today* a few years ago, which reported: "Guides explain that bullets were too precious to use for executions. Axes, knives and bamboo sticks were far more common. **As for children, their murderers simply battered them against trees**."[98] And the critics were no more accurate in their

[97] *See* http://www.yale.edu/cgp/.

[98] *"Killing Fields" Lure Tourists to Cambodia,* NATIONAL GEOGRAPHIC TODAY, Jan. 10, 2003, available on line at:

assurances that an American abandonment of our allies would promote "human rights" than they were that it would "stop the killing." Thirty years after the conquest of South Vietnam, Freedom House continued to rank Communist Vietnam and Laos among the "Worst of the Worst" human rights violators in the world.[99]

None of this had to happen. More than 58,000 Americans gave their lives to try to keep it from happening. And it would *not* have happened had not Congress seized the helm and legislated a Communist victory. And it didn't stop there.

In 1975 I drafted the "Griffin Amendment" that was designed to keep the Clark Amendment from prohibiting our government from spending appropriated funds to assist the non-Communist forces in Angola resist a Soviet and Cuban intervention designed to seize control of the country. But we could not overcome the warnings of "no more Vietnams." Nine years later, I was serving as Principal Deputy Assistant Secretary of State for Legislative and Intergovernmental Affairs when we started receiving questions from Capitol Hill about why the Administration wasn't doing anything about the tens of thousands of Cuban forces in Angola and neighboring states. When we explained that by enacting the Clark Amendment in 1975 Congress had made that unlawful, they were shocked and quickly moved to repeal the (in my view unconstitutional) statute. But as a result of congressional intervention, another half-million or so people lost their lives.[100] Senator Clark, who had assured his colleagues that he had a better understanding of the situation in Angola than did the State Department, lost his bid for reelection in 1978 and left no clear successor on the Hill to manage that particular problem. (I still recall watching in shock when not a single Senator on either side of the aisle so much as raised an eyebrow when Senator Clark, having returned from a three-day junket to Africa, told his colleagues of the lunch he had shared with "Roberto Holden" while there. Apparently, no one else on the floor even realized that the Senate's "Africa expert" had reversed the name of FNLA leader Holden Roberto.

So if we try to keep score of the harm done by Congress in using conditional appropriations to "stop wars," we have 1.7 to 2 million in Cambodia, well over half-a-million in South Vietnam, about half-a-million in Angola . . . . And let's not forget the Boland Amendment, which weakened President Reagan's efforts to stop Communist aggression in Central America and contributed to tens of thousands deaths throughout the region in various guerrilla conflicts.

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http://news.nationalgeographic.com/news/2003/01/0110_030110_tvcambodia.html. (Bold emphasis added.)

[99] *See*: http://www.freedomhouse.org/template.cfm?page=70&release=255.

[100] For a collection of estimates, see: http://users.erols.com/mwhite28/warstat3.htm.

Then there was Beirut in 1982-1983. My friend Fred Tipson, who served as Chief Counsel to the Senate Foreign Relations Committee at the time, told me he had never seen better "consultation" with Congress than occurred prior to joining the multinational force that entered Beirut to promote stability and give the various factions a chance to try to negotiate peace. Every country in the region and every armed faction involved had approved the multinational force, and there was no intention on anyone's part in Washington to start a "war."

And to the best of my recollection, not a single member of Congress openly opposed the deployment on the merits. But what many did do – especially members of the opposition party – was demand that the President "comply with the War Powers Resolution" by declaring that he was sending forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" under Section4(a)(1). By not doing so, House Foreign Affairs Committee Chairman Clement Zablocki declared the President was "eroding the integrity of the law" and threatening to precipitate a "constitutional crisis."[101]

Early in the deployment, two Americans had been accidentally killed while trying to defuse a booby-trapped artillery round that had been left behind when the Israelis withdrew from Beirut. That didn't violate the power of Congress to "declare War" (or any other legislative power), and – despite predictions to the contrary by legislators – it was nearly a year before the first America actually died as a result of hostile fire. This was an understood risk, but hardly evidence President Reagan was sending the Marines "into hostilities."

It soon became clear that there might be political mileage to be gained from the Beirut controversy, especially if they could portray the President as a "crook" for "violating the law" and there were further casualties. (In fact, Reagan had fully complied with the War Powers Resolution.) The *Washington Post* noted that the "prominent involvement" of Senator Lloyd Bentsen, the chair of the Senate Democratic Campaign Committee, in the dispute "suggest[ed] that the Democrats are doing push-ups for 1984."[102]

While President Reagan was trying to promote peace in Lebanon, the Senate Democratic Caucus unanimously declared that, as a matter of law, affirmative congressional authorization was necessary for the deployment to continue. (While there were risks involved, the deployment did not even arguably constitute the initiation of a "war" in violation of

[101] WASH. POST, Oct 3, 1982 at B7.
[102] TURNER, REPEALING THE WAR POWERS RESOLUTION 141.

congressional power.) Hearings were held in the Foreign Relations Committee, and for the first time to my recollection, the final Committee report included "Minority Views of all Democratic Committee Members."[103]

General P.X. Kelley,[104] at the time Commandant of the Marine Corps, pleaded with Senators during his Foreign Relations Committee testimony that their vocal and partisan efforts to place time limits on the deployment were endangering the lives of his Marines in Beirut; but he was ignored. When an unnamed White House official repeated the argument, Senator Tom Eagleton angrily declared: "To suggest . . . that congressional insistence that the law be lived up to is somehow giving aid and comfort to the enemy is totally unacceptable."[105]

In the end, in what the *Washington Post* characterized as a "highly partisan debate" in which "Democrats labeled it a possible first step toward another Vietnam,"[106] only two Democrats voted in favor of continuing the deployment to promote peace in Lebanon and a shift of only four votes would have defeated the 18-month reauthorization. And even then, Republican Senator Charles Percy, Chairman of the Foreign Relations Committee, suggested that if there were further casualties the issue could be revisited at any time.[107] The *Christian Science Monitor* noted "Congressional hesitation, reservations, and fears are such . . . that should American troops suffer casualties in Beirut, many senators and congressmen would immediately reconsider their support."[108]

At some point, I submit, someone should have been asking what message Congress was sending to our enemies around the world. The answer, of course, was clear. Syrian Foreign Minister Abdel Halim Khaddam told American diplomats that Syria had concluded the United States was "short of breath" and would give up and leave before Syria did.[109] And, shortly after the congressional vote, U.S. intelligence intercepted a message between two radical Muslim groups that said: "If we kill 14 Marines, the rest will leave."[110]

Without intending to, Congress had virtually placed a bounty on the lives of those Marines. It had told our enemies that we were sharply divided and would likely fold our tents if we suffered more casualties. At dawn

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[103] *Id*.
[104] *See* P.X. Kelley & Robert F. Turner, *Out of Harm's Way: From Beirut to Haiti, Congress Protects Itself Instead of Our Troops*, WASH. POST, Oct. 23, 1994 at C2.
[105] TURNER, REPEALING THE WAR POWERS RESOLUTION 142.
[106] *Id*. at 141.
[107] *Id*. at 141-42.
[108] *Id*. at 143.
[109] *Id*. at 143-44.
[110] *Id*. at 144.

on the morning of October 23, 1983, a terrorist truck bomb broke through the gate the Battalion Landing Team Headquarters and detonated, killing 241 sleeping Marines, soldiers, and sailors. Certainly no one in Congress intended for that to happen. But I don't think it would have happened had not a highly-partisan Congress sent a clear message that America had lost its will and could be driven out if more Marines were killed. One of those enemies who has acknowledged he was influenced by what happened in Beirut was Osama bin Laden, who in 1998 told ABC News that America's retreat following the Beirut bombing proved we were "paper tigers." A 2003 Knight Ridder account observed: "**The retreat of U.S. forces inspired Osama bin Laden and sent an unintended message to the Arab world that enough body bags would prompt Western withdrawal, not retaliation**."[111] I don't think it is an overstatement to conclude that the highly-partisan war powers debate of September 1983 contributed significantly to bin Laden's decision to attack the United States on September 11, 2001.

Mr. Chairman, I only had two days to prepare my testimony and thus cannot possibly go into the kind of detail that might be warranted on this issue. Let me just mention one other example of what I view as congressional "lawbreaking." As I explained in some detail when I testified before this Committee on February 28 and March 31 of last year, until Vietnam it was understood by both Congress and the Executive that – to quote John Jay in *Federalist* No. 64 – the Constitution had left the President "able to manage the business of intelligence as prudence may suggest." I noted that in 1818, the great Henry Clay and others as well observed during a House floor debate that expenditures from the President's "secret service" account "would not be a proper subject for inquiry" by Congress. But as Congress began usurping the constitutional powers of the Commander in Chief, it is perhaps not surprising that it also sought to control the Intelligence Community.

As a Senate staff member, I sat through some of the 1975 hearings of the Church Committee, but I'm not certain where the idea originated for Congress to usurp presidential power in this area. The earliest reference I have found is in a 1969 book by radical activist Richard Barnet, who wrote:

> Congressmen should demand far greater access to information than they now have, and should regard it as their responsibility to pass information on to their

[111] Scott Dodd & Peter Smolowitz, *1983 Beirut Bomb Began Era of Terror*, DESERET NEWS, Oct. 19, 2003, available on line at: http://deseretnews.com/dn/view/0,1249,515039782,00.html (bold italics added). *See also.,* Brad Smith, *1983 Bombing Marked Turning Point In Terror: The U.S. reaction to the Beirut attack set off a chain of events, some say,* TAMPA TRIB., October 23, 2003.

> constituents. Secrecy should be constantly challenged in Congress, for it is used more often to protect reputations than vital interests. There should be a standing congressional committee to review the classification system and to monitor secret activities of the government such as the CIA.[112]

Whatever the origins of the idea, after a number of successful raids on presidential power in other areas, and with the White House in the hands of a man who had not even been elected as Vice President,[113] the Church and Pike committees delighted in compelling DCI Bill Colby to make public some of the most secret records of the CIA.

Perhaps the most sensational exposés pertained to the CIA's "assassination" program, which resulted in a massive volume from the Church Committee. Of course, if anyone actually bothered to *read* the volume, they would learn that the Church Committee could not document a *single* instance in which anyone employed by or working on behalf of the CIA had ever "assassinated" anyone. Most of the alleged incidents they investigated led them to conclude the charge was false. There were two situations in which the CIA had made plans to kill foreign political leaders, including several attempts to kill Fidel Castro. A plot to kill Patrice Lumumba had also been in the works, but before anything could be done Lumumba was arrested by his own government, escaped from prison, and while trying to flee was captured and murdered by a rival leftist group. The Church report acknowledged that the Castro plots had been carried out at the direction of the White House, and that both DCI Colby and his predecessor at CIA, Richard Helms, had on their own issued internal regulations prohibiting any CIA involvement with "assassination."

When the Supreme Court in the 1967 *Katz* case held that telephone wiretaps were a constitutional "seizure" under the Fourth Amendment, it included a footnote *excluding* national security wiretaps ordered by the President from its holding. The following year, when Congress enacted the Omnibus Safe Streets and Crime Control Act of 1968 and in Title III established rules governing wiretaps, it emphasized that:

> **Nothing contained in this chapter . . . shall limit the constitutional power of the President** to take such measures as he deems necessary to protect the Nation

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[112] RICHARD J. BARNET, THE ECONOMY OF DEATH 178-789 (1969).

[113] Lest I be misunderstood, I had the greatest respect for President Ford and believe he showed uncommon courage in trying to stand up to some of the congressional power grabs, particularly in the area of war powers. But even he knew that his power base was weakened by the fact that he had been appointed Vice President and then became President only upon the resignation of President Nixon. I was deeply honored when he agreed to write the foreword to my 1991 book, *Repealing the War Powers Resolution*.

> against actual or potential attack or other hostile acts of a foreign power, **to obtain foreign intelligence information** deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities.[114]

In the 1972 *Keith* case, the Supreme Court did hold that national security wiretaps of purely *domestic* targets, having no connection with a foreign power, did require search warrants; but it repeatedly emphasized that its holding did not apply to national security wiretaps involving foreign powers or their agents in this country. The Court also noted that national security domestic wiretaps might warrant a different standard than that used for warrants in criminal investigations, and it suggested that Congress might wish to consider enacting new legislation governing national security wiretaps for purely *domestic* targets.

Congress didn't do that. Instead, it pretended that the Court had "invited" it to constrain the President's constitutional authority to wiretap agents of *foreign powers* inside the United States, and in 1978 it enacted the Foreign Intelligence Surveillance Act. I was in the Senate at the time. Attorney General Griffin Bell came to the Senate, and noted that a mere statute could not deprive the President of a power conferred on the Executive by the Constitution. But Congress did not find it desirable to acknowledge that point in the new statute.

In addition to creating the Foreign Intelligence Surveillance Court, the FISA statute also created a FISA Court of Review consisting of U.S. Court of Appeals judges to review appeals from the FISA Court. That special appeals chamber has only issued one opinion to date, in 2002. And in that opinion the Court of Review noted:

> [A]ll the other courts to have decided the issue held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.

One might have thought that with the Attorney General and several federal appeals courts – even the appeals court established by the FISA statute itself – asserting that Congress had usurped the President's constitutional power in this area, at least *someone* in Congress might have suggested that the issue be revisited. But nothing was done.

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[114] 18 USC § 2511(3) (1970) (bold emphasis added).

In the meantime, acting in response to the abuses reported by the Church Committee (most of which had already been discovered and made public by the Attorney General), President Carter and his new Director of Central Intelligence decided that America didn't really *need* a vigorous human intelligence (HUMINT) capability, because space-based platforms could eavesdrop on all sorts of interesting sources for intelligence without the risks inherent in having to deal with the kinds of people who can have ready access to the inner circles of tyranny around the globe. So major cutbacks were made in the CIA's Directorate of Operations, quite possibly setting the stage for some of the intelligence failures associated with the 9/11 attacks. It turns out that for some things there is no good alternative to having agents on the ground.

While serving as Counsel to the President's Intelligence Oversight Board in the 1980s I visited one trouble spot in Latin America that was facing a serious guerrilla threat. While meeting with the CIA Station Chief, I was shocked to learn that the Carter Administration had *shut down* his station in the 1970s on the assumption that we probably really wouldn't need to know what was going on there in the foreseeable future. He lamented the difficulties he had faced in trying to start up a new station from scratch and make new intelligence contacts.

We have all heard about the "risk-avoidance culture" in the Intelligence Community, but few have traced it to a major cause. Both during the Church and Pike hearings in 1975, and later during the Iran-Contra investigations, some legislators seemed to take personal pleasure in searching out and trying to destroy the careers of particularly effective intelligence officers who had carried out the missions assigned by the President with particular skill and dedication. What message did Congress send others in the Intelligence Community in so doing?

Following the Church and Pike hearings, the Carter Administration decided to prosecute the top FBI counter-terrorism officer and the Deputy Director as well, and as a result both received felony prison terms and incurred hundreds-of-thousands of dollars in debt for legal fees. My friend Buck Revell, who later ran FBI counter-terrorism for several years, told me that after those convictions he could not get a single FBI agent to volunteer for counter-intelligence duty.

I'm sure you all remember FBI Special Agent Coleen Rowley, who shared the honor of being *Time* magazine's "Person of the Year" in 2002 with two other female "whistleblowers" because of the scathing memorandum she had written to FBI Director Robert Mueller. According to Ms. Rowley, agents in the Minneapolis FBI office had identified Zacharias Moussaoui as a potential terrorist because he had taken flying lessons without any interest in learning how to land his plane. So she immediately

sought a FISA warrant from the National Security Law Unit at the FBI, and the incompetent bureaucrats in Washington had not even bothered to submit her request to the FISA Court. Understandably, Congress and the American people were outraged at those incompetent FBI lawyers – for if Rowley had received her warrant perhaps the 9/11 attacks could have been prevented. Or so the story went.

In reality, the problem was much different. When Congress in 1978 elected to usurp the President's constitutional authority to wiretap foreign terrorists and their agents in this country, it made it a *felony* for anyone to engage in national security surveillance in this country outside the scope of the FISA statute. And Congress in its wisdom didn't consider the possibility that it might someday be useful to be able to monitor the communications, or conduct other searches or seizures, of foreign terrorists in this country who had no formal connection with any foreign power or terrorist organization. So, yes, the FBI National Security Law Unit did refuse to forward Ms. Rowley's FISA request, but that was because there was no lawful basis to obtain such a warrant. Moussaoui was a nasty character and a clear threat to American national security, but he took neither money nor orders from al Qaeda or any other foreign terrorist organization. He was what we call a "lone wolf," and Congress neglected to consider the need to permit surveillance of that category of terrorists. (Brings to mind Locke's warning that the legislature could not foresee every eventuality by "antecedent, positive, standing law," doesn't it?)

Now, had the FBI lawyers in Washington elected to violate the FISA statute (becoming felons in the process), or merely to submit Rowley's request and see what happened, it would certainly have been rejected by the Office of Intelligence Policy and Review at the Justice Department. And if the lawyers there had ignored the law and sent it forward, the FISA Court would certainly have turned it down. This was not a close call. Finally, in 2003, Congress quietly amended FISA to permit surveillance of lone-wolf terrorists like Moussaoui. But by then, another 3,000 people had died. Is anyone keeping track of the figures?

Is there any reason to believe that our government would have discovered the 9/11 plot if the unconstitutional FISA statute had not made it a felony to act outside its terms? Well, we do have the statement by General Michael Hayden, who served as Director of the National Security Agency from 1999-2005, while discussing the NSA terrorist surveillance program that was disclosed by the *New York Times* in December 2005, that: "Had this program been in effect prior to 9/11, it is my professional judgment

that we would have detected some of the 9/11 al Qaeda operatives in the United States, and we would have identified them as such."[115]

After the fall of the Soviet empire, a group of left-wing intellectuals in Paris began trying to calculate the total death toll of international Communism in the twentieth century. In the *Black Book of Communism*, as I recall, they agreed on an estimate of between 80 and 100 million. That was the movement we were trying to stop in places like Indochina, Angola, and Central America when Congress grabbed for the helm and ran the ship of state against the rocks.

I wonder if at some point someone ought to do a similar count of the lives lost because members of Congress broke the law and seized critically important powers the American people had to the exclusive discretion of their President so that he might keep them safe. I'm not just talking about 241 Marines in Beirut and perhaps 3,000 victims of the 9/11 attacks, but also the millions killed in Indochina when Congress snatched defeat from the jaws of victory, another half-million in Angola, how many tens-of-thousands in Central America, and perhaps other places as well where signals of weakness and a lack of resolve undermined deterrence and led tyrants to take their chances. Would the Soviets and Cubans have gone into Afghanistan had not Congress gutted our defense budget and undercut our commitments in the 1970s? I don't know. Would the Iranians have seized our Embassy in Tehran? I don't know the answer to that one, either. But they might be worth exploring.

Prudential Considerations: Do You Really Want Our Enemies to Win and Have You Forgotten Recent History?

Like the overwhelming majority of Vietnam veterans, I continue to believe that our commitment to resist Communist aggression there was a noble and important one. By holding out from 1964 to 1973, we bought time for countries like Thailand and Indonesia to strengthen themselves against possible Communist insurgencies. More importantly, during that period China went through a dramatic internal transformation during the Great Proletarian Cultural Revolution. When it emerged, the fraternal socialist duty to promote armed struggle around the globe was no longer high on the agenda. Central Committee Vice Chairman Lin Biao — who had preached this internationalist duty and overseen Chinese assistance to guerrilla movements in Indochina, Thailand, Indonesia, the Philippines,

[115] Gen.Michael Hayden, Remarks at National Press Club, Jan. 23,2006, available on line at: http://www.fas.org/irp/news/2006/01/hayden012306.html.

and as far away as Mozambique — was dead. So was Ché Guevara, who had declared that the outcome of Vietnam would determine the future of revolution in the Americas. I think a credible case can be made that, had we simply walked away from Vietnam in 1964, we would quickly have found ourselves facing a dozen or more "Vietnams" throughout the Third World. And we could not have won a dozen such wars. Ike's threat of "massive retaliation" was credible in 1954, but who would believe we would use nuclear weapons against Moscow after the Soviets acquired the ability to deliver similar weapons against New York and Washington, DC? An early defeat in Indochina could have led to the choice of losing the Cold War one small nation at a time or resorting to nuclear war.

I was less confident about the wisdom of going in to Iraq. Indeed, I commented to friends at the time that I was glad I was a schoolteacher and not back in the policy cluster of the Pentagon, where someone might have honestly cared about my opinions. When the decision was made to go in, I did the best job I could to defend it. In humanitarian terms, that was not hard to do so. And the legal case was far stronger than many recognized.

The very first principle set forth in the first article of the UN Charter is to take effective collective action for the "removal" of "threats to the peace." Was Saddam Hussein's regime such a threat? The UN Security Council declared it to be a "threat to the peace" time and again over more than a decade. Like many, I hoped the Security Council would have the courage to follow up on its threats and deal seriously with Saddam. But he was funneling money to important figures in Russia and France, and leaders of both countries had other economic and political reasons to block effective action. So the clear choice became to continue the *status quo* indefinitely, or for other UN members to act collectively outside the framework of the Charter.

I don't know how many of you read the human rights reports on Iraq put out by the United Nations, or by NGOs like Amnesty International and Human Rights Watch. The UN experts reported that the mortality rate of children under five years of age in the parts of Iraq controlled by Saddam had more than doubled during the 1990s – in no small part, of course, because he refused to take advantage of the oil-for-food program to get humanitarian supplies to his people. Amnesty International estimate that these civilian deaths of under-five children exceeded half-a-million children. And that was just one part of the human rights crisis under Saddam.

As the war was beginning, I wrote a 15,000-word book chapter providing a legal justification for Operation Iraqi Freedom.[116] I don't think there

[116] *See*, Robert F. Turner, *Was Operation Iraqi Freedom Legal?,* in LAURIE MYLROIE, BUSH VS. THE BELTWAY (2003).

was a full paragraph discussing Weapons of Mass Destruction. (Although, like everyone else, I assumed that he had them.) I spoke of the importance of upholding the rule of law, and noted the human consequences when world leaders in Munich in 1938 failed to enforce the prohibition against aggressive war embodied in the Kellogg-Briand Treaty a decade earlier. I wrote of humanitarian intervention, of the rape and torture by Saddam and his thugs, and of the disappearances, refugees and mass graves.

Perhaps I am wrong, but I see some horrible parallels between Iran and Vietnam. As in Vietnam, we went to war in Iraq with the overwhelming approval of the public and strong support from both houses of Congress. In terms of our Constitution, it is a lawful war, fully authorized by Congress.

But as in Vietnam, I hear the lies. "LBJ tricked us into going to war." "George W. Bush invented the idea that Saddam had WMDs in order to carry out a neo-con conspiracy and avenge his father, who Saddam tried to assassinate." Does anyone here truly *believe* that the idea that Saddam Hussein had WMDs, or that he should be removed from power, first came from George W. Bush? Have you forgotten that every senior national security official in the Clinton Administration warned about Saddam's WMDs while George W. Bush was still Governor of Texas? Have you forgotten about the Iraq Liberation Act, unanimously approved by the Senate and passed by a 90 percent majority in the House in 1998 – more than two years before President Bush even moved to Washington – that made reference to the WMD threat and declared it should be U.S. policy to promote the removal of Saddam from power? These allegations clearly have political benefits, but they come at the expense of the security of our country.

As in the later stages of Vietnam, the public is angry and wants something done about the war and the President they have been told has been "lying" and "breaking the law." The President apparently believes he can improve the military situation in Iraq by sending in more troops, and under our Constitution that is without the slightest doubt his prerogative. You may refuse to raise new troops, and even refuse to fund the Department of Defense. As in Vietnam, you can pretty much guarantee that our forces lose the war and that the forces of darkness have a very good chance to prevail. But have you truly considered the consequences?

The issue of somehow rewinding the clock and reconsidering the decision to send troops into Iraq is not an option. Those forces are there. The issue now is what we do in our current situation. We have sent our soldiers into Iraq with the strong authorization of Congress and the support of the American people to deal with a world-class tyrant who had been repeatedly branded a "threat to the peace" by the United Nations Security

Council and this Congress. Saddam was supporting terrorists groups in the Middle East and providing a safe haven to key terrorists who had attacked this country in the past, and we had good reason to believe that he was planning terrorist attacks inside the United States.[117] Saddam has been brought to justice[118] and is now dead. But the President in seeking authority, and Congress in granting that authority (by a vote of 77-23 in this chamber), also embraced the goal of promoting democracy and the rule of law in Iraq. The 2002 Authorization for the Use of Force in Iraq provided in part: "Whereas the Iraq Liberation Act of 1998 (Public Law 105-338) expressed the **sense of Congress that it should be the policy of the United States** to support efforts to **remove from power the current Iraqi regime** and **promote the emergence of a democratic government** to replace that regime."[119] As I have discussed earlier, such efforts to determine U.S. foreign policy infringe the constitutional authority of the President. And I would add that Congress declared this policy years before George W. Bush even moved to Washington, so all the outrage about Bush leading the country into this war and deceiving Congress about it being desirable to remove Saddam from power doesn't really pass the straight-face test.

To date, we have gone to rescue an endangered neighbor, helped them destroy the rogue tiger that was eating their children, and in the process knocked every hornet and wasp nest in the neighborhood to the ground. The environment is not a good one, and some in Congress have lost their will and want to abandon the commitment – leaving the people of Iraq to

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[117] *See, e.g., Putin Claims Bush Was Personally Informed*, PRAVDA, June 18, 2004, available on line at: http://english.pravda.ru/main/18/88/350/13132_Putin.html. ("After the events of September 11th and prior to the military operations in Iraq Russian special services were informed several times about the fact that official body of Saddam regime was planning terrorist acts in the United States and beyond the country's borders, stated Russian president Vladimir Putin Friday. . . . According to him, our American colleagues have been supplied with this information, reports RIA "Novosti". "American president George Bush had an opportunity . . . to personally thank head of one of the Russian special services for this information, which he regarded as very important," stated Russian president.)

[118] I take some pride in having been the first (in an article co-authored by a colleague) to propose that Saddam Hussein be tried as a war criminal following his invasion of Kuwait, and as Chairman of the ABA Standing Committee on Law and National Security I wrote the first resolution ever approved by the American Bar Association endorsing a war crimes trial. See, John Norton Moore & Robert F. Turner, *Apply the Rule of Law,* INT'L HERALD TRIB., Sept. 12, 1990. Our proposal was that the Security Council authorize such a tribunal. I was delighted with the outcome of the Iraqi trial of Saddam, and believe justice was certainly done. But I was saddened by certain procedural shortcomings in the trial itself and appalled over the manner in which the sentence was carried out.

[119] Authorization for the Use of Force in Iraq, H.J. Res. 114, Pub. L. 107-40 (bold emphasis added).

suffer the consequences and sending very clear signals to the rest of the world about American resolve and reliability.

The President wants to try to win. By that, I gather, he means he wants to help the people of Iraq get control over their territory, restore order, and hopefully move in the direction of a democratic government based on the rule of law and recognizing certain fundamental rights of even minorities. It is an uphill struggle, but I think the stakes are worth it if we can prevail.

One of the most important developments that affected our military success in Vietnam was the change in command from General William Westmoreland to General Creighton Abrams. Westmoreland believed in "search and destroy," which permitted the Viet Cong to reenter villages where we had operated and extract revenge on any who had cooperated with us. Abrams favored "clear and hold," and along with people like Bill Colby set up an effective system in Vietnam to protect the people that worked. By 1972, with the exception of Quang Tri province in the north, Communist forces in South Vietnam had been driven from the populated areas and were hiding in the mountains of the Central Highlands or the swamps of the Mekong Delta – or camping across the border in Cambodia or Laos.

I've never met General Petraeus, but friends who know him well tell me he is a brilliant and creative commander. His Princeton Ph.D. doctoral dissertation, I am told, was on the lessons of Vietnam. He may be our Creighton Abrams for Iraq, and if we can stand united behind him he may yet produce a good outcome from a very difficult situation. But he can't do it alone. And as in Vietnam, Congress is critically important.

Every sane person today understands that the United States military is the most powerful military force in the history of mankind. In interviewing defectors and prisoners of war in Vietnam, it became clear to me that they never had the slightest expectation that they could beat us on the battlefield. And they never did – not in a *single* major battle during the entire war. Their game plan from the start was to tie us down, inflict casualties, and rely on the "peace movement" and "progressive forces of the world" to sap our will and persuade us to abandon our cause.

I knew a great deal about our enemies in Vietnam, but far less today in Iraq. But surely they perceive that they have no chance in direct combat with our military. They can blow up an IED or a suicide car bomb here and there and kill some of our troops and lots of Iraqi civilians, but when given a chance to engage an American unit in combat they run and hide.

Their one chance of prevailing is if we lose our *will*. And the more it appears to them that our will is failing, the harder they will fight and the

more American troops they will try to kill. I don't question anyone's constitutional right to speak openly and honestly about points of policy disagreement. But I hope you will understand that the current congressional debate over the "surge" deployment not only seeks to usurp powers clearly vested by the Constitutionl in the President; it also signals our enemies that we have *lost our* will. And if Congress passes any legislation or even a resolution opposing the President's exercise of his constitutional powers, you will make it far more difficult for General Petraeus to accomplish the mission we have given him.

Is the expectation among critics here that if we will simply bring our troops home all will be well in the Middle East? When Congress undermined President Reagan in Lebanon in 1983, we emboldened Syria and Islamic fundamentalists in the process. Do you expect a different result if we are seen as having been driven out of Iraq tomorrow?

I suspect I was one of few Americans who was not shocked at the 9/11 attacks. They did it better than I expected, but I had been giving speeches for years warning that we were going to be hit hard, and the only issue was *when*. But I have been very surprised that they have failed to follow up with new attacks inside this country. I gather the FBI and our Intelligence Community have had successes stopping planned attacks. But I've wondered if one of the reasons we weren't hit again was that, immediately after the 2001 attacks, we stood united as a country and took the war to our enemies. That must have shocked them, and the smart ones must have realized they had awakened a sleeping giant.

The Middle East is filled with frustrated and angry young men, often with decent educations, who see no future for themselves because of the corrupt systems in which they live. They are angry that their countries, with their great heritage as the cradle of civilization, are not taken very seriously by most of the world today and are economically well behind the more developed West. Perhaps not surprisingly, they find it easy to blame the west – and especially the United States – for their plight. We are so militarily strong, so economically rich, and so evidently happy, that it just doesn't seem fair.

Right now, many of them volunteer to sacrifice their lives for their cause and their religion, seeking out Americans in Iraq to try to kill. And do you think that if we bring those Americans home, angry Islamic radicals will decide they have run out of targets and take up golf? Or might they be so inspired by the great victory over the Infidels that the Shia will flock to Iran or its agents in Iraq and the Suni will line up to join al Qaeda and its ilk? The perceived defeat of the United States could do more to swell the ranks of radical Islam than anything else I can imagine. And if we withdraw the current crop of potential "targets" – trained soldiers

protected by body armor and armored vehicles – is there any serious reason to assume our enemies will decide that one great victory is enough and abandon their cause?

My own guess is they will spend some time training the hundreds of thousand if not millions of new recruits who join up, and then look for new targets. The first goal might be to drive Americans out of Jordan, or perhaps Egypt or Saudi Arabia – with the destruction of Israel being a key interim target. American diplomats, oil workers, teachers, and even tourists will become new targets – not only in the Middle East, but in Europe as well. And if we follow the logic that leads some to want us to run from danger in Iraq and pull back to a Fortress America, will our enemies have great difficulty finding volunteers to sneak into this country (or simply come in on student visas) to sacrifice themselves for their victorious cause as suicide bombers in our schools, churches, and shopping centers?

I've been to war. I understand that almost every American who has died in Iraq has left family, and many of them were parents with spouses and children of their own. Each loss is a tragedy. And for each one killed, many more are horribly wounded and disfigured. But the terrible price we are paying might easily be quickly dwarfed if Congress in its wisdom decides to usurp the President's constitutional discretion or even uses its own legitimate powers to tie the hands of our soldiers and their commanders.

By all means, as the protesters say, let us resolve that there shall be "no more Vietnams." But let us first understand what really happened in Vietnam, and why it went wrong. Mistakes are made in all wars, tragic mistakes that often unnecessarily cost the lives of innocent and good people. We've made our share of them in Iraq. But the goal of removing Saddam Hussein from power was not a bad idea, not was it some sort of neo-con "conspiracy." We went to war against an evil man to end his tyranny and give the people of Iraq a chance at human freedom.

I think it is fair to say we have achieved our primary objective. The war to remove Saddam from power has been won. Saddam is dead. His regime is out of power. But new threats have emerged, and the stakes are not merely the safety and freedom of the Iraqi people but the credibility of the United States as well. One of the unusual things about our legal system is that we recognize no "duty to rescue" in the absence of a special relationship (e.g., parent-child) imposing such a duty. But once one elects to undertake a rescue, there is a moral – and in our system a legal – duty to exercise due care, and not to leave the victim in a worst position than you initially found him. Walking away is not going to solve the problem in

Iraq, and it may very well make the situation in the entire Middle East far worse.

In *The Art of War,* the great Chinese military theorist Sun Tzu counsels that "To win 100 victories in 100 battles in not the acme of skill. To subdue the enemy without fighting is the acme of skill." Deterrence ought to be our goal, and deterrence is founded on two perceptions: *strength* and *will*. No one doubts America's strength (although we would be stronger had Congress not weakened our Intelligence Community over the past three decades). But our *will* is now very much in question. And unless we can persuade those who wish us harm – be they in Iraq, Iran, North Korea, China, or elsewhere – that we have the will to prevail, our ability to deter will be greatly limited.

In the short run, the President has the constitutional power to decide how to fight this war – and that certainly include the right to redeploy whatever military forces Congress has provided for him to command so as to most effectively protect our interests and do battle with the enemy. That power can not constitutionally be taken away by Congress — directly or indirectly.

In the long run, the President will need new money, new supplies, and probably new forces. Those resources will not come into being without the affirmative action of both houses of Congress. So you will have an opportunity to lawfully guarantee an American defeat in Iraq if that is you wish. You may undermine the sacrifices of the men and women who have given their lives for this cause, and those who have paid other prices as well.

But, before you take that step, I hope you will reflect a bit on the history I have presented this morning and ask yourselves whether you really *want* to do that. My own sense, as an outsider, is that while there are partisan considerations on both sides of the aisle, a major cause of the anger in this matter is an honest perception that the President is refusing to submit to the authority of Congress and a belief that unchecked Executive power is a manifestation of monarchies and not republics. In both hearings at which I testified last year on the NSA terrorist surveillance program, I did not hear a single member argue that we ought not be trying to listen in when al Qaeda members talk to people in this country. The entire issue was rather one of principle – the President is not above the law. As I argued then and have tried to reaffirm this morning, that perception – honest as it may be – is wrong as a matter of constitutional law. It is *Congress* that has been the lawbreaker.

You have succeeded in intimidating the President to subordinate his long-established independent constitutional power to "manage the business of

intelligence as prudence may suggest." As a result, an additional element of delay has been introduced into our efforts to fight the war against terror. The White House has concluded that this extra delay is acceptable in return for ending the charges that he is a lawbreaker. Were I a betting man, I would suspect that this delay probably won't make the difference in terms of stopping a catastrophic terrorist attack. But it *could*. And usurping the constitutional powers of the President is, even if no harmful consequences otherwise occur, an unlawful act.

I agree with the conclusion that the President must "obey the law." But would go one step further. *Congress*, too, must obey the law. And in this country, the supreme law is the *Constitution*. Having spent four decades studying the separation of powers in this area, it is my honest judgment that John Marshall was correct – as were Washington, Jefferson, Madison, Jay, and Hamilton – in noting that the Constitution has given the President a great deal of independent discretion in these matters concerning which neither Congress nor the courts are empowered to act. And when Congress seeks to usurp these powers, as by passing a statute or using conditional appropriations to prevent the President from deciding where to place troops in fighting a war authorized by Congress, *it* becomes the *lawbreaker*.

Thank you, Mr. Chairman. That concludes my prepared statement. I will be pleased to answer questions at the appropriate time.